

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION VII  
901 North 5<sup>th</sup> Street  
KANSAS CITY, KANSAS 66101

BEFORE THE ADMINISTRATOR

IN THE MATTER OF )

MORAN BEEF, INC., )

Respondent )

) Docket No. CWA-07-2010-0080

) MEMORANDUM IN SUPPORT OF  
) COMPLAINANT'S MOTION FOR  
) LEAVE TO FILE AMENDED  
) COMPLAINT

MEMORANDUM IN SUPPORT OF COMPLAINANT'S MOTION FOR LEAVE TO  
FILE AN AMENDED COMPLAINT

Pursuant to Rules 22.14(c) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, Complainant, the United States Environmental Protection Agency, Region VII ("EPA") seeks leave of the Court to amend the Administrative Complaint filed by EPA on March 31, 2010. The proposed Amended Complaint is attached. In support of this Motion, Complainant avers the following:

**Background**

1. The Complaint in this matter was filed March 31, 2010. The Complaint contains two counts alleging that Respondent violated the Clean Water Act ("CWA"). The first count alleges that Respondent is a point source that discharged pollutants into a water of the United States without a National Pollutant Discharge Elimination System ("NPDES")

permit in violation of Section 301 of the CWA. The second count alleges that Respondent failed to apply for a NPDES permit in violation of Sections 301, 308 and/or 402 of the CWA. In the original complaint, EPA pleaded up to the statutory maximum of \$177,500.

2. Respondent, Moran Beef, Inc., filed an Answer with EPA's Regional Hearing Clerk on April 30, 2010.
3. Hearing on this matter is currently scheduled for April 6 - 8, 2011, in Des Moines, Iowa.

#### **Issues for Amended Complaint**

4. At all times relevant to this matter, Respondent's animal feeding operation included a confinement barn containing approximately 862 head of cattle and open pens containing approximately 623 head of cattle.
5. In June and September 2010, EPA personnel observed a drainage tile inlet adjacent to the confinement barn at Respondent's facility. During the June 2010 visit, EPA observed process wastewater from Respondent's facility flowing into the drainage tile inlet. On September 24, 2010, the Respondent informed EPA personnel that the drainage system identified by EPA personnel led to – and discharged directly into – the tributary to Mosquito Creek, a stream adjacent to Respondent's facility. During the September 2010 inspection of the facility, EPA collected samples from two locations. The first sample was from process wastewater emanating from bedding material adjacent to the confinement barn and flowing toward the tile inlet. The second sample was collected at the discharge point of the drainage tile system in the unnamed tributary to Mosquito Creek. Sample results indicated the presence of pollutants, including ammonia, phosphorous, and Escherichia coli in both the facility's process wastewater and in the tributary. Statements made in Respondent's Prehearing Exchange, submitted October 2010, acknowledge that

an animal watering system contained in Respondent's confinement barn is connected to the drainage tile system identified herein. Moreover, Respondent acknowledged that pollutants, including agricultural waste such as cracked corn and cattle saliva, are released into the confinement barn watering system, flow through the drainage tile system, are discharged into the tributary to Mosquito Creek, and postulates that these pollutants cause the bacterial contamination identified by EPA in the stream.

**Complainant seeks the following changes in the Amended Complaint:**

6. Complainant seeks to add the definition of "Process wastewater" to the Statutory and Regulatory Framework section of the complaint. The definition specifically includes as process wastewater, "spillage or overflow from animal watering systems." Complainant's Amended Complaint and Notice of Opportunity for Hearing ("Amended Complaint"), Paragraph 10. Complainant alleges that Respondent discharges pollutants from its animal watering system into a water of the United States. Amended Complaint, Paragraphs 29, 31.
7. Complainant seeks to amend the Complaint to include the additional CWA violations, including continuous discharges from Respondent's Facility into a water of the United States, identified by EPA in June and September 2010 after the original Complaint was filed. Amended Complaint, Paragraphs 26 – 29.
8. Complainant seeks to allege that Respondent owns and operates as either a Large *or* Medium Concentrated Animal Feeding Operation ("CAFO") and is, therefore, a point source subject to CWA Section 301 discharge requirements.
  - a. Respondent asserts that it is not subject to CWA discharge requirements because it is not a "Large CAFO:"

i. Large CAFOs are defined as animal feeding operations that stable or confine as many as, or more than, 1,000 head of cattle. 40 C.F.R. 122.23 (b)(4)(i);

ii. CAFOs are point sources prohibited from discharging except in compliance with a NPDES permit. CWA Section 502(14), 33 U.S.C. § 1362(14), 40 C.F.R. § 122.23(a);

iii. Respondent asserts that its facility contains two separate operations, each containing less than 1,000 head of cattle and, therefore, it is not subject to CWA discharge requirements. Respondent's Answer and Request for Hearing, "Defenses to Proposed Civil Penalty," Paragraph 1.

