

BEFORE THE NEBRASKA DEPARTMENT OF ENVIRONMENTAL QUALITY

IN THE MATTER OF

Case No. 3477

Thomas Fagan,
d/b/a FAGAN FEEDLOT

FID #71368

Respondent.

CONSENT ORDER

I. INTRODUCTION

1. The Nebraska Department of Environmental Quality (NDEQ) and Thomas Fagan d/b/a Fagan Feedlot (Respondent) voluntarily enter into this Consent Order. The Consent Order establishes a schedule for Respondent to comply with 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).

II. JURISDICTION

2. NDEQ is the agency of the State of Nebraska charged with the duty, pursuant to Neb. Rev. Stat. § 81-1504, of exercising exclusive general supervision, administration, and enforcement of NEPA, LWMA, and all rules and regulations and orders promulgated under such acts, including Title 130.

3. In signing this Consent Order, Respondent agrees to undertake all actions required by this Consent Order. Respondent agrees not to contest the jurisdictional allegations referenced herein in any action to enforce this Consent Order. Respondent waives its 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 NDEQ and Thomas Fagan d/b/a Fagan Feedlot. This Consent Order is binding on NDEQ, Respondent, and any successors and assigns.

IV. FINDINGS OF FACT

5. Respondent is the owner and operator of animal feeding operation (AFO) located at S½, SW¼, Section 19, Township 012 North, Range 010 West in Hall County, Nebraska.

6. On December 22, 2017, NDEQ issued Respondent a Livestock Waste Control Facility (LWCF) Phased Construction and Operating Permit (C&O Permit), which, subject to its terms and conditions, authorizes Respondent to operate an AFO and manage livestock waste generated by the AFO in order to prevent discharges of livestock waste to waters of the state, as defined in Neb. Rev. Stat. §81-1502.

7. Among the terms and conditions of his C&O Permit, Respondent is required to complete construction of LWCFs according to the plans, specifications, and timelines in the issued permit and incorporated permit application.

8. On December 11, 2018, NDEQ performed a post-construction inspection of Respondent's AFO to verify Respondent's construction progress with the plans, specifications, and timelines in Respondent's C&O Permit. During the inspection, NDEQ staff observed:

- a. livestock waste levels in Wet Basin 1B/North were above the winter level and must pump level in violation of Title 130, Chapter 11, 003;
- b. permanent depth markers meeting the requirements of Title 130, Chapter 8, 008, and the issued C&O Permit were not installed in either wet basin;
- c. construction work to heighten berm walls and raise the overflow point for each wet basin had not been completed as required by the issued C&O Permit;
- d. a clean water diversion from the cropped field located northwest of Wet Basin 1B/North was not identified or described in the site plans submitted as part of the C&O Permit application;

- e. a manure storage area had been placed thirty (30) feet from a fresh water pond, was not included in the site plan submitted as part of the C&O Permit application, and did not contain berms to prevent discharge;
- f. livestock were allowed to graze in areas adjacent to Wet Basin 1B/North which requires that perimeter fencing be installed to prevent livestock access and damage to the LWCF; and
- g. underground piping between Wet Basin 1B/North and an adjacent land application field was not included in the irrigation distribution plans submitted as part of the C&O Permit application.

9. In addition to the construction completion deficiencies and permit application omissions as identified on inspection and described above, NDEQ staff also determined during records review and subsequent communication with Respondent and his representatives that no liner had been installed in either wet basin as indicated in the C&O Permit application and required by the issued C&O Permit.

10. On January 15, 2019, NDEQ staff conducted a follow-up inspection which included re-surveying the berm heights of. During the inspection, NDEQ staff observed:

- a. berm heights as represented on the signed and stamped engineering drawings in the C&O Permit application were found to be incorrect upon re-surveying;
- b. Wet Basin 1B/North had overtopped and was within ten (10) linear feet of discharging to a fresh water pond;
- c. abandoned wells had not been decommissioned in accordance with Title 130, Chapter 13, 007 and Nebraska Administrative Code, Title 178, Water Well Standards, Chapter 12, 012; and
- d. existing domestic and livestock wells had not been registered in accordance with Title 178, Water Well Standards, Chapter 12, 003.13.

11. In subsequent communications, Respondent and his representatives have communicated to NDEQ staff that he does not intend to construct the livestock waste holding pond as required in Phase II of the issued C&O Permit.

