

BEFORE THE NEBRASKA DEPARTMENT OF ENVIRONMENT AND ENERGY

IN THE MATTER OF)	
AltEn, LLC,)	CASE NOS. 3540 & 3546
)	
FID # 84069)	CONSENT ORDER
)	
Respondent.)	

I. INTRODUCTION

1. Emergency Complaint and Order No. 3540 was issued by the Director of the Department of Environment and Energy (hereinafter referred to as "Department") on February 4, 2021. Emergency Complaint and Order No. 3546 was issued by the Director of the Department on February 20, 2021. Both Orders were issued pursuant to Neb. Rev. Stat. § 81-1507(4) of the Environmental Protection Act (Act), Neb. Rev. Stat. § 81-1501 et seq., to require immediate action to protect the public health and the environment.

2. The Department and AltEn, LLC, (hereinafter referred to as "Respondent") voluntarily enter into this Consent Order to implement improvements to monitoring and environmental management controls at Respondent's Facility. This Consent Order requires Respondent to comply with the activities and schedules specified in Section V (Compliance Order and Schedule) below, in accordance with the Act; Neb. Admin. Code, Title 119, Rules and Regulations Pertaining to the Issuance of Permits under the National Pollutant Discharge Elimination System; and Neb. Admin. Code, Title 123, Rules and Regulations for the Design, Operation and Maintenance of Wastewater Works. This Consent Order supersedes Emergency Complaint and Order No. 3540 and Emergency Complaint and Order No. 3546 (hereinafter referred to as Emergency Orders).

3. The Department and Respondent agree that settlement of this matter is in the public interest to ensure compliance with state laws, rules and regulations, and permits that have been adopted and issued to protect the environment.

4. The Respondent categorically denies the allegations contained in the Complaints filed in these cases and in Section IV of this Consent Order.

II. JURISDICTION

5. The Department is the agency of the State of Nebraska charged with the duty pursuant to Neb. Rev. Stat. § 81-1504(1) to exercise exclusive general supervision of the administration and enforcement of the Act and all rules and regulations and orders promulgated under the Act.

6. The Respondent is AltEn, LLC, whose ethanol facility is located at 1344 County Road 10, Mead, Nebraska 68041. The legal description is N SW Section 12 Township N 14 Range E 08, Saunders County, Nebraska. AltEn, LLC, is a limited liability company registered to do business in Nebraska and organized in the state of Kansas.

III. PARTIES

7. This Consent Order shall be binding upon Respondent, its successors, assigns, subsidiaries, and upon all persons, agents, contractors and consultants, and management entities or managers (exclusive or otherwise) acting under or for Respondent in carrying out the actions required by this Consent Order.

8. The Respondent is a person as defined in Neb. Rev. Stat. § 81-1502(10).

9. Pursuant to the Nebraska Environmental Quality Council's authority to adopt rules and regulations for the purpose of water pollution control, as expressed in Neb. Rev. Stat. §§ 81-1505(1), (8), (11), (12), (15), (16), (20), the Council adopted rules and regulations codified as Neb. Admin. Code, Title 119, Rules and Regulations Pertaining to the Issuance of Permits under

the National Pollutant Discharge Elimination System, and Neb. Admin. Code, Title 123, Rules and Regulations for the Design, Operation and Maintenance of Wastewater Works.

IV. COMPLAINT

10. Respondent's ethanol plant used seed corn treated with pesticides to produce ethanol. The waste products included process wastewater and distiller's grain, both containing high levels of pesticide residue.

11. When operating, the Respondent's Facility discharges processed wastewater to three lagoons. The Southeast and Northeast Lagoons were built first, pursuant to the Facility's Wastewater Facility (WWF) Construction Permit # 05-0158. The West Lagoon was built in 2018 pursuant to WWF Construction Permit # 2018-0060. The three lagoons are interconnected to allow water to flow from one lagoon to another.

12. Testing of the West Lagoon wastewater on April 8, 2019, showed the presence of Azoxystrobin, Clothianidin, Thiabendazole, and Thiamethoxam, which are fungicides and pesticides used on treated seed corn. The levels of fungicides and pesticides reported in the test results were Azoxystrobin (33.9 parts per billion (ppb)), Clothianidin (58,400 ppb), Glyphosate (124 ppb), Thiabendazole (8450 ppb), and Thiamethoxam (35,400 ppb).

