

BEFORE THE NEBRASKA DEPARTMENT OF ENVIRONMENT AND ENERGY

IN THE MATTER OF) Case No. 3615
)
JARROD W. ANDERSON and)
PAULA J. ANDERSON) CONSENT ORDER
)
FID #72636)
)
Respondents.)

I. INTRODUCTION

1. The Nebraska Department of Environment and Energy (NDEE or Department) and Jarrod W. Anderson and Paula J. Anderson (Respondents), owners and operators of an animal feeding operation located in Morrill County, NE, voluntarily enter into this Consent Order. The Consent Order establishes a schedule for Respondents to comply with the Livestock Waste Management Act (LWMA), Neb. Rev. Stat. §§ 54-2416 to 54-2438; Nebraska Environmental Protection Act (NEPA), Neb. Rev. Stat. §§ 81-1501 to 81-1532; and Neb. Admin. Code, Title 130, *Livestock Waste Control Regulations* (Title 130).

2. This Consent Order replaces and supersedes the Complaint, Compliance Order, and Notice of Opportunity for Hearing issued on September 27, 2023 (NDEE document # 20230926796).

3. NDEE and Respondents agree that settlement of this matter is in the public interest.

II. JURISDICTION

4. NDEE is the agency of the State of Nebraska charged with the duty, pursuant to Neb. Rev. Stat. § 81-1504(1), of exercising exclusive general supervision, administration, and enforcement of LWMA, NEPA, and all rules and regulations promulgated by the Nebraska Environmental Quality Council (EQC) under such acts, including Title 130.

5. In signing this Consent Order, Respondents agree to undertake all actions required by this Consent Order. Respondents agree not to contest the jurisdictional allegations referenced herein in any action to enforce this Consent Order. Respondents waive their right to further hearing as provided in Neb. Rev. Stat. § 81-1507 and the Administrative Procedure Act, Neb. Rev. Stat. § 84-901 *et seq.*

III. PARTIES

6. The parties to this Consent Order are NDEE and Respondents Jarrod W. Anderson and Paula J. Anderson. This Consent Order is binding on the Respondents and all successors and assigns.

7. All Respondents are a “person” as defined in Neb. Rev. Stat. § 54-2417(16) and Neb. Rev. Stat. § 81-1502(10).

IV. FINDINGS OF FACT

8. Respondents Jarrod W. Anderson and Paula J. Anderson own and operate an animal feeding operation (AFO) located at NW ¼, NE ¼, Section 8, Township 21N, Range 51W, Morrill County, NE.

9. Respondents’ AFO consists of several confined feeding pens located along the west and east sides of a central road and feeding alley running approximately north-to-south. In total, the west and east pens contain approximately 2100 feet of bunk space capable of feeding between approximately 1400 and 2100 feeder cattle depending on animal size and age, feed blend, number of daily feedings, and other production variables. The confined feeding pens and operational capacity for feeding 1400 to 2100 cattle designates a facility of this size and operational character as both a “large” AFO and large concentrated animal feeding operation (CAFO) under Title 130, Chapter 1, 008 and 024.

10. On July 17, 2019, NDEE inspected the AFO that is now owned by Respondents and was under prior ownership at the time of inspection. On inspection, NDEE determined that discharges of livestock waste, runoff, and direct precipitation from the east pens flow east to an abandoned irrigation canal repurposed for use as a “debris basin”, as that term is used in Neb. Rev. Stat. § 54-2417(10), and is then left in the canal to evaporate.

11. During the July 17, 2019, inspection, NDEE also determined that discharges of livestock waste, runoff, and direct precipitation from the west pens were uncontrolled by any designed, repurposed, or other structures utilized to control livestock waste until it can be used, recycled, or disposed of in an environmentally acceptable manner. NDEE also determined that discharges of livestock waste from the west pens flowed north to the south road ditch for Nebraska Highway Link 62A, then flowed west for approximately ¼ mile, then turned south and flowed through a cropped intermittent drainage for approximately 650 feet, then emptied into a lateral branch of the Tristate Irrigation Canal, a water of the state as defined in Neb. Rev. Stat. § 54-2417(17) and Neb. Rev. Stat. § 81-1502(21).

12. As a result of the July 17, 2019, inspection of the AFO which was then under previous ownership and is now owned and operated by Respondents, NDEE determined that the discharge of livestock waste from the west pens was uncontrolled and had the potential to discharge livestock waste to a water of the state or to a place which will likely reach waters of the state, as “discharge” is defined and used in Neb. Rev. Stat. § 54-2417(8), LWMA, NEPA, and Title 130.

