

BEFORE THE NEBRASKA DEPARTMENT OF ENVIRONMENTAL QUALITY

THE CASE OF

ADAMS LAND & CATTLE CO.,  
a Nebraska corporation  
FID #61705

Respondent.

Case No. 3097

**CONSENT ORDER**

**I. JURISDICTION**

1. This Administrative Consent Order is entered into by Adams Land & Cattle Co. ("Respondent") and the Nebraska Department of Environmental Quality ("NDEQ"), at Respondent's request, pursuant to the Nebraska Environmental Protection Act, Neb. Rev. Stat. §81-1504(7).

2. By entering into this Order, Respondent (a) consents to and agrees not to contest the NDEQ's authority or jurisdiction to issue or enforce this Order, (b) agrees to undertake all actions required by the terms and conditions of this Order, (c) consents to be bound by the requirements set forth herein and (d) understands that it will be responsible for any discharges that occur during the duration of this Order involving Ponds 1 and 3.

**II. STATEMENT OF PURPOSE**

3. In accordance with the terms and conditions of this Order and applicable rules and regulations, the primary objectives of the parties in entering into this Order are to:

a) Have Respondent remove excess sludge accumulating in holding Ponds 1 and 3;

b) Provide Respondent with temporary relief from the "must pump" requirements set forth in Title 130, Chapter 11, Section 003 of the Nebraska Administrative Code to allow for Respondent's dredging activities in Ponds 1 and 3; and

c) Provide Respondent with temporary relief from the corollary "must pump" requirements set forth in Part III, Section F(2) of the National Pollutant Discharge Elimination



System (NPDES) General Permit for Concentrated Animal Feeding Operations (CAFO) Confining Cattle in Open Lots (NEG011000) under which Respondent has been issued coverage pursuant to Request for Coverage Number NEG011191.

4. This Order is entered by Respondent for the purpose of allowing Respondent to complete dredging operations at the Facility which cannot be performed without obtaining relief from the foregoing permit conditions and regulations. The Respondent stipulates to the factual basis of this Order solely for the purposes of obtaining the relief granted herein, and neither the stipulation of facts contained in this Order nor the act of entering into this Order shall be deemed as an admission of facts or liability by Respondent for purposes of the Notice of Violation issued by the NDEQ on December 6, 2010 or for any other purpose.

### **III. APPLICABILITY**

5. This Order shall apply to and be binding upon the NDEQ and Respondent, its agents, successors, and assigns and upon all persons, contractors, and consultants acting under or on behalf of the NDEQ and/or Respondent.

### **IV. DEFINITIONS**

6. Whenever terms listed below are used in this Order or in any documents attached hereto and incorporated hereunder, the following definitions apply:

a) "Director" shall mean the Director of the Nebraska Department of Environmental Quality.

b) "Engineering Evaluation" shall mean the engineering evaluation dated April 25, 2011 prepared for Respondent by WLA Consulting, Inc.

c) "EPA" shall mean the United States Environmental Protection Agency, Region 7.

d) "Facility" shall mean the concentrated animal feeding operation and property owned by Respondent and legally described as:

SW1/4 Section 7, Township 16N, Range 20W

NW1/4 Section 18, Township 16N, Range 20W

Part of N1/2SW1/4 Section 18, Township 16N, Range 20W

N1/2NE1/4 Section 13, Township 16N, Range 21W

SE1/4 Section 12, Township 16N, Range 21W

S1/2NE1/4 Section 12, Township 16N, Range 21W

which is commonly referred to as Respondent's "South Lot". A diagram depicting the location of the Facility is set forth in Attachment I to this Order.

