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IN THE DISTRICT COURT OF HALL COUNTY, NEBRASKA

STATE OF NEBRASKA, ex rel.,)
JIM MACY, Director, NEBRASKA)
DEPARTMENT OF ENVIRONMENT)
AND ENERGY,)

Case No. CI19-593

Plaintiff,)

COMPLAINT

v.)

FILED

C & I CATTLE COMPANY, a Nebraska)
Corporation, and KEN A. KOHLHOF, as)
an individual,)

JUL 19 2019

**VALORIE BENDIXEN
CLERK OF DISTRICT COURT**

Defendants.

COMES NOW the Nebraska Department of Environment and Energy¹ (hereinafter "NDEE"), who institutes this action through Douglas J. Peterson, Attorney General of the State of Nebraska, and alleges and states as follows:

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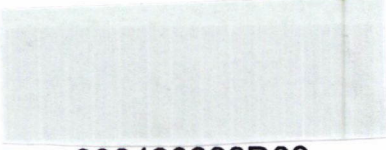
PARTIES

1. NDEE is an agency of the State of Nebraska charged with the duty to administer and enforce the Environmental Protection Act, NEB. REV. STAT. § 81-1501 *et seq.*, and the Livestock Waste Management Act, NEB. REV. STAT. § 54-2416 *et seq.*

2. C & I Cattle Company (hereinafter "C & I Cattle") is a domestic corporation incorporated in the State of Nebraska with a principal place of business at 11225 W. Loup River Road, Dannebrog, Hall County, Nebraska. C & I Cattle operates a large confined animal feeding operation in Hall and Howard Counties. Ken Kohlhof is the registered agent, president, and only director of C & I Cattle.

3. Ken A. Kohlhof is a resident of Hall County, Nebraska, and is the owner of C & I Cattle Company.

¹ On July 1, 2019, the name of the agency changed from the Nebraska Department of Environmental Quality to the Nebraska Department of Environment and Energy. For simplicity, this Complaint refers to the agency uniformly as the Nebraska Department of Environment and Energy.



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JURISDICTION AND VENUE

4. The District Court has subject matter jurisdiction pursuant to Neb. Rev. Stat. § 24-302 (Reissue 2016).

5. Venue is proper in Hall County pursuant to Neb. Rev. Stat. § 25-403.01 (Reissue 2016) as C & I Cattle is located primarily in Hall County, Ken Kohlhof is a resident of Hall County, and a significant part of the actions leading to the cause of action arose in Hall County.

FACTUAL ALLEGATIONS

6. C & I Cattle operates a large confined animal feeding operation in Hall and Howard Counties. The property straddles the line between Hall County and Howard County on either side of West Loup River Road, with the majority of the feeding facility on the Hall County side.

7. C & I Cattle's feeding facility is approximately two miles south of the Middle Loup River. In between the feeding facility and the Middle Loup River are pastures and fields, as well as intervening water bodies and wetlands.

8. Upon information and belief, the feeding facility was constructed in 2006. From June of 2009 to October of 2012, the feeding facility contained fewer than 999 head of cattle. Upon information and belief, since approximately November of 2012 the facility has housed more than 999 head of cattle.

9. On May 6, 2014, NDEE sent a letter to C & I Cattle informing them that a livestock waste control facility ("LWCF") was required for the property and that a Construction and Operating Permit and a National Pollution Discharge Elimination System ("NPDES") Permit were required before the LWCF could be built or the facility could be operated. The letter required a completed application for a Construction and Operating Permit and a completed application for an NPDES Permit to be submitted to NDEE by December 31, 2014.

10. On August 11, 2014, a Notice of Violation (“NOV”) was issued by NDEE to C & I Cattle for failure to request an inspection. The NOV required C & I Cattle to pay late fees for inspection. C & I Cattle paid the late fees to NDEE on September 19, 2014. No further enforcement is sought for that violation.

11. On December 4, 2014, C & I Cattle requested an extension of the deadline for the submission of Construction and Operating Permit and NPDES Permit applications. The extension request was granted on December 9, 2014, establishing a new application deadline of March 31, 2015.

12. On March 23, 2015, C & I Cattle requested an extension of the deadline for the submission of Construction and Operating Permit and NPDES Permit applications. The extension request was granted on April 16, 2015, extending the deadline to November 1, 2015. The letter granting the extension also stated, “A review of our files indicates that this is the second time the Department has granted an extension to the compliance date for the submission of a completed application. Any additional requests for extensions may be denied.”

