

BEFORE THE NEBRASKA DEPARTMENT OF ENVIRONMENTAL QUALITY

| | | |
|-----------------------------------|---|-------------------------------|
| IN THE MATTER OF |) | Case No. 3436 |
| |) | |
| Donald D. and Patricia K. Jensen, |) | |
| d/b/a JENSEN CATTLE COMPANY |) | COMPLAINT, COMPLIANCE ORDER |
| |) | AND NOTICE OF OPPORTUNITY FOR |
| FID #75413 |) | HEARING |
| |) | |
| Respondents |) | |

I. INTRODUCTION

1. This Complaint, Compliance Order and Notice of Opportunity for Hearing is issued pursuant to Neb. Rev. Stat. § 81-1507. The Complainant is the Director, State of Nebraska Department of Environmental Quality (hereinafter "NDEQ" or "Department"). The Respondents are Donald D. and Patricia K. Jensen d/b/a Jensen Cattle Company (hereinafter "Respondents"), whose facility # 75413 is located in Howard County, Nebraska. Complainant has determined that Respondents are in violation of the Nebraska Environmental Protection Act (NEPA), Neb. Rev. Stat. § 81-1501 *et seq.* (Reissue 2014; Cum. Supp. 2016); the Livestock Waste Management Act (LWMA), Neb. Rev. Stat. § 54-2416 *et seq.* (Reissue 2010); and Nebraska Administrative Code (NAC) Title 130, *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 NEPA, LWMA, 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 Respondents.



II. COMPLAINT

4. Respondents own and operate a medium animal feeding operation near St. Paul in Howard County, Nebraska. The legal description is SW 1/4 & W 1/2 of SE 1/4, Section 08, Township 15N, Range 10W, Howard County, Nebraska. The Howard County Assessor Parcel ID # is 470849165.

5. "Cedar Creek" is directly adjacent to Respondents' animal feeding operation and is the receiving water for uncontrolled discharges of livestock waste from Respondents' animal feeding operation.

6. Cedar Creek is a perennial stream and first order tributary to the North Loup River, which is located approximately one-half mile from Respondents' animal feeding operation.

7. Cedar Creek is a "Water of the State" under NEPA, in Neb. Rev. Stat. § 81-1502(21).

8. The LWMA, in 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."

9. Pursuant to the authority of the Nebraska Environmental Quality Council 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 has adopted rules and regulations

codified as Title 130, *Livestock Waste Control Regulations*. The rules and regulations in Title 130 require that discharges of livestock waste to the environment be eliminated or minimized and that animal feeding operations with the potential to discharge obtain permits and have engineering controls, operating requirements, and environmental monitoring.

10. Title 130, *Livestock Waste Control Regulations*, Chapter 2, 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."

11. On September 28, 2012, NDEQ issued Respondents a Title 130 Livestock Waste Control Facility (LWCF) Construction and Operating Permit for up to 999 head of feeder or fat cattle at the facility.

12. Among other terms and conditions, Respondents' Construction and Operating Permit states that "[t]he 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."

13. On June 23, 2016, NDEQ conducted a routine compliance inspection of Respondents' animal feeding operation. The inspectors observed:

- a.** livestock feeding pens to the east and southeast of the main pens that had no livestock waste controls, were not exempt from regulation, and had the potential to discharge to Cedar Creek, a water of the state, in violation of Title 130, Chapter 2, 003 and Neb. Rev. Stat. § 54-2432(4).
- b.** a livestock waste holding pond level that was approximately 1.5 feet above the maximum allowed operating level and approximately 4.8 feet about the "must pump" level in violation of Title 130, Chapter 11, 003;
- c.** no implementation of the approved groundwater monitoring plan despite cattle feeding activity in violation of Title 130, Chapter 4, 006.06 and permit condition #2 of Respondents' Construction and Operating Permit;
- d.** no implementation of the soil analysis and sampling procedures in Respondents' nutrient management plan and Construction and Operating Permit;

- e. no amended nutrient management plan in violation of Title 130, Chapter 4, 006.01, 006.07, and permit condition #6 of Respondents' Construction and Operating Permit;
- f. no facility record-keeping in violation of Title 130, Chapter 12, 001 and 002;
- g. livestock allowed to enter and have contact with livestock waste holding ponds in violation of Title 130, Chapter 11, 010;
- h. dead livestock allowed to remain in a pen for over 36 hours in violation of Title 130, Chapter 12, 003; Respondents' mortality management plan; and Respondents' Construction and Operating Permit;
- i. an inadequately labeled permanent depth marker in a livestock waste holding pond in violation of Title 130, Chapter 8, 008; and
- j. an unmaintained settling basin with accumulated solids and sediment preventing the structure from performing its designed function in violation of Respondents' issued Construction and Operating Permit, approved LWCF engineering design, and approved Operation and Maintenance Plan.

