

BEFORE THE NEBRASKA DEPARTMENT OF ENVIRONMENTAL QUALITY

IN THE MATTER OF	)	CASE NO. 3055
JD Cattle Co.	)	
Howard County, Nebraska	)	COMPLAINT, COMPLIANCE
	)	ORDER, AND NOTICE OF
	)	OPPORTUNITY FOR HEARING
Respondent.	)	

I. INTRODUCTION

This Complaint, Compliance Order, and Notice of Opportunity for Hearing is issued pursuant to Neb. Rev. Stat. § 81-1507 (Reissue 2008). The Complainant is the Director, State of Nebraska Department of Environmental Quality (hereinafter “NDEQ” or “Department”). The Respondent is JD Cattle Co., Inc., Howard County, Nebraska. The Complainant has determined that the Respondent is in violation of the Nebraska Environmental Protection Act (NEPA), Neb. Rev. Stat. § 81-1501 to -1532 (Reissue 2008) and the Livestock Waste Management Act, Neb. Rev. Stat. § 54-2416 to -2435 (Reissue 2004). The Complaint below establishes the violations.

II. FIRST CLAIM

1. Respondent is JD Cattle Co., Inc., a corporation authorized to do business in Nebraska. At all times material herein, Respondent owned and operated an animal feeding operation located at 1196 Twin Forks Lane, St. Paul, Nebraska, legally described as NW 1/4, Section 20, Township 15N, Range 10W, Howard County, Nebraska.

2. The Respondent is a “person” as defined in Neb. Rev. Stat. § 81-1502(10).

3. Neb. Rev. Stat. § 81-1506(1) states that “[i]t shall be unlawful for any person: (a) To cause pollution of any air, waters, or land of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any air, waters, or land of the state.”

4. Neb. Rev. Stat. § 81-1506(2) states that “[i]t shall be unlawful for any person to: (a) Discharge any pollutant into waters of the state without obtaining a permit as required by the National Pollutant Discharge Elimination System....”

5. Pursuant to Neb. Rev. Stat. § 81-1508.02(1)(e) (Reissue 2008), it is unlawful for any person to violate any rule or regulation adopted and promulgated pursuant to the Environmental Protection Act. Neb. Admin. Code Title 130, *Livestock Waste Control Regulations*, was promulgated pursuant to Neb. Rev. Stat. § 81-1505(1).

6. Neb. Admin. Code Title 130, Chapter 2, 008 states that:

Any person who owns or operates an animal feeding operation shall not: 008.02 ... allow or cause a discharge; [nor] ... 008.10 [d]ischarge animal excreta, feed, bedding, spillage, or overflow from water systems ... or other materials polluted by livestock waste in violation of or without first obtaining a NPDES permit, a construction and operating permit, construction approval, or exemption from the Department, if required by the Nebraska Environmental Protection Act, Livestock Waste Management Act, or these regulations.

7. On or about June 11, 2008 and again on or about June 29, 2010, Respondent allowed, without a permit, a discharge of waste from its animal feeding operation to waters of the State.

8. The Director finds that Respondent has violated Neb. Rev. Stat. § 81-1506 and Title 130.

9. The Director of the NDEQ is authorized pursuant to Neb. Rev. Stat. § 81-1504(7) (Reissue 2008) to issue this order prohibiting or abating discharges of wastes into waters of the state and requiring construction to abate further pollution.

### III. SECOND CLAIM

10. The Complainant hereby incorporates the allegations contained in its first claim above.

11. Neb. Rev. Stat. § 81-1506(1) states that “[i]t shall be unlawful for any person: ... (b) To discharge or emit any wastes into any air, waters, or land of the state which reduce the quality of such air, waters, or land below the air, water, or land quality standards established therefor by the council.”

12. Neb. Admin. Code Title 117, *Nebraska Surface Water Quality Standards*, was promulgated pursuant to Neb. Rev. Stat. § 81-1505(1). Neb. Admin. Code Title 117, Chapter 4, 003.04B1, establishes the one day minimum for dissolved oxygen for early life stages between April 1 and September 30. Dissolved oxygen must be at least 5.0 milligrams per liter (mg/l) during this time period.