13. Testing of the Northeast Lagoon wastewater on November 12, 2019, showed the presence of Azoxystrobin (99.3 ppb), Clothianidin (7070 ppb), Glyphosate (206 ppb), Thiabendazole (2450 ppb), and Thiamethoxam (2400 ppb). Testing of the West Lagoon wastewater on November 12, 2019, showed the presence of Azoxystrobin (111 ppb), Clothianidin (31,000 ppb), Glyphosate (116 ppb), Thiabendazole (2160 ppb), and Thiamethoxam (24,000 ppb).

14. The pesticide levels found in the lagoon wastewater testing from April 8, 2019, and November 12, 2019, far exceed the registered application rates for which EPA has conducted safety assessments for pesticide products. In a letter to the Department, dated January 13, 2021, EPA states that the level of pesticides found:

“represents a level of contamination that has no uniformity or limit on the number and amount of pesticides present.” “Some of these pesticides are known to leach and may contaminate groundwater. Some may be persistent, and runoff will contaminate aquatic ecosystems. Additionally, there are systemic pesticides in these samples and based on the high levels detected, they can be taken up into plant tissues and result in levels of residues in nectar and pollen that may harm pollinators or in leaves or other plant parts that are consumed by birds and mammals.”

15. On May 9, 2018, on behalf of the Respondent, Matthew D. Goeller, P.E., Settje Agri-Services & Engineering, Inc., filed an Engineering Design form #1 (ED-1) with the Department documenting and amending the maximum operating depth and freeboard above max (the distance between the surface of the wastewater and the top of retaining banks determined necessary to ensure safe operation) for the three lagoons at the Facility. This ED-1 amended the maximum operating depth and freeboard for the Northeast and West lagoons from the original plans and specifications because of the addition of the third lagoon and the interconnection between the lagoons. This ED-1 was approved by the Department as part of Permit # 2018-0060. The Southeast Lagoon currently has a maximum operating depth of 19.0 feet, and a freeboard above max of 3.0 feet. The Northeast Lagoon currently has a maximum operating depth of 19.0 feet, and a freeboard above max of 3.0 feet. The West Lagoon (referred to as the Northwest Lagoon in the ED-1) currently has a maximum operating depth of 17.9 feet, and a freeboard above max of 2.1 feet.

16. The purpose of maintaining freeboard is to protect the lagoons against exceptional storms and associated winds, heavy rain/snowfall, and damage to the integrity of the lagoon from

wave action and potential erosion. Freeboard protects the land and waters of the State from wastewater overflows.

17. The receiving water for stormwater drainage from the Facility is an undesignated tributary to Clear Creek (Segment LB2-10120 in the Lower Platte River Basin), which is a water of the State.

18. On February 12, 2021, the Department was notified of a reported release of waste materials consisting of thin stillage and manure from a four-million gallon digester tank at the Facility. The discharge of these waste materials was uncontrolled and unpermitted and flowed onto and off the Facility property into a drainage ditch and onto and past neighboring property owned by the University of Nebraska approximately 4.5 miles from the digester tank.

19. On February 17, 2021, the Department issued a Letter of Noncompliance (LNC) to the Facility alleging a violation of Neb. Rev. Stat. § 81-1506(1) and requiring the Facility to immediately take action to prevent further migration of the waste materials and remediate the areas contaminated by the waste materials.

20. A third party contractor was brought onto the site and worked to stop and remediate the discharge. The immediate discharge of waste materials has been stopped, but additional clean-up and/or remediation of the site and downstream discharge areas is still needed.

21. As a result of the release on February 12, 2021, the Department sent Respondent a letter on April 14, 2021, requiring Respondent to submit a Step 6/Step 7 site assessment work plan under Title 126, Chapter 18 and Title 118, Appendix A, Steps 6 and 7. The Respondent was required to submit its work plan no later than June 7, 2021. The work plan was to include a surface water and sediment sampling plan for the drainage area.

