



February 3, 2014

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U. S. Environmental Protection Agency
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Ohio Department of Agriculture
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Susan Hedman, Regional Administrator
U.S. Environmental Protection Agency, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Re: Clean Water Act, 505 Notice of Intent to Initiate Citizen Suit for Breach of Duty

Dear Sir/Madam:

This is a Notice of Intent ("NOI") to commence an action pursuant to the 505 citizen suit provisions of the federal Clean Water Act ("CWA" or "the Act"), 33 U.S.C. 1365 (a) (1) and (2), 40 CFR 135.1 (a) and (b), 40 CFR 123.24 (a), 40 CFR 123.62 (c), 40 CFR 123.63 (a) (1) (2) (4), and 28 USC 2412 (b), after the expiration of 60 days of the date of this letter (NOI).

Laws and Facts

1. Laws

Under 33 USC 1365 – Citizen Suit

(a) Authorization and Jurisdiction

- (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
- (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

40 CFR 135.1 – Purpose

(a) Section 505 (a) (1) of the Clean Water Act (hereinafter the Act) authorizes any person or persons having an interest which is or may be adversely affected to commence a civil action on his own behalf to enforce the Act or to enforce certain requirements promulgated pursuant to the Act. In addition, section 505(c)(3) of the Act provides that, for purposes of protecting the interests of the United States, whenever a citizen enforcement action is brought under section 505 (a) (1) of the Act in a court of the United States, the Plaintiff shall serve a copy of the complaint on the Attorney General and the Administrator. Section 505 (c) (3) also provides that no consent judgment shall be entered in any citizen action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator.

(b) The purpose of this subpart is to prescribe procedures governing the giving of notice required by section 505 (b) of the Act as a prerequisite to the commencing of such actions, and governing the service of complaints and proposed consent judgments as required by section 505 (c) (3) of the Act.

40 CFR 123.24 - Memorandum of Agreement with the Regional Administrator

(a) Any State that seeks to administer a program under this part must submit a Memorandum of Agreement. The Memorandum of Agreement must be executed by the State Program Director and the Regional Administrator and will become effective when approved by the Regional Administrator. In addition to meeting the requirements of paragraph (b) of this section, the Memorandum of Agreement may include other terms, conditions, or agreements consistent with this part and relevant to the administration and enforcement of the State's regulatory program. The Administrator will not approve any Memorandum of Agreement which contains provisions which restrict EPA's exercise of its' over site responsibility.

40 CFR 123.62 - Procedures for Revision of State Programs

(c) States with approved programs must notify EPA whenever they propose to transfer all or part of any program from the approved State agency to any other State agency, and must identify any new division of responsibilities among the agencies involved. The new agency is not authorized to administer the program until approved by the Administrator under paragraph (b) of this section. Organizational charts required under 123.22(b) (or, in the case of a sewage sludge management program, 501.12(b) of this chapter) must be revised and resubmitted.

40 CFR 123.63 – Criteria for Withdrawal of State Programs

Criteria for withdrawal of State programs

- (a) In the case of a sewage sludge management program, references in this section to "this part" will be deemed to refer to 40 CFR part 501. The Administrator may withdraw program approval when a State program no longer complies with the requirements of this part, and the State fails to take corrective action. Such circumstances include the following:
- (1) Where the State's legal authority no longer meets the requirements of this part including:
 - (i) Failure of the State to promulgate or enact new authorities when necessary; or

- (ii) Action by a State legislature or court striking down or limiting State authorities.
- (2) Where the operation of the State program fails to comply with the requirements of this part, including:
 - (i) Failure to exercise control over activities required to be regulated under this part, including failure to issue permits;
 - (ii) Repeated issuance of permits which do not conform to the requirements of this part; or
- (4) Where the State program fails to comply with the terms of the Memorandum of Agreement required under 123.24 (or, in the case of a sewage sludge management program, 501.14 of this chapter).

28 USC 2412 – Costs and Fees

(b) Unless expressly prohibited by statute, a court may reward reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable, under common law or under the terms of any statute which specifically provides for such an award.

2. Facts

The Administrator of the U.S. EPA has the sole oversight responsibility of state NPDES permitting programs.

The U.S. EPA approved Ohio's request to implement the NPDES Program on March 11, 1974. This approval recognized Ohio EPA as the agency responsible for implementing the State's approved NPDES Program.

In December 2000, the Ohio General Assembly passed Senate Bill 141, codified at Ohio Revised Code, Chapter 903, to transfer the Concentrated Animal Feeding Operation (“CAFO”) NPDES Program from the Ohio EPA to the Ohio Department of Agriculture (“ODA”).

The Ohio EPA CAFO NPDES Program consisted of three types of permits: an NPDES Permit, an installation permit (a “permit-to-install” or “PTI”), and a livestock waste management plan (a “permit-to-operate” or “PTO”).

In August 2002, the ODA began issuing PTIs and PTOs for CAFOs.

In conclusion, the ODA has issued PTIs and PTOs, being part of the NPDES Program for CAFOs, without the written authorization from the U.S. EPA [40 CFR 123.62(c)]. There is no approved Memorandum of Agreement in existence between the U.S. EPA and the ODA (See Exhibit 1). Therefore, the PTIs and PTOs issued by the ODA are void.

We ask that the U.S. EPA Administrator take immediate action to remedy this unlawful situation.

My name is Steve J. Edwards, 4030 Broadway, Grove City, Ohio 43123, telephone no. (614) 875-6661 and I am legal counsel for Jack L. Firsdon, Larry D. Askins and Vickie A. Askins who are the citizens giving this notice.

Respectfully Submitted,

Steve J. Edwards
Enclosure
SJE/