14. On July 25, 2016, NDEQ sent Respondents a Letter of Warning (LOW) identifying the alleged violations observed on the June 23, 2016, inspection and requiring Respondents to address the items listed in paragraph 13 above.

15. Respondents did not respond to NDEQ's July 25, 2016, LOW and made no showing to demonstrate compliance with the identified violations.

16. On March 30, 2017, NDEQ conducted a re-inspection of Respondents' animal feeding operation. The NDEQ inspector again observed all physical conditions, operational practices, and violations identified on the June 23, 2016, inspection and as listed in paragraph 13, above.

17. During the March 30, 2017, re-inspection, the NDEQ inspector also observed:

- a. areas of standing water, livestock waste, or mixtures of standing water and livestock waste in drainage ditches that connect Respondents' east and southeast cattle pens to Cedar Creek, indicating past discharges or, at a minimum, the potential to discharge to a water of the state in violation of Title 130, Chapter 2, 003 and Neb. Rev. Stat. § 54-2432(4);
- b. areas of washout and erosion leading from the southwest corner of Respondents' livestock waste holding pond to an adjacent field, indicating that the holding pond had overtopped and discharged to the environment and,

potentially, a water of the state in violation of Title 130, Chapter 7, 001; Chapter 11, 003; and

- c. the discharge from the southwest corner of Respondents' livestock waste holding pond had not been reported to NDEQ within 24 hours in violation of Title 130, Chapter 11, 009.

18. During the March 30, 2017, re-inspection, Respondent Donald Jensen stated that Respondents' livestock waste holding pond had overtopped and discharged to the environment in March 2017.

19. On April 6, 2017, NDEQ sent Respondents a "Construction and Operating Permit Required" letter requiring Respondents to submit a LWCF permit application by October 13, 2017, pursuant to Title 130, Chapter 4, 001, to control the unpermitted, uncontrolled east and southeast cattle pens that have actually discharged or have the potential to discharge to Cedar Creek.

20. On April 25, 2017, NDEQ sent Respondents a Notice of Violation (NOV) requiring Respondents to address all violations identified in both the June 23, 2016, inspection and March 30, 2017, re-inspection – all of which remained unaddressed.

21. On June 9, 2017; August 3, 2017; November 22, 2017; and November 30, 2017, NDEQ conducted brief re-inspections at Respondents' animal feeding operation to determine Respondents' compliance status. On these four re-inspections, the NDEQ inspector again observed the physical conditions, operational practices, and violations identified on the June 23, 2016, and March 30, 2017, inspections. In addition, on the August 3, 2017, re-inspection, the NDEQ inspector observed that Respondents had constructed a livestock crossing of Cedar Creek in violation of Title 130, Chapter 2, 008.02.

22. On September 5th, 2017, NDEQ received a groundwater monitoring report from an agricultural consultant representing Respondents. Submittal of the groundwater monitoring

report is an initial step toward compliance with the requirement identified in paragraph 13.c, above.

23. Other than submittal of the single groundwater monitoring report, Respondents have not taken action to comply with NDEQ's July 25, 2016, Letter of Warning; its April 6, 2017, "Construction and Operating Permit Required" letter; nor its April 25, 2017, Notice of Violation.

24. NDEQ has made every effort to obtain voluntary compliance, consistent with Neb. Rev. Stat. § 81-1510(1), and has provided compliance assistance to Respondent Donald Jensen on three separate occasions – June 23, 2016; March 30, 2017; and June 9, 2017 – detailing how Respondents could correct the violations at their animal feeding operation and comply with NEPA, LWMA, and Title 130.

25. Respondents have been in violation of Neb. Rev. Stat. §§ 54-2432(4) and (5) and Title 130, Chapter 2, 003 and 008.13; Chapter 4, 006.01 and 006.07; Chapter 8, 008; Chapter 11, 003 and 010; and Chapter 12, 001 through 003 since June 23, 2016.

26. Respondents have been in violation of Title 130, Chapter 7, 001 and Chapter 11, 009 since March 30, 2017.

27. Respondents have been in violation of Title 130, Chapter 2, 008.02 since August 3, 2017 or earlier.

28. Respondents have been in violation of Title 130, Chapter 2, 003 and 004 since October 14, 2017.

29. Title 130, Chapter 4, 006 states that "[a]ny person who obtains or has obtained a construction approval or a construction and operating permit shall comply with any compliance schedules established by the Department."

