

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BLVD.
LENEXA, KANSAS 66219

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
D&S Cattle Company, LLC) Docket No. CWA-07-2026-0005
)
)
)
 Respondent) COMPLAINT AND
) CONSENT AGREEMENT /
) FINAL ORDER
Proceedings under Section 309(g) of the)
Clean Water Act, 33 U.S.C. § 1319(g))
)
)

COMPLAINT

Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (“CWA”), 33 U.S.C. § 1319(g), and in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“Consolidated Rules”), 40 C.F.R. Part 22.

2. Complainant, the U.S. Environmental Protection Agency Region 7 (“EPA”), and Respondent have agreed to a settlement of this action before the filing of a complaint, and thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) and (3) of the Consolidated Rules, 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3).

3. This Complaint and Consent Agreement/Final Order serves as notice that the EPA has reason to believe that the Respondent has violated the National Pollutant Discharge Elimination System (“NPDES”) permits issued to the facility.

Parties

4. The authority to take action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), is vested in the Administrator of the EPA. The Administrator has delegated this authority to the Regional Administrator, EPA Region 7, who in turn has delegated the authority under Section 309(g) to the Director of the Enforcement and Compliance Assurance Division of EPA Region 7 with concurrence of the Regional Counsel (collectively referred to as the “Complainant”).

5. The Respondent is D&S Cattle Company, LLC (“D&S Cattle Company” or “Respondent”).

Statutory and Regulatory Framework

6. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, *inter alia*, Section 402 of the CWA, 33 U.S.C. § 1342. Section 402 of the CWA, 33 U.S.C. § 1342, provides that pollutants may be discharged only in accordance with the terms of an NPDES permit issued pursuant to that Section.

7. The CWA prohibits the discharge of “pollutants” from a “point source” into a “navigable water”, as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362.

8. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines the terms “discharge of a pollutant” and “discharge of pollutants” as, *inter alia*, any addition of any pollutant to navigable waters from any point source.

9. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines the term “pollutant” as, *inter alia*, biological materials and agricultural waste discharged to water.

10. “Process wastewater” is defined by 40 C.F.R. § 122.23(b)(7) as water “directly or indirectly used in the operation of the AFO for any or all of the following: spillage or overflow from animal or poultry watering systems; washing, cleaning, or flushing pens, barns, manure pits, or other AFO facilities; direct contact swimming, washing, or spray cooling of animals; or dust control. Process wastewater also includes any water which comes into contact with any raw materials, products, or byproducts including manure, litter, feed, milk, eggs or bedding.”

11. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines the term “point source” to include “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, [or] concentrated animal feeding operation . . . from which pollutants are or may be discharged.”

12. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines the term “navigable waters” as, *inter alia*, the “waters of the United States,” as defined at 40 C.F.R. § 122.2.

13. Section 502(5) of the CWA, 33 U.S.C. § 1362(5), defines the term “person” as, *inter alia*, any individual, corporation, partnership, or association.

14. To implement Section 402 of the CWA, the EPA promulgated regulations codified at 40 C.F.R. Part 122. Under 40 C.F.R. Part 122.1, an NPDES permit is required for the discharge of pollutants from any point source into waters of the United States.

15. The Kansas Department of Health and Environment (“KDHE”) is the state agency in Kansas with the authority to administer the federal NPDES program, pursuant to Section 402 of the CWA and applicable implementing regulations. The EPA has concurrent enforcement authority.

16. Pursuant to 40 C.F.R. § 122.23(a), “concentrated animal feeding operations,” or “CAFOs,” are point sources subject to NPDES permitting requirements.

17. “Concentrated animal feeding operation” or “CAFO” is defined by 40 C.F.R. § 122.23(b)(2) as an animal feeding operation that is defined as a Large CAFO or Medium CAFO in accordance with 40 C.F.R. § 122.23(b).

