

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)	
)	
BAR MK, L.L.C.,)	Docket No. CWA-07-2018-0250
)	
Respondent)	CONSENT AGREEMENT/ FINAL ORDER
)	
Proceedings under Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g))	
)	
)	

The U.S. Environmental Protection Agency, Region 7 (“EPA”) and Bar MK, L.L.C. (“Respondent”) have agreed to a settlement of the alleged violations set forth in this Consent Agreement and Final Order (“CA/FO”). Thus, this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 (“Consolidated Rules”).

COMPLAINT

Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g)(2)(B) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(g)(2)(B), and in accordance with the Consolidated Rules.

2. This CA/FO alleges that the Respondent discharged pollutants into a water of the United States without a National Pollutant Discharge Elimination System (“NPDES”) permit in violation of Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

Parties

3. Complainant, by delegation from the Administrator of EPA to the Regional Administrator, EPA, Region 7, and re-delegation to the Director of Region 7’s Water, Wetlands and Pesticides Division.

4. Respondent operates a Concentrated Animal Feeding Operation located in Beemer, Nebraska.

STATUTORY AND REGULATORY AUTHORITY

5. 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.

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 agricultural 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. § 112.2 (1993).

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*, any 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 an 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. Pursuant to 40 C.F.R. § 122.1, an 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.

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

16. “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).

17. “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.

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. § 112.2 (1993) 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 Nebraska Department of Environmental Quality (NDEQ) is the state agency authorized to administer the federal NPDES program in the state of Nebraska 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 the eastern ½ of the northeast ¼ of the northwest ¼ of Section 30, Township 23 North, Range 6 East, in Cuming County, Nebraska, and has a street address of at 1466 13th Road, Beemer, Nebraska 68716, more commonly known as Bar MK (the Facility).

24. Respondent is and, at all relevant times, was a limited liability company registered under the laws of the state of Nebraska.

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

26. On April 18, 2017, EPA personnel conducted a compliance evaluation inspection of the Facility (“the EPA inspection”).

27. At the time of the EPA inspection, the Facility was confining approximately 678 head of beef cattle in four open confinement lots. Based on information gathered during EPA inspection and state inspection records, Respondent has confined at least 300 or more head of beef cattle at the Facility at all times relevant to this Order.

28. 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.

29. 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.

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

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

32. The Facility is a “Medium CAFO” within the meaning of 40 C.F.R. § 122.23(b)(6).

33. 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).

34. Observations made during the inspection revealed that the Facility lacks adequate livestock waste control facilities, structures, or measures to prevent the discharge of manure and process wastewater from Facility's production areas. The EPA inspector observed manure and process wastewater discharging from the open confinement lots and feedstock storage areas that was flowing north and east through defined field drainage for approximately 900 yards before entering the south road ditch along O Road. From there the discharged manure and process wastewater flowed approximately 425 yards before discharging into Plum Creek.

35. The road ditches and culverts are "man-made ditches, flushing systems or similar man-made devices," as included in the definition of Medium CAFO in 40 C.F.R. § 122.23(b)(6).

36. 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).

37. Plum Creek is a perennial flowing stream directly east of the Facility and is tributary to the Elkhorn River, a traditionally navigable water.

38. Plum Creek and the Elkhorn River are "waters of the United States" and therefore, "navigable waters" pursuant to 40 C.F.R. § 112.2 (1993) and Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

39. Analysis of samples collected during the inspection documented that pollutants, including E. coli, discharge from the Facility into Plum Creek.

40. The Elkhorn is impaired by E. coli and Atrazine, for which a Total Maximum Daily Load (TMDL) was placed and approved for the Elkhorn River on December 2013.

41. Respondent did not have an NPDES permit authorizing the discharge of pollutants from the Facility.

42. Based on the size of the Facility, the presence of the road ditch that facilitates pollutant discharges, and the proximity of the Facility to Plum Creek, process wastewater containing pollutants from production areas at the Facility will continue to flow intermittently into Plum Creek as a result of significant precipitation events.