13. On April 27, 2015, C & I Cattle requested an inspection for a potential expansion of their feeding operation. An inspection was conducted on April 30, 2015 and NDEE sent a letter to C & I Cattle informing them that a LWCF would be required for the proposed operation (in addition to requirements for the existing operation) and that a Construction and Operating Permit and NPDES Permit were required before the facility could be built or operated. Completed applications for both permits were due to NDEE by November 1, 2015.

14. On October 30, 2015, C & I Cattle submitted a permit application to NDEE for both a Construction and Operating Permit and an NPDES Permit. The permit application showed a current population of 4000 head of cattle and a proposed expansion of 2250 head of cattle.

15. On November 19, 2015, NDEE sent a letter to C & I Cattle informing them that the permit applications were incomplete and that additional information was required. The letter stated

that, "Your submission of incomplete applications does not fulfill your regulatory obligation. In order to reestablish compliance, you must submit complete applications for a Construction and Operating Permit and for coverage under an NPDES Permit **as soon as possible.**"

16. On May 11, 2016, an NDEE investigator conducted a discharge investigation from a discharge that began on May 10, 2016 until May 11, 2016. The investigator observed a discharge of feedlot waste that entered the road ditch south of West Loup River Road. The discharged waste crossed north under the road into a pasture.

17. On January 3, 2017, NDEE issued an NOV to C & I Cattle for failure to submit completed permit applications by the required deadline.

18. On January 20, 2017, NDEE received an application for a Construction and Operating Permit from C & I Cattle. On February 8, 2017, NDEE sent C & I Cattle a letter informing them that the permit application was incomplete, citing several deficiencies and informing C & I Cattle that completed applications must be submitted as soon as possible.

19. On March 24, 2017, NDEE issued an NOV to C & I Cattle citing several violations, including failing to file completed permit applications with NDEE, operating an animal feeding operation prior to construction of an LWCF, and allowing a discharge to occur.

20. On May 2, 2017, an NDEE investigator conducted a discharge investigation for a reported discharge from April 28, 2017 through May 2, 2017. The investigator observed feedlot waste leaving the facility and entering the south ditch of West Loup River Road. The waste then flowed under the road and into a pasture to the north, and from there into a freshwater pond. The freshwater pond was purple in color and smelled like a livestock waste lagoon.

21. On May 9, 2017, NDEE issued an NOV for the May 2, 2017 discharge requiring C & I Cattle to stop all discharges, submit a "Notification of Discharge" form, and submit completed permit applications for a Construction and Operating Permit and NPDES Permit as soon as possible.

22. On May 19, 2017, C & I Cattle self-reported a discharge between May 9, 2017 and May 10, 2017 through a "Notification of Discharge of Livestock Waste." C & I Cattle stated that, "[t]his discharge actually is running through a ditch, a cornfield for a half mile, a pasture low spot for ¼ mile and ends up in a make shift dam that takes drainage for an additional 700 acres. Then it flows through a vegetative series through a marsh."

23. Also on May 19, 2017, C & I Cattle self-reported a discharge between May 17, 2017 and May 19, 2017 through a "Notification of Discharge of Livestock Waste." C & I Cattle again acknowledged that waste reached the freshwater pond.

24. On May 21, 2017, C & I Cattle self-reported a discharge between May 20, 2017 and May 21, 2017 through a "Notification of Discharge of Livestock Waste."

25. On May 25, 2017, NDEE issued an NOV to C & I Cattle requiring them to cease all discharges and, as soon as possible, submit completed applications for a Construction and Operating Permit and NPDES Permit.

26. On June 5, 2017, C & I Cattle submitted applications for a Construction and Operating Permit and NPDES Permit. On June 14, 2017, NDEE sent a letter to C & I Cattle informing them that their applications were not complete and that additional information was necessary. The letter cited a complete failure to include the pens in Howard County and a failure to meet the four foot separation requirements between the floor of the LWCF and the top of groundwater. The letter requested the additional information to be submitted by July 1, 2017. On August 16, 2017, NDEE sent a letter to C & I Cattle informing them that even though they had failed to submit all of the requested information, NDEE would review the application materials that were submitted.

27. On October 2, 2017, an NDEE investigator conducted a discharge investigation for a reported discharge from between September 30, 2017 to October 2, 2017. The discharge left the facility and followed the same path north into the pasture as previous discharges.

28. After additional communications and additional updates to the application, NDEE issued a Construction and Operating Permit on January 18, 2018. Construction of the LWCF was required to be completed by September 15, 2018.

29. After an extension request in September 2018, NDEE issued a Modified Construction and Operating Permit. Under the modified permit, construction of the LWCF was to be completed by December 15, 2018.

30. Until January 18, 2018, C & I Cattle had not received a Construction and Operating Permit. Although an application has been submitted, to date C & I Cattle has not received an NPDES Permit.