13. On or about June 11, 2008, Respondent allowed a discharge that caused dissolved oxygen in Lake of the Woods sand pit and the drainage way leading to the sand pit, which are waters of the state in Howard County, to fall below the applicable water quality standard.

14. The Director finds that Respondent has violated Neb. Rev. Stat. § 81-1506 and Title 117.

15. The Director of the NDEQ is authorized pursuant to Neb. Rev. Stat. § 81-1504(7) (Reissue 2008) to issue this order prohibiting or abating discharges of wastes into waters of the state and requiring construction to abate further pollution.

#### IV. THIRD CLAIM

16. The Complainant hereby incorporates the allegations contained in its first and second claims above.

17. Neb. Admin. Code Title 117, Chapter 4, 003.05, provides the nutrient criteria for lakes and impounded waters. The maximum total phosphorus limit for a water

classified as a sand pit is 95 micrograms per liter (ug/l). The maximum for total nitrogen is 1240 micrograms per liter (ug/l).

18. On or about June 11, 2008, Respondent allowed a discharge that caused total nitrogen and total phosphorus in Lake of the Woods sand pit, a water of the state in Howard County, to exceed the applicable water quality standard.

19. The Director finds that Respondent has violated Neb. Rev. Stat. § 81-1506 and Title 117.

20. The Director of the NDEQ is authorized pursuant to Neb. Rev. Stat. § 81-1504(7) (Reissue 2008) to issue this order prohibiting or abating discharges of wastes into waters of the state and requiring construction to abate further pollution.

#### V. FOURTH CLAIM

21. The Complainant hereby incorporates the allegations contained in its first and second claims above.

22. Neb. Admin. Code Title 117, Chapter 4, 004.02B1, provides the maximum conductivity limit for waters used for general agricultural purposes. Conductivity is not to exceed 2,000 microsiemens per centimeter (umhos/cm) between April 1 and September 30.

23. On or about June 11, 2008, Respondent allowed a discharge which caused conductivity in Lake of the Woods sand pit, a water of the state in Howard County classified for general agricultural use, to exceed the applicable water quality standard.

24. The Director finds that Respondent has violated Neb. Rev. Stat. § 81-1506 and Title 117.

25. The Director of the NDEQ is authorized pursuant to Neb. Rev. Stat. § 81-1504(7) (Reissue 2008) to issue this order prohibiting or abating discharges of wastes into waters of the state and requiring construction to abate further pollution.

#### VI. FIFTH CLAIM

26. The Complainant hereby incorporates the allegations contained in its first and second claims above.

27. Neb. Admin. Code Title 117, Chapter 4, 002.01, establishes the maximum *E. coli* bacteria level between May 1 and September 30 for waters used for primary recreation. Neb. Admin. Code Title 117, Chapter 4, 002.01 provides “*E. coli* bacteria shall not exceed a geometric mean of 126 [colonies per 100 milliliters (ml)].”

28. On or about June 11, 2008, Respondent allowed a discharge which caused *E. coli* in Lake of the Woods sand pit, a water of the state in Howard County, to exceed the applicable water quality standard.

29. The Director finds that Respondent has violated Neb. Rev. Stat. § 81-1506 and Title 117.

30. The Director of the NDEQ is authorized pursuant to Neb. Rev. Stat. § 81-1504(7) (Reissue 2008) to issue this order prohibiting or abating discharges of wastes into waters of the state and requiring construction to abate further pollution.

## VII. SIXTH CLAIM

31. The Complainant hereby incorporates the allegations contained in its first and second claims above.

32. Neb. Admin. Code Title 117, Chapter 4, 003.01C, states that “[s]urface waters shall be free from toxic substances, alone or in combination with other substances, in concentrations that result in acute or chronic toxicity to aquatic life.”

33. On or about June 11, 2008, Respondent allowed a discharge which caused acute toxicity and mortality to fish in Lake of the Woods sand pit, a water of the state in Howard County.