V. VIOLATIONS

12. Neb. Rev. Stat. §54-2432(3) states that it is unlawful for any person to operate an animal feeding operation prior to construction of an approved livestock waste control facility, unless exempted.

13. Neb. Rev. Stat. §81-1506(5)(a) states that it is unlawful for any person to construct or operate an animal feeding operation without first obtaining a permit if required under the LWMA, NEPA, or the rules and regulations adopted and promulgated pursuant to such acts.

14. Neb. Rev. Stat. §81-1506(5)(c) states that it is unlawful for any person to violate any term or condition of an animal feeding operation permit.

15. Neb. Rev. Stat. §81-1508.02(1)(b) states that it is unlawful for any person to violate a permit or license condition or limitation and any provision or duty imposed by rules and regulations.

16. Neb. Rev. Stat. §81-1508.02(1)(c) states that it is unlawful for any person to make any false statement, representation, or certification in any application, label, record, report, plan, or other document required to be filed or maintained by such acts, rules, or regulations.

17. Title 130, Chapter 2, 008.01 states that any person who owns or operates an animal feeding operating shall not provide false or misleading information to the Department or omit relevant facts when submitting reports and applications to the Department.

18. Title 130, Chapter 4, 006.01 states that any person who obtains or has obtained a C&O Permit shall comply with any construction or compliance schedule established by the Department.

19. Title 130, Chapter 4, 006.03 states that any person who obtains or has obtained a C&O Permit shall certify, and ensure the designer, if applicable, likewise certifies, that the facility was constructed pursuant to the application approved by the Department.

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

21. Respondent has violated Neb. Rev. Stat. §§54-2432(3); §81-1506(5)(a) and (c); §81-1508.02(1)(b) and (c); and Title 130, Chapter 2, 008.01; and Chapter 4, 006.01 and 006.03.

22. The NDEQ Director is authorized under Neb. Rev. Stat. §81-1504(7), (25), and §81-1507(1) to require and enforce compliance schedules to prevent, control, or abate unlawful discharges to waters of the State.

VI. COMPLIANCE ORDER

23. Respondent agrees to **immediately**:

- a. begin dewatering the wet basins and complete their dewatering to winter pump levels by **March 15, 2019**;
- b. install a temporary soil berm along the top of Wet Basin 1B/North to ensure livestock waste does not discharge to waters of the state; and
- c. relocate or install soil berms along manure storage areas with the potential to discharge to waters of the state.

24. By **March 15, 2019**, Respondent agrees to submit a complete application for major modification of Respondent's C&O Permit that:

- a. corrects all completeness deficiencies and inaccuracies as identified on inspection and in the paragraphs above;
- b. complies with Title 130 in the event that Respondent never constructs the livestock waste holding pond described in Respondent's C&O Permit application and Phase II of the issued C&O Permit.
- c. specifies maximum cattle numbers to be fed for any newly proposed or modified construction phases.

25. By March 15, 2019, Respondent agrees to submit a complete National Pollutant Discharge Elimination System (NPDES) Permit application meeting the requirements of Title 130, Chapters 5 and 14.

26. Upon Respondent's submittal of complete and approvable C&O and NPDES Permit applications, followed by NDEQ approval and issuance of said permits, Respondent agrees to complete construction of all project phases in accordance with the plans, specifications, and timelines as described in the permit applications and issued permits.

27. Information to be submitted under this Consent Order shall refer to FID # 71368 and shall be sent to:

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

VII. SATISFACTION AND COMPLIANCE WITH OTHER LAWS

28. Respondent 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

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

IX. NEGATION OF AGENCY RELATIONSHIP

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

X. AMENDMENT

31. This Consent Order may be modified and amended in writing by mutual agreement of NDEQ and Respondent.

XI. EFFECTIVE DATE

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

XII. SEVERABILITY

33. 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.

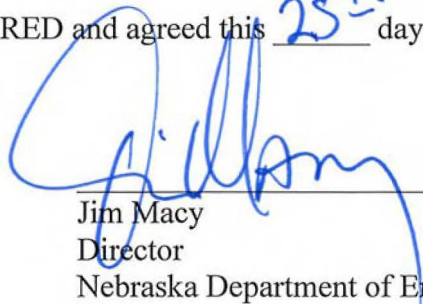
XIII. SIGNATURES

34. For Respondent:

By: Thomas Lagon
Title: Owner
Date: 3-1-19

35. For NDEQ:

IT IS SO ORDERED and agreed this 25th day of March, 2019.



Jim Macy
Director
Nebraska Department of Environmental Quality