

BEFORE THE NEBRASKA DEPARTMENT OF ENVIRONMENTAL QUALITY

IN THE MATTER OF

Case No. 3419

Brian Shaw,
d/b/a B-SHAW FEEDYARD

FID #74890

Respondent

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) COMPLAINT, COMPLIANCE ORDER
) AND NOTICE OF OPPORTUNITY
) FOR HEARING
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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, State of Nebraska Department of Environmental Quality (hereinafter "NDEQ" or "Department"). The Respondent is Brian Shaw d/b/a B-Shaw Feedyard (hereinafter "Respondent"), whose facility # 74890 is located in Clay County, Nebraska. Complainant has determined that the Respondent is in violation of the Nebraska Environmental Protection Act (NEPA), Neb. Rev. Stat. § 81-1501 et. seq. (Reissue 2014, 2015 Supp.); the Livestock Waste Management Act, Neb. Rev. Stat. §§ 54-2416 to 54-2438 (Reissue 2010); and Nebraska Administrative Code (NAC) Title 130, Rules and Regulations for Livestock Waste Control Regulations (Title 130).

2. The Department is the agency of the State of Nebraska charged with the duty, pursuant to Neb. Rev. Stat. §§ 81-1504 and 54-2418, of exercising exclusive general supervision, administration, and enforcement of the Nebraska Environmental Protection Act, the Livestock Waste Management Act, and all rules and regulations and orders promulgated under such acts.



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

II. COMPLAINT

4. Respondent is Brian Shaw, d/b/a B-Shaw Feedyard, who owns and operates a large concentrated animal feeding operation near Fairfield in Clay County, Nebraska. The legal description is S 1/2, SW 1/4 & SW 1/4, SE 1/2, Section 27 & Pt. NW 1/4, Township 06N, Range 07W, Clay County, Nebraska.

5. An adjacent property and the downslope receiving water for any discharges of livestock waste from Respondent's animal feeding operation is Kissinger Basin Wildlife Management Area (WMA) containing the "Brook Berringer Marsh." Kissinger Basin is a "Water of the State" under Neb. Rev. Stat. §§ 81-1502(21). It is the second-largest state-owned wetland in Nebraska's Rainwater Basin and is open to public access for hunting, fishing, hiking, and wildlife viewing.

6. Pursuant to the Nebraska Environmental Quality Council's authority to adopt rules and regulations for the purpose of livestock waste management, as expressed in Neb. Rev. Stat. §§ 81-1505(13)(d) and 54-2418, the Council adopted rules and regulations codified as Title 130, Livestock Waste Control Regulations.

7. Neb. Rev. Stat. § 81-1506(2) states:

"[i]t shall be unlawful for any person to: . . . (b) Construct, install, modify, or operate any disposal system or part thereof or any extension or addition thereto without obtaining necessary permits from the department".

8. Pursuant to Neb. Rev. Stat. § 81-1506(3)(c), it is unlawful for any person to violate any rule or regulation under the Livestock Waste Management Act.

9. Neb. Rev. Stat. § 81-1506(5) states that: "It shall be unlawful for any person

to:

- (b) Violate any provision of the Livestock Waste Management Act;
- (c) Violate any term or condition of an animal feeding operation permit;
- 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.

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

- "(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; or
- (5) Violate the terms of a National Pollutant Discharge Elimination System permit or construction and operating permit or any provision of the Livestock Waste Management Act and rules and regulations adopted and promulgated by the council pursuant to the act."

11. Title 130, Livestock Waste Management Regulations, Chapter 2, Section

008.13 states that:

- "008 Any person who owns or operates an animal feeding operation shall not: . . .
- 008.13 Violate the terms of an operating permit, construction approval, construction and operating permit or NPDES permit or any provision of the Livestock Waste Management Act and regulations."

12. Title 130, Livestock Waste Management Regulations, Chapter 3, Section 003

states that:

- "008 . . . Any modification meeting the definition of a major modification in Neb. Rev. Stat. § 54-2417(10) and these regulations requires the submittal of an application for a major modification and an application fee."

13. Title 130, Livestock Waste Management Regulations, Chapter 4, Section

006.01 states that:

"006 Any person who obtains or has obtained a construction approval or a construction and operating permit shall:
006.01 Comply with any construction or compliance schedule established by the Department."

14. Title 130, Livestock Waste Management Regulations, Chapter 11, Section

003 states that:

"003 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."

15. Respondent was issued a National Pollutant Discharge Elimination System Permit for Confined Animal Feeding Operations (NPDES CAFO Permit) on April 10, 2012 and a Construction and Operating Permit on June 10, 2012, for up to 4,000 head of feeder or fat cattle at the facility.

16. Among other terms and conditions, Respondent's Construction and Operating Permit states that:

"6) Permittee shall obtain approval from the Department prior to making any modifications or changes to the design or operation of the LWCF [livestock waste control facility].

7) The operation and LWCF shall be operated in compliance with the approved application, this permit, Title 130 regulations, and the laws of the State of Nebraska.

