

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

IN THE MATTER OF)
)
)
SEWARD TURKEY ENTERPRISES, INC.) COMPLAINT AND NOTICE OF
) OPPORTUNITY FOR HEARING
)
Respondent)
) Docket No. CWA-07-2019-0005
)
Proceedings under Section 309(g) of the)
Clean Water Act, 33 U.S.C. § 1319(g))
_____)

COMPLAINT

Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (CWA), 33 U.S.C. § 1319(g), and in accordance with 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).

2. This Complaint serves as notice that the United States Environmental Protection Agency (EPA) has reason to believe that Respondent has violated Section 301 of the CWA, 33 U.S.C. § 1311, and regulations promulgated thereunder.

Parties

3. The authority to take action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), is vested in the Administrator of EPA. The Administrator has delegated this authority to the Regional Administrator, EPA, Region 7, who in turn has delegated it to the Director of the Enforcement and Compliance Assurance Division of EPA, Region 7 (Complainant).

4. Respondent is Seward Turkey Enterprises, Inc., a corporation under the laws of the state of Nebraska.

Statutory and Regulatory Framework

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

6. 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.

7. 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.

8. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines the term “navigable waters” as the “waters of the United States.” In turn, “waters of the United States” has been defined to include, *inter alia*, all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce and tributaries to such waters. 40 C.F.R. § 122.2 (1993).

9. 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.”

10. 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.

11. 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.

12. 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.

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

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

18. “Large CAFO” is defined, according to 40 C.F.R. § 122.23(b)(4), as an animal feeding operation that stables or confines as many as or more than 55,000 turkeys.

19. “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.”

20. “Production area” is defined by 40 C.F.R. § 122.23(b)(8) as “that part of an AFO that includes the animal confinement area, the manure storage area, the raw materials storage area, 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.”

21. 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.

22. Section 309(g) of the CWA, 33 U.S.C. § 1319(g), authorizes EPA to commence an action for administrative penalties against any person who violates Section 301 of the CWA, 33 U.S.C. § 1311.

Factual Background

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

24. At all times relevant to this action, Respondent owned or operated an animal feeding operation that is located in the Northwest ¼ of Section 7 of Township 10 North, Range 4 East, in Seward County, Nebraska, with a street address of 2201 Superior Street, Seward, Nebraska 68434, more commonly known as the Milford Site (the Facility).

25. On or about September 10, 2013, a representative of the EPA conducted a compliance evaluation inspection at the Facility.

26. On or about February 25, 2014, the EPA mailed a Letter of Warning to the Respondent identifying that the Facility had uncontrolled litter stockpiles located approximately 300 yards to the west of Wolf Creek, and requesting that the Respondent take action to address the runoff concerns posed by the stockpiles.

27. In or about March or April 2014, Respondent constructed a containment berm to the east of the Facility’s confinement barns and outdoor stockpiles to control process wastewater runoff from the Facility.

28. On or prior to October 30, 2014, Respondent cut an opening in the containment berm.

29. At all times relevant to this action, Respondent maintained outdoor manure, litter and mortality composting stockpiles at the Facility, including between the confinement barns and adjacent to the containment berm.

30. On or about March 30, 2017, a representative of the EPA conducted a compliance evaluation inspection at the Facility (the 2017 inspection).

31. During the 2017 inspection, the EPA representative observed and sampled process wastewater flowing from several outdoor manure, litter, and mortality composting stockpiles at the Facility through an opening cut in the containment berm, and through an erosional feature approximately 300 yards and into Wolf Creek.

32. Aerial images document that the Facility lacked adequate livestock waste control facilities, structures, run-off controls, or measures throughout the period between October 30, 2014 and the 2017 inspection, and that the cut in the berm was present for most, if not all, of that period.

33. Rainfall data from the National Atmospheric and Oceanic Administration (NOAA) indicates that there were at least eight other precipitation events at the Facility between October 30,

2014 and the 2017 inspection that were of equal or greater amount as the precipitation at the Facility on the day prior to and morning of the 2017 inspection.

