

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 7  
901 NORTH FIFTH STREET  
KANSAS CITY, KANSAS 66101

BEFORE THE ADMINISTRATOR

RECEIVED  
MAY 10 2010  
EPA REGION 7

IN THE MATTER OF )  
)  
)  
MORAN BEEF, INC., ) AMENDED COMPLAINT AND  
) NOTICE OF OPPORTUNITY FOR HEARING  
)  
Respondent )  
) Docket No. CWA-07-2010-0080  
)  
Proceedings under Section 309(g) of the )  
Clean Water Act, 33 U.S.C. § 1319(g) )  
\_\_\_\_\_ )

**COMPLAINT**

**Jurisdiction**

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (CWA), 33 U.S.C. § 1319(g), and in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/ Termination or Suspension of Permits, 40 C.F.R. Part 22 (“Consolidated Rules”).

2. This Complaint serves as notice that the United States Environmental Protection Agency (EPA) has reason to believe that Respondent has violated Sections 301 and 402 of the CWA, 33 U.S.C. § 1311 and § 1344, and regulations promulgated thereunder.

**Parties**

3. The authority to take action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), is vested in the Administrator of EPA. The Administrator has delegated this authority to the Regional Administrator, EPA, Region 7, who in turn has delegated it to the Director of the Water, Wetlands and Pesticides Division of EPA Region 7 (“Complainant”).

4. Respondent, Moran Beef, Inc., is an Iowa corporation operating as a Concentrated Animal Feedlot Operation at 25794 Magnolia Road, Underwood, Iowa 51576.

### **Statutory and Regulatory Framework**

5. Section 301(a) of the CWA, 33 U.S.C. §1311(a), prohibits the discharge of pollutants except in compliance with, *inter alia*, Section 402 of the CWA, 33 U.S.C. § 1342.

6. Section 402 of the CWA, 33 U.S.C. § 1342, provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to that Section.

7. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines the term “discharge of pollutant” to include “any addition of any pollutant to navigable waters from any point source.”

8. To implement Section 402 of the CWA, EPA promulgated regulations codified at 40 C.F.R. Part 122. Under 40 C.F.R. § 122.1, a NPDES permit is required for the discharge of pollutants from any point source into waters of the United States.

9. “Pollutant” is defined by Section 502(6) of the CWA, 33 U.S.C. 1362(6) to include, *inter alia*, biological materials and agricultural waste discharged to water.

10. “Process wastewater” is an agricultural waste defined by 40 C.F.R. § 122.23(b)(7) to include water directly or indirectly used in the operation of an animal feeding operation, including, *inter alia*, spillage or overflow from animal watering systems and any water which comes into contact with any raw materials, products, or byproducts including manure, feed or bedding.

11. “Point source” is defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14) to include “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, [or] concentrated animal feeding operation . . . from which pollutants are or may be discharged.”

12. “Animal feeding operation” or “AFO” is defined by 40 C.F.R. § 122.23(b)(1) as a lot or facility where animals have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any twelve-month period, and where crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

13. 40 C.F.R. § 122.23(b)(2) provides that two or more AFOs under common ownership are considered to be a single AFO for 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.

14. “Concentrated animal feeding operation” or “CAFO” is defined by 40 C.F.R. § 122.23(b)(2) as an animal feeding operation that is defined as a Large CAFO in accordance with 40 C.F.R. § 122.23(b)(4) or a Medium CAFO in accordance with 40 C.F.R. § 122.23(b)(4).

15. “Large CAFO” is defined according to 40 C.F.R. § 122.23(b)(4)(i) as an animal feeding operation that stables or confines as many as, or more than, 1,000 head of cattle. A Large CAFO is a “point source” as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

16. “Medium CAFO” is defined according to 40 C.F.R. § 122.23(b)(6) as an animal feeding operation that stables or confines 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. A Medium CAFO is a “point source” as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

17. “Waters of the United States” are defined in 40 C.F.R. § 122.2 to include intrastate rivers and streams, and tributaries thereto.

18. The Iowa Department of Natural Resources (“IDNR”) is the agency within the state of Iowa authorized to administer the federal NPDES Program. EPA maintains concurrent enforcement authority with authorized state NPDES programs for violations of the CWA.

#### **Factual Background**

19. Respondent owns and operates an open cattle feedlot (hereinafter, the “Facility”) that is located in the Southeast ¼ of Section 17 in Township 76N, Range 42W, Pottawattamie County, Iowa. The Facility contains a confinement barn with covered animal pens and an area with open pens.

20. The Facility confines and feeds or maintains cattle for a total of forty-five (45) days or more in any twelve-month period.

21. Neither crops, vegetation, forage growth, nor post harvest residues are sustained over any portion of the Facility’s feeding areas.

22. The Facility is an AFO as defined by 40 C.F.R. § 122.23(b)(1).

23. Mosquito Creek and its tributaries are waters of the United States, as defined under 40 C.F.R. Part 122.2.

24. On June 4, 2009, EPA personnel conducted a compliance evaluation inspection of the Facility.

25. On October 30, 2009, EPA personnel conducted a sampling inspection of the Facility. Samples were taken within the unnamed tributary to Mosquito Creek where process wastewater from the Facility was observed discharging into the tributary.