18. “Animal feeding operation” or “AFO” is defined by 40 C.F.R. § 122.23(b)(1) as a lot or facility where animals have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any twelve-month period, and where crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

19. “Process wastewater” is defined by 40 C.F.R. § 122.23(b)(7) as water “directly or indirectly used in the operation of the AFO for any or all of the following: spillage or overflow from animal or poultry watering systems; washing, cleaning, or flushing pens, barns, manure pits, or other AFO facilities; direct contact swimming, washing, or spray cooling of animals; or dust control. Process wastewater also includes any water which comes into contact with any raw materials, products, or byproducts including manure, litter, feed, milk, eggs or bedding.”

EPA’s General Allegations

20. Respondent is a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

21. At all times relevant to this action Respondent owned, operated, or otherwise controlled the properties used to confine and raise beef cattle located in the West ½ of Section 27, Township 5 South, Range 5 East, in Washington County, Kansas (“Facility”).

22. D&S Cattle was issued an NPDES permit on September 13, 2021, with the associated permit number KS0100251 (“2021 Permit”). The permit was set to expire on September 12, 2026. The permit allowed a total maximum capacity of 5,999 head of cattle.

23. On February 27, 2023, D&S Cattle’s NPDES permit, KS0100251, was modified to reflect an expansion of the Facility (“2023 Permit”). The new permit cycle is set to expire on February 26, 2028. The 2023 permit allows a total maximum capacity of 9,000 head of cattle.

24. On March 27, 2024, EPA personnel conducted a compliance evaluation inspection of the Facility.

25. During the EPA Inspection, the Facility had approximately 6,827 head of beef cattle.

26. The Facility is an animal feeding operation (“AFO”) as defined by 40 C.F.R. § 122.23(b)(1) because (i) it stables, confines, feeds, or maintains non-aquatic animals – specifically, cattle – for a total of 45 days or more in any 12-month period and (ii) “[c]rops,

vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the [Facility].”

27. The Facility is a large Concentrated Animal Feeding Operation (“CAFO”) as that term is defined in 40 C.F.R. § 122.23(b)(4), and as that phrase is used in Section 502(14) of the CWA, 33 U.S.C. § 1362(14), because the number of cattle other than mature dairy cows or veal calves that can be confined and fed at the Facility is greater than 999 head.

28. Respondent discharged process wastewater to a tributary of North Fork Fancy Creek, a perennial water, which flows for approximately six miles into North Fork Fancy Creek.

29. North Fork Fancy Creek, a perennial water, flows for approximately five miles into Fancy Creek.

30. Fancy Creek, a perennial water, flows for approximately thirteen miles into Tuttle Creek Lake, an impoundment of the traditionally navigable Big Blue River.

EPA's Allegations of Violation

Count 1

Failure to Initiate and Conduct Dewatering on all Suitable Days

31. The facts and allegations stated above are herein incorporated.

32. Section B of the 2021 and 2023 permits require Respondent to initiate and conduct dewatering on all days suitable for land application of waste until the required storage capacity is again available.

33. Respondent's operating records document that Respondent did not conduct dewatering on all suitable days.

34. Respondent did not dewater on fifty suitable days in 2022.

35. Respondent did not dewater on twenty suitable days in 2023.

36. Respondent did not dewater on sixteen suitable days in 2024.

37. Respondent's failure to conduct dewatering on all suitable days when required storage is not available is a violation of the conditions and limitations of Respondent's NPDES Permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

Count 2
Failure to Maintain Retention Structure Levels

38. The facts and allegations stated above are herein incorporated.

39. Section B of the 2021 permit requires the Operating Level for the East Retention Control Structure to be maintained at least two vertical feet below the lowest point of the top of the berm year-round. The Operating Level for the West Retention Control Structure was required to be maintained at least nine and one-half vertical feet below the lowest point of the top of the berm year-round.

