

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

BEFORE THE ADMINISTRATOR

In the Matter of)	
)	
Jim Dalinghaus,)	Docket No. CWA-07-2017-0148
)	
Respondent)	

**FINDINGS OF VIOLATION AND
ADMINISTRATIVE ORDER FOR COMPLIANCE ON CONSENT**

PRELIMINARY STATEMENT

1. The United States Environmental Protection Agency (EPA), Region 7 and Jim Dalinghaus (Respondent), doing business as Jim Dalinghaus Feedlot, have agreed to voluntarily enter into this Administrative Order for Compliance on Consent (Order) for the purpose of carrying out the goals of the Clean Water Act (CWA or the Act), 33 U.S.C. § 1251 et seq., to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters.”

JURISDICTION

2. The following Findings of Violation are made and Order issued pursuant to the authority of Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3).

PARTIES

3. Complainant, by delegation from the Administrator of the EPA and the Regional Administrator, EPA, Region 7, is the Director of Water, Wetlands and Pesticide Division.

4. Respondent is Jim Dalinghaus, doing business as Jim Dalinghaus Feedlot, owner and operator of an animal feeding operation located at: 424 144th Road, Baileyville, Kansas 66404.

5. Complainant and Respondent are hereinafter collectively referred to as “the Parties.”

STATUTORY AND REGULATORY AUTHORITY

6. 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.

7. 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.

8. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines the term “pollutant” as, *inter alia*, biological materials and agriculture waste discharged to water.

9. 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.

10. 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.”

11. 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.

12. 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.

13. 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.

14. To implement Section 402 of the CWA, EPA promulgated regulations codified at 40 C.F.R. Part 122.

15. 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.

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

17. “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).

18. “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, vegetative, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

19. “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.”

20. “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 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.

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

22. “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.”

23. “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.

24. 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

25. Jim Dalinghaus, doing business as Jim Dalinghaus Feedlot, owns or operates an animal feeding operation that is located at: North West Quarter of Section 03 of Township 03 South, Range 11 East, in Nemaha County, Kansas more commonly known as: 424 144th Road, Baileyville, Kansas 66404 (the Facility).

26. Respondent is and, at all times referred to herein, was doing business in the State of Kansas.

27. Respondent is and, at all times referred to herein, was a "person" as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

28. On or about January 27, 2017 and March 29, 2017, a representative of the EPA conducted compliance evaluation inspections at the Facility (the "inspections"). The inspections were conducted under the authority of Section 308 of the CWA, 33 U.S.C. § 1318, to evaluate Respondent's compliance with the requirements of the CWA and the federal regulations promulgated thereunder. A copy of the inspection reports were mailed to Respondent on April 24, 2017.

29. At the time of the inspections, Respondent did not have a NPDES permit authorizing the discharge of pollutants from the Facility.

30. Observations made during the inspections revealed that the Facility lacks adequate livestock waste control facilities to prevent the discharge of manure and process wastewater from Facility production areas.

31. Manure and process wastewater discharged from the Facility are “pollutants” as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

32. Observations made during the inspections revealed that, as a result of significant precipitation events, pollutants from production areas of the Facility discharge east of the Facility, through a culvert, into an unnamed tributary of the North Fork of the Black Vermillion River (the River) and west of the Facility into another unnamed tributary of the River, which flows for 400 yards prior to entering the unnamed tributary of the River east of the Facility.

33. Analysis of samples collected during the March 29, 2017 inspection revealed the presence of *Escherichia coli* (*E. coli*), a disease-causing type of fecal coliform bacteria passed through the fecal excrement of livestock and associated with discharges from CAFOs, in the discharge from the Facility and in the unnamed tributary of the River.

34. The observations made during the inspections and collected samples document the discharge of pollutants from the Facility into tributaries of the River and ultimately the River.

