

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 7  
901 NORTH 5<sup>th</sup> STREET  
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION  
AGENCY-REGION VII  
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

Terry Van Wyhe )  
d/b/a Terry Van Wyhe Feedlot )  
4111 Dove Lane ) Docket No. CWA-07-2010-0143  
Ireton, Iowa 51027, )  
)  
)  
Respondent ) FINDING OF VIOLATION  
) ORDER FOR COMPLIANCE  
)  
)  
)  
Proceedings under )  
Sections 308(a) and 309(a)(3) )  
of the Clean Water Act, )  
33 U.S.C. §§ 1318(a) and 1319(a)(3) )  
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**Preliminary Statement**

1. The following Findings of Violation are made and Order for Compliance (“Order”) issued pursuant to the authority of Section 308(a) and Section 309(a)(3) of the Clean Water Act (“CWA” or “Act”), 33 U.S.C. §§ 1318 and 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, Terry Van Wyhe d/b/a Terry Van Wyhe Feedlot (“Respondent”), owns and/or operates an animal feeding operation located in the northeast ¼ of the northeast ¼ of Section 13 in Township 95 North, Range 47 West, in Sioux County, 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, *inter alia*, 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 of pollutants may be authorized and establish design, construction, operation, and maintenance requirements for the permit holder.

5. Section 502(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. “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.
7. “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.”
8. 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)(1), the owner or operator of a CAFO must apply for an NPDES permit if the CAFO discharges or proposes to discharge. A CAFO proposes to discharge if it is designed, constructed, operated, or maintained such that a discharge will occur. 40 C.F.R. § 122.23(d)(1).
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 Medium CAFO in accordance with 40 C.F.R. § 122.23(b)(6).
11. “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 either of the following conditions are met:
  - a. Pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device; or
  - b. Pollutants are discharged directly into waters of the United States 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.

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 Iowa Department of Natural Resources ("IDNR") is the agency within the state of Iowa authorized to administer the federal NPDES Program. EPA maintains concurrent enforcement authority with authorized state NPDES programs for violations of the CWA.

#### **Factual Background and Findings of Violation**

14. Respondent owns and operates a feedlot that is located in the northeast ¼ of the northeast ¼ of Section 13 in Township 95 North, Range 47 West, in Sioux County, Iowa.
15. On July 27, 2010, EPA personnel conducted a compliance evaluation inspection of the Facility. During the inspection, EPA's inspectors determined that runoff from the feedlot flows through a roadside ditch along Dove Avenue to an unnamed tributary and into Six Mile Creek. Based on the size of the Facility, the distance from the Facility to the Six Mile Creek and its tributaries, and the slope and condition of the land across that distance, wastewater containing pollutants from open feeding areas and from stockpiled manure at the Facility will continue to discharge into the Six Mile Creek and its tributaries as a result of significant precipitation events.
16. The roadside ditch is a man-made ditch pursuant to 40 C.F.R. § 122.23(b)(6).
17. The Six Mile Creek and its tributaries are waters of the United States, as defined in 40 C.F.R. §122.2. IDNR has identified Six Mile Creek as being impaired for aquatic life because of ammonia and bacteria that have been attributed to animal wastes typically found in runoff from animal feeding operations and manure piles.
18. The Facility confines and feeds or maintains cattle for a total of forty-five (45) days or more in any twelve month period.
19. Crops, vegetation, forage growth, and post harvest residues are not sustained over any portion of the Facility's feeding areas.
20. The Facility is an AFO as defined by 40 C.F.R. §122.23(b)(1).
21. The Facility was confining approximately 968 head of beef cattle at the time of the July 27, 2010, EPA inspection.
22. At all times pertinent to this order the number of cattle confined and fed at the Facility was between 300 and 999 and storm water containing pollutants flowed from the Facility

through the roadside ditch and discharged into waters of the United States. Therefore, the Facility is a Medium CAFO as that term is defined in 40 C.F.R. § 122.23(b)(6).