- e) "NDEQ" shall mean the Nebraska Department of Environmental Quality.
- f) "Notice of Violation" shall mean the Notice of Violation dated December 6, 2010 issued by NDEQ to Respondent.
- g) "Parties" shall mean the NDEQ and the Respondent.
- h) "Permit" shall mean the National Pollutant Discharge Elimination System (NPDES) General Permit for Concentrated Animal Feeding Operations (CAFO) Confining Cattle in Open Lots (NEG011000) under which Respondent has been issued coverage pursuant to Request for Coverage Number NEG011191.
- i) "Pond 1" shall mean the livestock waste management pond, located at the Facility as depicted on Attachment I to this Order and shall include both Ponds 1A and 1B.
- j) "Pond 3" shall mean the pond located at the Facility, depicted on Attachment I as Pond 3.
- k) "Respondent" shall mean Adams Land & Cattle Co., a Nebraska corporation, its successors, receivers, trustees and assigns.
- l) "Title 130" shall mean Title 130 of the Nebraska Administrative Code, Livestock Waste Contract Regulations, as it exists on the effective date of this Order.

## **V. FINDINGS OF FACT**

7. Respondent is a corporation organized and existing under the laws of the State of Nebraska and authorized to transact business in the State of Nebraska.

8. Respondent's Facility includes several livestock waste management ponds, including Pond 1 and Pond 3.

9. Respondent is engaged in a sequential dredging operation to remove sludge and liquid from the livestock waste management ponds at the Facility, including Pond 1 and Pond 3.

10. Pond 1 has a two-tier design, which was approved by the NDEQ. The northern section of Pond 1 has a base elevation of approximately eight hundred ninety nine (899.0) feet, while the southern section of Pond 1 has a base elevation of approximately nine hundred five (905.0) feet.

11. According to the Engineering Evaluation, the "must pump" level (as defined in Title 130 and the Permit) for Pond 1 is at an elevation of approximately nine hundred six and one-half (906.5) feet, or a depth from bottom of approximately seven and one-half (7.5) feet.

12. In order to dredge Pond 1, the water level in the southern section of Pond 1 must be at least four (4) feet deep. Because of the difference in elevations of the two-tier pond, this will result in water levels of approximately eleven and one-half (11.5) feet in the northern section of Pond 1, which exceeds the "must pump" level of seven and one-half (7.5) feet.

13. On September 23, 2010, Respondent notified the NDEQ that the Facility had received 4.78 inches of rain in less than a 24 hour period and that, as a result of this rain event, a discharge had occurred from Pond 1. Upon investigation, the NDEQ determined that the combined sludge and liquid level in Pond 1A was reported as approximately twelve and one-half (12.5) feet prior to the rainfall event. This level was approximately five (5.0) feet above the "must pump" level of seven and one-half (7.5) feet, a condition that existed at the time to accommodate Respondent's ongoing dredging operations in Pond 1.

14. According to the Engineering Evaluation, the "must pump" level for Pond 3 is at an elevation of approximately eight hundred ninety five (895) feet, or a depth from bottom of approximately six (6.0) feet. The Respondent's record indicates that the combined sludge and liquid level in Pond 3 was approximately five (5.0) feet prior to the rainfall event.

15. On December 6, 2010, NDEQ issued a Notice of Violation alleging violations of Title 130 – Livestock Waste Control Regulations, including violations of the "must pump" requirements of Title 130, Chapter 11, Section 003.

16. An inspection of Respondent's operation on December 7-8, 2010, by the EPA and NDEQ, revealed that combined sludge and liquid level in Pond 1 was approximately seven and one-half (7.5) feet, which is the "must pump" level.

17. The December 7-8, 2010 inspection also revealed that sludge accumulation in Pond 3 was two (2.0) feet above "winter pump down" level.

18. The parties agree that sludge should be removed from Pond 3 to restore its capacity, consistent with the requirements of Title 130 and the Permit, and that Respondent should be relieved of the "must pump" requirements to support dredging operations on Pond 3.

## **VI. CONCLUSIONS OF LAW AND DETERMINATIONS**

19. Based upon the forgoing Findings of Fact and the administrative record, the Director makes the following conclusions of law and determinations:

a) Respondent is a "person" within the meaning of the Nebraska Environmental Protection Act, *Neb. Rev. Stat. § 81-1502 (10)*.

b) At the time of the 25 year, 24 hour rain event on September 23, 2010, the combined sludge and liquid in Pond 1 were above the "must pump" level to support the Respondent's dredging operations. The exceedance of the "must pump" level was a violation of the Permit and corresponding regulations and a contributing factor in the discharge that occurred during the rain event.