22. On June 15, 2021, the Department issued a Letter of Noncompliance to the Respondent for failure to submit its work plan by June 7, 2021. To date no work plan has been submitted by the Respondent.

23. Neb. Rev. Stat. § 81-1506(1)(a) makes it “unlawful for any person 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.”

24. Neb. Admin. Code, Title 123, Rules and Regulations for the Design, Operation, and Maintenance of Wastewater Works, Chapter 11, Section 008.07 states that “Wastewater lagoons shall be operated so that the water level is not maintained in the area designed for freeboard.”

25. Neb. Admin. Code, Title 119, Rules and Regulations Pertaining to the Issuance of Permits under the National Pollutant Discharge Elimination System, Chapter 14, Section 001, states in pertinent part that:

“001.01Duty to comply. The permittee must comply with all conditions of the permit. Any permit noncompliance constitutes a violation of the Federal and State Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or denial of a permit renewal application.” [and]

“001.03 Need to halt or reduce activity not a defense. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.”

26. Respondent was issued National Pollutant Discharge Elimination System (hereafter NPDES) Permit Number NE0137634, effective July 1, 2017, and modified on October 30, 2020. This permit authorizes Respondent to discharge wastewater in accordance with permit limits. This permit in part provides:

“Part IV. D. Prohibited Discharges

The discharge of process wastewater to Waters of the State from the AltEn, LLC facility is prohibited. Process wastewater is defined as any wastestream generated from the chemical, physical, or biological procedures utilized to produce ethanol.”

“Appendix A. Conditions Application to All NPDES Permits

7. The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit.”

27. Neb. Admin. Code, Title 123, Rules and Regulations for the Design, Operation, and Maintenance of Wastewater Works, Chapter 11, section 008.06 states that “The liners of wastewater lagoons shall be maintained so that wastewater seepage does not exceed the rate approved by the Department in the construction plans and specifications. Where no record of approved plans and specifications exist, the lagoon liner shall be maintained to meet the seepage rate prescribed by the Department for the specific wastewater being treated. The owner shall perform seepage testing when requested by the Department.” The design seepage rate for the Respondent’s lagoons is zero (per ED-1 noted in Paragraph # 15 above).

28. Neb. Admin. Code, Title 123, Chapter 11, § 001 states: “Wastewater treatment facilities shall be maintained in proper operating condition in accordance with this chapter and shall be operated in a manner to meet all NPDES permit requirements and not result in a prohibited bypass or an unauthorized discharge.”

29. In a Consent Order entered into between the Department and the Respondent on April 24, 2019, Respondent was ordered to make repairs to its lagoon system. As of the date of this Consent Order, the Northeast lagoon and West lagoon liners have not been repaired, are still badly damaged, and have deteriorated further since the issuance of the Emergency Orders.

30. Damaged lagoon liners with whales are also susceptible to further damage from wind and high-water levels in the lagoons. Whales are large blisters of liner which have risen above the surface of the water. The Northeast and West Lagoons remain unrepaired; using the lagoons without adequate freeboard could subject the lagoons to additional damage.

31. The Respondent, by operating its unrepaired and deteriorating Facility lagoons has and continues to be violating the Act, Neb. Rev. Stat. § 81-1501 et. seq. (Reissue 2014, Cum. Supp. 2020); Title 119; Title 123; the Facility's Wastewater Facility (WWF) Construction Permits #2018-0060, #05-0158; and NPDES Permit # NE0137634.

32. Neb. Rev. Stat. § 81-1506(2)(d) makes it unlawful for any person to "construct, install, or operate any industrial, commercial, or other facility or extend, modify, or add to any such facility if the operation would cause an increase in the discharge or emission of wastes into the air, waters, or land of the state or would otherwise cause an alteration of the physical, chemical, or biological properties of any air, waters, or land of the state in a manner that is not lawfully authorized."

33. Neb. Rev. Stat. § 81-1502(14) defines "wastes" to mean "sewage, industrial waste, and all other liquid, gaseous, solid, radioactive, or other substances which may pollute or tend to pollute any air, land, or waters of the state" and in subsection (26) further defines "solid waste" in part to "mean any garbage, refuse, or sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, and mining operations and from community activities."

