UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	**Docket No. CWA-07-2016-0066**
WIEBE FARMS, INC.,	)	
	)	
Respondent.	)	**FINDING OF VIOLATION AND**
	)	**ORDER FOR COMPLIANCE**

PRELIMINARY STATEMENT

1. The following Finding of Violation is made and Administrative Order for Compliance ("Order") issued pursuant to the authority of Section 309(a)(3) of the Clean Water Act ("CWA"), 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. Wiebe Farms, Inc. ("Respondent"), operates an animal feeding operation that is located in Section 30 of Township 23 South, Range 4 East, in Butler County, Kansas, and has a street address of 13232 NW Prairie Creek Road, Whitewater, Kansas 67154.

STATUTORY AND REGULATORY AUTHORITY

3. Section 101(a) of the CWA, 33 U.S.C. § 1251(a), states that the objective of the CWA is to restore and maintain the chemical, physical, and biological integrity of the nation's waters.

4. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant by any person except in compliance with, *inter alia*, a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

5. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines the terms "discharge of a pollutant" and "discharge of pollutants" as, *inter alia*, any addition of any pollutant to navigable waters from any point source.

6. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines the term "pollutant" as, *inter alia*, biological materials and agricultural waste discharged into water.

7. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines the term "navigable waters" as, *inter alia*, the "waters of the United States," as defined at 40 C.F.R. § 122.2.

8. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines the term "point source" 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. Section 502(5) of the CWA, 33 U.S.C. § 1362(5), defines the term "person" as, *inter alia*, an individual, corporation, partnership, or association.

10. 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.

11. Pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, EPA authorizes states to issue 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.

12. To implement Section 402 of the CWA, 33 U.S.C. § 1342, EPA promulgated regulations codified at 40 C.F.R. Part 122.

13. Pursuant to 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," as those terms are defined at 40 C.F.R. § 122.2.

14. Pursuant to 40 C.F.R. § 122.23(a), "concentrated animal feeding operations," or "CAFOs," are point sources subject to NPDES permitting requirements.

15. "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 or Medium CAFO in accordance with 40 C.F.R. § 122.23(b).

16. "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.

17. "Large CAFO" is defined, according to 40 C.F.R. § 122.23(b)(4), as an animal feeding operation that stables or confines "1,000 cattle other than mature dairy cows or veal calves."

18. "Medium CAFO" is defined, according to 40 C.F.R. § 122.23(b)(6), as an animal feeding operation that stables or confines "300 to 999 cattle other than mature dairy cows or veal calves" and where either of the following conditions are met:

(a) Pollutants are discharged into waters of the U.S. through a man-made ditch, flushing system, or other similar man-made device; or

(b) Pollutants are discharged directly into waters of the U.S. which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

19. "Waters of the United States" are defined in 40 C.F.R. § 122.2 to include intrastate rivers and streams, and tributaries thereto.

20. "Process wastewater" is defined by 40 C.F.R. § 122.23(b)(7) as water "directly or indirectly used in the operation of the AFO for any or all of the following: spillage or overflow from animal or poultry watering systems; washing, cleaning, or flushing pens, barns, manure pits, or other AFO facilities; direct contact swimming, washing, or spray cooling of animals; or dust control. Process wastewater also includes any water which comes into contact with any raw materials, products, or byproducts including manure, litter, feed, milk, eggs or bedding."

21. "Production area" is defined by 40 C.F.R. § 122.23 as that part of an AFO that includes the animal confinement area, the manure storage area, the raw materials storage areas, and the waste containment areas. The animal confinement area includes, but is not limited to, open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns, milkrooms, milking centers, cowyards, barnyards, medication pens, walkers, animal walkways, and stables. The manure storage area includes, but is not limited to, lagoons, runoff ponds, storage sheds, stockpiles, under house or pit storages, liquid impoundments, static piles, and composting piles. The raw materials storage area includes, but is not limited to, feed silos, silage bunkers, and bedding materials. The waste containment area includes, but is not limited to, settling basins, and areas within berms and diversions which separate uncontaminated storm water. Also included in the definition of production area is any egg washing or egg processing facility, and any area used in the storage, handling, treatment, or disposal of mortalities.