c) Title 130, Chapter 11, Section 003 requires that any time the waste storage volume in the livestock waste control facility exceeds the level identified in 008.02 in Chapter 8 (i.e., the “must pump level”), livestock wastes shall be land applied on all available dewatering days until adequate storage is restored.

d) Title 130, Chapter 8 requires a permanent depth marker, clearly marked in at least one-foot increments (a staff gauge), for all holding ponds and Section 008.02 states that it shall be marked with “the level indicating the volume needed to contain the runoff and direct precipitation of the 25-year, 24-hour rainfall event or 100-year, 24-hour rainfall event, as appropriate. Pumping shall begin as soon as possible anytime this storage level is exceeded. This is the ‘must pump’ level.”

e) Part III, Section (F)(2) of the Permit requires that any time the waste storage volume in the livestock waste control facility exceeds the “must pump” level, pumping shall begin as soon as possible, and livestock wastes shall be land applied on all available dewatering days until adequate storage is restored.

f) Part II, Section (G)(1)(04)(ii) defines the “must pump” level as the volume needed to contain the runoff and direct precipitation of the 25-year, 24-hour rainfall event.

g) Pond 1 cannot be dredged by Respondent unless the “must pump” level is exceeded to accommodate dredging operations.

h) Dredging operations on Pond 3 will be facilitated if Respondent is allowed to exceed the “must pump” requirements for Pond 3.

i) Respondent should be granted relief from the “must pump” requirements of Title 130, Chapter 11, Section 003 and Part III, Section F(2) of the Permit with respect to Pond 1 and Pond 3 until December 15, 2011 in order to complete scheduled dredging activities on Pond 1 and Pond 3.

## **VII. WORK TO BE PERFORMED AND RELIEF GRANTED**

20. By December 15, 2011, Respondent shall remove sludge from Pond 1 and Pond 3 sufficient to obtain a proper operating level as set out in the Permit and Title 130.

21. Respondent is hereby granted relief from Title 130, Chapter 11, Section 003 for Pond 1 and Pond 3 until December 15, 2011.

22. Respondent shall be relieved from the requirements of Part III, Section (F)(2) of the Permit for Pond 1 and Pond 3 until December 15, 2011.

23. All other terms and conditions of the Permit shall remain in full force and effect.

## **VIII. SUBMISSIONS/AGENCY APPROVAL/ADDITIONAL WORK**

24. Upon completion of all work to be performed by Respondent under this Order, Respondent shall submit written notice of completion to NDEQ within thirty (30) days after completion. In submitting the notice, Respondent shall demonstrate in writing and certify that all activities required under this Consent Order have been performed. The certification shall be signed by a responsible official for Respondent who shall make the following attestation: "I certify that the information contained in or accompanying this certification is true, accurate and complete." For purposes of this Order, a responsible official is a company manager or officer who is in charge of a principal business function and who has been designated as a responsible official by Respondent, for purposes of compliance with this Order.

## **IX. PROJECT MANAGERS**

25. Information required to be submitted to NDEQ under this Order shall be sent to:

Dennis Heitmann  
Nebraska Department of Environmental Quality  
P.O. Box 98922  
Suite 400, The Atrium  
1200 N Street  
Lincoln, Nebraska 68509-8922  
(402)471-2186  
Fax (402)471-2909

26. Information required to be submitted to Respondent under this Order shall be sent to:

Barry Fox, President

Adams Land & Cattle Co.  
P.O. Box 485  
Broken Bow, Nebraska 68822

#### **X. RESERVATION OF RIGHTS**

27. NDEQ hereby expressly reserves all of its statutory and regulatory power, authority and rights or remedies, both legal and equitable, including enforcement of the Respondent's permit except as expressly provided in this Order. This Order shall not be construed as a covenant not to sue, or as a release, waiver or limitation of any right, remedy, power and/or authority, civil or criminal, which NDEQ has under any statutory, regulatory or common law authority of the State of Nebraska.

28. Respondent hereby expressly reserves all rights and defenses, both legal and equitable, including without limitation the defense of *force majeure*, with respect to the events described in the Notice of Violation.

