

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION VII  
901 NORTH 5<sup>TH</sup> STREET  
KANSAS CITY, KANSAS 66101

Circle T Feedlot, Inc. – Draft NPDES Permit No. NE0134481  
Morgan Feedlot LLC – Draft NPDES Permit No. NE0134767  
Sebade Feedyard – Draft NPDES Permit No. NE0135712  
Stanek Brothers – Draft NPDES Permit No. NE034775  
Bruns Feedlot, LLC – Draft NPDES Permit No. NE0135399  
LBBJ, Inc. – Draft NPDES Permit No. NE0134961  
Ron Bruns Feed Yards, Homeplace – Draft NPDES Permit No. NE0135704  
Ron Bruns Feed Yards, Eastplace – Draft NPDES Permit No. NE0106526

Response to Comments  
January 2008

On July 19, 2007, the United States Environmental Protection Agency (EPA) placed on public notice draft National Pollutant Discharge Elimination System (NPDES) permits for the eight concentrated animal feeding operations (CAFOs) listed above. EPA received timely comments and a request for a public hearing, which was held December 13, 2007. The comments received from the public hearing concerning the draft NPDES permits are summarized below with EPA's responses.

EPA's responses to public comments are mandated by the Code of Federal Regulations (CFR). 40 CFR §25.8 requires EPA to "summarize the public's views, significant comments, criticisms and suggestions; and set forth the agency's specific responses ..."

*Comments made by some individuals:*

*The commentors assert that the Clean Water Act (CWA) NPDES program, as directly implemented by Region 7, should not apply to the CAFOs located within the Omaha and Winnebago Indian Reservation because they are not within Indian country. The commentors further argue that EPA has no authority to issue the permits.*

*Response:*

EPA is issuing four NPDES permits to the Circle T Feedlot, Inc., Morgan Feedlot LLC, Sebade Feedyard, and Stanek Brothers facilities. These facilities are in Indian country and EPA received no specific comments concerning these four facilities. EPA is postponing issuance of NPDES permits to the Ron Bruns Feed Yards (Eastplace), Ron Bruns Feed Yards (Homeplace), Bruns Feedlot, LLC, and LBBJ, Inc. facilities pending the outcome of litigation concerning the Omaha Reservation boundary currently with the Omaha Tribal Court.

EPA has authority to issue these four CAFO permits because: 1) EPA is authorized to issue NPDES permits in Indian country (or “Indian lands” – EPA’s uses these terms interchangeably) where no State or Tribe has been authorized; 2) EPA has not approved the State or Tribe to implement the NPDES program within the Omaha Reservation and Winnebago; and 3) the facilities are within the Omaha and Winnebago Indian Reservations.

Congress granted EPA the authority to issue NPDES permits under Section 402(a) of the CWA. EPA’s policies and procedures are set forth in the CFR. Section 123.1(h) of 40 CFR states that “EPA will administer the (NPDES) program on Indian lands if a State (or Indian Tribe) does not seek or have authority to regulate activities on Indian lands.” In addition, the Regional Administrator may designate CAFOs in “Indian country where no entity has expressly demonstrated authority and has been expressly authorized by EPA to implement the NPDES program.” 40 CFR Section 122.23(c)(1)(ii). Neither the Tribe nor the State has an approved NPDES CAFO program for the Omaha Reservation. The Tribe has not requested EPA approval of an NPDES permit program for the Reservation under the CWA. See 40 CFR Part 123 and 58 Fed. Reg. 67966 (December 22, 1993), *Treatment of Indian Tribes as States*, for certain sections of the CWA (TAS rule). Nor has Nebraska ever requested EPA approval to establish a state NPDES program for implementation within Indian country. See 40 CFR § 123.23(b).

Indian country includes “all land within the limits of any Indian reservation under the jurisdiction of the United States Government.” 18 U.S.C. § 1151(a). Region 7 has determined that the Circle T Feedlot, Inc., Morgan Feedlot LLC, Sebade Feedyard, and Stanek Brothers facilities are under EPA jurisdiction because: (1) they are not within the disputed area concerning the abovementioned litigation and (2) the Bureau of Indian Affairs has advised EPA that the remaining land is within Omaha Reservation property (See May 12, 2006 letter from BIA Branch of Realty Superintendent Tammie Poitra to Jane Kloeckner, EPA Office of Regional Counsel, Tab B4 of the Administrative Record).