34. Neb. Rev. Stat. § 81-1502(20) states "Water pollution shall mean the manmade or man-induced alteration of the chemical, physical, biological, or radiological integrity of water."

35. Neb. Rev. Stat. § 81-1502(21) states "Waters of the state shall mean all waters within the jurisdiction of this state, including all streams, lakes, ponds, impounding reservoirs, marshes, wetlands, watercourses, waterways, wells, springs, irrigation systems, drainage

systems, and all other bodies or accumulations of water, surface or underground, natural or artificial, public or private, situated wholly or partly within or bordering upon the state."

36. Neb. Rev. Stat. § 81-1502(19) defines "land pollution" to mean "the presence upon or within the land resources of the state of one or more contaminants or combinations of contaminants, including, but not limited to, refuse, garbage, rubbish, or junk, in such quantities and of such quality as will or are likely to (a) create a nuisance, (b) be harmful, detrimental, or injurious to public health, safety, or welfare, (c) be injurious to plant and animal life and property, or (d) be detrimental to the economic and social development, the scenic beauty, or the enjoyment of the natural attractions of the state."

37. The Respondent failed to immediately contain the unpermitted and uncontrolled release and discharge of wastes described herein, creating an imminent and substantial danger and risk to human health and the environment and causing pollution to the waters and land of the state in violation of state law and a risk to downstream property owners. Assessment and potential remediation of the nearby drainage and impacted surface water and sediments associated with the drainage downstream of the Facility is still needed. The Respondent also failed to operate its Facility to adequately maintain and provide secondary containment for the two digesters at the Facility, which failure caused the February 12, 2021, release.

V. COMPLIANCE ORDER AND SCHEDULE

IT IS HEREBY ORDERED AND AGREED THAT:

38. Respondent shall bring its Facility into compliance with all requirements of the Act and all rules, regulations and orders promulgated under such act, including, but not limited to completing the following:

A. Respondent must continue compliance with the February 4, 2021, Emergency

Order to cease discharge of process wastewater (as defined by Title 119, Chapter 1, § 091) into its wastewater lagoons.

B. Respondent must not remove wastewater from its wastewater lagoons except in accordance with standards and conditions for treatment, disposal, or discharge of wastewater using traditional parameters and in accordance with standards and conditions for treatment, disposal, or discharge of wastewater containing pesticides. Wastewater treated to Department standards may only be disposed to discharged at a location and in a manner approved by the Department.

C. Respondent shall not discharge any process wastewater into its wastewater lagoons until the Respondent provides verification to the Department that the wastewater lagoons are operating below freeboard above max; operating in accordance with a wastewater disposal or discharge protocol approved by the Department; and all repairs have been made to the industrial wastewater lagoons and approved by the Department, including repair of all lagoons and liners, provided however, nothing in Paragraph 28 limits Respondent's removal of wastewater from the wastewater lagoons which are part of a: (i) Department approved water filtration process; (ii) Department approved land application of the wastewater; and/or (iii) another Department approved method of wastewater disposal or discharge.

D. Respondent may request permission from the Department to discharge other wastewater into its wastewater lagoons for the limited purposes of containing stormwater, management of Respondent's lagoon system to resolve a potential future emergency situation, and for purposes of remediation and treatment at the Facility. All requests must be in writing and approved by the Department prior to any discharge.

E. Respondent shall continue and complete all remediation measures required under the February 20, 2021, Emergency Order. In lieu of the secondary containment referred to in Paragraph 25, Respondent has given permission for the AltEn Facility Response Group (AFRG) to submit an NPDES Construction Permit for construction of additional wastewater lagoons. Both digesters containing thin stillage and manure wastes and recovered spill waste materials have been emptied into permitted wastewater lagoons during the winterization process.

F. Within one hundred and twenty (120) days of the signing of this order, Respondent shall submit a Step 6/Step 7 site assessment work plan as delineated in the April 14, 2021, letter referred to in Paragraph 21 above. Respondent shall then complete the submitted work plan in a timely manner.

G. Respondent's NPDES Permit # NE0137634 expires on June 30, 2022. Respondent has applied for a new NPDES permit in a timely fashion to ensure it has an NPDES Permit at all times necessary to complete the remediation of the Facility.

