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ENVIR. APPEALS BOARD

EPA Appeal Comments to issue NPDES Permits in Thurston County,
Nebraska

Written and submitted by: Teri Lamplot
Date mailed, USPS: January 16, 2009

This appeal is specific to the decision by EPA Region 7 to issue NPDES on 4 feed yards located in Thurston County, Nebraska:

Circle T Feedlot, Inc.-Draft NPDES Permit No. NE0134481
Morgan Feedlot LLC-Draft NPDES Permit No. NE0134767
Sebade Feedyard-Draft NPDES Permit No. NE01035712
Stanek Brothers-Draft NPDES Permit No. NE034775

and specific to the decision of EPA to postpone issuance of NPDES permits on 4 yards located in Thurston County, Nebraska:

Bruns Feedlot, LLC-Draft NPDES Permit No. NE0135399
LBBJ Inc.-Draft NPDES Permit No. NE-0134961
Ron Bruns Feed Yard, Homeplace-Draft NPDES Permit No. NE0135704
Ron Bruns Feed yards, Eastplace-Draft NPDES Permit No. NE0106526

The comments herein, pages 1-9, shall apply to the following Draft NPDES Permits, based on the fact that none of the 8 feed yards listed are in Indian country:

Circle T Feedlot, Inc.-Draft NPDES Permit No. NE0134481
Morgan Feedlot LLC-Draft NPDES Permit No. NE0134767
Sebade Feedyard-Draft NPDES Permit No. NE01035712
Stanek Brothers-Draft NPDES Permit No. NE034775
Bruns Feedlot, LLC-Draft NPDES Permit No. NE0135399
LBBJ Inc.-Draft NPDES Permit No. NE-0134961
Ron Bruns Feed Yard, Homeplace-Draft NPDES Permit No. NE0135704
Ron Bruns Feed yards, Eastplace-Draft NPDES Permit No. NE0106526

On December 13, 2007, EPA Region 7 held a public hearing regarding their initial decision to issue NPDES permits for the above 8 feed yards. Written and oral comments were submitted. **Over a year later**, on December 19, 2008, EPA Region 7 sent response

letters, and gave those who submitted comment 30 days to respond to the comments that took them over a year to produce.

Throughout EPA's response to comments, EPA applies a double standard; takes law passed by Congress out of context, and generally does not address comments submitted. The "comments made by some individuals" are generalized and reworded to the point that they are unrecognizable by those that submitted the comments.

40 CFR 25.8 requires EPA to "summarize the public's view, **significant comments**, criticisms and suggestions, and set forth the agency's specific **responses in terms of modifications of the proposed action or an explanation for rejection of proposals made by the public.**"

The following was submitted in written form and expanded upon orally at the public hearing on December 13, 2007:

PUBLIC COMMENTS RE: NPDES PERMITS in Thurston County

Prepared by Teri Lamplot, County Supervisor
December 13, 2007

Region 7 EPA, in error, has assumed jurisdiction to issue NPDES permits for the following feeding operations located in Thurston County: NE1034481 (Circle T Feedlot, Inc.), NE0134767 (Morgan Feedlot, LLC), NE0135712(Sebade Feed yard), NE0134775 (Stanek Brothers), and NE0135399 (Bruns Feedlot, LLC), located within the State of Nebraska, based on the following reasons:

- 1) These facilities are NOT located in "Indian Country."
 - a. Acts of Congress following removed federal jurisdiction from these parcels of land.
 - b. As established in the State of Michigan, DEQ v. The Environmental Protection Agency (2001), "the test for determining whether land is Indian country does not turn upon whether that land is denominated 'trust land' or 'reservation'. Rather, we ask whether the area has been 'validly set apart for the use of the Indians as such, under the superintendence of the Government.'" (Quoted United States v. John, 437 U.S. 634, 648-49(1978).
 - c. Due to the General Allotment Act of 1887, and the Burke Act of 1906, federal superintendence and restriction upon the historical reservation land in Thurston County on fee land was removed, resulting in all of the above listed businesses to be owned by non-tribal affiliated Nebraska citizens.
 - d. 25 U.S.C. § 349, states that "trust land" is under federal superintendence, while lands with patent in fee, the land and owner of such land 'shall have

the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside.'