One commenter cites *Michigan v. EPA*, 268 F.3d 1075 (DC Cir. 2001) and argues that “EPA cannot implement a federal program” without first determining “the scope of state and tribal jurisdiction.” Specifically, *Michigan* held that EPA cannot issue permits where the boundaries of Indian country are “in question.” However, the CAFOs where EPA is issuing final permits are located within the Omaha and Winnebago Reservations. Therefore, the status of these CAFOs existing in Indian country is not “in question.” The *Michigan* court also expressly recognized that Indian country includes “all land within the limits of any Indian reservation.” *Michigan*, 268 F3d at 1079, quoting *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 527 (1998) (construing 18 U.S.C. § 1151(a)). Finally, *Michigan* involved the Clean Air Act, which provides separate procedural requirements than the Clean Water Act.

The same commenter cites both *Nevada v. Hicks*, 533 U.S. 353 (2001) and 33 U.S.C. § 1377 (CWA Section 518) as arguments against tribal authority over non-tribal members. The *Hicks* opinion and § 1377, however, are not relevant in this case because

both address *tribal* authority. The NPDES permits in question are issued under *federal*, not tribal, authority. Nor do *Hicks* and § 1377 change the settled policy that “primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribes inhabiting it, and not with the State.” *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 527 n 1 (1998).

The same commenter also cites the abovementioned pending litigation and opinions written by two Nebraska Attorneys General. The litigation and A.G. opinions challenge the location of the Omaha Reservation western boundary, alleging reservation diminishment. Although Attorney General Jon Bruning’s 2007 opinion questions the Omaha Reservation boundary, he explicitly defers to the courts as the final arbiter by acknowledging that “the determination of reservation boundaries is a federal matter...” With respect to the litigation and as mentioned above, even if the courts determine that the Omaha western boundary stops at the railroad right-of-way, the Circle T, Morgan, Stanek, and Sebade CAFOs remain in Indian Country. Therefore, EPA is the permitting authority for these facilities. Concerning the remaining facilities, EPA intends to monitor the outcome of the Tribal court and any subsequent Federal Court litigation to determine permitting authority.

For more information concerning tribal and federal authority in Indian country, please reference the Frequently Asked Questions Supplement to the “Information Repository” provided by EPA to the Thurston County libraries, Fall 2003

***One individual comments that “EPA’s claim to have sole authority for issuing these permits is questionable on being faithful with section 2 of EO 13132, Federalism.”***

***Response:***

Executive Order 13132 requires federal agencies to follow “fundamental federalism principles.” Section Three of the Order requires that federal agency preemption of states’ policymaking discretion should be taken “only where there is constitutional and statutory authority for the action and the national activity is appropriate in light of the presence of a problem of national significance.” As previously stated, Congress has authorized EPA to administer the Clean Water Act in Indian Country. Under Section 101 of the CWA, Congress established goals to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters.” These goals are national both in scope and significance.

***The Nebraska Attorney General commented that EPA should “delay adoption of its Technical Standard for Nutrient Management for (CAFOs) in Indian Country ... until the boundary dispute has been resolved.”***

***Response:***

EPA is postponing issuance of the NPDES permits to Ron Bruns Feed Yards (Eastplace), Ron Bruns Feed Yards (Homeplace), Bruns Feedlot, LLC, and LLBJ, Inc. pending the outcome of the above referenced litigation concerning the Omaha Reservation boundary.

Because the Circle T, Morgan, Stanek, and Sebade facilities are within the Omaha Reservation, the outcome of the litigation will not impact their Indian country status and, therefore, will not impact EPA's regulatory authority over these facilities. Because these CAFOs are subject to EPA's permitting authority, they are also subject to EPA's nutrient management technical standards (*see* 40 CFR § 123.36).

The Technical Standard for Nutrient Management for CAFOs is based on provisions set forth by the Nebraska Natural Resource Conservation Service (USDA Code 590). EPA has determined that these standards are required for all CAFOs in Indian Country in Nebraska. EPA has received no comments about the criteria specified in the Technical Standard for Nutrient Management for CAFOs in Indian Country in Nebraska.

***One commenter asserts that Bruns Feedlot, LLC should not be permitted by EPA because the CAFO's pond is not located within the exterior boundaries of the Winnebago Reservation.***

***Response:***

EPA has determined that all point sources within Bruns Feedlot, LLC are located within the area challenged in the pending Omaha Reservation boundary litigation referenced above. EPA has therefore determined that issuance of the NPDES permit for Bruns Feedlot, LLC will be postponed until the courts resolve the Omaha boundary issue.