35. The unnamed tributary of the River is a perennial stream with a well-defined bed and bank and continuous flow.

36. The unnamed tributary, which flows approximately one and a half (1.5) miles before entering the River, and the River are “waters of the United States” and therefore, “navigable waters” pursuant to Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

37. On January 6, 2000, the KDHE established a total maximum daily load (TMDL) for the Black Vermillion River watershed that includes the North Fork of the Black Vermillion River and its tributaries. The TMDL was established to address impairments of the Black Vermillion River watershed caused by high concentrations of fecal coliform bacteria, a type of bacteria passed through the fecal excrement of livestock and associated with discharges from CAFOs.

38. At all times relevant to the allegations herein, the Facility stabled or confined and fed or maintained animals for a total of 45 days or more in a twelve (12) month period.

39. At all times relevant to the allegations herein, neither crops, vegetation, forage growth, nor post-harvest residues were sustained over any portion of the Facility’s confinement areas.

40. At all times relevant to the allegations herein, the Facility was an “animal feeding operation” or “AFO” as defined by 40 C.F.R. § 122.23(b)(1).

41. At all times relevant to the allegations herein, the Facility stabled or confined at least 1,000 head of cattle for a total of 45 days or more in a twelve (12) month period.

42. At all times relevant to the allegations herein, the Facility was a "Large CAFO" as defined by 40 C.F.R. § 122.23(b)(4), and in the alternative a "Medium CAFO" as defined by 40 C.F.R. § 122.23(b)(6).

43. The Facility is a "concentrated animal feeding operation" or "CAFO" as defined by 40 C.F.R. § 122.23(b)(2).

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

FINDINGS OF VIOLATION

45. The facts stated in Paragraphs 25 through 44 above are herein incorporated.

46. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants, unless such discharge is in compliance with a NPDES permit.

47. As described above, based on the size of the Facility and the proximity of the Facility to the unnamed tributary of the River, pollutants from production areas at the Facility will continue to flow intermittently into the unnamed tributary of the River and the River itself as a result of significant precipitation events.

48. The intermittent but continuing flow of process wastewater from the Facility to the unnamed tributary of the River and the River itself constitutes unauthorized discharges of pollutants to waters of the United States in violation Section 301(a) of the CWA, 33 U.S.C. § 1311(a), and implementing regulations.

ORDER FOR COMPLIANCE

49. It is the Parties' intent through entering into the Order to address noncompliance by Respondent in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

50. The Order requires Respondent to comply with the requirements of the CWA, and the regulations promulgated thereunder. All activities specified below shall be initiated and completed as soon as possible, even though maximum time periods for their completion, as agreed to by the Parties, may be specified herein. The terms of the Order shall not be modified except by subsequent written agreement between the Parties.

51. By entering into the Order, Respondent: (1) consents to and agrees not to contest EPA's authority or jurisdiction to issue or enforce the Order; (2) agrees to undertake all actions required by the terms and conditions of the Order; and (3) consents to be bound by the requirements set forth herein.

52. Respondent neither admits nor denies the specific factual allegations or Findings of Violation in the Order, except that Respondent admits the jurisdictional allegations herein.

53. Respondent waives any and all remedies, claims for relief and otherwise available rights to jurisdictional or administrative review that Respondent may have with respect to any issue of fact or law set forth in the Order, including, but not limited to, any right of judicial review of the Order under Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

54. Based on the Findings 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 and AGREES to take the following actions to eliminate violations of the CWA:

55. Respondent shall comply with the CWA and immediately cease all discharges of pollutants from the Facility into the waters of the United States.

56. If Respondent cannot immediately cease all discharges from the Facility 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.

57. Within thirty (30) days of the Effective Date of the Order, Respondent shall submit to EPA a written description and photo documentation of the interim measures and actions Respondent has taken or will take to correct and prevent the recurrence of the violations noted above.

58. Within ninety (90) days of the Effective Date of this Order, Respondent shall submit a good faith application to KDHE for a NPDES permit that authorizes pollutant discharges to waters of the United States.