- e. 25 U.S.C. § 379 makes clear that land held in fee-simple patent, it and its owner are subject to taxation and laws of the State.
- f. Land owned by all of these producers is taxed by the County and the State government only.
- g. Region 7 has erred in it's assumption that it has "sole authority to issue NPDES permits" as presented in EPA's Statement of Basis.
- i. 33 U.S.C. § 1342 does not include Indian tribes or tribal governments; it only provides for the permitting authority of a State.
- ii. An Indian tribe can be treated as a State as provided by 33 U.S.C. § 1377, which describes the qualifications that a tribe needs to meet to be treated as a State.
- iii. 40 CFR § 123.31 et seq. outline the procedure by which an Indian tribe can attain Treatment as a State. To my knowledge, neither tribe in Thurston County has applied for Treatment as a State, and neither tribe could meet the procedural requirements to receive such status.
- iv. The State of Nebraska has the authority to issue these NPDES permits per 33 U.S.C. § 1342.
- v. Although I do not believe these facilities are located in "Indian Country," even if they were, EPA is undermining the sovereignty of the State of Nebraska by acting in direct contrast to Supreme Court decisions. In *Nevada v. Hicks* (2001), a unanimous decision was issued solidifying State's authority within Indian Country. "Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border... Ordinarily; it is now clear an Indian reservation is considered part of the territory of the State."
- vi. There is simply no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. Indeed, throughout the congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction. It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.

- h. If EPA has claimed jurisdiction on behalf of and Indian tribe, 33 U.S.C. § 1377 states that Indian tribes may be treated as States ONLY IF:
- i. The Indian tribe has a governing body carrying out substantial governmental duties and powers (this does NOT on any feedlots in question).
 - ii. The function to be exercised by the Indian tribe pertain to the management and protection of water resources which are **held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation.**
 - iii. Restrictions of alienation on lands located in the lands owned by these feedlot operators were removed in the early 1900's with the fee patent process (25 U.S.C. § 349, and 379.)
 - iv. Federal Indian reservation means all land within the limits of any Indian reservation under the jurisdiction of the United States Government. FEE patent land, taxed by the State, is under the jurisdiction of the STATE, not the federal government, which is why services come from STATE ENTITIES, not FEDERAL. If this area is under federal superintendence, ALL residents within the boundaries of the "reservation" should be receiving the benefits of programs paid for with federal monies. If this area is under the jurisdiction of the federal government, federal dollars should be extended to these feedlot operators for cost of operations. This is NOT happening, because the owners of these facilities are under State jurisdiction, funded with State tax dollars, paid by these State citizens on lands they purchased over 100 years ago.
- I. As determined by Michigan v. EPA, the **EPA cannot implement a federal program in the absence of clear state or tribal authority**. Prior to implementing any federal operating permits program EPA must determine the scope of state and tribal jurisdiction.
- II. 42 U.S.C. § 7601 (d) and 7661 grants EPA the authority to "promulgate and administer and enforce a federal operating permit program FOR a State or tribe IF, AND ONLY IF, (1) the state or tribe fails to submit an operating program or (2) the operating program is disapproved by EPA or (3) EPA determines the state or tribe is not adequately administering and enforcing a

program. **Congress has not delegated authority to the agency to act beyond these statutory parameters.**

Please consider the comments submitted, and make a clear determination that these NPDES permits should be issued by the State of Nebraska.

Sincerely,

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In violation of 40 CFR 25.8, **significant comments** and evidence submitted on December 13, 2007, supporting commenter's claim that the 8 above mentioned feed yards were not "Indian country", were not commented on by EPA in their response dated December 19, 2008.

