

4. Section 402 of the CWA, 33 U.S.C. § 1342, provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to that Section.
5. Section 504(12) of the CWA, 33 U.S.C. § 1362(12), defines the term "discharge of pollutant" to include "any addition of any pollutant to navigable waters from any point source."
6. To implement Section 402 of the CWA, EPA promulgated regulations codified at 40 C.F.R. Part 122. Under C.F.R. Part 122.1, a NPDES permit is required for the discharge of pollutants from any point source into waters of the United States.
7. "Pollutant" is defined by Section 502(6) of the CWA, 33 U.S.C. § 1362 to include, *inter alia*, biological materials and agricultural waste discharged to water.
8. "Point source" is defined by Section 502(14) of the CWA, 33 U.S.C. § 1362 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, concentrated animal feeding operation . . . from which pollutants are or may be discharged."
9. "Animal feeding operation" 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.
10. "Concentrated animal feeding operation" is defined by 40 C.F.R. § 122.23(b)(3) as "an 'animal feeding operation' which meets the criteria in appendix B of this part."
11. Appendix B to 40 C.F.R. § 122.23 states that an animal feeding operation is a concentrated animal feeding operation for purposes of § 122.23 if the animal feeding operation confines more than 1,000 slaughter and feeder cattle.
12. "Waters of the United States" are defined in 40 C.F.R. Part 122.2 to include intrastate rivers and streams, and tributaries thereto.
13. The Facility is located within the exterior boundaries of the Omaha Tribal Reservation. Pursuant to 40 CFR § 123.1, the authority to issue NPDES permits for facilities on Indian lands resides with EPA if a State or Tribal authority does not seek or have authority under

the Clean Water Act to regulate activities on Indian lands.

14. The State of Nebraska lacks authority under the Clean Water Act to regulate activities on Indian lands.
15. To date, the Omaha Indian Tribe has not sought authority to regulate activities under the Clean Water Act.

Factual Background and Findings of Violation

16. Morgan Feed Yard, LLC, is a partnership and therefore a person as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362.
17. Morgan Feed Yard, LLC operates an animal feeding operation ("Facility") located in the SW 1/4 of SW 1/4 of Section 18, T25N, R9E in Thurston County, Nebraska within the exterior boundaries of the Omaha Indian Tribe Reservation.
18. On April 17, 2002, EPA personnel observed conditions at Respondent's Facility from a public road adjacent to the Facility.
19. At the time of the EPA visit, the Facility confined approximately 3,000 head of cattle. The number of cattle confined at the Facility is greater than 1,000 animal units as that term is defined in 40 C.F.R. Part 22, Appendix B.
20. The Facility confines and feeds or maintains cattle for a total of forty five (45) days or more in any twelve-month period.
21. Neither crops, vegetation, forage growth, nor post-harvest residues were sustained over any portion of the Facility at the time of inspection.
22. The Facility is a "concentrated animal feeding operation" as defined by 40 C.F.R. § 122.23(b)(3), and as that phrase is used in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).
23. Cattle are fed at the Facility in two open feedlots, a west feedlot and an east feedlot, located approximately 100 yards apart.
24. The Facility does not have any runoff control structures. Wastewater runoff containing pollutants from the east feedlot flows into a road ditch, then east into an unnamed tributary of South Omaha Creek. Runoff from the west feedlot flows through a culvert under a county road, and then across adjacent cropland south of the feedlot for

approximately 150 meters before it flows into an unnamed tributary of South Omaha Creek. This intermittent stream runs approximately 1½ miles and flows into South Omaha Creek.

25. The South Omaha Creek joins the North Omaha Creek and becomes Omaha Creek, which is a direct tributary of the Missouri River. The Omaha Creek is designated for warmwater aquatic life and agricultural uses.
26. In June 2001, Respondent applied to EPA for an NPDES permit for the open cattle feedlot it owns and operates. EPA is in the process of reviewing Respondent's NPDES permit application.
27. Based on the size of the Facility, the distance from the Facility to waters of the United States, and the slope and condition of the land across that distance, wastewater containing pollutants from the open lots at the Facility will continue to flow into the intermittent stream which discharges into the South Omaha Creek during precipitation events less than a 25 year, 24 hour storm event.
28. The flow of wastewater from Respondent's Facility to the unnamed tributary of South Omaha Creek constitutes unauthorized discharge of pollutants from a point source to waters of the United States, in violation of Sections 301 and 402 of the Clean Water Act, 33 U.S.C. §§ 1311 and 1342, and implementing regulations.

