

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

901 NORTH FIFTH STREET  
KANSAS CITY, KANSAS 66101

BEFORE THE ADMINISTRATOR

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ENVIRONMENTAL PROTECTION  
AGENCY REGION VII  
REGIONAL HEARING CLERK

IN THE MATTER OF  
MORAN BEEF, INC.,

Respondent

ANSWER TO AMENDED COMPLAINT  
AND REQUEST FOR HEARING

Docket No. CWA-07-2010-0080

COMES NOW the Respondent, Moran Beef, Inc., by and through its attorney, Eldon L. McAfee, and for its Answer to the EPA's Amended Complaint and Notice of Opportunity for Hearing, states:

1. Respondent admits paragraph 1.
2. Respondent denies paragraph 2.
3. Respondent admits paragraph 3.
4. Respondent admits that the animal feeding operations are located at the address alleged in paragraph 4.
5. Respondent admits paragraph 5.
6. Respondent admits paragraph 6.
7. Respondent admits paragraph 7.
8. Respondent admits paragraph 8.
9. Respondent admits paragraph 9.
10. Respondent admits paragraph 10.

11. Respondent admits paragraph 11.
12. Respondent admits paragraph 12.
13. Respondent admits paragraph 13.
14. Respondent admits paragraph 14.
15. Respondent admits paragraph 15.
16. Respondent admits paragraph 16.
17. Respondent admits paragraph 17.
18. Respondent admits paragraph 18.
19. Respondent admits paragraph 19.
20. Respondent admits paragraph 20.
21. Respondent admits paragraph 21.
22. Respondent admits paragraph 22.
23. Respondent admits paragraph 23.
24. Respondent admits paragraph 24.
25. Respondent denies paragraph 25 for lack of information sufficient to form a belief.
26. Respondent denies paragraph 26 for lack of information sufficient to form a belief.
27. Respondent denies paragraph 27 for lack of information sufficient to form a belief.
28. Respondent admits paragraph 28.
29. Respondent denies paragraph 29.
30. Respondent denies paragraph 30.

31. Respondent denies paragraph 31.
32. Respondent denies paragraph 32.
33. Respondent reincorporates its answers to paragraphs 4 through 32 in this paragraph 33.
34. Respondent admits paragraph 34.
35. Respondent denies paragraph 35.
36. Respondent denies paragraph 36.
37. Respondent denies paragraph 37.
38. Respondent reincorporates its answers to paragraphs 4 through 37 in this paragraph 38.
39. Respondent denies paragraph 39.
40. Respondent denies paragraph 40.
41. Respondent denies paragraph 41.
42. Respondent admits paragraph 42.
43. Respondent admits that EPA is proposing a penalty as set out in paragraph 43. All other allegations in paragraph 43 are denied.
44. Respondent denies paragraph 44 for lack of information sufficient to form a belief.
45. Respondent denies paragraph 45 for lack of information sufficient to form a belief.
46. Respondent admits paragraph 46.
47. Respondent admits paragraph 47.
48. Respondent admits paragraph 48.

49. Respondent admits paragraph 49.
50. Respondent admits paragraph 50.
51. Respondent admits paragraph 51.
52. Respondent admits paragraph 52.
53. Respondent admits paragraph 53.
54. Respondent admits paragraph 54.
55. Respondent admits paragraph 55.
56. Respondent admits paragraph 56.
57. Respondent admits paragraph 57.

#### **DEFENSES TO PROPOSED CIVIL PENALTY**

Respondent submits that the EPA's proposed penalty is inappropriate considering the statutory factors and specific facts of this case.

1. EPA alleges that Moran Beef is a large CAFO and is therefore subject to the Clean Water Act as a point source. However, Moran Beef consists of a totally enclosed deep bedded confinement barn and an open feedlot. At the time of the June 4, 2009 EPA inspection, the open feedlot had 623 cattle and the confinement building had 862 cattle. Under EPA regulations, the numbers of cattle in the confinement barn and the open lot are added together if the two operations are adjoining. In this case, crop ground separates the two operations. Under the regulations effective February 12, 2003, only the animal production areas are included in the definition of animal feeding operation and land areas where no production occurs are excluded. See Fed. Reg. Vol. 68, No. 29, Feb. 12, 2003, pp. 7196-7197. Accordingly, Moran Beef's open lot and confinement barn are

not adjoining and therefore neither operation is a large CAFO subject to Clean Water Act discharge requirements.

2. EPA's sample results from the samples taken on October 30, 2009, referenced in ¶25 and taken on September 23, 2010, referenced in ¶27 of the Amended Complaint do not show that a discharge of pollutants from the Moran Beef open lot or confinement barn occurred. First, the sample taken on October 30, 2009 from a drainage pipe with very little water in it and the water in the drainage pipe came from surface flow over a cornfield that is in between the open lot and the sampling point. Any pollutants that are in the samples collected that day are more likely than not to have come from the more than twenty acres of cornfield that drain to this discharge point. Second, the sample taken on October 30, 2009 shows no evidence of a discharge of pollutants from the cattle confinement barn. In addition, even if EPA's sampling results could be proven to show a discharge, contrary to the allegations in ¶'s 25, 27, 35 and 36 of the Amended Complaint, EPA has at the most proof of one discharge event. Due to the real world variability in precipitation and runoff that may or may not occur from any particular runoff event, EPA cannot extrapolate one sampling as proof of discharges on other days.

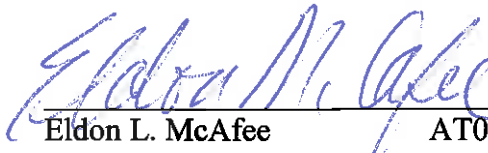
3. During the EPA site inspection on June 4, 2009, Mr. Trevor Urban of the EPA expressly told Frank Moran and his consultant, Joe Turner, that Moran Beef should not proceed with constructing runoff controls on the open lot until Moran Beef received his inspection report. That report is date stamped September 25, 2009. Due to the date of receipt of the report, it was not possible for Moran Beef to get the necessary permit work accomplished and initiate construction during the 2009 construction season. Moran Beef has obtained an NPDES permit and has completed construction of the necessary controls.

## REQUEST FOR A HEARING

Pursuant to 40 C.F.R. section 22.15(c), Respondent requests a hearing on the issues raised in the Complaint and in this Answer.

Dated this 28th day of February, 2011.

BEVING, SWANSON & FORREST, P.C.



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### CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon each of the attorneys of record of all parties to the above-entitled cause herein at their respective addresses disclosed on the pleadings of record on the 28th day of February, 2011.

By:  U.S. Mail  FAX  
 Hand Delivered  Overnight Courier  
 Federal Express  Other: \_\_\_\_\_

Signature: 

Original and one copy to:

Regional Hearing Clerk  
U.S. EPA, Region VII  
901 North 5<sup>th</sup> Street  
Kansas City, KS 66101

Copy by regular U.S. Mail to:

Judge Barbara A. Gunning  
U.S. Environmental Protection Agency  
Office of Administrative Law Judges  
1200 Pennsylvania Ave. NW  
Mail Code 1900L  
Washington, DC 20460

Chris Muehlberger, Asst. Regional Counsel  
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