40. Section B of the 2023 Permit requires the Operating Level for the East and West Retention Control Structures to be maintained at least seven vertical feet below the lowest point of the top of the berm. On December 1st, as part of the 2023 Permit's winter-storage-pump down requirements, the Operating Level for the East Retention Control Structure changes to eight and one-half feet. On December 1st the Operating Level for the West Retention Control Structure changes to nine and one-half feet.

41. Respondent's records document the minimum operating levels for the West Retention Control Structure was not maintained for 153 days in 2022 and 51 days in 2023. Further, the EPA's review of the facility's operating record shows that the facility did not maintain minimum levels for 90 days in 2024.

42. Respondent's failure to maintain the appropriate retention structure levels is a violation of the conditions and limitations of Respondent's NPDES Permits issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

Count 3
Discharged from the Animal Waste Management System

43. The facts and allegations stated above are herein incorporated.

44. Section D of Respondent's 2021 and 2023 NPDES permits require Respondent to operate facility in a manner to prevent any discharge that is in violation of the permit or that has a potential to adversely affect human health or the environment.

45. On or about July 5, 2022, and for approximately five days thereafter Respondent, without NPDES-permit authorization, discharged approximately 800,000 gallons of process wastewater to a tributary of North Fork Fancy Creek and the North Fork Fancy Creek. Among the reasons the discharge was not authorized by NPDES-permit are Respondent's failures prior to the discharge to maintain required retention structure levels and to conduct dewatering on all suitable days when required storage was not available.

46. On July 9, 2022, a fish kill was reported in a tributary of North Fork Fancy Creek approximately five miles downstream of the discharge site to the Kansas Department of Health and Environment (“KDHE”).

47. On July 11, 2022, the KDHE responded to investigate the fish kill. By the time KDHE had arrived there were no dead fish visible. However, KDHE documented low dissolved oxygen, high ammonia, and high *E. Coli* at the reported site. KDHE concluded the conditions killed or could have killed fish in the tributary to North Fork Fancy Creek and North Fork Fancy Creek.

48. Based upon these results, on July 12, 2022 KDHE issued a stream advisory for the tributary of North Fork Fancy Creek as a result of the discharge.

49. Respondent’s unauthorized discharge of process wastewater was a violation of the conditions and limitations of Respondent’s NPDES Permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

Count 4
Failure to Monitor & Document Freeboard Levels

50. The facts and allegations stated above are herein incorporated.

51. Section B of the 2021 and 2023 permits requires Respondent to monitor and document freeboard levels in the wastewater retention control structures.

52. Respondent’s operating records document that Respondent did not monitor and/or document freeboard in the East Retention Control Structure for 156 weeks in 2022, 2023, and 2024.

53. Respondent’s failure to monitor and document freeboard levels in the East Retention Control Structure is a violation of the conditions and limitations of Respondent’s NPDES Permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

Count 5
Failure to Install a Staff Gauge

54. The facts and allegations stated above are herein incorporated.

55. Section B of the 2021 and 2023 permits requires a water level measurement device, also known as a staff gauge, installed in both wastewater retention control structures.

56. During the EPA inspection, the inspector observed the East Retention Control Structure did not have a water level measurement device.

57. Respondent's failure to have a water level measurement device in the East Retention Control Structure is a violation of the conditions and limitations of Respondent's NPDES Permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

Penalty

58. As alleged by the EPA above, and pursuant to Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), as adjusted pursuant to 40 C.F.R. § 19.4, for violations that occurred on or after November 2, 2015, where penalties are assessed on or after December 27, 2023, Respondent is liable for civil penalties of up to \$26,685 per day for each day during which the violation continues, up to a maximum of \$333,552.

CONSENT AGREEMENT

59. Respondent and EPA agree to the terms of this Consent Agreement/Final Order.

60. Respondent admits the jurisdictional allegations of this Complaint and Consent Agreement/Final Order and agrees not to contest the EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of this Consent Agreement/Final Order.

61. Respondent neither admits nor denies the factual allegations asserted by the EPA in this Complaint and Consent Agreement/Final Order.

