

Statutory and Regulatory Framework

3. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, *inter alia*, Section 402 of the CWA, 33 U.S.C. § 1342.
4. Section 402 of the CWA, 33 U.S.C. § 1342, provides that pollutants may be discharged only in accordance with the terms of a NPDES permit issued pursuant to that Section.
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. § 122.1, a NPDES permit is required for the discharge of pollutants from any point source into waters of the United States.
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, [or] 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).
11. “Large CAFO” is defined according to 40 C.F.R. § 122.23(b)(4)(iii) as an animal feeding operation that stables or confines as many as, or more than, “1,000 cattle other than mature dairy cows or veal calves.”
12. “Waters of the United States” are defined in 40 C.F.R. § 122.2 to include intrastate rivers and streams, and tributaries thereto.
13. The Kansas Department of Health and Environment (“KDHE”) is the agency within the State of Kansas 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 KDHE. EPA maintains concurrent enforcement authority with authorized state NPDES programs for violations of the CWA.

Factual Background

14. Respondent owns and operates an animal feeding operation ("Facility") that is located on the north and south sides of State Highway 169 directly east and south from the town of Greeley, Kansas. The facility consists of three operations: Main, Hilltop, and South feedlots. The Main feedlot facility is in the E ½ of Section 25, Township 19S, Range 20E and in parts of the W ½ of Section 30, Township 19S, Range 21E, both in Anderson County, KS within the Marias des Cygnes River Basin.

15. On April 22, 2008, EPA personnel conducted a compliance evaluation inspection ("the April 2008 inspection") of the Facility.

16. The Facility confines and feeds or maintains cattle for a total of forty-five (45) days or more in any twelve month period.

17. Neither crops, vegetation, forage growth, nor post-harvest residues are sustained over any portion of the Facility's feeding areas.

18. The Facility is an AFO as defined by 40 C.F.R. §122.23(b)(1).

19. At the time of the April 2008 inspection, the Facility was confining approximately 3,500 head of beef cattle in the Main feedlot confinement pens, 800 head of beef cattle in the Hilltop feedlot confinement pens, and approximately 600 head of beef cattle in the South feedlot confinement pens. At approximately 4,900, the total number of beef cattle confined and fed at the Facility is greater than 1,000; therefore the Facility is a large CAFO as that term is defined in 40 C.F.R. §122.23(b)(4)(iii), and as that phrase is used in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

20. KDHE granted NPDES Permit No. KS 0097187 to Respondent on November 1, 2007. The NPDES permit expires on October 31, 2012.

21. Pottawatomie Creek is a water of the United States, as defined in 40 C.F.R. § 122.2.

22. At the time of the April 2008 inspection, the Facility did not have adequate process wastewater controls to prevent the discharge of process wastewater from the Hilltop and South feedlots as well as from the Facility's manure and composting areas to Pottawatomie Creek.

23. Based on the size of the Facility, the distance from the Facility to Pottawatomie Creek, and the slope and condition of the land across that distance, wastewater containing pollutants from open feeding areas at the Facility will continue to flow into Pottawatomie Creek during precipitation events less than a 25-year, 24-hour storm event.

Findings of Violation

Count 1

24. Respondent's NPDES permit requires Respondent to control livestock and related wastes in a manner capable of preventing water pollution. Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342, prohibit discharges into "waters of the United States" except pursuant to a NPDES permit.

25. During the April 2008 inspection, EPA inspectors observed that the Hilltop and South feedlots, as well as the facility's manure and composting areas, did not contain process wastewater controls to manage or collect the facility's process wastewater.

26. Respondent's failure to control the flow of wastewater from the Facility during significant rain events to Pottawatomie Creek and its tributaries is a violation of Respondent's permit and, as such, is a violation of Section 402 of the CWA, 33 U.S.C. § 1342.

Count 2

27. Respondent's NPDES permit stipulates that Respondent must maintain operating levels in Respondent's retention structures at or below the operating levels specified in Section B of the Permit.

28. During the April 2008 inspection, EPA inspectors observed that the west and north lagoons exceeded permitted operating levels. The operating records reviewed during the inspection also showed that Respondent maintained operating levels above the permitted levels for both retention structures.

29. Respondent's failure to maintain approved operating levels of process wastewater in the Facility's retention structures pursuant to its NPDES permit is a violation of Respondent's permit and, as such, is a violation of Section 402 of the CWA, 33 U.S.C. § 1342.

Count 3

30. Respondent's NPDES permit stipulates that the Facility's east lagoon is to be kept empty.

31. During the April 2008 inspection, EPA inspectors observed that the east lagoon was not empty. Additionally, the monthly operations report indicated that the east lagoon had not been empty since the permit went into effect.

32. Respondent's failure to keep the Facility's east lagoon empty is a violation of Respondent's NPDES permit and, as such, is a violation of Section 402 of the CWA, 33 U.S.C. § 1342.

Count 4

33. Respondent's NPDES permit requires Respondent to maintain the integrity of retention structure liners.

34. During the April 2008 inspection, EPA inspectors observed cattle hoof prints inside the east retention structure berm, indicating that livestock had compromised the integrity of the retention structure liners. Respondent acknowledged that cattle and horses are allowed access in and around the retention structures.