* * * * *

9) The following items of the nutrient management plan in the application approved on March 29, 2012 are terms of this permit:

a. Adequate storage of manure, litter and process wastewater, including procedures to ensure proper operation and maintenance of the storage facilities."

17. On December 11, 2013, NDEQ conducted a routine compliance inspection of Respondent's animal feeding operation. The inspector observed:

- a. items of solid waste in holding pond #3;
- b. inadequate weed control around holding ponds;
- c. bank erosion at holding pond #3;
- d. a depth marker in holding pond #1 not meeting Title 130 requirements;
- e. no depth markers in holding ponds #2 and #3;
- f. a large volume of livestock waste stored in holding pond #2 requiring holding pond #2 needing to be pumped down to its "pre-winter pump down level" to prevent a discharge of livestock waste; and
- g. the replacement of a gated pipe system with a center pivot system used for land application of livestock waste.

18. As defined in Neb. Rev. Stat. § 54-2417(11) and Title 130, Chapter 1, Section 028, a change in the method of land application of livestock waste is a major modification that requires Respondent to file an application for major modification to Respondent's Construction and Operating permit under Title 130, Chapter 3, 003. At the time of inspection, Respondent had not submitted an application for major modification in violation of Neb. Rev. Stat. §54-2432 (5), and Title 130, Chapter 3, 003.

19. In addition, Respondent had failed to comply Neb. Rev. Stat. §54-2432 (4), Title 130 Chapter 2, 008.03; Chapter 4, 006.01, and Chapter 11, 003, and specific construction and operating permit conditions described above.

20. On March 31, 2014, NDEQ sent Respondent a letter requiring him, by July 1, 2014, to:

- "1) Establish a weed control program along the banks of all the holding ponds.
- 2) Remove and properly dispose of the solid waste materials in and along the banks of holding pond #3.
- 3) Repair the south bank of holding pond #3 as specified in your permit application.

4) Install depth markers in each of the three holding ponds. Each marker must include a clearly identifiable reference number and all the critical levels must be labeled as specified in Title 130, Chapter 8.008."

21. The March 31, 2014, letter also required Respondent to submit an application for major modification to his Construction and Operating Permit due to the conversion of the livestock waste application system from gated pipe to center pivot.

22. On April 13, 2015, NDEQ conducted a follow-up compliance inspection of Respondent's animal feeding operation. The inspector observed that Respondent had not removed solid waste from holding pond #3 and had not installed depth markers in any of the three holding ponds.

23. On January 26, 2017, NDEQ conducted a routine compliance inspection of Respondent's animal feeding operation again. The inspector observed:

- a. solid waste had not yet been removed from holding pond #3;
- b. no depth markers had been installed in any of the three holding ponds;
- c. the center pivot system was being used to apply livestock waste without the submission of an application for major modification;
- d. the large volume of livestock waste held in holding pond #2 must be lowered to the "start pump level" by pumping during all available dewatering days and as soon as possible;
- e. the record-keeping requirements of Title 130, Chapter 12 were not being followed, including documenting liquid levels in the holding ponds at least weekly, after precipitation events, and before and after pumping to land application sites; and
- f. current Phosphorus-index calculations for land application fields meeting the requirements of Title 130, Chapter 14 were missing.

24. On February 10, 2017, NDEQ sent Respondent a Letter of Warning identifying the alleged violations observed on the January 26, 2017 inspection and requiring Respondent to address items 'a' through 'f' of the above list.

25. On June 26, 2017, NDEQ conducted a follow-up compliance inspection of Respondent's animal feeding operation. The inspector observed that Respondent

had taken no action to address items 'a' through 'f', above; that holding pond #2 was within 12 inches of overtopping and discharging into Kissinger Basin WMA; and that wastewater from holding pond #2 had backed up into debris basin #2a.

26. On July 10, 2017, NDEQ sent Respondent a Notice of Violation identifying the failure to correct the violations observed on June 26, 2017 and requiring

Respondent to:

- a. immediately and completely dewater holding ponds #1 and 2; and
- b. remove all solid waste from holding pond #3 within 30 days; and
- c. install depth markers in holding ponds #1 and #3 within 30 days; and
- d. submit an engineering evaluation for holding pond #2 within 45 days; and
- e. install a depth marker in holding pond #2 within 60 days that reflects the results of the required engineering analysis.

27. On July 27, 2017, NDEQ conducted a follow-up compliance inspection of Respondent's animal feeding operation and observed that Respondent had partially dewatered holding ponds #1 and #2, but had taken no other action to comply with the March 31, 2014, letter; February 10, 2017, Letter of Warning; or July 10, 2017, Notice of Violation.

28. Respondent has been in violation of Neb. Rev. Stat. §§ 54-2432(4),(5); 81-1506(2), (3)(c), (5)(b)-(d); and Title 130, Chapter 2, 008.03; Chapter 3, 003; Chapter 4, 006.01; and Chapter 11, 003, since December 11, 2013.

29. The Director of the NDEQ is authorized pursuant to Neb. Rev. Stat. § 81-1507(1) to issue this order requiring enforcement of the Nebraska Environmental Protection Act, the Livestock Waste Management Act, and Title 130.