34. The Director finds that Respondent has violated Neb. Rev. Stat. § 81-1506 and Title 117.

35. The Director of the NDEQ is authorized pursuant to Neb. Rev. Stat. § 81-1504(7) (Reissue 2008) to issue this order prohibiting or abating discharges of wastes into waters of the state and requiring construction to abate further pollution.

#### VIII. SEVENTH CLAIM

36. The Complainant hereby incorporates the allegations contained in its first and second claims above.

37. Neb. Admin. Code Title 130, Chapter 2, 010 states that “[a]ny person who owns or operates an animal feeding operation shall report any discharge of manure, litter, or process wastewater to the Department within 24 hours of the event and provide a written report to the Department within five days of the event.”

38. On or about June 11, 2008 and again on or about June 29, 2010, Respondent failed to notify the Department of a discharge from Respondent’s facility within 24 and provide written notice within five days of the discharge.

39. The Director finds that Respondent has violated Neb. Rev. Stat. § 81-1506 and Title 130.

#### IX. EIGHTH CLAIM

40. The Complainant hereby incorporates the allegations contained in paragraphs one, two, and five above.

41. Neb. Rev. Stat. § 81-1506(5)(b) states that it is unlawful to violate any provision of the Livestock Waste Management Act. Neb. Rev. Stat. § 54-2432 states that “it shall be unlawful for any person to ...[o]perate an animal feeding operation prior to construction of an approved livestock waste control facility.”

42. Neb. Admin. Code Title 130 Chapter 2, 003 states that “[a] livestock waste control facility is required for an existing or proposed animal feeding operation when livestock wastes have discharged or have the potential to discharge in a manner that is not lawfully authorized by permit or these regulations.”

43. Respondent has failed to construct an adequate livestock waste control facility and has not filed an accurate and complete application with the Department to build such a facility. Further, Respondent continues to operate using an inadequate livestock waste control facility which places livestock waste in a location where it is likely to cause pollution to lands and waters of the state in violation of Neb. Rev. Stat. § 81-1506(1)(a).

44. The Director finds that Respondent has violated Neb. Rev. Stat. §§ 81-1506 and 54-2432 and Title 130.

45. The Director of the NDEQ is authorized pursuant to Neb. Rev. Stat. § 81-1504(7) to issue this order requiring the construction of livestock waste control facilities to prevent, control, or abate pollution.

#### X. NINTH CLAIM

46. The Complainant hereby incorporates the allegations contained in paragraphs one, two, and five above.

47. Pursuant to Neb. Rev. Stat. §81-1506(5), "It shall be unlawful for any person to: (a) Construct or operate an animal feeding operation without first obtaining a permit if required under the Livestock Waste Management Act or under the Environmental Protection Act and the rules and regulations adopted and promulgated by the council pursuant to such acts."

48. Neb. Admin. Code Title 130, Chapter 2, 008 states that "[a]ny person who owns or operates an animal feeding operation shall not...[o]perate a concentrated animal feeding operation without a construction approval, operating permit, construction and operating permit or a NPDES permit as required in Chapter 5 of these regulations..."

49. Neb. Admin. Code Title 130, Chapter 5, 001 requires owners and operators of concentrated animal feeding operations to apply for NPDES permit coverage if their operation discharges.

50. Neb. Rev. Stat. § 54-2428(1) states that any person required to obtain a permit for a livestock waste control facility shall file an application with the Department.

51. On or about September 23, 2008, Complainant sent a Notice of Violation to Respondent requiring Respondent to submit applications for NPDES and Construction and Operating Permits by March 1, 2009.

52. Respondent has failed to submit accurate and complete applications as required for permit coverage and continues to operate its animal feeding operation in Howard County without the required permits.

53. The Director finds that Respondent has violated Neb. Rev. Stat. §§ 81-1506 and 54-2428(1) and Title 130.

54. The Director of the NDEQ is authorized pursuant to Neb. Rev. Stat. § 81-1504(20) (Reissue 2008) to issue this order “[t]o require all persons engaged ... in operations which result or which may result in air, water, or land pollution to secure a permit prior to ... continued operation.”