43. The intermittent but continuing flow of process wastewater from the Facility to Plum Creek 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.

CONSENT AGREEMENT

44. Respondent admits the jurisdictional allegations of this CAcafoFO and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order.

45. Respondent neither admits nor denies the factual allegations contained in this CA/FO.
46. Respondent waives any right to contest the allegations and its right to appeal the proposed Final Order accompanying this Consent Agreement.
47. Respondent and Complainant each agree to bear their own costs and attorney's fees.
48. Nothing contained in the Final Order shall alter or otherwise affect Respondent's obligations to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits.
49. Respondent certifies that it is fully authorized to enter the terms and conditions of this CA/FO and to execute and legally bind Respondent to it.
50. Respondent certifies by the signing of this CA/FO that, to the best of its knowledge, Respondent is in compliance with all requirements of Sections 301 and 402 of the CWA.
51. The effect of settlement is conditional upon the accuracy of the Respondent's representations to EPA, as memorialized in paragraph 47 above, of this CA/FO.

PENALTY

IT IS HEREBY AGREED BY THE PARTIES, and pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), that:

52. Respondent shall pay a civil penalty of Twenty-Nine Thousand Dollars (\$29,000). The penalty shall be paid in full within thirty (30) days following receipt by Respondent of a fully executed copy of this CA/FO. Respondent shall pay the penalty by certified or cashier's check payable to "Treasurer, United States of America" and shall deliver it, with a transmittal that identifies the case name and docket number to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P. O. Box 979077
St. Louis, Missouri 63197-9000.

The check must also be annotated with the docket number and with the name of the case. Copies of the transmittal letter and the check shall be simultaneously sent to:

Lisa Haugen
Regional Hearing Clerk
U.S. Environmental Protection Agency - Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219

and

Chris Muehlberger
Office of Regional Counsel
U.S. Environmental Protection Agency - Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

Should the civil penalty not be paid as provided above, interest will be assessed at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on the overdue amount from the due date through the date of payment.

53. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this CA/FO shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

Reservation of Rights

54. EPA reserves the right to enforce the terms of this CA/FO by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

55. With respect to matters not addressed in this CA/FO, EPA reserves the right to take any enforcement action pursuant to the CWA, or any other available legal authority, including without limitation, the right to seek injunctive relief, monetary penalties and punitive damages.

Parties Bound

56. This Final Order shall apply to and be binding upon the 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 CA/FO.

Effective Date

57. This Final Order shall become effective upon filing pursuant to 40 C.F.R. § 22.31(b). All time periods herein shall be calculated therefrom unless otherwise provided in this Final Order.

COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY

Jeffery Robichaud
Director
Water, Wetlands and Pesticides Division

Date

Chris Muehlberger
Assistant Regional Counsel

Date

FOR RESPONDENT, BAR MK, L.L.C.:

Kandi Kulle
Name

Member
Title

7-23-2018
Date

FINAL ORDER

Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22, the foregoing Consent Agreement resolving this matter is hereby ratified and incorporated by reference into this Final Order.

The Respondent is ORDERED to comply with all of the terms of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(b), the effective date of the foregoing Consent Agreement and this Final Order is the date on which this Final Order is filed with the Regional Hearing Clerk.

IT IS SO ORDERED.

Date

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 Consent Agreement and Final Order 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 Consent Agreement and Final Order to the following

Ms. Karla A. Knobbe, Registered Agent
Bar MK, L.L.C.
1466 13th Road
Beemer, Nebraska 68716

and

Mr. Steve Mossman, Esq.
Mattson Ricketts Law Firm
134 S. 13th Street, Suite 1200
Lincoln, Nebraska 68508

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 Consent Agreement and Final Order to the following representative of the State of Nebraska:

Mr. Blake Onken, Supervisor
Agriculture Section
Nebraska Department of Environmental Quality
1200 N Street, Suite 400
P. O. Box 98922
Lincoln, Nebraska 68509

Name

Date