22. The Kansas Department of Health and Environment ("KDHE") is the state agency authorized to administer the federal NPDES program in the state of Kansas pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. EPA maintains concurrent enforcement authority with authorized states for violations of the CWA.

FACTUAL BACKGROUND AND FINDING OF VIOLATION

23. Respondent owns or operates an animal feeding operation that is located in Section 30 of Township 23 South, Range 4 East, in Butler County, Kansas, and has a street address of 13232 NW Prairie Creek Road, Whitewater, Kansas 67154 ("the Facility").

24. Respondent is a "person" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

25. On or about July 22, 2015, EPA personnel conducted a compliance evaluation inspection of the Facility ("the EPA inspection").

26. Based on information gathered by during and following the EPA inspection, Respondent routinely confines at least 300 head of beef cattle at the Facility and confined greater than 1,000 head between January 1, 2015, and June 1, 2015.

27. Neither crops, vegetation, forage growth, nor post-harvest residues were sustained over any portion of the Facility's confinement areas at times relevant to this Order.

28. The Facility confined and fed or maintained cattle for a total of 45 days or more in any twelve month period relevant to this Order.

29. The EPA inspector observed that the Facility lacks adequate engineered livestock waste control facilities to prevent discharges of manure and process wastewater. Analysis of samples obtained by the EPA inspector during the inspection document that feedlot-related pollutants discharge into Dry Creek and its tributaries.

30. The EPA inspector observed that culverts facilitate the discharge of manure and process wastewater from production areas of Respondent's Facility into the Dry Creek and its tributaries. The culverts are man-made ditches, flushing systems, or similar man-made devices.

31. Manure and process wastewater discharged from the Facility are "pollutants" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

32. Dry Creek and its tributaries are "waters of the United States" within the meaning of 40 C.F.R. § 122.2 and, therefore, "navigable waters" pursuant to Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

33. The Facility is an "animal feeding operation" or "AFO" within the meaning of 40 C.F.R. § 122.23(b)(1).

34. Between January 1, 2015, and June 1, 2015, the Facility was a "Large CAFO" within the meaning of 40 C.F.R. § 122.23(b)(4). At all other times relevant to this Order, the Facility was a "Medium CAFO" within the meaning of 40 C.F.R. § 122.23(b)(6).

35. The Facility is a "concentrated animal feeding operation" or "CAFO" within the meaning of 40 C.F.R. § 122.23(b)(2).

36. The Facility is a "point source" within the meaning of 40 C.F.R. § 122.23(a) and Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

37. Respondent did not have a NPDES permit authorizing the discharge of pollutants from the Facility.

38. Based on the size of the Facility, the presence of culverts that facilitate pollutant discharges, and the proximity of the Facility to Dry Creek and its tributaries, process wastewater containing pollutants from production areas at the Facility will continue to flow intermittently into Dry Creek and its tributaries as a result of significant precipitation events.

39. The intermittent but continuing flow of process wastewater from the Facility to Dry Creek and its tributaries constitutes an unauthorized discharge of pollutants from a point source to waters of the United States. This discharge violates Section 301 of the CWA, 33 U.S.C. § 1311, and implementing regulations.

ORDER FOR COMPLIANCE

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

40. Respondent shall comply with the CWA.

41. Within 180 days of the Effective Date of this Order, Respondent shall reduce the number of cattle confined at the Facility below the Medium CAFO regulatory threshold of 300 head of beef cattle, unless:

(a) the Facility can be managed in a manner that prevents the discharge of pollutants into waters of the United States through a man-made ditch, flushing system, or other similar man-made device; or

(b) Respondent applies for a NPDES permit that authorizes pollutant discharges to waters of the United States.

42. If Respondent cannot immediately cease all discharges from the Facility through a man-made ditch, flushing system, or other similar man-made device into waters of the

United States, regardless of whether the number of livestock is reduced below regulatory thresholds, then Respondent shall immediately remove and properly dispose of manure, litter, and process wastewater from areas that cannot be controlled in a manner to prevent discharges.