30. The Director of the NDEQ is authorized pursuant to Neb. Rev. Stat. § 81-1507(1) to issue this order requiring enforcement of NEPA, LWMA, and Title 130.

III. COMPLIANCE ORDER

31. Respondents shall immediately begin dewatering the livestock waste holding pond and make every attempt to dewater the holding pond to its winter level within 30 days, using an application rate and timing schedule that considers soil temperature, air temperature, and the potential for runoff and discharge from land application during cold or freezing conditions. Land application of livestock waste shall not exceed the intake rate of the soil such that runoff occurs. Dewatering shall be done at agronomic rates and at approved land application sites in accordance with Respondents' most recent Nutrient Management Plan, approved by the Department on January 25, 2005, until such time as Respondents have an updated, approved Nutrient Management Plan as required by paragraph 38, below.

32. Respondents shall maintain the livestock waste holding pond at or below the start pump level at all times. When the start pump level is exceeded, Respondents shall utilize all available dewatering days until adequate storage is restored. An available dewatering day is any day that has suitable weather and soil conditions for land application in accordance with LWMA and Title 130 requirements.

33. Respondents shall immediately implement and maintain a record-keeping system for a medium permitted animal feeding operation that meets the requirements of Title 130, Chapter 12 and Chapter 14, 001.10F, 001.11, and 002.09.

34. Respondents shall submit to NDEQ copies of records of the holding pond level, weather conditions, and pumping activity by the 15th of each month covering the previous month for a period of one (1) year.

35. Within 30 days, Respondents shall remove all cattle from the east and southeast cattle pens. Cattle shall not be allowed in these areas until the facility submits a complete application as required in paragraph 39, below, and receives an Approval to Operate letter from NDEQ.

36. Within 30 days, Respondents shall fence off and install gates necessary to prevent cattle from entering the holding pond and debris basin areas. Cattle shall not be allowed to enter these areas.

37. Within 30 days, Respondents shall install a permanent depth marker in the holding pond that meets all requirements of Title 130, Chapter 8, 008, including the required levels in 008.01 through 008.03.

38. Within 30 days, Respondents shall submit an amended nutrient management plan and supporting documentation meeting the requirements of Title 130, Chapter 14.

39. Within 60 days, Respondents shall submit a complete application for a major modification to Respondents' Construction and Operating Permit, in accordance with the requirements described in Title 130, Chapter 4. This submittal shall include design criteria for the construction of a Livestock Waste Control Facility that will contain runoff from the uncontrolled east and southeast cattle pens.

40. As an alternative to paragraph 39, Respondents may elect to permanently abandon the uncontrolled east and southeast pens that have the potential to discharge to Cedar Creek. If Respondents intend to permanently abandon the uncontrolled east and southeast pens, Respondents shall:

- a.** Within 30 days, submit a written letter to NDEQ stating that Respondents agree to permanently abandon the south and southeast cattle pens and confine no cattle in the abandoned south and southeast pens at any time;

- b. Within 60 days, remove all fence lines, bunk lines, feed panels, and all other equipment from the abandoned pens that had been used to feed or confine cattle; and
- c. Within 180 days, establish permanent vegetation in the abandoned south and southeast pens. Permanent vegetation must be maintained at all times and no grazing activity can occur in these areas.

41. Within 60 days, Respondents shall submit documentation to NDEQ, detailing how compliance with paragraphs 31 through 37 and, if elected, paragraph 40 has been achieved.

42. Respondents shall respond promptly to any written communication by 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 # 75413 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 Respondents file an answer and request, in writing, a hearing no later than 30 days after receipt of this Order. Failure to answer within 30 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 NAC Title 115, *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

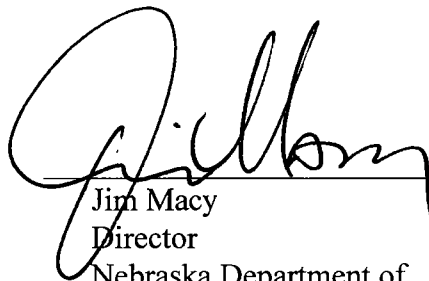
46. Whether or not Respondents request a hearing, an informal settlement conference may be requested by writing to Brian McMullen, Attorney, Nebraska Department of Environmental Quality, P.O. Box 98922, Lincoln, Nebraska 68509-8922, or have your attorney make such a request.

47. A request for settlement conference does not extend the 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 NDEQ from pursuing such enforcement.

1-26-18
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 January, 2018, upon the Respondents listed below:

Donald and Patricia Jensen
795 Cushing Road
St. Paul, NE 68873



Brian McMullen