#### XI. COMPLIANCE ORDER

55. The Respondent shall perform, within the following time frames, the following activities:

- A. By March 1, 2011, submit a complete and accurate application for a Construction and Operating Permit, including a plan for construction of a livestock waste control facility, and submit an application for coverage under a general or individual National Pollutant Discharge Elimination System Permit.

- B. By July 1, 2011, begin construction on the approved livestock waste control facility.
- C. By July 1, 2012, complete construction of the livestock waste control facility, in accordance with plans and specifications approved by NDEQ, and which meets all other regulatory requirements.

56. Beginning July 1, 2011, Respondent shall submit monthly progress reports to NDEQ on the activities listed in paragraph 55 of this Order. These reports shall contain information regarding the activities associated with the project, construction schedule, and completion date.

57. The Respondent shall respond promptly to any written communication by the NDEQ to modify any submitted documents and shall make the required modifications or changes no later than 30 days after receipt or date specified in written comments by NDEQ. Any delay in responding to such communication shall be construed as non-compliance with this Order.

58. Information to be submitted under this Order shall be sent to:

Dennis Heitmann  
Agricultural Section Supervisor  
Water Quality Division  
Nebraska Department of Environmental Quality  
P.O. Box 98922  
Lincoln, Nebraska 68509-8922  
Telephone number (402) 471-2186

## XII. NOTICE OF OPPORTUNITY TO REQUEST A HEARING

59. This Order shall become final, pursuant to Neb. Rev. Stat. § 81-1507(1), unless Respondent files an answer and requests, in writing, a hearing no later than thirty (30) days after receipt of this Order. Failure to answer within thirty (30) days shall be deemed an admission of the allegations of the Complaint.

60. A written answer to the Complaint, Compliance Order, and Notice of Opportunity for Hearing must conform to the requirements of Title 115, Neb. Admin.

Code, *Rules of Practice and Procedure*, Chapter 7. The answer and request for hearing may be filed by mail to:

Michael J. Linder, Director  
Nebraska Department of Environmental Quality  
P.O. Box 98922  
Lincoln, Nebraska 68509-8922

or may be delivered to the Department's Lincoln office located at 1200 "N" Street, Suite 400, Lincoln, Nebraska.

### XIII. SETTLEMENT CONFERENCE

61. Whether or not Respondent requests a hearing, an informal settlement conference may be requested by writing to Lydia Fiedler, Attorney, Nebraska Department of Environmental Quality, P.O. Box 98922, Lincoln, Nebraska 68509-8922, or have your attorney make such a request.

62. A request for settlement conference does not extend the thirty (30) day period during which a written answer and request for hearing must be submitted or otherwise delay the final effective date of this Order.

### XIV. INJUNCTIVE RELIEF AND PENALTY PROVISIONS

63. The NDEQ reserves the right to pursue enforcement in the proper court of law for injunctive relief or to seek civil or criminal penalties for any violations that are the subject of this Complaint, Compliance Order and Notice of Opportunity for Hearing. Nothing in this Complaint, Compliance Order and Notice of Opportunity for Hearing precludes the NDEQ from pursuing such enforcement. Failure to obey this order may result in fine up to \$10,000 per day as set out in Neb. Rev. Stat. § 81-1508.02.

January 4, 2011  
Date

/s/ Michael J. Linder  
Michael J. Linder, Director  
NEBRASKA DEPARTMENT OF  
ENVIRONMENTAL QUALITY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Complaint, Compliance Order, and Notice of Opportunity for Hearing, with attachments, was served by certified United States mail, postage prepaid, return receipt requested this 4<sup>th</sup> day of January 2011 upon the Respondent listed below:

Darlene Klinginsmith, Registered Agent  
JD Cattle Co., Inc.  
1196 Twin Forks Lane  
St. Paul, NE 68873

/s/ Lydia Fiedler  
Lydia Fiedler  
Staff Attorney