29. Compliance by Respondent with the terms of this Order shall not relieve Respondent of its obligations to comply with any applicable local, state or federal laws and regulations. This Order is not intended to be, nor shall it be, construed to be a permit. Except as expressly stated herein, this Order does not relieve Respondent of any obligation to obtain and comply with any local, state or federal permits.

#### **XI. OTHER APPLICABLE LAWS**

30. All actions required to be taken by Respondent pursuant to this Order shall be undertaken in accordance with all applicable local, state and federal laws and regulations. Respondent shall obtain or cause its representatives to obtain all permits and approvals necessary under such laws and regulations.

#### **XII. SUBSEQUENT MODIFICATION**

31. This Order may only be amended by mutual agreement of NDEQ and Respondent. Any amendment shall be in writing, signed by representatives of NDEQ and Respondent, and shall



have as its effective date those dates specified therein, and shall be incorporated into and enforceable as part of this Order.

### **XIII. FORCE MAJEURE**

32. Respondent shall perform the requirements of this Order within the time periods set forth or approved herein, except to the extent that performance is prevented or delayed by events which constitute a *force majeure*. For the purposes of this Order, a *force majeure* is defined as an event or series of events arising from causes beyond the reasonable control of Respondent (including but not limited to weather-related events) which could not be overcome by due diligence and which delay performance of any obligation required by this Order. Respondent shall have the burden of proving a *force majeure*. Any discharge from the facility shall not be considered a *force majeure* event, except to the extent that such relief is specifically granted in the applicable regulations.

33. Respondent shall notify NDEQ in writing, as soon as reasonably practicable, after it becomes aware of events, or the cumulative effect of a series of events, which Respondent knows, or has reason to believe, may constitute a *force majeure*. Such notice shall estimate the anticipated length of delay, its cause, measures taken or to be taken to minimize the delay, and an estimated timetable for implementation of the measures delayed. Respondent's failure to comply with the notice provision of this Section shall constitute a waiver of Respondent's right to assert a *force majeure*.

34. If NDEQ determines that a *force majeure* has or will occur, the time for performance for that element of the Order may be extended for a period equal to the delay resulting from such circumstance. This shall be accomplished through an amendment to this Order pursuant to Paragraph 31 (Subsequent Modification) of this Order. Such an extension shall not alter the schedule for performance or completion of other tasks required by this Order.

#### XIV. NON-SIGNATORIES TO ORDER

35. Except as otherwise expressly provided herein, nothing contained in this Order shall be construed as conferring upon or giving rise to any rights to any persons not parties hereto.

#### XV. WAIVER OF HEARING

36. Respondent waives its right to request a public hearing pursuant to *Neb. Rev. Stat.* §81-1507(1) relating to this Order.

#### XVI. TERMINATION AND SATISFACTION

37. This Order shall terminate upon written acceptance by NDEQ of Respondent's certification pursuant to Paragraph 24 of this Order that all activities required under this Consent Order have been performed. Any non-compliance with this Order shall result in termination of any relief granted to Respondent under the Order and possible further enforcement action by the Department.

#### XVII. EFFECTIVE DATE

38. This Order shall be effective upon the signature of the Order by the Director and that date shall be the "effective date."

IT IS SO AGREED.