31. To date, C & I Cattle has not completed construction of the required livestock waste control facility.

32. C & I Cattle continues to discharge feedlot waste at periodic intervals.

CAUSES OF ACTION

FIRST CAUSE OF ACTION – FAILURE TO OBTAIN A CONSTRUCTION AND OPERATING PERMIT OR NPDES PERMIT

33. The allegations contained in paragraphs 1 through 32 above are incorporated herein by reference.

34. Under NEB. REV. STAT. § 54-2432, it shall be unlawful for any person to:

(1) Construct or operate an animal feeding operation prior to an inspection from the department, unless exempted from inspection 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;

...

(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.

35. Under NEB. REV. STAT. § 81-1506(5), “[i]t 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 and promulgated by the council pursuant to such acts.”
36. C & I Cattle is required by state law to have both a Construction and Operating Permit and an NPDES Permit. C & I Cattle is not exempt from either of these requirements.
37. After paying late fees as described in paragraph 10 and receiving extensions as described in paragraphs 11 & 12, C & I Cattle was required to submit satisfactory completed applications for a Construction and Operating Permit and an NPDES Permit to NDEE by November 1, 2015.
38. Until January 18, 2018, C & I Cattle had not received a Construction and Operating Permit. Although an application has been submitted, to date C & I Cattle has not received an NPDES Permit and is operating in contravention of state law.
39. Under Neb. Rev. Stat. § 81-1508.02, a penalty amount is authorized of up to \$10,000 per each continuing day of violation constituting a separate offense for “violat[i]ons of] any air, water, or land quality standards, any emission or effluent standards or limitations, any permit or license condition or limitation, any order of the director, or any monitoring, reporting, or record-keeping requirements contained in or issued or entered into pursuant to the Environmental Protection Act, the Integrated Solid Waste Management Act, or the Livestock Waste Management Act or the rules or regulations adopted and promulgated pursuant to such acts.”
40. C & I Cattle has operated, and is currently operating, an animal feeding operation without an NPDES Permit. NDEE required that a completed application be filed for an NPDES Permit by November 1, 2015.

SECOND CAUSE OF ACTION – OPERATING A LARGE CONFINED ANIMAL FEEDING OPERATION WITHOUT A LIVESTOCK WASTE CONTROL FACILITY

41. The allegations contained in paragraphs 1 through 32 above are incorporated herein by reference.
42. Under NEB. REV. STAT. § 54-2432, it shall be unlawful for any person to:
- (3) Operate an animal feeding operation prior to construction of an approved livestock waste control facility, unless exempted from the requirement for a livestock waste control facility 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;
43. Under 130 Neb. Admin. Code § 2-003, “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.”
44. Under 130 Neb. Admin. Code § 2-008.08, it is unlawful to, “Operate an animal feeding operation prior to construction of an approved livestock waste control facility, unless exempted from the requirements for a construction and operating permit by the Nebraska Environmental Protection Act, Livestock Waste Management Act, or these regulations.”
45. C & I Cattle is required by state law to have a livestock waste control facility for its animal feeding operation, both because of the size of its operation and because they have had discharges from their operation.
46. C & I Cattle has never constructed a livestock waste control facility for its animal feeding operation. C & I Cattle has not received an exemption from the requirement to build a livestock waste control facility and is not exempt from such requirements.
47. C & I Cattle has, and continues, to operate its animal feeding operation without a livestock waste control facility in contravention of state law.

48. Under Neb. Rev. Stat. § 81-1508.02, a penalty amount is authorized of up to \$10,000 per each continuing day of violation constituting a separate offense for “violat[i]ons of] any air, water, or land quality standards, any emission or effluent standards or limitations, any permit or license condition or limitation, any order of the director, or any monitoring, reporting, or record-keeping requirements contained in or issued or entered into pursuant to the Environmental Protection Act, the Integrated Solid Waste Management Act, or the Livestock Waste Management Act or the rules or regulations adopted and promulgated pursuant to such acts.”
49. C & I Cattle has operated, and is currently operating, an animal feeding operation without a livestock waste control facility. A livestock waste control facility has been required since approximately 2012 for the facility, and certainly since the first date of documented discharge on May 10, 2016. C & I Cattle is out of compliance with the requirement to build a livestock waste control facility.

**THIRD CAUSE OF ACTION – DISCHARGE FROM
AN ANIMAL FEEDING OPERATION**

50. The allegations contained in paragraphs 1 through 32 above are incorporated herein by reference.

51. Under Neb. Rev. Stat. § 54-2432(4), it is unlawful for any person to, without a permit:

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.

52. Under Neb. Rev. Stat. § 81-1506(1)(a), it is unlawful for any person 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.”