H. On April 20, 2017, Respondent was authorized to discharge storm water under the terms and conditions of the NPDES Industrial Storm Water General Permit NER910000. This authorization is valid until a new Industrial Storm Water General Permit is issued by the Department. The Department has published notice that it is proposing issuance of the NPDES General Permit NER 920000 Authorizing Storm Water Discharges Associated with Industrial Activity. Upon issuance of the NPDES General Permit NER 920000 or any other new NPDES General Permit, Respondent shall timely file an Industrial Storm Water Notice of Intent for authorization to discharge storm water under the terms and conditions of any new NPDES General Permit issued by the

Department.

I. Respondent must provide access to Department employees, agents, and contractors; United States Environmental Protection Agency ("USEPA") employees, agents, and contractors; and third parties conducting remediation work at the site pursuant to the Consent Order.

J. Respondent is prohibited from resuming its commercial and industrial operations of producing ethanol until such time as it has been notified by the Department that the Facility has been sufficiently remediated to ensure resumption will not present a further threat of harm to public health and the environment.

K. Respondent shall promptly respond to any written communication by the Department. Any unreasonable delay in responding to such communication shall be construed as non-compliance with this Consent Order.

L. Respondent shall continue to cooperate with the AFRG's clean-up efforts at the Facility, to the extent such cooperation is within Respondent's control and the actions of AFRG have been authorized by the Department.

VI. SUBMITTALS

39. Any information or verification required to be submitted to the Department pursuant to this Consent Order shall refer to FID #84069 and shall be sent to:

Brad Pracheil
Division Administrator, Inspection and Compliance
Nebraska Department of Environment and Energy
PO Box 98922
245 Fallbrook Blvd.
Lincoln, NE 68509-8922
402-471-2186
brad.pracheil@nebraska.gov

Any information or verification required to be submitted to the Respondent pursuant to this

Consent Order shall refer to FID #84069 and shall be sent to:

Tanner Shaw, President
AltEn, LLC
P.O. Box 3243
Kansas City, KS 66103-0243
(402) 624-0900
tshaw@mrgkc.com

With copies to:

Stephen D. Mossman
Mattson Ricketts Law Firm
134 S. 13th St., Ste. 1200
Lincoln, NE 68508-1901
(402) 475-8433
sdm@mattsonricketts.com

Scott Tingelhoff, General Manager
AltEn, LLC
(402) 624-0900
stingelhoff@mrgkc.com

VII. SATISFACTION AND COMPLIANCE WITH OTHER LAWS

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

VIII. RESERVATION OF RIGHTS

41. Nothing in this Consent Order shall be construed to sanction any violation of State or Federal law or limit the power and authority of the Department to take or order any action necessary to protect public health, welfare, or the environment or to enforce any provision of the Act and any rules, regulations, orders, or permits issued pursuant to the Act. The Department 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 Consent Order, or the underlying violations alleged herein, including penalties, injunctive relief, or recovery of costs incurred by the Department in responding to the release from the Facility.

IX. NEGATION OF AGENCY RELATIONSHIP

42. Nothing contained in this Consent Order shall be construed to create, either expressly or by implication, the relationship of agency between the Department and Respondent.

X. AMENDMENT

43. This Consent Order may be modified and amended in writing by mutual agreement of the Department and Respondent.

XI. EFFECTIVE DATE

44. This Consent Order shall become effective on the date it is signed by the Director of the Department.

XII. SEVERABILITY

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

XIII. SIGNATURES

For the Respondent: The undersigned representative of AltEn, LLC, certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Order and to bind the Respondent.

By:



Tanner Shaw
President
AltEn, LLC

Date:

2-23-22

For the Department: IT IS ORDERED and agreed this 23rd day of February 2022.

By: _____

Jim Macy
Director

Nebraska Department of Environment and Energy

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Consent Order, was served by certified
United States mail, postage prepaid, return receipt requested this 23rd day of February, 2022, to:

Stephen D. Mossman
Mattson Ricketts Law Firm
134 South 13th St.
Suite 1200
Lincoln, NE 68508
USPS Label #: 9414811898765848075375


Lauren Triplett
Office Specialist - Legal Division