



**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, *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 National Pollutant Discharge Elimination System (“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, the EPA promulgated regulations codified at 40 C.F.R. § 122. Under 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, 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)(iii) as an animal feeding operation that stables or confines 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 with the delegated authority to administer the federal NPDES Program pursuant to Section 402 of the Act, 33 U.S.C. § 1342, and a Memorandum of Understanding between EPA and KDHE. The EPA maintains concurrent enforcement authority with delegated state NPDES programs for violations of the CWA.

**Factual Background and Findings of Violation**

14. Respondent owns and operates an animal feeding operation that is located in the Southwest Quarter of Section 6 and the North Half of Section 7 of Township 20 South, Range 8 West in Rice County, Kansas.
15. On May 24, 2005, EPA personnel conducted a compliance inspection of the Facility that included surface water sampling.
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), and as that phrase is used in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).
19. At the time of the EPA inspection, the Facility was confining approximately 7,529 head of cattle and the Facility is permitted to confine 12,000 head. The number of 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).
20. Respondent is currently operating under a NPDES permit (KS0086690) which was issued on January 28, 2002 and expires January 27, 2007.
21. Respondent's NPDES permit requires that water pollution control facilities be operated and maintained to prevent the discharge of livestock waste into waters of the United States. Specifically the permit requires all waste retention structures be regularly maintained with adequate freeboard to ensure structural stability and provide storage capacity for a two-week period plus precipitation induced flow from a 25-year, 24-hour storm event.

22. Runoff from the Facility's feeding pens on the northeast corner of the facility drain south and then east to a ditch that flows 0.6 miles south and 0.1 miles east to an unnamed tributary of the Little Cow Creek. Upon entering the unnamed tributary the runoff flows 0.8 miles to the Little Cow Creek. The Little Cow Creek flows 1.0 miles to the Cow Creek which feeds into the Arkansas River. At the time of the EPA inspection, the EPA observed that liquid waste from the facility was flowing through the ditch and into the unnamed tributary of Little Cow Creek.
23. The drainage ditch at the Facility, Little Cow Creek, Cow Creek and the Arkansas River are waters of the United States, as defined under 40 C.F.R. Part 122.2. The Cow Creek has been listed by the State of Kansas as an impaired waterbody because of elevated presence of fecal coliform and dissolved oxygen. Fecal coliform is a contaminant associated with cattle feedlot runoff and low concentrations of dissolved oxygen is characteristic of a stream that may have been impacted by feedlot runoff.
24. The Facility has partial livestock waste control structures to prevent the discharge of animal waste to the Little Cow Creek. These controls are insufficient to prevent discharges from the Facility into the Little Cow Creek.
25. The Facility NDPEs permit states "stockpiles shall be located in areas not subject to uncontrolled runoff." At the time of the EPA inspection, the EPA observed that the Facility had four manure piles stockpiled on site subject to uncontrolled runoff.
26. Runoff from manure piles drained to an unnamed tributary of the Little Cow Creek. At the time of the EPA inspection, the EPA observed that liquid waste from one manure pile located on the east side of 14<sup>th</sup> Road flows 0.6 miles south to the roadside ditch and 0.1 miles west to the unnamed tributary to the Little Cow Creek. At the time of the EPA inspection, the EPA also observed that liquid waste from the another manure pile located northwest of the facility on the east side of 13<sup>th</sup> Road flows into the unnamed tributary to the Little Cow Creek. Upon entering the unnamed tributary, the tributary flows north approximately 0.5 miles and then flows northeast approximately 0.3 miles and then flows southeast approximately 1.5 miles to the Little Cow Creek. The Little Cow Creek flows 1.0 miles to the Cow Creek which feeds into the Arkansas River.
27. Based on the size of the Facility, the distance and proximity of the Facility to waters of the United States, and the slope and condition of the land across that distance, waste water containing pollutants from open feeding areas at the Facility will continue to flow into Little Cow Creek during significant precipitation events.

28. The ongoing flow of waste water from Respondent's Facility and Respondent's failure to adequately stockpile manure in a manner to prevent discharges to Little Cow Creek constitutes unauthorized discharges of pollutants from a point source to waters of the United States. This is a violation of Sections 301 and 402 of the Clean Water Act, 33 U.S.C. §1311 and 1342, and implementing regulations.
29. On dates between March 2004 and May 2005, Respondent did not maintain adequate freeboard as required by its NPDES permit. Respondent's failure to maintain adequate freeboard is a violation of its NPDES Permit and a violation of the CWA.
30. Respondent's NPDES permit states that available storage depth shall be recorded daily whenever the water level infringes on the required freeboard or the required storage capacity is not available in any retention structure. Daily records are to be kept until the required storage capacity is again available. Respondent's failure to maintain adequate records is a violation of its NPDES Permit and a violation of the CWA.
31. According to Respondent's records entitled Operational Reports of Agricultural and Related Waste Control Facilities, records were not kept on days when freeboard was exceeded or the required storage volume was not available between March 2004 and May 2005.
32. Respondent's NPDES permit states that a water level measurement device shall be installed in each outdoor retention structure. Respondent's failure to install the measurement device is a violation of its NPDES Permit and a violation of the CWA.
33. At the time of the EPA inspection, the EPA observed that liquid waste was being stored in pond #2. A water level measurement device was not installed in pond #2.