Order For Compliance

Based on the Findings of Violation set forth above, and pursuant to Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), Morgan Feed Yard, LLC, is hereby ORDERED to take the following actions to eliminate its violations of the CWA:

29. Immediately upon receipt of this Order, Morgan Feed Yard, LLC, shall take interim measures to reduce the discharge of runoff from the feedlot to waters of the U.S., until Respondent constructs the waste control structures necessary to comply with the Clean Water Act. Examples of possible interim measures include frequent scraping of the feedlot, movement of cattle to areas of the feedlot where the likelihood of discharge is lessened, and reduction in the number of cattle maintained or fed at the Facility. Respondent shall provide written notice to EPA within 30 days of receipt of this Order, describing all interim measures it has taken and will continue to take to reduce discharges until waste control structures are constructed at the Facility.

30. Within sixty days (60) of receipt of this Order, Morgan Feed Yard, LLC, shall submit to EPA for review and comment a report conducted by a licensed professional engineer (hereinafter referred to as the "Waste Management Plan") which evaluates the waste handling needs of the Facility and proposes a design for a waste handling system that will enable Respondent to operate in full compliance with the Clean Water Act and its implementing regulations. The waste management system shall be a fully integrated system in which storage capacity is determined based on the amount of wastewater to be controlled, and the equipment and land available throughout the year for proper disposal of wastewater. Specific items that shall be addressed in the report include, but are not limited to:
- a. An evaluation of minimum storage capacity needed at the Facility to contain the expected runoff from a 25-year, 24-hour precipitation event, and an evaluation of the minimum design capacity needed at the Facility, sufficient to accommodate snow melt and precipitation during winter and early spring months. The evaluation shall also consider and describe whether any additional storage capacity is needed to contain runoff during periods when wastewater application is limited due to cropping practices.
 - b. All the elements of a Comprehensive Nutrient Management Plan, including an evaluation of the amount of solids, liquids, and nutrients to be disposed of annually by the Facility; an evaluation and description of the amount and location of land needed and available for land application of wastes from the Facility, considering agronomic application rates of nutrients (including nitrogen and phosphorus) in light of planned cropping practices, and the availability of land application sites throughout the year due to cropping practices. The report shall also include a county or USGS map on which the specific land application sites to be utilized by Respondent are identified.
 - c. A description of the types and capacities of equipment to be used for removing and land applying both solid and liquid wastes, and an evaluation of the Facility's ability to restore storage capacity following precipitation events.
 - d. Drawings and plans for proposed waste management improvements for the Facility.
 - e. A proposed schedule for expeditious construction of all necessary waste management improvement to the Facility.
 - f. An Operation and Maintenance Plan, which includes a description of actions Respondent will take to monitor wastewater storage levels and restore storage

capacity following precipitation events.

Any or all of the above requirements may be met by submitting appropriate documents (existing or to be developed) that may be required by state or local authorities and which contain the required information.

31. Upon review of the Waste Management Plan, EPA may provide comments to Respondent.
32. At the same time that Respondent submits the Waste Management Plan to EPA for review, Respondent shall submit any required local and/or state construction permit applications that are necessary prior to initiation of construction of waste control systems at the Facility.
33. Upon receipt of any required local/state construction permits, Respondent shall commence construction of the required improvements in accordance with the schedule set forth in the Waste Management Plan. Respondent shall notify EPA in writing within 30 days of when construction is completed, and shall include in such notification as-built drawings of the constructed improvements.
34. Beginning upon issuance of this Order and continuing until construction of waste management control structures is complete, Respondent shall submit monthly reports to EPA, describing progress made, problems encountered, and actions taken during the preceding month, as well as planned actions during the upcoming month. The monthly reports shall be submitted to EPA by the tenth of each month.
35. Beginning upon completion of construction and continuing until such time as EPA makes a final decision regarding Respondent's NPDES permit application, Respondent shall maintain the following operational records: storage facility liquid levels after every event with potential to change the amount of liquid in the storage facility; land application records, including dates, location, amounts applied, and application rates; precipitation records.

