

BEFORE THE NEBRASKA DEPARTMENT OF ENVIRONMENT AND ENERGY

IN THE MATTER OF
KENNETH HARDERS and
DANIEL HARDERS

FID #80056

Respondents.

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Case No. 3513

COMPLAINT, COMPLIANCE ORDER
AND NOTICE OF
OPPORTUNITY FOR HEARING

I. INTRODUCTION

1. This Complaint, Compliance Order, and Notice of Opportunity for Hearing is issued pursuant to Neb. Rev. Stat. § 81-1507 (Reissue 2014). The Complainant is the Director of the Nebraska Department of Environment and Energy (NDEE or Department). The Respondents are Kenneth Harders and Daniel Harders, owners and operators of a cattle feeding operation (facility) located in Hall County, NE.

2. Complainant has determined the Respondents are in violation of the Nebraska Environmental Protection Act (NEPA), Neb. Rev. Stat. §§ 81-1501 to 81-1532 (Reissue 2014; Cum. Supp. 2018); the Livestock Waste Management Act (LWMA), Neb. Rev. Stat. §§ 54-2416 to 54-2438 (Reissue 2010; Cum. Supp. 2018); and Neb. Admin. Code, Title 130, Livestock Waste Control Regulations.

II. JURISDICTION

3. 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 NEPA and LWMA and all rules and regulations promulgated under such acts.

4. NDEE is further charged with the duty to “administer the state program for construction and operating permits and major modification approval for animal feeding operations and livestock waste control facilities provided under the Environmental Protection Act, the Livestock



Waste Management Act, and the rules and regulations adopted and promulgated pursuant to such acts.” Neb. Rev. Stat. § 54-2418(2)

III. COMPLAINT

5. The Complaint below establishes the violations, and the Compliance Order establishes a schedule for corrective actions to be taken by the Respondents.

6. Respondents operate a medium animal feeding operation (AFO) as defined by Title 130, Chapter 1, 029.03. The AFO is located at SE ¼, Section 17, Township 11N, Range 11W, Hall County, NE. The AFO's lots drain to the east and south and enter county road ditches. The road ditches flow south and enter a cropped intermittent drainage, a tributary of Silver Creek, which enters a flood control project. Silver Creek and its drainage systems are waters of the state under Neb. Rev. Stat. § 81-1502(21).

7. On August 25, 2016, an NDEE inspector inspected Respondents' operation and observed that the road ditches receiving runoff from the lots were not completely dewatering.

8. On October 20, 2016, NDEE sent a letter to Mr. Vernon Harders, based on the findings of its August 25, 2016 inspection. The letter offered and described the conditions necessary for the medium AFO to continue to operate without obtaining a Construction and Operating permit from NDEE and, as such, be considered "exempt" under Neb. Rev. Stat. § 54-2432 and Title 130.

This letter was a one-time offer of regulatory flexibility conditioned upon timely compliance with the offer and conferred no permanent legal rights or regulatory determinations to Vernon Harders Livestock, its successors, or assigns. To be eligible for the offer of a conditional exemption, the facility was required to:

- a. By August 1, 2017, install a diversion to divert feedlot runoff to the east into the cropped field adjacent to North Burwick Road and West Old Potash Road.

- b. By August 1, 2017, ensure feedlot runoff does not stand in the county road ditches along West Old Potash Road or North Burwick Road.
- c. Scrape the pens on a regular basis and land apply the livestock waste at agronomic rates for nitrogen and phosphorus.
- d. Stockpile livestock waste in a location that will prevent runoff to waters of the State.

9. On April 18, 2018 an NDEE inspector inspected the animal feeding operation. The NDEE inspector met with Vernon Harders and Mr. Kenneth Harders, son of Vernon Harders. The NDEE inspector observed that the Harders had not completed the conditional requirements to divert runoff into an adjacent cropped field and to ensure that runoff from the facility would not stand in the county ditches.

10. On May 9, 2018, NDEE issued a Notice of Violation (NOV) to Vernon Harders for failing to complete the conditional requirements contained in the October 20, 2016 letter.

11. The NOV required the AFO to either immediately install a berm to divert runoff into an adjacent cropped field and prevent pooling water in road ditches or submit an application for a construction and operating permit by Nov 1, 2018.

12. In a letter received by NDEE on May 21, 2018, Kenneth Harders, responding on behalf of the facility, indicated that the facility planned to divert runoff into an adjacent cropped field.

13. On April 8, 2019 an NDEE inspector spoke with Kenneth Harders regarding the status of the required modifications to the AFO and performed an inspection. The NDEE inspector documented that required modifications to the operation had not been performed and standing water was present in both the intermittent drainage and road ditches which receive runoff from the lots.

14. On November 13, 2019 ownership of the AFO was transferred from the estate of Vernon Harders to his sons Kenneth Harders and Daniel Harders.