13. On August 30, 2019, and based on the findings of its July 17, 2019, inspection, NDEE sent a previous owner of Respondents’ AFO a “Permits Required” letter informing the previous owner that the AFO was subject to the livestock waste control permit requirements of Title 130 and that applications for a Construction and Operating (C&O) Permit and a National Pollutant

Discharge Elimination System (NPDES) Permit were required to be submitted to the Department on or before March 1, 2020. Among other requirements, a major requirement of a Title 130 C&O Permit is that the AFO owner/operator construct and operate an engineered livestock waste control facility (LWCF) as defined in Neb. Rev. Stat. § 54-2417(10), or multiple LWCFs, to contain and manage livestock waste, runoff, and precipitation from the AFO's production area.

14. Between August 30, 2019, and August 29, 2022, NDEE received no Title 130 C&O or NPDES permit applications from previous owners of Respondents' AFO.

15. On August 29, 2022, and after learning that Respondents were now the current owners of the AFO at NW ¼, NE ¼, Section 8, Township 21N, Range 51W, Morrill County, NE, NDEE contacted Respondent Jarrod Anderson by phone to inform him that Respondents' AFO was subject to Title 130 C&O and NPDES permit requirements. Respondent stated that he was aware that his AFO was subject to permit requirements. Respondent also stated that he had been working with an engineering consulting firm, but that the project became too expensive. Respondent further stated that he was not intending to obtain the required permits and intended to "possibly move the facility capacity to under 1,000 head of cattle".

16. On August 31, 2022, NDEE sent Respondents a "Permits Required" letter which was identical in content to two (2) "Permits Required" letters NDEE sent to previous owners of Respondents' AFO on August 30, 2019, and July 16, 2020. All three (3) Permits Required letters are viewable to the public on NDEE's online public records portal.

17. In good faith and in fulfilling its statutory mandate in Neb. Rev. Stat. § 81-1510(1) to pursue voluntary compliance prior to initiating enforcement proceedings, NDEE conducted a reinspection and compliance assistance visit (CAV) of Respondents' AFO on October 5, 2022, for purposes of: 1) evaluating whether and under what operating conditions Respondents could

operate their AFO lawfully and in an environmentally acceptable manner without the requirements to obtain Title 130 permits and construct a LWCF, and 2) confirming the observations made on and determinations resulting from the NDEE inspection on July 17, 2019, when Respondents' AFO was under prior ownership.

18. Pursuant to LWMA and Title 130, certain AFOs operating at a maximum capacity of 999 head of feeder cattle and in accordance with operational conditions and limitations established by NDEE to prevent discharges of livestock waste to waters of the state may potentially be exempt from the Title 130 C&O and NPDES permit requirements.

19. During the October 5, 2022 reinspection and CAV, NDEE confirmed that discharges of livestock waste, runoff, and direct precipitation from the east pens flow east to an abandoned irrigation canal repurposed for use as a debris basin. NDEE observed and documented that the debris basin could be used as a LWCF within the meaning of LWMA and Title 130 for the east pens provided that the debris basin was maintained to be free of weeds, dewatered within 84 hours of a runoff event, and pumped to an adjacent field directly to the east which, when cropped, would require crops to be planted in rows oriented from west to east to allow for proper drainage.

20. During the October 5, 2022 reinspection and CAV, NDEE confirmed that discharges of livestock waste, runoff, and direct precipitation from the west pens were uncontrolled; that the drainage path for discharges of livestock waste from the west pens followed the route documented by NDEE on its July 17, 2019, inspection; that operation of the west pens had the potential for discharge of livestock waste to a water of the state; and that a LWCF and Title 130 permits were required for lawful operation of Respondents' AFO if such operation included use of the west pens. As an alternative to constructing a LWCF and obtaining Title 130 permits,

NDEE documented in its inspection report that Respondents could permanently abandon the west pens and reduce the AFO's maximum operating capacity to 999 feeder cattle or below, thus becoming a medium AFO as defined in Title 130, Chapter 1, 029.03.

21. On October 31, 2022, NDEE sent Respondents a "Conditional Requirements" letter offering and describing the conditions necessary for Respondents to lawfully operate as a medium AFO without the requirements to construct a LWCF and obtain Title 130 C&O and NPDES permits, and, as such, be considered conditionally exempt from the requirements of Neb. Rev. Stat. § 54-2432(3) and (4) and Title 130, Chapter 2, 003 and 004.

22. On January 4, 2023, NDEE conducted a compliance status inspection at Respondents' AFO, noting that Respondents "had not complied with the Department's requests; there were cattle in the west pens, and the facility, [with a capacity] for 2,000 head, looked to be at or near capacity."