34. Analysis of samples collected during the 2017 inspection documented that pollutants, including *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, discharged from the Facility into Wolf Creek.

35. At the time of the inspection, the Facility was confining approximately 180,000 turkeys.

36. At all times relevant to this action, the Facility confined more than 55,000 turkeys.

37. At all times relevant to this action, the Facility stabled or confined and fed or maintained turkeys for a total of 45 days or more in a twelve (12) month period.

38. At all times relevant to this action, neither crops, vegetation, forage growth, nor post-harvest residues were sustained over any portion of the Facility's confinement areas.

39. At all times relevant to this action, the Facility was an "animal feeding operation" or "AFO" as defined by 40 C.F.R. § 122.23(b)(1).

40. At all times relevant to this action, the Facility was a "Large CAFO" as defined by 40 C.F.R. § 122.23(b)(4).

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

42. 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).

43. Process wastewater discharged from the Facility contains "pollutants" as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

44. Wolf Creek is a tributary to the Big Blue River.

45. Wolf Creek and the Big Blue 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).

46. The Big Blue River is impaired by *E. coli*, for which a Total Maximum Daily Load (TMDL) was placed and approved for the Big Blue River in December 2013.

47. At all times relevant to this action, Respondent did not have an NPDES permit authorizing the discharge of pollutants from the Facility.

Findings of Violation

48. At all times relevant to this action, the Facility lacked adequate livestock waste control facilities, structures, run-off controls, or measures to contain all precipitation-related run-off and prevent the discharge of process wastewater from Facility production areas. There were at least nine precipitation events from October 30, 2014 up to and including March 30, 2017 that resulted in single and/or multi-day discharges of pollutants from the Facility into Wolf Creek.

49. Respondent's discharges of pollutants from a point source into waters of the United States without authorization by an NPDES permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, violated Section 301 of the CWA, 33 U.S.C. § 1311.

Relief

50. For violations of CWA Sections 301, 33 U.S.C. § 1311, Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), authorizes the administrative assessment of civil penalties in an amount not to exceed \$10,000 per day for each day during which the violation continues, up to a maximum total penalty of \$125,000. Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule of 2019, as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. § 2461 note; Pub. L. 101-410), amended by the Debt Collection Improvement Act of 1996 and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (28 U.S.C. § 2461 note; Pub. L. 114-74, Section 701), and pursuant to EPA's implementing regulations at 40 C.F.R. Part 19, civil administrative penalties may be assessed in the following amounts: for violations on or before November 2, 2015, up to \$16,000 per day for each day during which a violation continues; for violations after November 2, 2015, up to \$21,933 per day for each day during which a violation continues; and for penalties assessed on or after January 15, 2019, up to a maximum total penalty of \$274,159.

51. Based on the foregoing Findings of Violations, and pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), EPA, Region 7 hereby proposes to issue a Final Order Assessing an Administrative Penalty against the Respondent for the violations cited above, in the amount of \$115,000.

52. The proposed penalty is based upon the facts stated in this Complaint, the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, ability to pay, any prior history of such violation, the degree of culpability, economic benefit or savings resulting from the violation, and such other matters as justice may require.

53. The penalty proposed in this Complaint is based upon the best information available to EPA at the time that the Complaint was issued. The penalty may be adjusted if the Respondent

establishes bona fide issues of ability to pay, or other defenses relevant to the appropriate amount of the proposed penalty.

54. As required by Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4), prior to the assessment of a civil penalty, EPA will provide public notice of the proposed penalty, and reasonable opportunity for the public to comment on the matter, and present evidence in the event a hearing is held.

55. EPA has notified the state of Nebraska regarding this proposed action by mailing a copy of this document to the Nebraska Department of Environmental Quality.

NOTICE OF OPPORTUNITY TO REQUEST A HEARING

Answer and Request for Hearing

56. Respondent may request a hearing to contest any material fact contained in the Complaint above or to contest the appropriateness of the proposed penalty set forth therein. Such a hearing will be held and conducted in accordance with the Consolidated Rules, a copy of which is enclosed herein.