26. On June 23, 2010, EPA personnel conducted a site visit to the Facility. During this visit, EPA observed process wastewater adjacent to the confinement barn flowing into a drainage tile inlet adjacent to the Facility's confinement barn.

27. On September 23, 2010, EPA conducted a sampling inspection of the Facility. Samples were taken from pooled process wastewater adjacent to the confinement barn and within the unnamed tributary to Mosquito Creek.

28. According to statements made by Respondent on September 24, 2010, the drainage tile identified during the EPA site visits discharges directly into the unnamed tributary to Mosquito Creek.

29. Respondent's confinement barn contains an animal watering system that is connected to the tile drainage system referenced in Paragraphs 26 and 28. Pollutants discharge continuously from the watering system into the tile drain system, which, in turn, discharges to the unnamed tributary of Mosquito Creek.

30. Respondent's Facility is a Large CAFO as that term is defined in 40 C.F.R. §122.23(b) and as that phrase is used in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

31. In the alternative, pursuant to 40 C.F.R. § 122.23(b)(6), the Facility's confinement barn is a Medium CAFO because, at all times relevant to this action, (1) the confinement barn at the Facility contained approximately 862 head of cattle, and (2) storm water and/or watering system discharges containing pollutants flowed from the confinement barn through a man-made tile drainage system that discharges into the unnamed tributary of Mosquito Creek. Therefore, the facility is a CAFO as that phrase is used in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

32. Respondent had not applied for a NPDES permit at any time relevant to this action.

## **Findings of Violation**

### **Count 1**

#### **Unpermitted Discharge of Pollutants to Waters of the United States**

33. Paragraphs 4 through 32 are incorporated herein by reference.

34. Section 301 of the CWA prohibits discharges of pollutants from a point source to waters of the United States.

35. The Facility does not have adequate livestock waste control facilities to prevent the discharge of animal waste to Mosquito Creek and its tributaries. Samples taken by the inspectors during the October 2009 and September 2010 inspections, as referenced above, demonstrate that pollutants from the Facility, including ammonia, nitrate, and Escherichia coli were discharging to the unnamed tributary of Mosquito Creek at times relevant to this action.

36. Based on the size of the Facility, the distance from the Facility to the unnamed tributary to Mosquito Creek, and the slope and condition of the land across that distance, the Facility discharged wastewater containing pollutants into the unnamed tributary to Mosquito Creek as a result of significant precipitation events since Respondent began operations around 1986. Precipitation records demonstrate that there have been a minimum of 11 precipitation events within the last 5 years that have resulted in the discharge of pollutants from the Facility to the unnamed tributary to Mosquito Creek. Moreover, the continuous-flow cattle watering system associated with the confinement barn has discharged process waste water into the unnamed tributary to Mosquito Creek.

37. The flow of wastewater and process wastewater from Respondent's Facility into Mosquito Creek and its tributaries constitute unauthorized discharges of pollutants from a point source to waters of the United States and, as such, are violations of Section 301 of the CWA.

### **Count 2**

#### **Failure to Apply for a NPDES Permit**

38. Paragraphs 4 through 37 are incorporated herein by reference.

39. Based on the size of the Facility, the distance from the Facility to the unnamed tributary to Mosquito Creek, the slope and condition of the land across that distance, and sampling, the Facility discharged wastewater containing pollutants into the unnamed tributary to Mosquito Creek as a result of significant precipitation events since Respondent began operations around 1986. Precipitation records

demonstrate that there have been a minimum of 11 precipitation events within the last 5 years that have resulted in the discharge of pollutants from the Facility to the unnamed tributary to Mosquito Creek.

40. Pursuant to 40 C.F.R. § 122.21(a), CAFOs that discharge have the duty to apply for a NPDES permit. Respondent's Facility discharged pollutants without a NPDES permit in violation of Sections 301 and 402 of the Clean Water Act, 33 U.S.C. §§ 1311 and 1342, and implementing regulations at least 180 days prior to the date on which its confinement barn became operational. Respondent had a duty to apply for a NPDES permit 180 days prior to discharging any pollutants to waters of the United States.

41. Respondent's failure to apply for a permit is a daily violation of Section 301, 308, and/or 402 of the CWA, 33 U.S.C. §§ 1311, 1318, and/or 1342, and implementing regulations.

### Relief

42. Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), authorizes the administrative assessment of civil penalties in an amount not to exceed \$10,000 per day for each day during which the violation continues, up to a maximum total penalty of \$125,000. Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule of 2004, as mandated by the Debt Collection Improvement Act of 1996, and the EPA's implementing regulations at 40 C.F.R. Parts 19 and 27, civil administrative penalties of up to \$11,000 per day for each day during which a violation continues, up to a maximum of \$157,500, may be assessed for violations of CWA Sections 301 and 402, 33 U.S.C. §§ 1311 and 1342, that occur after March 15, 2004. Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule of 2008, civil administrative penalties of up to \$16,000 per day for each day during which a violation continues, up to a maximum of \$177,500, may be assessed for violations of CWA Sections 301 and 402, 33 U.S.C. §§ 1311 and 1342, that occur after January 12, 2009.