23. On February 14, 2023, NDEE conducted a compliance status inspection at Respondents' AFO, noting that "as of today, no work has been completed" on meeting the conditions of the "Conditional Requirements" letter.

24. Also on February 14, 2023, NDEE sent Respondents a "Letter of Non-Compliance" (LNC) citing violations of Title 130 and requiring Respondents to either meet the conditions of the "Conditional Requirements" letter or submit Title 130 C&O and NPDES permit applications by May 1, 2023. The LNC also required a written progress update by April 1, 2023.

25. To date, Respondents have not responded to the February 14, 2023, LNC and have not complied with both the progress update deadline of April 1, 2023, and revised completion deadline of May 1, 2023.

26. On April 4, 2023, NDEE conducted a compliance status inspection at Respondents' AFO, noting that "[a]t the time of inspection, the facility still had cattle confined in the pens west of the drover's alley". The inspection report documented the ongoing presence of cattle in the west pens in three (3) photographs with captions.

27. On May 5, 2023, NDEE conducted a compliance status inspection at Respondents' AFO, noting that "[d]uring the compliance status inspection, it was noted that the pens west of the drover's alley still confined cattle." In four (4) photographs with captions, the inspection report documented the ongoing presence of cattle in the west pens. In two (2) photographs with captions, the inspection report documented standing liquid livestock waste at low points of the west pens that had the potential to discharge during a rain event.

28. On June 1, 2023, NDEE documented in a memorandum to file that it had attempted to contact Respondent Jarrod Anderson by phone and had left messages with him on February 8, 2023, and May 12, 2023, for the purposes of providing follow-up on prior agency correspondence and providing compliance assistance, but did not receive return calls from Respondents.

29. As these Findings of Fact establish, Respondents are required to either: 1) obtain Title 130 C&O and NPDES permits for the lawful operation of their AFO, or 2) maintain compliance with the conditions for an exemption from Title 130 C&O and NPDES permit requirements.

30. Without Title 130 C&O and NPDES permits or an exemption, Respondents continue to operate their AFO in violation of Neb. Rev. Stat. § 54-2432(3) and (4) and Title 130, Chapter 2, 003 and 004.

31. In negotiations between the parties subsequent to issuance of the unilateral administrative order by NDEE on September 27, 2023, Respondents have elected to maintain compliance with

conditions for an exemption from Title 130 C&O and NPDES permit requirements. The compliance schedule below contains the conditions for an exemption.

32. The NDEE Director is authorized under Neb. Rev. Stat. § 81-1504(7), (25), and § 81-1507(1) to require and enforce compliance schedules to prevent, control, or abate unlawful discharges to waters of the state or when a violation of LWMA, NEPA, or Title 130 has occurred.

V. COMPLIANCE SCHEDULE

33. The parties agree that the conditions for an exemption from Title 130 C&O and NPDES permit requirements as established below are a one-time offer of regulatory flexibility conditioned upon: 1) Respondents' compliance with paragraphs 36 through 42, and 2) the performance of the vegetative buffer to replace the northwest pen in preventing discharges of livestock waste to the road ditch for Nebraska Highway Link 62A.

34. The parties further agree that the conditions for an exemption described herein must be maintained continuously during and after this administrative case for as long as Respondents own and operate the AFO or until such time as they obtain Title 130 C&O and NPDES permit coverage.

35. The parties also agree that the conditional exemption confers no permanent legal rights or regulatory determinations to Respondents, their successors, or assigns beyond those described herein; does not run with the land under Nebraska law; and is not transferable to subsequent owners of Respondents' AFO.

36. Effective immediately, Respondents agree to confine no more than 999 head of feeder cattle at any time.

37. Respondents agree to permanently abandon the northwest pen as identified in 'Attachment A' and to maintain permanent vegetation in the full area of the northwest pen.

Respondents further agree to:

- a. by May 31, 2024, clean the northwest pen of livestock waste and remove all fencing and gating;
- b. by May 31, 2024, disk, drill, scrape, or otherwise disturb the soil surface in the full area of the former northwest pen area so that hardpan is sufficiently broken up to allow for vegetation to be established in the 2024 growing season;
- c. on an ongoing basis, maintain vegetation in the full area of the former northwest pen at all times and to re-apply seed and irrigate the area as necessary to maintain vegetation; and
- d. any future loss of surface area from the full area of the former northwest pen resulting from the expansion project for Nebraska Highway Link 62A must be offset by an equivalent amount of surface area removed and planted to vegetation from the pen immediately to the south. The northeast pen east of drover's alley may remain its current size, shape, and surface area regardless of the expansion project for Nebraska Highway Link 62A.