62. By signing this consent agreement, Respondent waives any rights or defenses that respondent has or may have for this matter to be resolved in federal court, including but not limited to any right to a jury trial and waives any right to challenge the lawfulness of the final order accompanying the consent agreement.

63. Respondent and Complainant agree to conciliate the matters set forth in this Consent Agreement/Final Order without the necessity of a formal hearing and agree to bear their own costs and attorney's fees incurred as a result of this action.

64. Respondent consents to receive service of the filed Consent Agreement and Final Order electronically at the following email addresses:

Janece Vathauer
Respondent
vathauer@twinvalley.net

65. The undersigned representative of Respondent certifies that they are fully authorized to enter the terms and conditions of this Consent Agreement/Final Order and to execute and legally bind Respondent to it.

66. Respondent understands and agrees that this Consent Agreement/Final Order shall apply to and be binding upon Respondent and Respondent's agents, successors and/or assigns.

Respondent shall ensure that all contractors, employees, consultants, firms or other persons or entities acting for Respondent with respect to matters included herein comply with the terms of this Consent Agreement/Final Order.

67. Respondent certifies by the signing of this Consent Agreement/Final Order that the Site is in compliance with the CWA.

Penalty Payment

68. Respondent agrees that, in settlement of the claims alleged in this Consent Agreement/Final Order, Respondent shall pay a civil penalty of **\$71,494** to be paid in full no later than 30 days after the effective date of this Consent Agreement/Final Order pursuant to the authority of Section 309(g) of the CWA, 33 U.S.C. § 1319(g).

69. The penalty payment shall identify Respondent by name and docket number “CWA-07-2026-0005,” and shall be by certified or cashier’s check made payable to “Treasurer, United States of America,” and sent to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979078
St. Louis, Missouri 63197-9000

or by alternate payment method described at <http://www.epa.gov/financial/makepayment>.

70. A copy of the check or other information confirming payment shall simultaneously be emailed to the following:

Regional Hearing Clerk
R7_Hearing_Clerk_Filings@epa.gov; and

Adam Hilbert, Attorney
hilbert.adam@epa.gov

71. Respondent agrees that no portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this Consent Agreement/Final Order shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

72. Interest on any late payment will be assessed at the annual interest rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on any overdue amount from the due date stated in Paragraph 36 above through the date of payment. Failure to pay the civil penalty when due may result in the commencement of a civil action in Federal District Court to collect said penalty, together with costs or interest.

73. Pursuant to 26 U.S.C. § 6050X and 26 C.F.R. § 1.6050X-1, EPA is required to send to the Internal Revenue Service (“IRS”) annually, a completed IRS Form 1098-F (“Fines, Penalties, and Other Amounts”) with respect to any court order or settlement agreement (including administrative settlements) that require a payor to pay an aggregate amount that EPA reasonably believes will be equal to, or in excess of, \$50,000 for the payor’s violation of any law or the investigation or inquiry into the payor’s potential violation of any law, including amounts paid for “restitution or remediation of property” or to come “into compliance with a law.” EPA is further required to furnish a written statement, which provides the same information provided to the IRS, to each payor (i.e., a copy of IRS Form 1098-F). Failure to comply with providing IRS Form W-9 or Tax Identification Number (“TIN”), as described below, may subject Respondent to a penalty, per 26 U.S.C. § 6723, 26 U.S.C. § 6724(d)(3), and 26 C.F.R. § 301.6723-1. To provide EPA with sufficient information to enable it to fulfill these obligations, EPA herein requires, and Respondent herein agrees, that:

- a. Respondent shall complete an IRS Form W-9 (“Request for Taxpayer Identification Number and Certification”), which is available at <https://www.irs.gov/pub/irs-pdf/fw9.pdf>;
- b. Respondent shall certify that its completed IRS Form W-9 includes Respondent’s correct TIN or that Respondent has applied and is waiting for issuance of a TIN;
- c. Respondent shall email its completed Form W-9 to EPA’s Cincinnati Finance Center at weidner.lori@epa.gov within 30 days after the Final Order ratifying this Agreement is filed, and EPA recommends encrypting IRS Form W-9 email correspondence; and
- d. In the event that Respondent has certified in its completed IRS Form W-9 that it has applied for a TIN and that TIN has not been issued to Respondent within 30 days after the Effective Date, then Respondent, using the same email address identified in the preceding sub-paragraph, shall notify EPA of this fact within 30 days after the Effective Date of this Consent Agreement and Final Order, and email EPA with Respondent’s TIN within 5 days of Respondent’s issuance and receipt of the TIN.