15. On January 8, 2020, an NDEE inspector inspected the operation and observed that livestock waste continued to drain into road ditches which flowed south into the intermittent drainage.

16. The January 8, 2020 inspection and previous inspections document that runoff from the animal feeding operation conveyed by road ditches to the intermittent drainage will likely reach waters of the State and is a discharge as defined at Neb. Rev. Stat. § 54-2417(8).

17. Respondents' non-compliance with the October 20, 2016 conditional requirements letter and May 9, 2018 NOV now results in the following NDEE determinations:

- a. Respondent's animal feeding operation has the potential to discharge pursuant to Title 130, Chapter 2, 003;
- b. NDEE's one-time offer of a conditional exemption is terminated; and
- c. Respondents are now subject to the Construction and Operating Permit requirement in Title 130, Chapter 2, 004.

18. Neb. Rev. Stat. § 54-2432 states that it shall be unlawful for any person to

“(2) Construct a livestock waste control facility without first obtaining a construction and operating permit from the department [...]
(3) Operate an animal feeding operation prior to construction of an approved livestock waste control facility [...]
(4) Discharge animal excreta, feed, bedding, spillage or overflow from the watering systems, wash and flushing waters, sprinkling water from livestock cooling, precipitation polluted by falling on or flowing onto an animal feeding operation, or other materials polluted by livestock waste in violation of or without first obtaining a National Pollutant Discharge Elimination System permit, a construction and operating permit, or an exemption from the department, if required by the Environmental Protection Act, the Livestock Waste Management Act, or the rules and regulations adopted and promulgated by the council pursuant to such acts”.

19. Neb. Rev. Stat. § 81-1506 provides:

“(1) It 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; or

(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. Any such action is hereby declared to be a public nuisance. [...]

(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;

(b) Violate any provision of the Livestock Waste Management Act; [...] or;

(d) Violate any rule or regulation adopted and promulgated by the council pursuant to the Environmental Protection Act or the Livestock Waste Management Act.”

20. Pursuant to the Nebraska Environmental Quality Council’s authority to adopt and promulgate rules and regulations as expressed in Neb. Rev. Stat. §§ 81-1505(10) and 54-2435, the Council adopted rules and regulations codified as Neb. Admin. Code, Title 130, Livestock Waste Control Regulations (Title 130).

21. Title 130, Chapter 2, states that:

“003 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.

004 When livestock waste control facilities are required by the Department, the owner or operator of the animal feeding operation is required to apply for construction and operating permit as provided in Chapter 4. In the case of an existing animal feeding operation, the owner or operator will be notified in writing following an inspection by the Department whether or not a facility is required and, if required, the applicant shall submit an application according to the compliance dates in the notification.”

III. COMPLIANCE ORDER

22. Within 180 days of receiving this Order, Respondents shall submit a complete application for a Construction and Operating permit in accordance with the requirements of Title 130. Said

application shall describe the proposed construction of livestock waste control facilities which will prevent discharges to waters of the State.

23. Submissions to the Department under this Order shall refer to FID #80056 and shall be sent to:

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

IV. NOTICE OF OPPORTUNITY TO REQUEST A HEARING

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

25. A written answer to the Complaint, Compliance Order and Notice of Opportunity for Hearing must conform to the requirements of Neb. Admin. Code, Title 115, Rules of Practice and Procedure. The answer and request for hearing may be filed by mail to: Jim Macy, Director, State of Nebraska Department of Environment and Energy, 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.

V. SETTLEMENT CONFERENCE

26. Whether or not Respondents request a hearing, an informal settlement conference may be requested by writing to Steve Thomas, Attorney, Nebraska Department of Environment and Energy, P.O. Box 98922, Lincoln, Nebraska 68509-8922, or have your attorney make such a request.

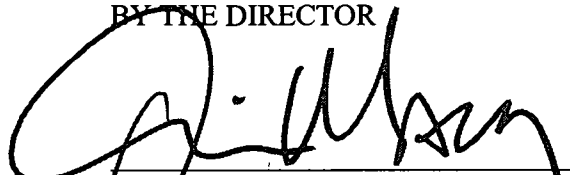
27. A request for settlement conference does not extend the thirty (30) day period during which a written answer and request for hearing must be submitted or otherwise delay the final effective date of this Order.

VI. INJUNCTIVE RELIEF AND PENALTY PROVISIONS

28. The NDEE 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 NDEE from pursuing such enforcement.

Dated this 11th day of March, 2020.

BY THE DIRECTOR




Jim Macy, Director
NEBRASKA DEPARTMENT OF
ENVIRONMENT AND ENERGY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Complaint, Compliance Order and Notice of Opportunity for Hearing, was served by certified United States mail, postage prepaid, return receipt requested this 11th day of March, 2020, upon the Respondent listed below:

Kenneth Harders & Daniel Harders
228 N Burwick Rd.
Wood River, NE 68883



Lauren Triplett
Staff Assistant - Legal Division

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