EPA is incorrect in asserting that privately owned FEE land, not owned by a tribal member, is Indian Country. **Geographical historical reservation boundaries from the 1800's do not depict federal jurisdiction, rather, the land status, whether it is fee or trust, does.** This point is made in written comments, dated December 13, 2007, 1) a, 1)b, 1)c, 1)d, 1)e, 1)f, 1)g vi., 1)h iii, and 1)h iv. **EPA failed to address any of the evidence submitted and simply cited 18 U.S.C 1151, taken from the Criminal Code, as their authority over fee land in Thurston County.**

In the Response to Comments, page one, EPA writes, "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."

This is a false statement by EPA. Submitted written comment and oral testimony included ALL 8 feed yards with the same argument that that none of the 8 facilities are located in "Indian Country." (See page 1 of Public Comments RE: NPDES Permits in Thurston County, prepared by Teri Lamplot, County Supervisor, dated December 13, 2007).

EPA continues on page one, "EPA is postponing issuance of NPDES permits to the Ron Bruns Feed Yard (Eastplace), Ron Bruns Feed Yards (Homeplace), Bruns Feedlot, LLC, and LLBJ, Inc. facilities pending the outcome of litigation concerning the Omaha Reservation boundary currently with the Omaha Tribal Court. EPA has the 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..."

Again, keeping with 40 CFR 25.8, this response does not explain or address the evidence submitted regarding jurisdiction over private property, fee land.

EPA contends on page 2, "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."

As submitted December 13, 2007, both written and orally, there is no federal jurisdiction on non-tribal fee land. EPA continues to assert federal jurisdiction where federal jurisdiction has long been removed. 25 U.S.C. 349 states that "trust land" is under federal superintendence, while lands with patent in fee, 'shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside.' Fee patent land, owned by all 8 feed yard operators, is NOT Indian land, nor is it Indian country. EPA defines Indian country in 40 CFR 122.2, taken from 18 U.S.C. 1151, Criminal Code:

Indian country means:

- (1) All land within the limits of any Indian reservation **under the jurisdiction of the United States Government**, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;
- (2) All dependent Indian communities with the borders of the United States whether within the originally or subsequently acquired territory thereof, and whether within or without the limits of a state; and
- (3) All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

EPA, as well as other federal agencies, have misinterpreted the definition of Indian country in policy development and implementation. CRIMINAL CODE, 18 U.S.C. 1151. Part a) All land within the limits of any Indian reservation UNDER THE JURISDICTION OF THE UNITED STATES GOVERNMENT..." The portion in capitalization of 18 U.S.C. 1151 part a) is what EPA and other federal entities misinterpret. What qualifies land to be "under the jurisdiction of the United States Government?"

TRUST land and RESTRICTED TRIBAL ALLOTMENTS are “under the jurisdiction of the federal government.” Evidence submitted, and again omitted by EPA’s Response to Comments, include the facts in testimony that 25 USC 379 makes fee land and its owner subject to taxation and laws of the State. Trust lands are not taxable by the State, nor are they under State jurisdiction. Fee lands are taxed by the State and under State jurisdiction.

On page two of EPA’s Response to Comments, EPA cites that, “the Bureau of Indian Affairs has advised EPA that this 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.)”

As pointed out orally at the public hearing, ALL 8 of the feed yards are owned by non-tribal affiliated private citizens, in fee patent status. The tribe retains no ownership or rights to the land, nor do they have jurisdiction over fee land. The federal government has NO jurisdiction over private property any more than the State has jurisdiction over trust property. There is no law, including the CWA that directs EPA to use historical reservation boundaries from the 1800’s to depict territorial federal jurisdiction. Again, it is an EPA policy error, misinterpreting the definition and application of 18 USC 1151 from the Criminal Code.