Effect of Settlement and Reservation of Rights

74. Respondent’s payment of the entire civil penalty pursuant to this Consent Agreement/Final Order resolves all civil and administrative claims pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), for alleged violations identified in this Complaint and Consent Agreement/Final Order. Complainant reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law.

75. The effect of settlement described above is conditional upon the accuracy of the Respondent's representations to the EPA, as memorialized in this Consent Agreement/Final Order.

76. Nothing contained in this Consent Agreement/Final Order shall alter or otherwise affect Respondent's obligations to comply with all applicable federal, state and local environmental statutes and regulations and applicable permits.

77. Notwithstanding any other provision of this Consent Agreement/Final Order, the EPA reserves the right to enforce the terms of this Consent Agreement/Final Order by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319, and to seek penalties against Respondent or to seek any other remedy allowed by law.

78. With respect to matters not addressed in this Consent Agreement/Final Order, the EPA reserves the right to take any enforcement action pursuant to the CWA and its implementing regulations, or any other available legal authority, including without limitation, the right to seek injunctive relief, penalties and damages.

General Provisions

79. The parties acknowledge that this Consent Agreement/Final Order is subject to the public notice and comment required pursuant to Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45.

80. Pursuant to 40 C.F.R. § 22.31(b), this Consent Agreement/Final Order shall be effective after signature by the authorized regional official and upon filing with the Regional Hearing Clerk, U.S. Environmental Protection Agency, 11201 Renner Boulevard, Lenexa, Kansas 66219. All time periods herein shall be calculated therefrom in calendar days unless otherwise provided in this Consent Agreement/Final Order.

81. The state of Kansas has been provided an opportunity to consult with Complainant regarding this matter in accordance with the requirements of 40 C.F.R. § 22.38(b) and Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1).

82. The headings in this Consent Agreement/Final Order are for convenience of reference only and shall not affect interpretation of this Consent Agreement/Final Order.

83. Respondent and Complainant agree that this Consent Agreement/Final Order may be signed electronically in part and counterpart.

For the Complainant, United States Environmental Protection Agency Region 7:

David Cozad
Director
Enforcement and Compliance Assurance Division

Adam Hilbert
Office of Regional Counsel

For Respondent:

D&S Cattle Company, LLC

Jane A Vathauer Secretary
SIGNATURE

12-1-2025

DATE

Jane A Vathauer Secretary
NAME/TITLE

FINAL ORDER

Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation, Termination or Suspension of Permits, 40 C.F.R. Part 22, the foregoing Consent Agreement resolving this matter is hereby ratified and incorporated by reference into this Final Order.

The Respondent is ORDERED to comply with all of the terms of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(b), the effective date of the foregoing Consent Agreement and this Final Order is the date on which this Final Order is filed with the Regional Hearing Clerk.

IT IS SO ORDERED

Date

Karina Borromeo
Regional Judicial Officer

Certificate of Service

I certify a true and correct copy of the Complaint and Consent Agreement / Final Order was sent this day in the following manner to the addressees:

Copy by email to representative for Respondent:

Janece Vathauer
Respondent
vathauer@twinvalley.net

For Complainant, U.S. Environmental Protection Agency Region 7:

Suzanne Ward
Enforcement and Compliance Assurance Division
ward.suzanne@epa.gov

Adam Hilbert
Office of Regional Counsel
hilbert.adam@epa.gov

Date

Signature