43. Within 30 days of the Effective Date of this Order, Respondent shall inform EPA in writing of all actions that Respondent has taken or will take to comply with the CWA and the terms of this Order.

44. If Respondent intends to apply for a NPDES permit that authorizes the discharge of pollutants, then upon issuance of that permit Respondent shall comply with all terms contained therein.

45. If Respondent intends to construct runoff control structures that enable confinement of beef cattle above regulatory thresholds, then Respondent shall submit written monthly progress reports to EPA beginning within 60 days of the Effective Date of this Order and continuing monthly on the seventh day of each month until Respondent submits a Notice of Construction Completion to EPA. The monthly reports shall describe in detail the construction and related activities that occurred at the Facility during the reporting period, construction and related activities anticipated during the upcoming reporting period, and a description of any problems encountered or anticipated and how these problems were or will be addressed.

46. Upon completion of runoff control structures, Respondent shall submit to EPA a Notice of Construction Completion certified by a professional engineer within 30 days of the completion of construction. The notification shall be in writing and shall include as-built drawings of the constructed improvements.

General Provisions

Opportunity to Confer

47. The Effective Date of this Order shall be 30 days following Respondent's receipt of the Order. The terms of this Order shall become effective and enforceable against Respondent upon the Effective Date.

48. Prior to the Effective Date, Respondent has the opportunity to confer with and/or submit information to EPA concerning the validity of this Order, including the basis for the Order, the terms of the Order, and the applicability of the Order to Respondent. Within 10 days of receiving this Order, Respondent may request a conference regarding the Order or submit information to EPA. If Respondent requests a conference and/or wishes to submit information, the conference and/or submission of information shall occur within 20 days of receipt of this Order. EPA will deem a failure to request a conference or to submit information as a waiver of the opportunity to confer.

49. Requests for a conference shall be made in writing to the EPA contact identified in Paragraph 55.

Effect of Order

50. 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. Respondent has the right to seek immediate federal judicial review of the Order pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706. Section 706 provides the grounds for such review and is available online at *http://www.gpo.gov/fdsys/pkg/USCODE-2010-title5/pdf/USCODE-2010-title5-partI-chap7-sec706.pdf.*

51. Compliance with the terms of this Order shall neither relieve Respondent of liability for any violations of the CWA nor preclude EPA from initiating an administrative or civil judicial enforcement action to recover penalties or seek additional injunctive relief pursuant to Section 309 of the CWA, 42 U.S.C. § 1319, for such violations.

52. Nothing in this Order shall limit EPA's right to obtain access to and/or inspect the Facility and/or to request additional information from Respondent pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318.

53. 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.

54. 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.

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

Stephen Pollard
Water Enforcement Branch
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency, Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

56. Pursuant to 40 C.F.R. §§ 2.201-2.311, Respondent may assert a business confidentiality claim covering any portion of the information submitted that is entitled to

confidential treatment and which is not effluent data. For any such claim, Respondent must describe the basis for the claim under the applicable regulation. Any material for which business confidentiality is claimed should be placed in a separately enclosed envelope labeled "Confidential Business Information." Failure to assert a claim in the manner described in 40 C.F.R. § 2.203(b) allows 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 Clean Water Act appear in 40 C.F.R. § 2.302.

57. Notice is hereby given that violation of, or failure to comply with, any of the provisions of the foregoing Order may subject Respondent to 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), and 40 C.F.R. Part 19; or civil action in federal district court for injunctive relief, pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b).

U.S. ENVIRONMENTAL PROTECTION AGENCY

Date: 7-1-16

Karen A. Flournoy
Director
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency, Region 7

Date: 7/1/2016

Jared Pessetto
Associate Regional Counsel
U.S. Environmental Protection Agency, Region 7

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 Docket 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 address:

Van R. Harrold
Registered Agent
Wiebe Farms, Inc.
3 West 8th Street
Hutchinson, Kansas 67501

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:

Ms. Tara Mahin
Kansas Department of Health & Environment
Bureau of Water
Livestock Waste Management Section
1000 SW Jackson St., Suite 420
Topeka, Kansas 66612-1367

Name

7/1/2016
Date