III. COMPLIANCE ORDER

30. Respondent shall immediately begin dewatering and within 30 days completely dewater holding ponds #1 and #2.

31. Upon dewatering of holding pond #2 and by November 1, 2017, Respondent shall remove sediment and sludge from holding pond #2 to allow debris basin 2a to dewater in 72 to 84 hours as required by Respondent's issued Construction and Operating Permit, approved LWCF engineering design, and approved Operation and Maintenance Plan.

32. By November 1, 2017, Respondent shall install permanent depth markers in holding ponds #1 and #3 that meet all requirements of Title 130, Chapter 8, Section 008.

33. By November 1, 2017, Respondent shall remove and properly dispose of all solid waste and debris from holding pond #3.

34. By November 1, 2017, Respondent shall remove all weeds from the berms of all holding ponds and debris basins.

35. By November 1, 2017, Respondent shall implement and maintain a record-keeping system that meets the requirements of Title 130, Chapter 12, including but not limited to, documenting liquid levels in the holding ponds at least weekly, after precipitation events, and before and after pumping to land application sites.

36. Beginning on November 1, 2017, and repeating on a monthly basis, Respondent shall submit copies of all records required by Title 130, Chapter 12, for a period of one (1) year. At the end of one (1) year, provided Respondent has demonstrated compliance with this requirement, Respondent may resume

maintaining the file of required records at its facility only, and cease submitting reports to NDEQ.

37. By November 15, 2017, Respondent shall submit an engineering evaluation prepared by a professional engineer licensed in Nebraska pursuant to Title 130, Chapter 2, Section 007 that contains:

- a. an evaluation to verify that holding pond #2 is designed and constructed to contain all manure, litter, and process wastewater including the runoff and direct precipitation from a 25-year, 24 hour rainfall event; and
- b. an updated stage storage table and all associated calculations for holding pond #2; and
- c. an evaluation to verify the structural integrity of the east berm of holding pond #2; and
- d. an updated site map with:
 - i. all relevant elevations of holding pond #2, including but not limited to, the berm heights, pipe and culvert inlet elevations and floor elevation; and
 - ii. the associated drainage area, debris basins, and culverts for holding pond #2; and
 - iii. the associated drainage area for any areas used for feed storage.

38. By December 1, 2017, Respondent shall submit documentation to NDEQ, detailing how compliance with paragraphs 29 through 33 has been achieved.

39. By December 1, 2017, Respondent shall install a permanent depth marker in holding pond #2 that corresponds with the updated stage storage table required in paragraph 37.b and that meets all requirements of Title 130, Chapter 8, Section 008.

40. By December 31, 2017, Respondent shall submit a complete application for a major modification to Respondent's Construction and Operating Permit that addresses conversion of the land application system from gated pipe to center pivot. The major modification shall also address the location of feed storage areas and

verify that feed storage areas are located to ensure that runoff does not enter the clean water diversion.

41. By December 31, 2017, Respondent shall submit updated Phosphorous-index calculations for all land application fields.

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

43. Information to be submitted under this Order shall refer to FID # 74890 and shall be sent to:

Brad Edeal
Agriculture Section
Nebraska Department of Environmental Quality
PO Box 98922
Lincoln, NE 68509-8922

IV. NOTICE OF OPPORTUNITY TO REQUEST A HEARING

44. This Order shall become final, pursuant to Neb. Rev. Stat. § 81-1507(1), unless Respondent files an answer and requests, 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.

45. A written answer to the Complaint, Compliance Order and Notice of Opportunity for Hearing must conform to the requirements of Title 115, Neb. Admin. Code, Rules of Practice and Procedure, Chapter 7. The answer and request for hearing may be filed by mail to: Jim Macy, Director, State of Nebraska Department of Environmental Quality, 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

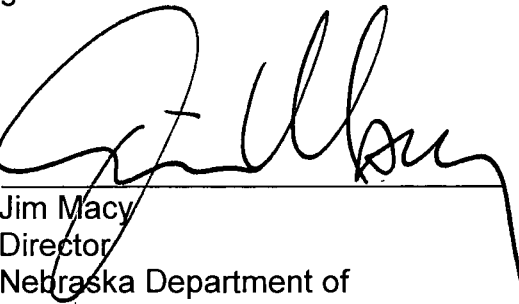
46. Whether or not Respondent requests a hearing, an informal settlement conference may be requested by writing to Brian McMullen, Attorney, Nebraska Department of Environmental Quality, P.O. Box 98922, Lincoln, Nebraska 68509-8922, or have your attorney make such a request.

47. 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

48. 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.

September 26th, 2017
Date



Jim Macy
Director
Nebraska Department of
Environmental Quality

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Complaint, Compliance Order and Notice of Opportunity for Hearing, with attachments, was served by certified United States mail, postage prepaid, return receipt requested this 26th day of September, 2017, upon the Respondent listed below:

Brian Shaw
B-Shaw Feedyard
1008 East 4th Street
Fairfield, NE 68938


Brian McMullen