Adams Land & Cattle Co.,  
a Nebraska corporation

Date: 8/1/11

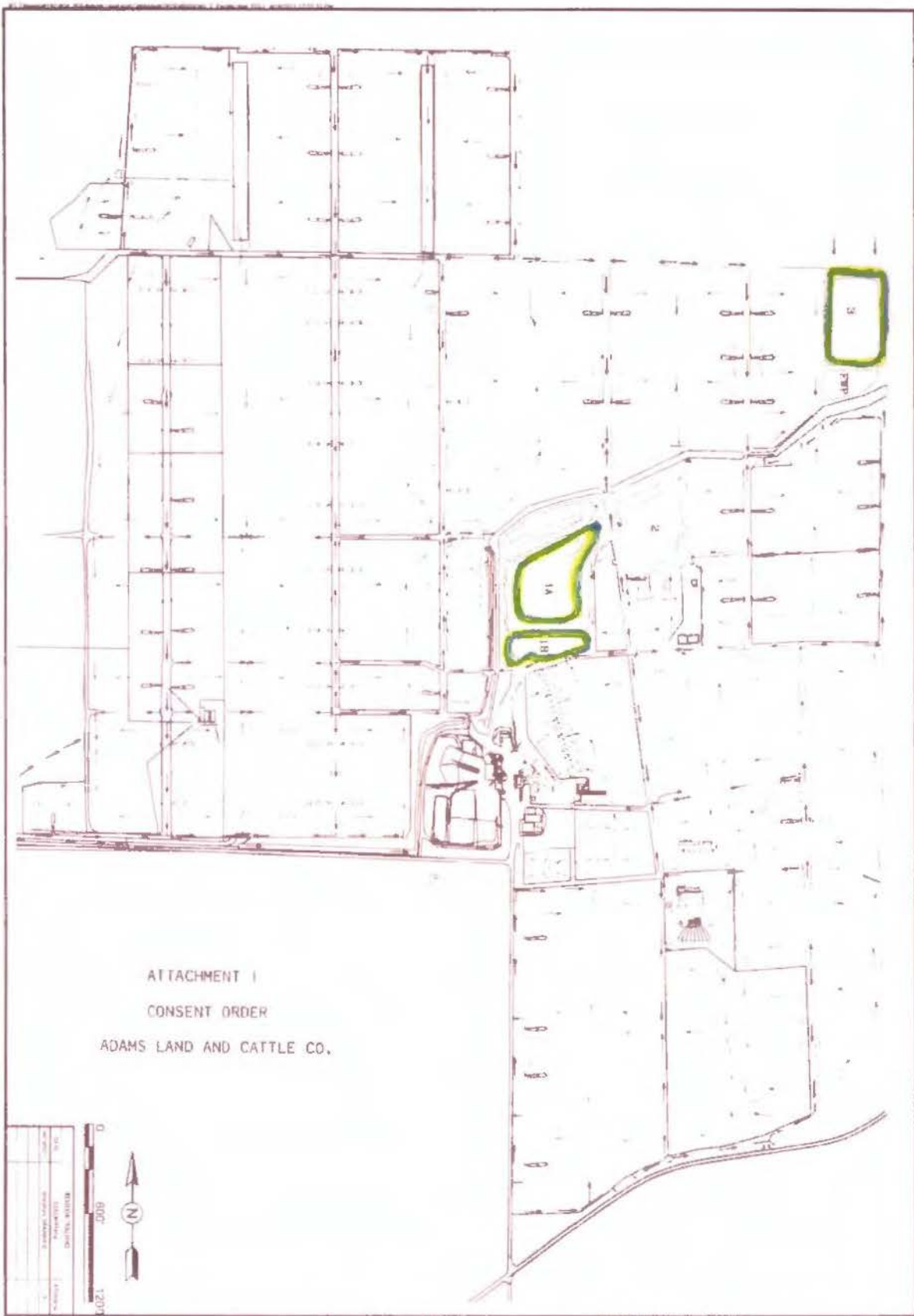
By: [Signature]  
Title: President

IT IS SO ORDERED.

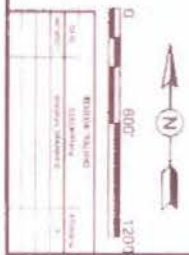
Nebraska Department of Environmental Quality

Date: August 5 2011

By: [Signature]  
Michael J. Linder, Director



ATTACHMENT I  
 CONSENT ORDER  
 ADAMS LAND AND CATTLE CO.



DRAWING NUMBER <b>FIG-1</b>	 <b>WLA Consulting, Inc.</b> Engineers & Scientists Water and	1945 O STREET, SUITE D LINCOLN, NE 68504 TEL (402) 475-8588 FAX (402) 477-1955 <a href="http://www.WLA-consulting.com">www.WLA-consulting.com</a>	PROJECT NUMBER: 1810A	ADAMS LAND AND CATTLE LIVESTOCK WASTE CONTROL FACILITY CUSTER COUNTY, NEBRASKA  FACILITY SITE PLAN
			DESIGNER: JLS	
			CHECKED: JLS	