59. Upon submittal of the application for a NPDES permit, should KDHE require any additional documentation or revisions, Respondent shall provide the same to KDHE, as requested, within fourteen (14) calendar days of receipt of notice from KDHE that additional documentation or revisions are necessary to complete the application for a NPDES permit.

60. Respondent shall comply with all terms contained in the NPDES permit, beginning on the permit effective date, as stated in the NPDES permit issued by KDHE (permit effective date).

61. Within six (6) months of the permit effective date, Respondent shall initiate construction of the runoff control structures approved by KDHE.

62. Respondent shall submit written monthly progress reports, describing the construction of runoff control structures that enable the confinement of beef cattle above regulatory thresholds, to EPA beginning within sixty (60) days of the Effective Date of the Order and continuing monthly on the seventh (7th) 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.

63. Within eighteen (18) months of the permit effective date, Respondent shall complete construction of the runoff control structures approved by KDHE.

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

65. All submitted documents, including certifications, required to be submitted to EPA by the Order, shall be submitted by electronic mail, facsimile or in hard-copy to the following:

Stephen Pollard
Water Enforcement Branch
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency, Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219
pollard.stephen@epa.gov
Fax: (913) 551-7884

66. Electronic and facsimile submissions will be deemed submitted on the date they are transmitted.

67. 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.

General Provisions

Effect of Compliance with the terms of the Order

68. The Order shall not constitute a permit under the CWA. Compliance with the terms of the Order shall not relieve Respondent of its responsibility to obtain any required local, state, and/or federal permits.

69. This Order does not constitute a waiver or a modification of any requirements of the CWA, 33 U.S.C. § 1251 *et seq.*, all of which remain in full force and effect. EPA retains the right to seek any and all remedies available under Section 309 of the CWA, 33 U.S.C. § 1319, for any violation cited in this Order. Issuance of this Order shall not be deemed an election by EPA to forgo any civil or criminal action to seek penalties, fines, or other appropriate relief under the CWA for any violation whatsoever.

70. Compliance with the terms of the 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.

Access and Requests for Information

71. Nothing in the 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.

Amendment of Order

72. EPA may subsequently amend the Order in accordance with the authority of the CWA. For example, EPA may amend the 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 the Order, all requirements for

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

Severability

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

Parties Bound

74. This Order shall apply to and be binding upon Respondent, its agents, successors and assigns. Respondent shall ensure that any directors, officers, employees, contractors, consultants, firms or other persons or entities acting under or for it with respect to matters included herein comply with the terms of this Order.

Effective Date

75. The terms of this Order shall be effective and enforceable against Respondent on the Effective Date, which is the date this Order is signed by EPA.

Termination

76. This Order shall remain in effect until a written notice of termination is issued by an authorized representative of EPA. Such notice shall not be given until all requirements of the Order have been met.

Failure to Comply

77. Notice is hereby given that violation of, or failure to comply with, any of the provisions of the Order may subject Respondent to civil penalties of up to \$52,414 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).

IN THE MATTER OF JIM DALINGHAUS
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RESPONDENT
JIM DALINGHAUS

Date: 6-10-17

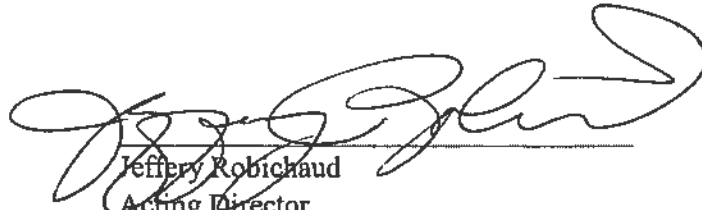
By: Jim Odeybens

Jim Dalinghaus
Print Name

Pres
Title

COMPLAINANT
U.S. ENVIRONMENTAL PROTECTION AGENCY

Date: 10/14/17



Jeffery Robichaud
Acting Director
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency, Region 7

Date: 6/14/17



Clarissa Howley Mills
Associate Regional Counsel
Office of 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 on Consent with the Regional Hearing Clerk, Region 7.

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

CH Mills
Name

6/20/2017
Date