57. To avoid being found in default, which constitutes an admission of all facts alleged in the Complaint and a waiver of the right to hearing, Respondent must file a written answer and request for hearing within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing. The answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in this Complaint with respect to which Respondent has any knowledge, or shall clearly state that Respondent has no knowledge as to particular factual allegations in this Complaint. The answer shall also state (a) the circumstances or arguments which are alleged to constitute the grounds of defense; (b) the facts that Respondent disputes; (c) the basis for opposing any proposed relief; and (d) whether a hearing is requested. Said answer shall be filed with the following:

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

58. Failure to admit, deny or explain any material factual allegation in this Complaint constitutes an admission of the allegation.

59. A hearing upon the issues raised by this Complaint and the answer may be held if requested by Respondent in the answer. If Respondent does not request a hearing, the Presiding Officer may hold a hearing if issues appropriate for adjudication are raised in the answer.

60. In any hearing on the proposed penalty for this Complaint, members of the public to whom EPA is obligated to give notice of this proposed penalty action, will have the right, under Section 309(g) (4) (B) of CWA, 33 U.S.C. § 1319(g) (4) (B), to be heard and present evidence on the merits of the proposed CWA penalty assessment. If no hearing is held, EPA will issue a Final Order Assessing Administrative Penalties pursuant to the CWA, and only members of the public who submitted timely comments on the proposed penalty assessment will have an additional thirty (30) days to petition to set aside the said Order and to hold a hearing thereon. EPA will grant the petition and will hold a hearing only if the petitioners' evidence is material and was not considered by EPA in the issuance of the Final Order.

61. If Respondent fails to file a written answer within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing, Respondent may be found in default. Such default by Respondent constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. A Default Order may thereafter be issued by the Presiding Officer and the civil penalties proposed herein shall become due and payable unless the record clearly demonstrates that the requested relief is inconsistent with the CWA.

62. Whether or not Respondent requests a hearing, an informal conference may be requested in order to discuss the facts of this case, the proposed penalty, and the possibility of settlement. To request a settlement conference, please contact:

Shane E.C. McCoin
Assistant Regional Counsel
U.S. Environmental Protection Agency Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219
Telephone: (913) 551-7955

63. Please note that a request for an informal settlement conference does not extend the thirty (30) day period during which a written answer and request for a hearing must be submitted.

64. EPA encourages all parties against whom a civil penalty is proposed to pursue the possibilities of settlement as a result of an informal conference. Any settlement which may be reached as a result of such a conference shall be embodied in a written Consent Agreement and Final Order (CAFO) issued by the Regional Judicial Officer, EPA Region 7. The issuance of such a CAFO shall constitute a waiver of Respondent's right to request a hearing on any matter stipulated therein.

5/7/19

Date



DeAndre Singletary
Acting Director
Enforcement and Compliance Assurance Division

5/7/19

Date



Shane E.C. McCain
Assistant Regional Counsel

CERTIFICATE OF SERVICE

I certify that on the date indicated below, I hand delivered the original and one true copy of this Complaint and Notice of Opportunity for Hearing to the Regional Hearing Clerk, United States Environmental Protection Agency, 11201 Renner Boulevard, Lenexa, Kansas 66219.

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 Complaint and Notice of Opportunity for Hearing and a copy 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, to the following person:

Mr. Craig Wittstruck, Registered Agent
Seward Turkey Enterprises, Inc.
1630 K Street
Lincoln, Nebraska 68508

I further certify that on the dated noted below I sent a copy of the foregoing Complaint and Notice of Opportunity for Hearing by first class mail to the following persons:

Mr. Thomas E. Jeffers, Esq.
Crosby Guenzel, LLC
134 South 13th Street, Suite 400
Lincoln, Nebraska 68508

Cay Ewoldt
Supervisor, Agricultural Section
Water Quality Division
Nebraska Department of Environmental Quality
1200 N Street, Suite 400
PO Box 98922
Lincoln, Nebraska 68508

5-7-19
Date


Signature

Carolina F. Adams
Printed Name