EPA applies a double standard regarding the existence of federal jurisdiction and land status. In NPDES Appeal No. 03-08, Mille Lacs Wastewater Treatment Facility, decided on April 6, 2004, EPA stressed repeatedly that “trust land” and land in which the federal government has jurisdiction has been, “validly set apart for the use of the Indians as such, under the superintendence of the Government.” “The transfer into trust for the Band was an express decision to set the land apart for the use of the Band under DOI’s superintendence...” Although the facts surrounding this case differ from those in Thurston County, EPA stresses the significance and difference of jurisdiction between fee land and trust land. EPA applies a double standard regarding the existence of federal jurisdiction. In the Mille Lacs case, the land was not within the historical boundaries of an Indian reservation but found to be Indian country by EPA *because the land was in trust*, and as such under the superintendence of the Government. The 8 feed yards in Thurston County are not in trust, nor are they under the superintendence of the federal government, but found by EPA to be Indian country based on historical reservation boundaries from the 1800’s.

There is no DOI superintendence over fee land, and the DOI has no presence of any kind over the 8 feed yards needing a NPDES permit. If there is no DOI superintendence, where is the federal jurisdiction, or EPA authority coming from?

EPA responded that comments citing, *Nevada v. Hicks*, 533 U.S. 353 (2001) and 33 U.S.C 1377, arguing against tribal authority over non-tribal lands are “not relevant” because both address *tribal authority*. EPA argues that NPDES permits in question are issued under *federal* authority. EPA continued, “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.”

Again, EPA cites their “settled policy,” but does not address the evidence by the commenter that their policy and assignment of “Indian country” is incorrect.

If the federal government and the tribes have “primary jurisdiction” over geographical historical Indian reservation boundaries, the tribes and the federal government should be providing all governmental functions for all of the citizens within historical reservation boundaries.

Governmental services, such as fire, rescue, police protection, E911 services, and road maintenance are not provided by the federal government in Thurston County, unless the land is in trust status with title held by the federal government. The tribes, nor the federal government have “primary jurisdiction” over all lands in Thurston County, nor do they have jurisdiction over the 8 feed yards listed on page one of this appeal.

Thurston County contains a total of 252,038.4 acres. Of that acreage, 54,384.04 acres are in trust status, which title to land is held by the federal government for the benefit of Indians. 54,384.04 acres of land in Thurston County are not taxed by Thurston County and are under federal superintendence with local BIA supervision. The remaining 197,654 acres in Thurston County are not under the superintendence of the federal government or BIA supervision, title is privately held, and State taxes are paid.

Neither tribe, nor can the federal government demonstrate “primary jurisdiction” over the 8 feed yard operators or their land. All of the owners of the 8 feed yards are Americans, not members of an Indian tribe, and do not have tribes “inhabiting” their private property. The historical evidence presented listed the various Acts of Congress and laws that allowed settlement and unrestricted property ownership of historical reservation land. This evidence was not addressed by EPA’s response to comments.

EPA’s “settled policy” is incorrect. The State of Nebraska is the only entity with jurisdiction to issue NPDES permits on private fee land property.

EPA cites the outcome of pending litigation as the reason to hold permitting on 4 of the feed yards.

This clearly demonstrates that EPA’s sole reason for issuing NPDES permits is their interpretation of where the historical “reservation” boundaries exist, without considering the comments submitted regarding the jurisdictional difference between fee land and trust land. EPA’s interpretation and implementation of 18 USC 1151 in their policy is incorrect. EPA has a double standard when depicting jurisdiction based on land status. NPDES permits should be issued by the State of Nebraska

because there is no federal/tribal jurisdiction on any of the 8 feed yards seeking an NPDES permit.

EPA failed to address specific comments regarding jurisdictional authority submitted on December 13, 2007. I ask that the Appeals Board seriously consider the comments presented in this appeal and find that NPDES permits for all 8 feed yards listed on page one of this appeal, should be issued by the State of Nebraska.



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1-16-09
Date