43. Based on the foregoing Finding of Violations, and pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), EPA, Region 7 hereby proposes to issue a Final Order Assessing an Administrative Penalty against the Respondent for the violations cited above, in the amount of \$79,000.

44. The proposed penalty is based upon the facts stated in this Complaint, the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, ability to pay, any prior history of such violation, the degree of culpability, economic benefit or savings resulting from the violation, and such other matters as justice may require.

45. The penalty proposed in this Complaint is based upon the best information available to EPA at the time that the Complaint was issued. The penalty may be adjusted if the Respondent establishes bona fide issues of ability to pay, or other defenses relevant to the appropriate amount of the proposed penalty.

46. As required by Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4), prior to the assessment of a civil penalty, EPA will provide public notice of the proposed penalty, and reasonable opportunity for the public to comment on the matter, and present evidence in the event a hearing is held.

47. EPA has notified the state of Iowa regarding this proposed action by mailing a copy of this document to the INDR.

### **NOTICE OF OPPORTUNITY TO REQUEST A HEARING**

#### **Answer and Request for Hearing**

48. Respondent may request a hearing to contest any material fact contained in the Complaint above or to contest the appropriateness of the proposed penalty set forth therein. Such a hearing will be held and conducted in accordance with the Consolidated Rules, a copy of which is enclosed herein.

49. To avoid being found in default, which constitutes an admission of all facts alleged in the Complaint and a waiver of the right to hearing, Respondent must file a written answer and request for hearing within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing. The answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in this Complaint with respect to which Respondent has any knowledge, or shall clearly state that Respondent has no knowledge as to particular factual allegations in this Complaint. The answer shall also state (a) the circumstances or arguments which are alleged to constitute the grounds of defense; (b) the facts that Respondent disputes; (c) the basis for opposing any proposed relief; and (d) whether a hearing is requested. Said answer shall be filed with the following:

Kathy Robinson  
Regional Hearing Clerk  
U. S. Environmental Protection Agency, Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101.

50. Failure to admit, deny or explain any material factual allegation in this Complaint constitutes an admission of the allegation.

51. A hearing upon the issues raised by this Complaint and the answer may be held if requested by Respondent in the answer. If Respondent does not request a hearing, the Presiding Officer may hold a hearing if issues appropriate for adjudication are raised in the answer.

52. In any hearing on the proposed penalty for this Complaint, members of the public to whom EPA is obligated to give notice of this proposed penalty action, will have the right, under Section 309(g) (4) (B) of CWA, 33 U.S.C. § 1319(g) (4) (B), to be heard and present evidence on the merits of the proposed CWA penalty assessment. If no hearing is held, EPA will issue a Final Order Assessing Administrative Penalties pursuant to the CWA, and only members of the public who submitted timely comments on the proposed penalty assessment will have an additional thirty (30) days to petition to set aside the said Order and to hold a hearing thereon. EPA will grant the petition and will hold a hearing only if the petitioners' evidence is material and was not considered by EPA in the issuance of the Final Order.

53. If Respondent fails to file a written answer within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing, Respondent may be found in default. Such default by Respondent constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. A Default Order may thereafter be issued by the Presiding Officer and the civil penalties proposed herein shall become due and payable unless the record clearly demonstrates that the requested relief is inconsistent with the CWA.

54. Whether or not Respondent requests a hearing, an informal conference may be requested in order to discuss the facts of this case, the proposed penalty, and the possibility of settlement. To request a settlement conference, please contact:

Chris Muehlberger  
Assistant Regional Counsel  
United States Environmental Protection Agency, Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101  
Telephone: 913-551-7578

55. Please note that a request for an informal settlement conference does not extend the thirty (30) day period during which a written answer and request for a hearing must be submitted.

56. EPA encourages all parties against whom a civil penalty is proposed to pursue the possibilities of settlement as a result of an informal conference. Any settlement which may be reached as a result of such a conference shall be embodied in a written Consent Agreement and Final Order (CAFO) issued by the Regional Judicial Officer, EPA, Region 7. The issuance of such a CAFO shall constitute a waiver of Respondent's right to request a hearing on any matter stipulated therein.

57. If Respondent has not filed an answer within the thirty (30) day time period allowed by this Notice, the penalties proposed above may be assessed by the entry of a Default Order.



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1-28-11  
Date

Karen A. Flournoy  
Karen A. Flournoy  
Acting Director  
Water, Wetlands and Pesticides Division

1.28.11  
Date

Chris Muehlberger  
Chris Muehlberger  
Assistant Regional Counsel

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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 Amended Complaint and Notice of Opportunity for Hearing, 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  
Suite 350  
Washington, D.C. 20005

  
Signature of Sender