38. Respondents agree to maintain the function of the debris basin receiving livestock waste, runoff, and precipitation from the east pens and perform periodic sludge removal as necessary.

NDEE acknowledges that Respondents performed debris basin maintenance and sludge removal during July and August of 2023. Respondents further agree to:

- a. pump the debris basin to the east field within 72-84 hours of a runoff event;

- b. ensure that livestock waste pumped from the debris basin to the east field is land applied as sheet flow runoff and that the east field does not become channelized;
- c. ensure that when the east field is planted to row crops, the rows must be oriented from west to east.

39. Respondents agree to scrape livestock from all active pens on a regular basis and land apply the livestock waste at agronomic rates for nitrogen and phosphorous.

40. Respondents agree to stockpile livestock waste in a location that will prevent runoff to waters of the state and the road ditch for Nebraska Highway Link 62A.

41. Respondents agree to notify NDEE by email or phone within 24 hours of a discharge of livestock waste to the road ditch for Nebraska Highway Link 62A or waters of the state.

42. Respondents agree to respond to NDEE by email or phone within seven (7) days of any requests for information or compliance status updates by NDEE.

43. Submittals to the Department under this Order shall refer to FID #72636 and shall be sent to:

Brad Edeal
Agriculture Section Supervisor
Nebraska Department of Environment and Energy
P.O. Box 98922
Lincoln, NE 68509-8922

VI. SATISFACTION AND COMPLIANCE WITH OTHER LAWS

44. Respondents shall perform all actions required by this Consent Order in accordance with all applicable local, state, and federal laws, regulations and permits.

VII. RESERVATION OF RIGHTS

45. Nothing in this Consent Order shall be construed to limit the power and authority of the NDEE to take or order any action necessary to protect public health, welfare, or the environment

or to enforce any provision of ISWMA, NEPA, and any rules, regulations, orders, or permits issued pursuant to ISWMA or NEPA. NDEE reserves the right to pursue any remedies available under law or equity for violations of this Consent Order or the underlying violations alleged herein, including penalties or injunctive relief.

46. NDEE reserves its right to terminate the present conditional exemption and require Respondents to obtain Title 130 C&O and NPDES permit coverage upon a volume or frequency of livestock waste discharges as may be necessary to protect waters of the state.

VIII. NEGATION OF AGENCY RELATIONSHIP

47. Nothing in this Consent Order shall be construed to create, either expressly, or by implication, the relationship of agency between NDEE and Respondents.

IX. AMENDMENT

48. This Consent Order may be modified and amended in writing by mutual agreement of NDEE and Respondents.

X. EFFECTIVE DATE

49. This Consent Order shall become effective on the date it is signed by the NDEE Director or designee of the Director.

XI. TERMINATION

50. Upon Respondents' completion of the tasks in paragraph 37, Respondents agree to notify NDEE in writing or by phone within seven (7) days. Upon receiving this notification from Respondents, NDEE agrees to schedule a compliance status inspection during the summer of 2024.

51. NDEE agrees to close the present administrative case upon making a determination after the summer of 2024 or later that: 1) permanent vegetation has been established in the full area of


the former northwest pen, and 2) the vegetative buffer replacing the former northwest pen has been effective in preventing discharges of livestock waste to the road ditch for Nebraska Highway Link 62A or waters of the state.

XII. SEVERABILITY

52. If any provision or authority of this Order or the application of this Order to any party or circumstances is held by any judicial or administrative authority to be invalid, the application of such provisions to other parties or circumstances and the remainder of the Order shall remain in force and shall not be affected thereby.

XIII. SIGNATURES

53. For Respondent Jarrod W. Anderson:

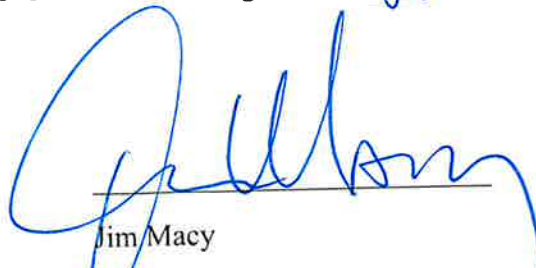
Signed: 
Date: 1/19/24

54. For Respondent Paula J. Anderson:

Signed: 
Date: 1/19/24

55. For NDEE:

IT IS SO ORDERED and agreed this 23rd day of January, 2023~~4~~.


Jim Macy
Director

NEBRASKA DEPARTMENT OF ENVIRONMENT AND ENERGY

Attachment A - Anderson Animal Feeding Operation

Red outline denotes Northwest pen agreed to be abandoned and vegetated.

Legend

