

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

**901 NORTH 5th STREET
KANSAS CITY, KANSAS 66101**

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

)
) **Docket No. CWA-07-2010-0123**
)
Mark Beitelspacher)
d/b/a Beitelspacher Farms)
Le Mars, Iowa)
)
)
Respondent) **FINDING OF VIOLATION**
) **ORDER FOR COMPLIANCE**
)
)
Proceedings under)
Section 309(a)(3))
of the Clean Water Act,)
33 U.S.C. § 1319(a)(3))
)

PRELIMINARY STATEMENT

1. The following Findings of Violation are made and Order for Compliance ("Order") issued pursuant to the authority of Section 309(a)(3) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1319(a)(3). This authority has been delegated by the Administrator of the United States Environmental Protection Agency ("EPA") to the Regional Administrator, EPA, Region 7, and redelegated to the Director of Region 7's Water, Wetlands and Pesticides Division.
2. The Respondent is Mark Beitelspacher, doing business as Beitelspacher Farms, who owns and operates an animal feeding operation that confines up to 3,000 head of cattle and 4,700 head of swine near Le Mars, Iowa.

STATUTORY AND REGULATORY AUTHORITY

3. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, among other things, Section 402 of the CWA, 33 U.S.C. § 1342.

4. Pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, EPA authorizes states to issue National Pollutant Discharge Elimination System (“NPDES”) permits that, among other things, prescribe conditions whereby a discharge may be authorized and establish design, construction, operation, and maintenance requirements for the permit holder.
5. Section 504(12) of the CWA, 33 U.S.C. § 1362(12), defines the term “discharge of pollutant” to include “any addition of any pollutant to navigable waters from any point source.”
6. To implement Section 402 of the CWA, EPA promulgated regulations codified at 40 C.F.R. § 122. Under 40 C.F.R. § 122.23(d), an NPDES permit is required for any CAFO that discharges or proposes to discharge.
7. “Pollutant” is defined by Section 502(6) of the CWA, 33 U.S.C. § 1362 to include, *inter alia*, biological materials and agricultural waste discharged to water.
8. “Point source” is defined by Section 502(14) of the CWA, 33 U.S.C. § 1362 to include “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation . . . from which pollutants are or may be discharged.”
9. “Animal feeding operation” or “AFO” is defined by 40 C.F.R. § 122.23(b)(1) as a lot or facility where animals have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any twelve month period, and where crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.
10. “Concentrated animal feeding operation” or “CAFO” is defined by 40 C.F.R. § 122.23(b)(2) as an animal feeding operation that is defined as a Large CAFO in accordance with 40 C.F.R. § 122.23(b)(3).
11. “Large CAFO” is defined according to 40 C.F.R. § 122.23(b)(4) as an animal feeding operation that stables or confines more than “1,000 cattle other than mature dairy cows or veal calves” or “2500 or more swine each weighing 55 pounds or more.”
12. An AFO is defined as a CAFO only if the specific threshold for any one animal sector is met. Once an operation is defined as a CAFO, regardless of animal type, the CAFO regulations apply to all of the manure, litter, and wastewater generated by the AFO. 68 Federal Register 29 (February 2003).

13. "Waters of the United States" are defined in 40 C.F.R. § 122.2 to include intrastate rivers and streams, and tributaries thereto.
14. The Iowa Department of Natural Resources ("IDNR") is the agency within the State of Iowa authorized to administer the federal NPDES Program pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, and a Memorandum of Understanding between EPA and IDNR. EPA maintains concurrent enforcement authority with authorized state NPDES programs for violations of the CWA.

FACTUAL BACKGROUND

15. Respondent owns and operates an animal feeding operation ("Facility") that is located in the Southwest ¼ of the Southwest ¼ of Section 15, Township 93 North, Range 46 West, in Plymouth County, Iowa. The Facility is comprised of 14 outdoor cattle pens with a capacity of 3,000 head and three confinement barns that have a capacity to confine approximately 4,700 head of swine.
16. On April 28, 2010, EPA personnel conducted a compliance evaluation inspection of the Facility.
17. The Facility confines and feeds or maintains cattle and swine for a total of forty-five (45) days or more in any twelve month period.
18. Neither crops, vegetation, forage growth, nor post harvest residues are sustained over any portion of the Facility that confines animals while cattle or swine are present.
19. The Facility is an AFO as defined by 40 C.F.R. §122.23(b)(1).
20. At the time of the EPA inspection, the Facility was confining approximately 2,300 head of beef cattle in outdoor pens and 4,700 head of swine each weighing 55 pounds or more under roof within the confinement buildings. Based on the number of beef cattle or the number of swine confined and fed at the Facility the operation is a large CAFO as that term is defined in 40 C.F.R. §122.23(b)(4)), and as that phrase is used in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).
21. Respondent is currently operating under an NPDES permit (IA0080446) which was issued on November 28, 2006, and expires on November 27, 2011. However, Respondent has not sought to cover to the swine portion of the operation under the NPDES permit.
22. Respondent's CAFO is located near a tributary to Mink Creek. The unnamed tributary of Mink Creek flows from the facility to the southwest approximately one mile before entering Mink Creek.

