

**BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.**

In re:	)
	)
Circle T Feedlot, Inc.    NE0134481	)
Morgan Feedlot LLC    NE0134767	)
Sebade Feedyard    NE0135712	)
Stanek Brothers    NE0134775	)
	)

ENVIRONMENTAL APPEALS BOARD

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**PETITION FOR REVIEW**

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## INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(a), Joel Lamplot (“Petitioner”) petitions for review of the conditions of NPDES Permit Nos. NE0134481, NE0134767, NE0135712, and NE0134775, (“the Permits”), which are to be issued to Circle T Feedlot, Inc., Morgan Feedlot LLC, Sebade Feedyard, and Stanek Brothers respectively (“Permittees”) on, February 9, 2009, by USEPA Region 7. The State of Nebraska is authorized to administer the National Pollutant Discharge Elimination System permit program pursuant to a delegation of authority by the United States Environmental Protection Agency. The permits at issue in this proceeding are wrongly assumed by the USEPA rather than the State of Nebraska. Petitioner contends that certain permit conditions are based on clearly erroneous findings of fact and conclusions of law. Specifically, petitioner challenges the following permitting conditions:

- (1) Region 7 has exceeded statutory authority.
- (2) Region 7 is violating Executive Order 13132.

## **FACTUAL AND STATUTORY BACKGROUND**

Region 7 has consistently contended that the State of Nebraska does not have permitting authority in Thurston County, Nebraska. Region 7 claims that a historical Indian reserve located within State boundaries is not subject to the jurisdiction of Nebraska's environmental authority. Thurston County, a political subdivision of the State of Nebraska, has a land area of 393.81 square miles. Of that land area 84.98 square miles are held in trust, by the federal government, for and Indian or Indian tribe. 308.83 square miles are owned in fee-simple title, under the jurisdiction of the State of Nebraska. The Permittees are all located on fee-simple properties as well as their discharge points for their permits. Region 7 is preempting the State of Nebraska the authority to issue permits to entities located on fee-simple land under the jurisdiction of the State.

\* \* \*

## **THRESHOLD PROCEDURAL REQUIREMENTS**

Petitioner satisfies the threshold requirements for filing a petition for review under Part 124, to wit:

1. Petitioner has standing to petition for review of the permit decision because it participated in the public comment period on the permit. Petitioner submitted both written and oral comments at the public hearing on December 13, 2007, in South Sioux City, Nebraska.
2. The issues raised by Petitioner in its petition were raised during the public comment period and therefore were preserved for review.

\* \* \*

## ARGUMENT

In EPA Region 7's Response to Comments, it is stated that; "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." and "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."

It is important to note that Region 7 states that Congress has granted EPA the authority to issue NPDES permits, but does not state that Congress has granted EPA the authority to preempt a States authority to issue NPDES permits within its boundaries if a State has been granted permitting authority. It is also important to note that Region 7 has erred in its response to the Federalism comment that; "Congress has authorized EPA to administer the Clean Water Act in Indian Country." The CWA contains no language that USEPA is the sole authority to administer the CWA in Indian country.

Nebraska was enabled to form a constitution and boundaries defined by an Act of Congress in 1864, *13 Stat. 47*. Nowhere in the Nebraska Enabling Act did the state boundary go around any "Indian country." The enabling act does not include any language pertaining to Indian people or Indian lands. In *United States v. McBratney*, 104 U. S. 622, the Supreme Court of the United States held that where a state was admitted into the Union and the enabling act

contained no exclusion of jurisdiction as to crimes committed on an Indian reservation by others than Indians or against Indians, the state courts were vested with jurisdiction to try and punish such crimes. By the admission to the Union by act of Congress (*14 Stat. 391*), the federal government did not retain any usufructuary right to regulate private property in Nebraska. EPA's claim to have preempting authority over a State that has been granted environmental authority is based on policy not law.

Region 7 has erred in its interpretation of Executive Order 13132, Federalism. Region 7's response, "Section Three of the Order requires that federal agency preemption of states' policy making 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.'", is hypocritical that they would allow CWA authority in all of the State but Thurston County. Region 7 declined to respond to the comment; "EPA's claim to have sole authority for issuing these permits is questionable on being faithful with section 2 of EO 13132, Federalism." The principles of federalism allow issues to be addressed by the government closest to the people. Although the CWA is national in scope, it also recognizes the rights and responsibilities of States in Section 101(b); it is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States... This recognition of the sovereignty of States by Congress demonstrates that the CWA is a program of cooperative federalism. Section 101(b) of the CWA does not parallel with Region 7's interpretation of EO 13132; Congress intends for the States to have rights, Region 7 does not.

## CONCLUSION

The Clean Water Act makes no reference to Indian tribes, Indian country or Indian lands except for in Section 518. Congress did not prohibit States from administering environmental permits to State governed entities located in historical Indian reserves. The policies that EPA has developed are the crux of the problem. EPA policy on 'Indian country' does not reflect the language in the CWA written by Congress. USEPA should revert the permit issuing authority back to the State of Nebraska.



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Date: Jan. 16, 2009

Public Comments for EPA hearing  
December 13, 2007

Circle T Feedlot, Inc. NE0134481  
Morgan Feedlot LLC NE0134767  
Sebade Feedyard NE0135712  
Stanek Brothers NE0134775  
Bruns Feedlot, LLC NE0135399

1. Where in the Clean Water Act (CWA) §402 does it say that EPA has the sole authority to issue NPDES permits to the CAFO's in Thurston County?
2. Where in the CWA is EPA granted jurisdiction decision making authority?
3. Where in the CWA is EPA granted the authority to disassociate CAFO operations located in a political subdivision in the State of Nebraska from State environmental oversight?
4. Does the CWA expressly preempt the State of Nebraska from issuing NPDES permits within its own political subdivision, Thurston County?
5. Is the EPA issuing these permits on a basis of policy rather than law?
6. Does EPA consider Thurston County Nebraska to be a federal enclave?
7. EPA's claim to have sole authority for issuing these permits is questionable on being faithful with section 2 of EO 13132, Federalism. Please address how your policies on being the sole authority of these permits align with principles a – i.

Please do not alter, embellish or consolidate these questions with any other questions submitted for these permits.

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