53. Under 130 Neb. Admin. Code § 2-008, any person who owns or operates an animal feeding operation shall not:

008.02 Allow livestock at an animal feeding operation to come into contact with waters of the State, apply livestock waste on or into waters of the State, or to otherwise allow or cause a discharge;

...

008.10 Discharge animal excreta, feed, bedding, spillage, or overflow from water 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 NPDES permit, a construction and operating permit, construction approval, or exemption from the Department, if required by the Nebraska Environmental Protection Act, Livestock Waste Management Act, or these regulations;

...

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.

54. Under 130 Neb. Admin. Code § 7-001, “For existing large beef . . . concentrated animal feeding operations . . . there shall be no discharge of manure, litter, or process wastewater pollutants into the waters of the state from the production area” unless precipitation causes an overflow from a production area that is “[d]esigned, constructed, operated and maintained to contain all manure, litter, and process wastewater including the runoff and the direct precipitation from a 25-year, 24-hour rainfall event,” and “[o]perated in accordance with these regulations.”

55. Due to the lack of a livestock waste control facility, C & I Cattle has repeatedly discharged animal waste from its facility, which, at all times material, was not designed, constructed,

operated or maintained to contain the manure, litter, or process wastewater from a 25-year, 24-hour rainfall event and was not operated in accordance with relevant regulations.

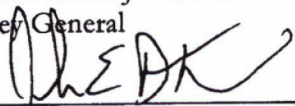
56. C & I Cattle discharged waste from May 10, 2016 until May 11, 2016, as described in paragraph 16, above.
57. C & I Cattle discharged waste from April 28, 2017 through May 2, 2017, as described in paragraph 20, above.
58. C & I Cattle discharged waste from May 9, 2017 through May 10, 2017, as described in paragraph 22, above.
59. C & I Cattle discharged waste from May 17, 2017 through May 19, 2017, as described in paragraph 23, above.
60. C & I Cattle discharged waste from May 20, 2017 through May 21, 2017, as described in paragraph 24, above.
61. C & I Cattle discharged waste from September 30, 2017 through October 2, 2017, as described in paragraph 27, above.
62. Each of the discharges described in paragraphs 55 through 60 have left C & I Cattle's facility. Many of them have run under the county road and into a pasture to the north, in a place likely to reach waters of the state.
63. C & I Cattle's discharges have caused anaerobic conditions in a stock pond on neighboring property, causing the pond to turn purple and smell like livestock waste.
64. C & I Cattle's discharges have violated state law and caused irreparable injury to waters of the State.
65. There is no adequate remedy at law for C & I Cattle's discharges.

PRAYER FOR RELIEF

66. C & I Cattle operated without a Construction and Operating Permit through January 18, 2018.
67. C & I has operated, and is currently operating, without an NPDES permit.
68. C & I has operated, and is currently operating, without an approved livestock waste control facility.
69. C & I Cattle has discharged livestock waste from its facility in contravention of state law over approximately 17 days.
70. Under Neb. Rev. Stat. § 81-1508.02, a penalty amount is authorized of up to \$10,000 per each continuing day of violation constituting a separate offense, subject to the discretion of the Court.
71. WHEREFORE, under the First, Second, and Third Causes of Action, the Plaintiff requests a judgment in the form of civil penalties in an amount to be determined at trial, subject to the discretion of the Court.
72. Under the First, Second, and Third Causes of Action, C & I Cattle has caused irreparable harm to the State that cannot be remedied by money damages. The Plaintiff requests injunctive relief requiring C & I Cattle to completely depopulate its feeding operation and remove all manure that could be discharged by a rain event or other cause from the premises until such time that proper permits have been received and the facility is in compliance with Nebraska law.
73. Any other relief deemed appropriate by the Court.

STATE OF NEBRASKA, ex rel.,
JIM MACY, Director
NEBRASKA DEPARTMENT OF
ENVIRONMENT AND ENERGY,
Plaintiff,

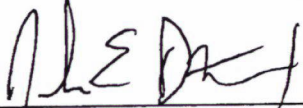
By: DOUGLAS J. PETERSON #18146
Attorney General

By: 
Joshua E. Dethlefsen, #24667
Justin D. Lavene, #22178
Assistant Attorney General
2115 State Capitol Building
Lincoln, Nebraska 68509-8920
Telephone: (402) 471-1813
joshua.dethlefsen@nebraska.gov

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Complaint was served on the Defendant by electronic mail on this 18th day of July, 2019, addressed to the Defendant's counsel as follows:

David A. Domina
ddomina@dominalaw.com


Joshua E. Dethlefsen
Assistant Attorney General