b. Complainant alleges that Respondent owns and operates a "Large CAFO" subject to CWA discharge requirements either because:

i. Respondent's facility contains approximately 1,485 head of cattle and is, therefore, a Large CAFO. Amended Complaint, Paragraph 30.

ii. Alternatively, Respondent owns and operates two animal feeding operations that must be considered one Concentrated Animal Feeding Operation:

1. Two or more animal feeding operations ("AFOs") under common ownership are considered to be a single AFO for the purposes of determining the number of cattle at an operation if they adjoin each other or if they use a common area or system for the disposal of wastes. 40 C.F.R. § 122.23(b)(2);

2. At all times relevant to this matter, Respondent's confinement barn and open feedlot were owned by Respondent, were adjoined by a cattle walkway, or utilized the same system for disposal of wastes. Therefore, Respondent's facility is considered a single AFO containing over 1,000 head of cattle that is, therefore, a point source subject to CWA discharge prohibitions. Amended Complaint, Paragraph 30.

c. Complainant seeks to amend the Complaint to add that, in the alternative, Respondent owns and operates a "Medium CAFO" subject to CWA discharge requirements:

i. Medium CAFOs are defined as animal feeding operations that stable or confine between 300 and 999 head of cattle and where: (1) pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device, or (2)

pollutants are discharged directly into waters of the United States that originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation. 40 C.F.R. § 122.23(b)(6);

ii. Medium CAFOs are point sources prohibited from discharging except in compliance with a NPDES permit. CWA Section 502(14), 33 U.S.C. § 1362(14), 40 C.F.R. § 122.23(a);

iii. EPA inspectors observed and Respondent has admitted that, at all times relevant to this matter, Respondent's confinement barn, an AFO, contained between 300 and 999 head of cattle and was discharging pollutants through a man-made device into a water of the United States. Therefore, Respondent's confinement barn is a Medium CAFO subject to NPDES permitting requirements. Amended Complaint, Paragraphs 31.

9. Complainant seeks leave to amend the proposed penalty to \$79,000, the amount proposed by EPA in its prehearing information exchange pursuant to 40 C.F.R. 22.19(a)(4).

Amended Complaint, Paragraph 43.

10. Complainant seeks leave to amend the Complaint to correct a typographical error and allege that Respondent had a duty to apply for a NPDES permit 180 days prior to the date on which Respondent's confinement barn was operational. Amended Complaint,

Paragraph 40.

### **Controlling Legal Authority**

11. Pursuant to 40 C.F.R. 22.14, the Complainant may amend the complaint after the Respondent has filed an answer only upon motion granted by the Presiding Officer.

12. It is a general legal principle that "administrative pleadings are liberally construed and easily amended" and permission to amend will usually be freely given. *Yaffe Iron & Metal Co., Inc. v. EPA*, 774 F.2d 1008, 1012 (10<sup>th</sup> Cir. 1985). If leave to amend is to be denied, it must generally be shown that the amendment will result in prejudice to the opposing

party and that the prejudice would constitute a serious disadvantage that goes beyond mere inconvenience. *In re: Port of Oakland*, MPRSA Appeal No. 91-1 (EAB, August 5, 1992).

13. Complainant seeks to amend the Complaint to include additional CWA violations identified by EPA after the original Complaint was filed and to allege that Respondent is subject to CWA discharge requirements as a Large or Medium CAFO. The amendments EPA seeks will not require the addition of fact witnesses for the Complainant or the Respondent and, as a result, will not prejudice the Respondent. A denial of leave to amend the Complaint may create the need to pursue the alleged CWA violations in a separate proceeding, thus resulting in duplication of efforts by Complainant, Respondent, and the Court, and the inefficient use of the administrative process.
14. This amendment is in the public interest and will promote the justiciable disposition of this matter.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 28<sup>th</sup> day of January, 2011, I hand-delivered the original and one true copy of this Motion for Leave to Amended Complaint, to Sybil Anderson, the Office of Administrative Law Judges Hearing Clerk, and sent one true and correct copy:

via Federal Express:

Mr. Eldon McAfee, Esq.  
Beving, Swanson & Forrest, P.C.  
321 East Walnut Street, Suite 200  
Des Moines, Iowa 50309

via Federal Express:

Judge Barbara Gunning  
U.S. Environmental Protection Agency  
Office of Administrative Law Judges  
1099 14<sup>th</sup> Street  
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Signature of Sender