23. Mink Creek and its tributary are waters of the United States, as defined under 40 C.F.R. Part 122.2.

FINDINGS OF VIOLATION

A. Cattle Confinement: NPDES Permit Violations

Count 1 (Failure to Maintain Berm Elevations)

24. Section IV A.(1)(c) of Respondent's NPDES permit requires Respondent to assure that the original berm height of the solids settling structure(s) is maintained by adding soil and compacting it on top of berms.
25. During the EPA inspection referenced in paragraph 16 above, inspectors observed that equipment traffic on the eastern berm of the settling basin had compacted the berm sufficiently to impact its elevation and allow manure and process wastewater to run out of the settling basin into a grassed waterway. This grassed waterway diverts freshwater around the Facility's settled open feedlot effluent basin towards waters of the United States.
26. Respondent's failure to maintain the berm elevation is a violation of the NPDES permit, and as a result, is a violation of Section 402 of the CWA. Any pollutants that reached Mink Creek or its tributaries are unauthorized discharges and violate Section 301 of the CWA.

Count 2 (Storage Capacity)

27. Section IV.A(1) of Respondent's NPDES permit requires Respondent to assure that solids settling structures maintain adequate capacity and that collected manure solids must be removed as necessary to maintain adequate solids storage capacity for future runoff events.
28. During the EPA inspection referenced in paragraph 16 above, inspectors noted that the solids settling basin was full of solids and that manure had run over or around the east portion of the settling basin and was located in the grass waterway, an uncontrolled area subject to storm water runoff events.
29. Respondent's failure to maintain adequate storage capacity is a violation of the NPDES permit, and as a result, is a violation of Section 402 of the CWA.

Count 3 (Recordkeeping)

30. Section III.A(6) of Respondent's NPDES permit requires Respondent to maintain on site for a period of five years from the date they are created a complete copy of records from the land application areas according to 40 CFR Part 412.37(c) and 567 IAC 65.112(10)(b).
31. During the EPA inspection referenced in paragraph 16 above, inspectors noted, and Respondent acknowledged, that Respondent does not maintain records associated with liquid effluent land application activities.
32. Respondent's failure to maintain records for land application of effluent is a violation of Respondent's NPDES permit, and as such, is a violation of Section 402 of the CWA.

Count 4 (Failure to install required lagoon elevation gauge)

33. Section III.A4(b) of Respondent's NPDES permit requires that Respondent have a depth marker in all open surface liquid impoundments that clearly indicates the minimum capacity necessary to contain the runoff and direct precipitation from a 25 year, 24 hour rainfall event.
34. During the EPA inspection referenced in paragraph 16 above, inspectors noted that the solid settling basin did not have a staff gauge.
35. Respondent's failure to install a depth marker in its open surface liquid impoundment is a violation of its NPDES Permit, and as such, is a violation of Section 402 of the CWA.

B. Swine Confinement: Failure to apply for an NPDES Permit

36. Pursuant to 40 C.F.R. § 122.23(d), the owner or operator of a CAFO must seek coverage under an NPDES permit if the CAFO discharges or proposes to discharge pollutants to a water of the United States.
37. Respondent is currently operating under an NPDES permit (IA0080446) which was issued on November 28, 2006, and expires on November 27, 2011. However, Respondent did not and has not sought to cover the swine portion of the operation under the NPDES permit.
38. The swine confinement area of Respondent's Facility is part of a CAFO that discharges or proposes to discharge pollutants to Mink Creek and its tributaries, waters of the United States.
39. Respondent's failure to seek permit coverage for the swine confinement portion of its CAFO is a violation of 40 C.F.R. § 122.23(d) and the CWA.

ORDER FOR COMPLIANCE

Based on the Findings of Violation set forth above, and pursuant to Sections 308(a) and 309(a)(3) of the CWA, 33 U.S.C. §§ 1318(a) and 1319(a)(3), Respondent is hereby ORDERED to take the following actions to eliminate its violations of the CWA:

40. Respondent shall submit an application to modify the NPDES permit to include the Facility's swine production and land application by December 31, 2010.
41. Respondent shall immediately comply with all terms of its NPDES permit and the CWA including, but not limited to, the following terms:
 - remove manure that is located in the grass waterway;
 - clean out the solids settling basin;
 - install a depth marker in the SOFEB;
 - initiate record keeping requirements for all land application activities; and
 - repair settling basin berms.
42. Respondent shall ensure that adequate storage is maintained in waste retention structures and storage measurements are recorded and maintained in accordance with the NPDES permit.
43. Respondent shall comply with all applicable requirements regarding the proper land application of wastewater. Moreover, Respondent shall maintain all required records associated with their NPDES permit and Nutrient Management Plan.
44. Within thirty (30) days of the effective date of this Order, Respondents shall inform EPA in writing, of all actions that have or will be taken to comply with its NPDES permit, the CWA, and the terms of this Order.
45. Respondent shall immediately repair structures (e.g., settling basin berms) where they are inadequate to control runoff and install a depth marker. The depth marker and berm elevations must meet the original design criteria (correct height) and be certified by an engineer.
46. Respondent shall submit written monthly progress reports to EPA beginning within thirty (30) days of the effective date of this Order and continuing monthly on the seventh day of each month until Respondent certifies that any construction or other activities required by this order, including NPDES permit modification, installation of depth marker, berm repair, and settling structure cleanout have been fulfilled. The monthly reports shall describe, in detail, the activities that occurred at the facility during the reporting period, activities anticipated during the upcoming reporting period, and a description of any problems encountered or anticipated and how these problems were/will be addressed.

