

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

CONSENT ORDER

**I. INTRODUCTION**

1. The Nebraska Department of Environment and Energy (NDEE or Department) and Kenneth Harders and Daniel Harders (Respondents) voluntarily enter into this Consent Order. The Consent Order establishes a schedule for Respondents to comply 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 (Title 130).

**II. JURISDICTION**

2. 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, including Title 130.

3. In signing this Consent Order, Respondents agree to undertake all actions required by this Consent Order. Respondents agree not to contest the jurisdictional allegations referenced herein in any action to enforce this Consent Order. Respondents waive their right to further hearing as provided in Neb. Rev. Stat. §81-1507 and the Administrative Procedure Act, Neb. Rev. Stat. §84-901 *et seq.* for the violations alleged herein.



### **III. PARTIES**

4. The parties to this Consent Order are NDEE and Respondents Kenneth Harders and Daniel Harders. This Consent Order is binding on NDEE, Respondents, and all successors and assigns.

### **IV. FINDINGS OF FACT**

5. Respondents own and 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.

6. 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. 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”.

18. 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.”

19. 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).

20. 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**

21. **By June 12, 2020**, Respondents agree to complete the drainage project as described in written correspondence submitted on May 18, 2018 (NDEE document id# 20180036331). The drainage project must meet the following objectives:

- a. to separate process waste water from non-process waste water as it runs off Respondents' animal feeding operation and into adjacent road ditches;
- b. to install a properly-sized culvert and complete any grading work necessary to divert process waste water under Burwick Road, then south along Burwick Road, then east along Old Potash Road, before emptying to the north upon a

field immediately east of the AFO which is owned by Respondent Daniel Harders;

- c. to install a second, properly-sized culvert and complete any grading work necessary to divert non-process waste water, direct precipitation, and non-contact surface runoff to the south of the AFO, first into the road ditch along Old Potash Road before then entering the road ditch along Burwick Road and then ultimately reaching various intermittent tributaries of Silver Creek;
- d. to completely dewater all road ditches used for these drainage activities within 84 hours so as not to create a public safety hazard or public nuisance; and
- e. to contain the manure, litter, process waste water, and runoff from the animal feeding operation that is generated by a 25-year, 24 hour rainfall event so as not to create a public safety hazard or public nuisance.

22. In the event that the drainage project is not completed on schedule or as described, Respondents agree to submit a complete application for a Construction and Operating permit in accordance with the requirements of Title 130 **by September 10, 2020**. 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

## **VII. SATISFACTION AND COMPLIANCE WITH OTHER LAWS**

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

## **VIII. RESERVATION OF RIGHTS**

25. Nothing in this Consent Order shall be construed to limit the power and authority of the NDEE to take or order any action necessary to protect public health, welfare, or the environment or to enforce any provision of NEPA, LWMA, and any rules, regulations, orders, or permits issued pursuant to NEPA or LWMA.

## **IX. NEGATION OF AGENCY RELATIONSHIP**

26. Nothing in this Consent Order shall be construed to create, either expressly, or by implication, the relationship of agency between NDEE and Respondents.

## **X. AMENDMENT**

27. This Consent Order may be modified and amended in writing by mutual agreement of NDEE and Respondents.

## **XI. EFFECTIVE DATE**

28. This Consent Order shall become effective on the date it is signed by the NDEE Director or his designee.

## **XII. SEVERABILITY**

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

**XIII. SIGNATURES**

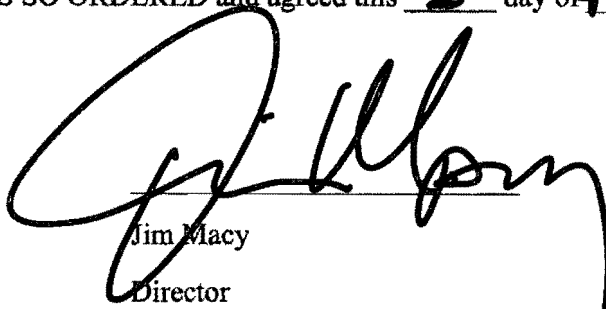
30. For Respondents:

By: Don Handberg  
Title: owner  
Date: 4-2-2020

By: Ken Handberg  
Title: owner  
Date: 4/2/20

31. For NDEE:

IT IS SO ORDERED and agreed this 3<sup>rd</sup> day of April, 2020.

  
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Jim Macy  
Director

NEBRASKA DEPARTMENT OF ENVIRONMENT AND ENERGY