23. The Facility is a CAFO as defined by 40 C.F.R. § 122.23(b)(2), and as that phrase is used in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).
24. The Facility does not have adequate livestock waste control facilities to prevent the discharge of manure, litter, and process waste water into the Six Mile Creek and its tributaries.
25. Respondent has not applied for an NPDES permit for the Facility.
26. The intermittent yet ongoing flow of process waste water from Respondent's Facility through the man-made ditch and into the Six Mile Creek and its tributaries constitutes unauthorized discharges of pollutants from a point source to waters of the United States. The unauthorized discharges and Respondent's failure to apply for an NPDES permit are violations of Sections 301, 308 and/or 402 of the Clean Water Act, 33 U.S.C. §§1311, 1318 and 1342, and implementing regulations.

#### **Order For Compliance**

Based on the Findings of Violation set forth in paragraphs 14 through 26 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:

27. Within fifteen (15) days of the effective date of this Order, Respondent shall submit an Interim Measures Plan (Plan) to the EPA. The Plan shall describe, in detail, actions that Respondent will take to reduce the discharge of pollutants from Respondent's Facility to waters of the United States until permanent livestock waste controls are in place. The Plan shall also include a schedule for implementation of the interim measures. The interim measures shall remain in place and operated until Respondent completes construction of the feedlot waste controls as required by IDNR. Respondent shall implement the Plan immediately.
28. Unless Respondent permanently reduces the number of livestock confined at the Facility below regulatory thresholds, Respondent shall apply for an NPDES permit for the Facility within one hundred and eighty (180) days of the effective date of this Order. Upon issuance of the NPDES Permit, Respondent shall comply with all terms contained therein, including terms related to the design, construction, operation, and maintenance of livestock waste controls.
29. By October 31, 2011, Respondent shall complete construction of feedlot waste controls

as required by IDNR pursuant to NPDES and other state issued permits. If construction is not completed by this date, Respondent shall cease operations within areas of the Facility where feedlot runoff cannot be managed to prevent discharges to waters of the United States. If Respondent is unable to prevent the discharges by this date then Respondent shall reduce the number of cattle confined at the Facility below regulatory threshold for a Medium CAFO until the controls are in place and Respondent has received an NPDES permit. Respondent shall not repopulate cattle above this regulatory threshold at the Facility unless the Facility can be operated in a manner that complies with the CWA.

30. If Respondent intends to apply for an NPDES permit and construct runoff controls to allow the confinement of cattle above regulatory thresholds, then beginning thirty (30) days after receipt of this Order and continuing monthly on the seventh day of each month until Respondent submits a Notice of Construction Completion to EPA, Respondent shall submit written monthly progress reports 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/will be addressed.
31. Upon completion of the runoff control structures, Respondent shall submit a Notice of Construction Completion certified by a professional engineer to EPA within thirty (30) days of completion of construction. The notification shall be in writing and shall include as-built drawings of the constructed improvements.

#### Effect of Order

32. 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.
33. 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.
34. 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.
35. EPA may subsequently amend this Order in accordance with the authority of the CWA. For example, EPA may amend this Order to address any non-compliance with the CWA, including, but not limited to, any non-compliance 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.

36. 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.

37. 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 5<sup>th</sup> Street  
Kansas City, Kansas 66101

38. 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 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.

39. 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).

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

8/11/10  
Date

*William A. Spratlin* *for WAS*  
William A. Spratlin  
Director  
Water, Wetlands and Pesticides Division

\_\_\_\_\_  
Date

*Sara S. Hertz Wu*  
Sara S. Hertz Wu  
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 United Parcel Service (UPS) Express, 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:

Mr. Terry Van Wyhe  
4111 Dove Lane  
Ireton, Iowa 51027

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:

Mr. Ken Hessenius  
Iowa Department of Natural Resources  
Field Office #3  
1900 Grand Avenue  
Gateway North Mall, Suite E17  
Spencer, Iowa 51301.



8/11/20  
Date