Effect of Order

36. Compliance with the terms of this Order shall not relieve Respondent of liability for, or preclude EPA from initiating an administrative or judicial enforcement action to recover penalties for any violations of the CWA, or seek additional injunctive relief, pursuant to Section 309 of the CWA, 42 U.S.C. § 1319.

In the Matter of Morgan Feed Yard, LLC
Docket No. CWA-07-2002-0173

37. This Order shall not constitute a permit under the CWA. Compliance with the terms of this Order shall not relieve Respondent of its responsibility to obtain any required local, state and/or federal permits.
38. Nothing in this Order shall limit EPA's right to obtain access to, and/or inspect Respondent's Facility, and/or to request additional information from Respondent, pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318.
39. EPA may subsequently amend this Order in accordance with the authority of the CWA. For example, EPA may amend this Order to address any noncompliance with the CWA, including, but not limited to, any noncompliance with the requirements of Section 402 of the CWA. In the event of any such subsequent amendment to this Order, all requirements for performance of this Order not affected by the amendment shall remain as specified by this original Order.
40. If any provision or authority of this Order, or the application of this Order to Respondent is held by federal judicial authority to be invalid, the application to Respondent of the remainder of this Order shall remain in full force and effect and shall not be affected by such a holding.
41. All submissions to EPA required by this Order shall be sent to:

Paula Higbee
CAFO Enforcement Coordinator
Water, Wetlands, and Pesticides Division
U.S. Environmental Protection Agency – Region VII
901 N. 5th Street
Kansas City, KS 66101
42. Pursuant to 40 C.F.R. §§ 2.201-2.311, Respondent may assert a business confidentiality claim covering any portion of the submitted information which is entitled to confidential treatment and which is not effluent data. For any such claim, describe the basis for the claim under the applicable regulation. Any material for which business confidentiality is claimed should be placed in a separate envelope labeled, "Confidential Business Information." Failure to assert a claim in the manner described in 40 C.F.R. § 2.203(b) allows EPA to release the submitted information to the public without further notice. EPA may disclose information subject to the business confidentiality claim only to the extent set forth in the above-cited regulations. Special rules governing information obtained under the Clean Water Act appear in 40 C.F.R. § 2.302.

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43. Notice is hereby given that violation of, or failure to comply with, any of the provisions of the foregoing Order may subject Respondent to (1) civil penalties of up to \$27,500 per day for each violation, pursuant to Section 309(d) of the Act, 33 U.S.C. § 1319(d); or (2) civil action in federal court for injunctive relief, pursuant to Section 309(b) of the Act, 33 U.S.C. § 1319(b).
44. The terms of this Order shall be effective and enforceable against Respondent upon its receipt of the Order.

Date

7/16/02



Leo Alderman, Director
Water, Wetlands, and
Pesticides Branch

Date

7/16/02



David Cozad
Associate Regional Counsel

CERTIFICATE OF SERVICE

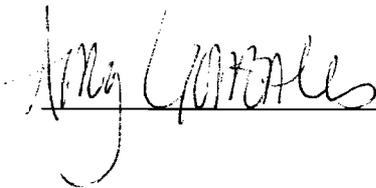
I certify that on the date note below I filed the original and one true and correct copy of the signed original Findings of Violation and Order of Compliance with the Regional Hearing Clerk, Region VII.

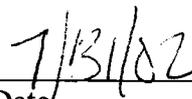
I further certify that I sent by certified mail, return receipt requested, a true and correct copy of the signed original Findings of Violation and Order for Compliance together with cover letter and small business assistance information, to the following registered agent for Morgan Feed Yard, LLC.:

Brad Morgan
Morgan Feedlot, L.L.C.
RR 1
Walthill, NE 68067

I further certify that on the date noted below, I sent by certified mail, return receipt requested, a true and correct copy of the signed original Findings of Violation and Order for Compliance to the following representative of the State of Nebraska:

Dennis Heitmann
Supervisor, Agriculture Section
Water Quality Division
Nebraska Department of Environmental Quality
Suite 400, 1200 N Street, The Atrium
Lincoln, NE 68509




Date _____