#### **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:

34. Respondent shall immediately cease operations within areas of the Facility where feedlot runoff cannot be managed to prevent discharges to waters of the United States.
35. Respondent shall immediately remove manure piles from areas where they are exposed to precipitation and uncontrolled runoff and shall stockpile manure in a manner to prevent discharges.

36. Respondent shall ensure that waste water levels in storage structures are in compliance with the storage structure operating levels of Respondent's NPDES permit. On an ongoing basis, Respondent shall remove waste water from the storage structures in a timely manner so that the Facility remains in continuous compliance with storage structure operating level requirements. Respondent shall comply with all applicable requirements regarding the proper land application of waste water.
37. Respondent shall ensure that it meets or exceeds the inspection and record keeping requirements of its NPDES permit.
38. Respondent shall ensure that each outdoor retention structure contains a water level measurement device as specified in the NPDES permit.
39. Respondent shall submit to the EPA a Notice of Construction Completion within thirty (30) days of when the current construction of all feedlot waste control structures is completed. This notification shall be in writing and shall include as-built drawings of the constructed improvements.
40. Commencing upon the effective date of this Order and continuing for one year after Respondent submits a Notice of Construction Completion, Respondent shall on a quarterly basis submit to EPA copies of all lagoon level, soil condition, precipitation, and land application monthly records that Respondent is required to keep in accordance with the Respondent's NPDES permit. Respondent shall submit copies of these records to the EPA on a quarterly basis for the periods of January-March, April-June, July-September and October-December. Records must be submitted on or before the seventh day of the month following the end of the period (April 7, October 7, January 7, and July 7).

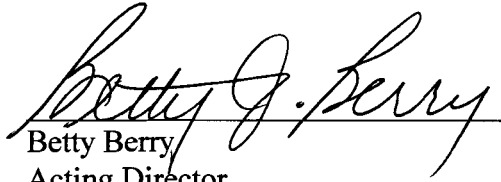
#### **Effect of Order**

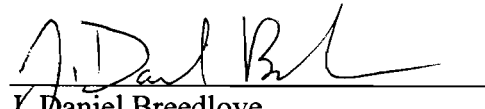
41. Compliance with the terms of this Order shall not relieve Respondent of liability for, or preclude the EPA from initiating an administrative or judicial enforcement action to recover penalties for any violations of the CWA, or seek additional injunctive relief, pursuant to Section 309 of the CWA, 42 U.S.C. § 1319.
42. 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.
43. Nothing in this Order shall limit the 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.

44. The EPA may subsequently amend this Order in accordance with the authority of the CWA. For example, the 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.
45. 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.
46. All submissions to the EPA required by this Order shall be sent to:

Kimberly Harbour  
CAFO Enforcement Program  
Water, Wetlands and Pesticides Division  
U.S. Environmental Protection Agency Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101
47. 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. The 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 Clean Water Act appear in 40 C.F.R. § 2.302.
48. 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 \$32,500 per day for each violation, pursuant to Section 309(d) of the Act, 33 U.S.C. § 1319(d); or (2) civil action in federal court for injunctive relief, pursuant to Section 309(b) of the Act, 33 U.S.C. § 1319(b).
49. The terms of this Order shall be effective and enforceable against Respondent upon its receipt of the Order.

Date 03/01/06

  
Betty Berry  
Acting Director  
Water, Wetlands and Pesticides Division

  
J. Daniel Breedlove  
Assistant Regional Counsel



**CERTIFICATE OF SERVICE**

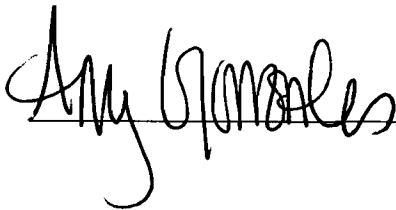
I certify that on the date noted below I filed the original and one true and correct copy of the signed original Findings of Violation and Order of Compliance with the Regional Hearing Clerk, Region 7.

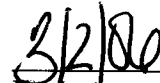
I further certify that I sent by certified mail, return receipt requested, a true and correct copy of the signed original Findings of Violation and Order for Compliance together with cover letter and small business assistance information, to the following registered agent for Sellers Farms, Inc.:

Daniel J. Shanelec  
Registered Agent for Sellers Farms, Inc.  
111 East Avenue North  
Lyons, Kansas 67554

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 Kansas:

John Harsch, Chief  
Livestock Waste Management Program  
Kansas Department of Health and Environment  
1000 S.W. Jackson  
Topeka, Kansas 66612

  
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Date \_\_\_\_\_