

IN THE DISTRICT COURT FOR CUMING COUNTY, NEBRASKA

MERNA RECKER
CLERK OF DISTRICT COURT

STATE OF NEBRASKA, ex rel.,)
MICHAEL J. LINDER, Director)
DEPARTMENT OF ENVIRONMENTAL)
QUALITY,)
)
Plaintiff,)
v.)
GERALD SMITH, d/b/a)
GERALD SMITH LIVESTOCK,)
)
Defendant.)

Case No. 08-67 2008 SEP 25 AM 10 55
FILED
CUMING COUNTY, NE

CONSENT DECREE

Plaintiff, the Department of Environmental Quality ("NDEQ"), proceeding on its Complaint filed herein and appearing through its counsel, Jon C. Bruning, Attorney General, and the Defendant, Gerald Smith, d/b/a Gerald Smith Livestock ("Smith"), appearing through its counsel, Thomas H. DeLay, and each party having contested to the making and entering of this Consent Decree without trial, the Court finds that the Consent Decree should be and hereby is entered.

IT IS THEREFORE ORDERED AND DECREED:

1. This Court has jurisdiction of the parties and the subject matter of this action. The complaint filed in this case is a justiciable cause of action against Smith.
2. NDEQ, in its Complaint, alleged that beginning on or about August 8, 2004, and continuing daily thereafter, representatives of NDEQ observed Smith operating a livestock operation without the necessary controls in place as required by Title 130, Chapter 2, Section 004 of the Nebraska Administrative Code. Further, since March 1, 2005, Smith continues to operate and place livestock waste in a location where it is likely to cause pollution to waters of the state in violation of Neb. Rev. Stat.

§81-1506 (1) (a) (Reissue 1999). Finally, beginning on or around January 1, 2008, Smith has violated an administrative order of the Department in failing to submit a complete and accurate application for construction of a livestock waste control facility and to submit an application for a general or individual National Pollutant Discharge Elimination System permit in violation of Neb. Rev. Stat. §81-1508.02 (1) (b) (Reissue 1999).

3. NDEQ further alleges that Smith is therefore subject to a civil penalty as provided in Neb. Rev. Stat. §81-1508.02 (1) (b) (Reissue 1999).

4. Smith contends that the only approved configuration of his feeding pens and proposed livestock waste control facility upon his land did not allow for the economical construction of a such a waste facility, and that in the alternative, on January 10, 2008, he entered a Conservation Program Contract with the U.S. Department of Agriculture Natural Resources Conservation Service to implement and maintain specific conservation practices as set forth in the plan, and for cost sharing, for the purpose of construction of a fabricated structure (hoops buildings) for the temporary storage of animal and related agricultural wastes and the application of such wastes in accordance with the said contract. Smith further contends that the construction of such hoops buildings and the feeding of cattle within the buildings on bedding eliminates a requirement for storage of wet livestock animal waste and the requirement for an approved Livestock Waste Control Facility permit as required by Nebraska law. Smith intends to complete the approved structures and feed cattle within the structures, disposing of the dry livestock waste (bedding) in accordance with said contract.

5. The parties agree that settlement of these matters is in the public interest and that entry of this Consent Decree is the most appropriate means of resolving their dispute. Smith, without admitting any allegations of the Complaint, agrees to the form and entry of this Consent Decree for purposed of settlement only.

6. The parties agree that this Consent Decree shall be in full satisfaction of all claims between the parties alleged in the Complaint and arising out of the same transaction or occurrence asserted therein, provided that such claims were known to the State of Nebraska as of the date of the filing of the Consent Decree.

7. IT IS FURTHER ORDERED that Smith is enjoined from any further cattle feeding in open lots and shall remove all fences from the abandoned areas (with the exception of working pens), do a complete clean-up/removal of waste from the abandoned pens, establish permanent vegetative cover in the abandoned areas, and refrain from onsite stockpiling of used bedding without prior approval by NDEQ.

8. IT IS FURTHER ORDERED that Smith shall pay to the Clerk of the District Court of Cuming County a civil penalty in the sum of ten thousand dollars (\$10,000) pursuant to Neb. Rev. Stat. §81-1508.02, together with court costs in the amount of seventy-nine dollars (\$79.00). Said penalty is to be handled pursuant to Article VII, Section V, of the Nebraska Constitution.

A. \$5,000 of the civil penalty, as well as the \$79 in court costs, shall be paid to this Court according to the following schedule:

i. \$79 in court costs is due upon the entry of this consent decree.

ii. \$2,500 of the civil penalty is due February 1, 2009.

iii. \$2,500 of the civil penalty is due March 1, 2009.

B. \$5,000 of the civil penalty shall be paid to this Court no more than 365 days from the entry of this consent decree by the Court. However, if Smith maintains compliance with both the Nebraska Environmental Protection Act, Neb. Rev. Stat. § 81-1501 *et. seq.* and Title 130 of the Nebraska Administrative Code, "Livestock Waste Control Regulations," during the 365 days following the entry of this consent decree, then payment of this \$5,000 of civil penalties will be waived.

C. To qualify for the waiver of \$5,000 of civil penalties as described in paragraph 8(B), Smith shall file a showing with the Court within 15 days following the due date of the civil penalties establishing that he has maintained compliance with the statutes and regulatory provisions listed in paragraph 8(B). If Smith does not receive a Notice of Violation from NDEQ and is not a party to a legal action initiated by the State or NDEQ disputing compliance with the statutes and regulatory provisions in paragraph 8(B) during the relevant time period, the State shall file a satisfaction of judgment in the case within 10 days of receiving Smith's showing. If Smith receives a Notice of Violation from NDEQ or is a party to legal action initiated by the State or NDEQ disputing compliance with the statutes and regulatory provisions in paragraph 8(B) during the relevant time period, the State shall file an objection to Smith's showing, and the determination of this waiver provision shall be stayed pending ongoing enforcement proceedings.

9. IT IS FURTHER ORDERED that Smith shall pay, as a Supplemental Environmental Project, the sum of ten thousand dollars (\$10,000) into the Attorney General's Environmental Protection Fund to be used for environmental safety, training,

public awareness, or other related used as permitted by state law, at the sole discretion of the Nebraska Attorney General. This payment shall be paid according to the following schedule:

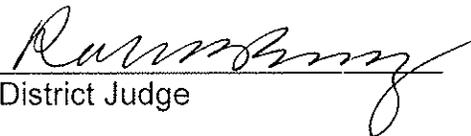
- i. \$2,500 is due upon the entry of this consent decree.
- ii. \$2,500 is due November 1, 2008.
- iii. \$2,500 is due December 1, 2008.
- iv. \$2,500 is due January 1, 2009.

10. This Consent Decree will have no effect on any enforcement action brought by Plaintiff against Smith for future violations of any statutes or regulations or Smith's ability to pursue other parties for liability related to the circumstances giving rise to this action.

11. The undersigned consent without further notice to the form and entry of the foregoing Consent Decree.

DATED THIS 24 day of September, 2008, in Cuming County, Nebraska.

BY THE COURT:


District Judge

STATE OF NEBRASKA, ex rel.,
MICHAEL J. LINDER, Director
NEBRASKA DEPARTMENT OF
ENVIRONMENTAL QUALITY, Plaintiff

By JON C. BRUNING, #20351
Attorney General

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