

BEFORE THE NEBRASKA DEPARTMENT OF ENVIRONMENTAL QUALITY

IN THE MATTER OF BRIAN C. KISSINGER,
KEVIN S. KISSINGER, JEFF BIEGERT,
JERALD R. KISSINGER, RESPONDENTS,
d/b/a FORT KEARNY CONSOLIDATED.

Case No. 3025
COMPLAINT, COMPLIANCE
ORDER, AND NOTICE OF
OPPORTUNITY FOR HEARING

1. This Complaint, Compliance Order and Notice of Opportunity for Hearing is issued pursuant to Neb. Rev. Stat. § 81-1507(1) (Reissue 2008) of the Nebraska Environmental Protection Act § 81-1501 et seq (Reissue 2008). The Complainant is Michael J. Linder, Director of the Nebraska Department of Environmental Quality (referred to herein as NDEQ). The Respondents are Brian Kissinger, Kevin S. Kissinger, Jeff Biegert, and Jerald R. Kissinger, doing business as Fort Kearny Consolidated.

2. NDEQ is the agency of the state of Nebraska charged with the duty pursuant to Neb. Rev. Stat. § 81-1504(1) and (4) (Reissue 2008) of is exercising exclusive general supervision, administration, and enforcement of the Nebraska Environmental Protection Act, Neb. Rev. Stat. § 81-1501 et seq., and all rules, regulations and permits promulgated thereunder. The authority of NDEQ to require compliance measures is expressed in Neb. Rev. Stat. § 81-1504 (7) and § 81-1507 (Reissue 2008).

3. The Respondents own and operate a confined cattle feeding facility in Kearney County, Nebraska, commonly known as Fort Kearny Consolidated, located in Sections 5 and 6, Township 7 North, Range 14 West, Kearney County, Nebraska, which is a point source of groundwater contaminants.

4. Pursuant to Neb. Rev. Stat. § 81-1505 (1) and (2) (Reissue 2008) the Nebraska Environmental Quality Council adopted Nebraska Administrative Code, Title 118 Groundwater Quality Standards and Use Classification. The following provisions of Title 118, Chapter 4, are in effect at all times material herein:

“001 The following narrative standards shall apply to ground waters in the State:

001.01 Wastes, toxic substances, or any other pollutant (alone or in combination with other pollutants) introduced directly or indirectly by human activity shall not be allowed to enter ground water:

001.01A If beneficial uses of ground water would be impaired or public health and welfare would be threatened; or

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001.01B If beneficial uses of hydrologically connected ground waters or assigned uses of surface waters would be impaired.

001.02 Any pollutant introduced directly or indirectly by human activity that would impair beneficial uses of ground water due to unacceptable color, corrosivity, odor, or any other aesthetic characteristic shall not be allowed.

“002 Numerical standards (maximum contaminant levels) for the parameters listed below shall apply to ground waters in the State in accordance with Chapters 2 and 3. Any substance introduced directly or indirectly by human activity shall not be allowed to enter ground water if one or more of the following numerical standards would be exceeded ...Nitrate (as N) 10mg/l...Chloride 250 mg/l...”

5. The Respondents’ operation of its facility has caused the contaminant content of groundwater at the facility and the surrounding area to exceed the numerical groundwater quality standards established by the Nebraska Environmental Quality Council for chloride and nitrate, contrary to Title 118, Chapter 4, 002.

6. The Respondents’ operation of its facility has caused pollutants to enter the groundwater that impair beneficial use of the groundwater due to unacceptable color and odor, and due to excess ammonia, chloride, and nitrate, contrary to Title 118, Chapter 4, 001.

7. The Respondents’ operation of its facility has caused and contributed to pollution of groundwater with the contaminants: ammonia, chloride, and nitrate, and potentially other contaminants not yet identified, contrary to Neb. Rev. Stat. §81-1506 (1) (Reissue 2008).

8. Pursuant to Neb. Rev. Stat. § 81-1505 (1) and (2) (Reissue 2008) the Nebraska Environmental Quality Council adopted Nebraska Administrative Code, Title 118, Groundwater Quality Standards and Use Classification. The following provisions of Title 118, Chapter 10, are in effect at all times material herein:

“001 When a point source pollution event (except for petroleum releases which are covered under 002 below) has caused or will cause, in the Department’s judgment, ground water pollution, the Ground Water Remedial Action Protocol found in Appendix A shall apply. ...”

9. Neb. Rev. Stat. §81-1504 (6) (Reissue 2008) empowers the NDEQ to issue orders prohibiting or abating discharges of wastes into waters and land of the state, and orders requiring construction and modification of disposal systems or adoption of other measures to prevent, control, or abate pollution.

10. Neb. Rev. Stat. §81-1507 (1) (Reissue 2008) authorizes the NDEQ to order necessary corrective action be taken when the Environmental Protection Act, or a rule or regulation pursuant to the act is violated.

11. IT IS THEREFORE ORDERED that the Respondents shall on or before May 1, 2011, submit to NDEQ for its approval, an action plan for removal of contamination and the threat of contamination with a reasonable timetable for initiating and completing the elements of the plan. The plan shall conform to the NDEQ's letter to the Respondents concerning Step 8 of December 29, 2010, and otherwise conform to Title 118, Step 8, Ground Water Quality Standards and Use Classification. IT IS FURTHER ORDERED that among elements of their plan the Respondents shall include the following:

- a. Provisions for removal and reconstruction or abandonment of the Livestock Waste Containment Facility and the ponds and wet basins on the west side of the facility, in a manner appropriate to the area's high groundwater levels and local flooding tendencies. The features and structures affected by this requirement are the wet basin and ponds: 1A, 1B, 1C, and 1D.
- b. Provisions for termination of livestock waste application to the fields immediately north and east of the facility. Any fields offered as substituted sites for waste application shall be of finer-grained soil and otherwise adequate and with greater depth to groundwater, and shall be identified at a minimum by the site owner's name and standard legal description.

NOTICE OF OPPORTUNITY TO REQUEST A HEARING

12. Pursuant to Neb. Rev. Stat. § 81-1507 (Reissue 2008) the Respondents have the right to apply for a hearing to contest a Complaint, and Compliance Order by making a request for such hearing to the director no later than 30 days after service hereof.

Nebraska Department of Environmental Quality, Rules of Practice and Procedure, Title 115, Chapter 7, set forth the procedure of such hearings.

ADVISEMENT OF POSSIBLE PENALTIES

13. 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 civil fines of up to \$10,000 per day as set out in Neb. Rev. Stat. §81-1508.02 (Reissue 2008).

ADVISEMENT OF CUMMULATIVE REMEDIES

14. The requirements of the foregoing Complaint, Compliance Order, and Notice of Opportunity for Hearing are intended to halt contamination and release of pollutants to groundwater at the Respondents' facility. The NDEQ intends to pursue to completion its Ground Water Remedial Action Protocol, Appendix A of Title 118, Ground Water Quality Standards and Use Classification, which in the case of the Respondents has advanced to Step 7 of the protocol. In the event that the Respondents do not address contamination as required by the protocol and NDEQ's letter of December 29, 2010, based on the protocol, NDEQ reserves its rights to issue further orders and/or apply to the courts for the purpose of compelling remedial action.

Dated: 12/30/2010

By: /s/ Michael J. Linder
Michael J. Linder, Director
Nebraska Department of
Environmental Quality