The monthly progress report requirement does not apply to the record keeping and

documentation requirements of Paragraph 47, below.

47. Commencing upon the effective date of this Order and continuing for two years, Respondent shall submit records that document the following for each land application event:
- a) Date of land application event;
 - b) Total quantity of manure or process waste water applied and the application rate per acre;
 - c) Identification and location of field where land application occurred (include maps to show location within each field where manure or process waste was applied);
 - d) Whether process waste was solid or liquid;
 - e) Source of manure or process waste water (i.e., settled open feedlot effluent basin, pit, etc.); and
 - f) Provide the most recent manure or process waste sample analyses and most recent soil sample analyses from each land application field.

Respondent shall submit copies of these records to EPA on a quarterly basis for the periods of July-September, October-December, January-March, April-June. Records must be submitted on or before the seventh day of the month following the end of the period (October 7, January 7, April 7, and July 7). The first report for this paragraph shall be submitted to EPA by October 7, 2010. The final report for this Order shall be submitted to EPA by July 7, 2012. These documentation requirements are intended to supplement the record keeping and reporting requirements of the NPDES permit and do not negate or supplant NPDES permit requirements.

Effect of Order

48. Compliance with the terms of this Order shall not relieve Respondent of liability for, or preclude EPA from initiating an administrative or judicial enforcement action to recover penalties for any violations of the CWA, or seek additional injunctive relief, pursuant to Section 309 of the CWA, 42 U.S.C. § 1319.
49. This Order shall not constitute a permit under the CWA. Compliance with the terms of this Order shall not relieve Respondent of its responsibility to obtain any required local, state and/or federal permits.
50. Nothing in this Order shall limit EPA's right to obtain access to, and/or inspect Respondent's Facility, and/or to request additional information from Respondent, pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318.
51. EPA may subsequently amend this Order in accordance with the authority of the CWA. For example, EPA may amend this Order to address any noncompliance with the CWA, including, but not limited to, any noncompliance with the requirements of Section 402 of the CWA. In the event of any such subsequent amendment to this Order, all

requirements for performance of this Order not affected by the amendment shall remain as specified by this original Order.

52. If any provision or authority of this Order or the application of this Order to Respondent is held by federal judicial authority to be invalid, the application to Respondent of the remainder of this Order shall remain in full force and effect and shall not be affected by such a holding.

53. All submissions to the EPA required by this Order shall be sent to:

Don Hamera
CAFO Enforcement Program
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency Region 7
901 North 5th Street
Kansas City, Kansas 66101.

54. Pursuant to 40 C.F.R. § 2.201-2.311, Respondent may assert a business confidentiality claim covering any portion of the submitted information which is entitled to confidential treatment and which is not effluent data. For any such claim, describe the basis for the claim under the applicable regulation. Any material for which business confidentiality is claimed should be placed in a separate envelope labeled, "Confidential Business Information." Failure to assert a claim in the manner described in 40 C.F.R. § 2.203(b) allows the EPA to release the submitted information to the public without further notice. EPA may disclose information subject to the business confidentiality claim only to the extent set forth in the above-cited regulations. Special rules governing information obtained under the CWA appear in 40 C.F.R. § 2.302.

55. Notice is hereby given that violation of, or failure to comply with, any of the provisions of the foregoing Order may subject Respondent to (1) civil penalties of up to \$37,500 per day for each violation, pursuant to Section 309(d) of the CWA, 33 U.S.C. § 1319(d); or (2) civil action in federal court for injunctive relief, pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b).

56. The terms of this Order shall be effective and enforceable against Respondent upon its receipt of the Order:

Date 1-29-10

Karen A. Flawney
for William A. Spratlin
Director
Water, Wetlands and Pesticides Division

J. Daniel Breedlove
J. Daniel Breedlove
Assistant Regional Counsel

CERTIFICATE OF SERVICE

I certify that on the date note below I filed the original and one true and correct copy of the signed original Findings of Violation and Order of Compliance with the Regional Hearing Clerk, Region 7.

I further certify that I sent by certified mail, return receipt requested, a true and correct copy of the signed original Findings of Violation and Order for Compliance to:

Mark Beitelspacher
Mark Beitelspacher Farms
28279 130th Street
Le Mars, Iowa 51031

I further certify that on the date noted below, I sent by certified mail, return receipt requested, a true and correct copy of the signed original Findings of Violation and Order for Compliance to the following representative of the State of Iowa:

Ken Hessenius
Iowa Department of Natural Resources
Gateway North, Suite E17
Spencer, Iowa 51301.



7/21/2010

Date