35. Respondent's failure to maintain the integrity of retention structure liners by allowing livestock access to the retention structure berms is a violation of Respondent's NPDES permit and, as such, is a violation of Section 402 of the CWA, 33 U.S.C. § 1342.

CONSENT AGREEMENT

36. Respondent admits the jurisdictional allegations in this CA/FO and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of this CA/FO.

37. Respondent neither admits nor denies the factual allegations contained in this CA/FO.

38. Respondent waives any right to contest the allegations in this CA/FO as well as its right to appeal the proposed Final Order accompanying this Consent Agreement.

39. Respondent and Complainant each agree to bear their own costs and attorney's fees.

40. Nothing contained in the CA/FO shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits.

Penalty

41. Respondent consents to the issuance of the Final Order and consents to the payment of a civil penalty of \$5,500, plus interest of \$110.36 over a period of one year, for a total payment of \$5,610.36. The total civil penalty of \$5,610.36 shall be paid in three installments. The first payment of \$1,870.12 is due within thirty (30) days of the effective date of this CA/FO. Respondent shall pay the second payment of \$1,870.12 no later than March 15, 2010. Respondent shall pay the third payment of \$1,870.12 no later than September 15, 2010.

42. Pursuant to 40 C.F.R. § 13.18, failure to make any payment according to the above schedule will automatically accelerate the debt which will become due and owing in full, immediately. Interest on any late payment will be assessed at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on any

overdue amount from the due date through the date of payment. Failure to pay the civil penalty when due may result in the commencement of a civil action in Federal District Court to collect said penalty, together with costs and interest.

43. Payment of the penalty must be by cashier or certified check made payable to "United States Treasury." The check must include the docket number and the name of the case. The check must be remitted to:

U.S. Environmental Protection Agency - Region 7
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000.

Copies of the transmittal letter and the check shall simultaneously be sent to:

Regional Hearing Clerk
U.S. Environmental Protection Agency - Region 7
901 North 5th Street
Kansas City, Kansas 66101;

and

Chris Muehlberger
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency - Region 7
901 North 5th Street
Kansas City, Kansas 66101.

44. Respondent's failure to pay any portion of the civil penalty in accordance with the provisions of this CA/FO may result in commencement of a civil action in Federal District Court to recover the total penalty, together with interest thereon at the applicable statutory rate.

45. Payment of the entire civil penalty shall resolve all civil and administrative claims of the United States alleged in the Findings of Violations portion of this CA/FO.

46. Respondent certifies by the signing of this CA/FO that Respondent's facility is in compliance with all requirements of Sections 301 and 402 of the CWA, and all regulations promulgated thereunder, pursuant to the terms of EPA's Administrative Compliance Order, docket number CWA-07-2008-0083. The effect of this settlement described in Paragraph 45 is conditioned upon the accuracy of this certification.

47. EPA reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law and to enforce the terms and conditions of

this CA/FO. Respondent reserves the right to defend against such actions on any basis in law or fact.

48. The undersigned representative of Respondent certifies that he/she is fully authorized to enter the terms and conditions of this CA/FO and to execute and legally bind Respondent to it.

49. This Final Order shall be entered and become effective only after the conclusion of the period of public notice and comment required pursuant to Section 309(g)(4), 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45. The effective date shall be the date it is signed by the Regional Judicial Officer.

In the Matter of Bryan Enterprises, Inc.
Docket No. CWA-07-2009-0106


For the Respondent:

8-17-09
Date

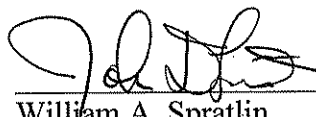
Reed D. McShee
Name

For the United States Environmental Protection Agency - Region 7:

8.17.09
Date


Chris Muehlberger
Assistant Regional Counsel
U.S. Environmental Protection Agency - Region 7

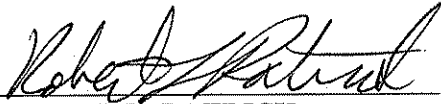
9/25/09
Date


William A. Spratlin
Director
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency - Region 7

FINAL ORDER

The foregoing Consent Agreement is hereby approved and incorporated by reference into this Final Order. The Respondent is ordered to comply with the terms of the above Consent Agreement, effective immediately.

IT IS SO ORDERED.


ROBERT L. PATRICK
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 7

Date: Sept. 28, 2009

IN THE MATTER OF Bryan Enterprises, Inc., Respondent
Docket No. CWA-07-2009-0106

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Consent Agreement and Final Order was sent this day in the following manner to the addressees:

Copy hand delivered to
Attorney for Complainant:

Christopher Muehlberger
Assistant Regional Counsel
Region VII
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Les McGhee
Bryan Enterprises, Inc.
32131 N.E. Trego Road
P.O. Box 110
Greeley, Kansas 66033

Dated: 9/28/09



Kathy Robinson
Hearing Clerk, Region 7