ENVIRONMENTAL LAW

REGULATION OF WATER POLLUTION FROM AGRICULTURAL POINT SOURCES IN NEBRASKA: IMPACT OF THE NPDES PERMIT PROGRAM ON FEEDLOT OPERATIONS

INTRODUCTION

The Federal Water Pollution Control Act Amendments of 1972 to the Federal Water Pollution Control Act (FWPCA) contemplate that the states shall take primary responsibility for control of water pollution within their jurisdictions. Section 402 of the 1972 Federal Water Pollution Control Act Amendments establishes the National Pollutant Discharge Elimination System (NPDES), which regulates water pollution by a system of permit issuance. As no pollutant may be discharged into the nation's waters without an NPDES permit, the National Pollutant Discharge Elimination System provides the principal enforcement mechanism for the Federal Water Pollution Control Act Amendments of 1972.

While the Federal Water Pollution Control Act and 1972 Amendments delegate to the United States Environmental Protection Agency (EPA) authority to issue NPDES permits to regulate the discharge of pollutants into the nation's waters, section 402(b) allows the states to obtain operating control of NPDES permit issuance. A state which proposes a program for issuing pollution control permits adequate to secure compliance with federal requirements may apply to the EPA Administrator for approval of its state plan. By his approval, the EPA Administrator allows the state

4. Id.
8. Id.
to administer its own NPDES program and suspends federal permit issuance. So long as a state fails to propose an adequate plan, the Environmental Protection Agency will not relinquish its primary control over water pollution regulations within the state, and the EPA retains superior rights to ensure that the state regulatory system secures compliance with federal water pollution standards.

On June 12, 1974, Nebraska became the first state in the Environmental Protection Agency, Region VII, to administer a state NPDES permit program. Nebraska's success in administering its plan will be of interest to other agricultural states, particularly those without a state NPDES implementation program.

BACKGROUND: FEDERAL WATER POLLUTION CONTROL

On January 1, 1970, the National Environmental Policy Act of 1969 (NEPA) became effective with its goal to protect and enhance the environment. Following a reorganization of existing offices and agencies, the Environmental Protection Agency (EPA) was created as the regulatory agency to administer legislation designed to curb water, air, solid waste, noise, pesticide and radiation pollution. Following this major law, Congress enacted other environmental legislation including: the Clean Air Act Amendments of 1970, amending the Clean Air Act; the Environmental Pesticide Control Act of 1972, amending the Federal Insecticide, Fungicide and Rodenticide Act of 1947 and the Federal Water Pollution Control Act Amendments of 1972, amending the Federal Water Pollution Control Act (FWPCA).

FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972

The Federal Water Pollution Control Act Amendments of 1972 declare two national goals: (1) to eliminate by 1985 the discharge

9. Id.
10. Id. § 1342(d).
11. Letter from Russell E. Train, EPA Administrator, to Governor James J. Exon of Nebraska, June 12, 1974, on file with Nebraska Dep't of Environmental Control.
13. Id. § 4321.
of pollutants into navigable waters and (2) to attain by 1983 an interim goal of water quality which will provide for the protection and propagation of fish, shellfish and wildlife and which will support recreation in and on the nation's waters.10

"Discharge of pollutants" encompasses addition of any pollutant into navigable waters, i.e., "dredge spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste."19

To "restore and maintain the chemical, physical and biological integrity of the nation's waters," the FWPCA establishes "effluent limitations",21 which define the maximum amount of pollutants permitted to be discharged from individual point sources.22 Point sources are discernible or confined areas such as ditches through which water may flow carrying pollutants to other bodies of water.

Water quality standards limit the amount of contaminants allowed in bodies of water classified by categories of water use, such as public water supply; recreation; fish, wildlife and aquatic propagation; industrial use and agricultural use. The Act prohibits degradation of the existing water quality of a body of water.24 Therefore, as between existing water quality standards and proposed effluent limitations, the stricter standard defines required water quality.25

By July 1, 1977, industries must meet federally established effluent limitations by use of the "best practicable technology" to

19. Id. § 1251(a) (2).
20. Id. § 1362(6).
21. The FWPCA defines "effluent limitation" as any restriction established by a state or the EPA Administrator on quantities, rates and concentrations of chemical, physical, biological and other constituents which are discharged from point sources into navigable waters. 33 U.S.C. § 1362(11) (Supp. III, 1973); Primer at 13.
be determined by facilities involved, processes employed, equipment age and energy requirements of each industrial operation. By July 1, 1983, the "best available technology" must be employed to achieve defined effluent limitations which are economically achievable as determined by the EPA and which will result in reasonable progress toward the national goal of eliminating the discharge of pollutants.

WATER POLLUTION FROM AGRICULTURAL WASTE

Water pollution originates from industrial, municipal and agricultural sources. A very rough, oversimplified approximation is that water pollution comes one-third from industry, one-third from communities, and one-third from agriculture.

More than half of the solid waste produced each year in the United States is livestock manure. The approximately 1.7 billion tons of animal waste is equivalent to the sewage from a human population of over two billion. Livestock deposit a large percentage of this manure in open pastures and ranges. However, recent expansion of the livestock feeding industry has caused heavy concentrations of animals in small areas, especially in feedlots and poultry farms. It has been estimated that eighty percent of all beef cattle and more than ninety percent of all hogs and chickens now spend at least a part of their lives in feedlots; therefore concentrated amounts of manure accumulate in small areas.

The water pollution problem stems from inadequate disposal of animal wastes in animal confinement facilities. During periods...
of snow melt and rain, water may drain through confinement areas resulting in uncontrolled runoff which reaches nearby lakes, streams and rivers. Feedlot runoff constitutes a major water pollution problem in rural areas, especially the Cornbelt and Great Plains states.

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

The heart of the 1972 Federal Water Pollution Control Act Amendments is a national permit program for the three categories of pollution sources. The real impact on the agricultural community stems from section 402 which creates the National Pollutant Discharge Elimination System (NPDES).

The NPDES permit program applies the national effluent and water quality standards to individual polluters. The FWPCA prohibits the discharge of any pollutant into the nation's waters without a permit.

POINT SOURCES

Only the discharge of pollutants from point sources is governed by the FWPCA. All point source discharges into the nation's navigable waters must comply with the National Pollutant Discharge Elimination System of the FWPCA. Section 502(14) of the Act defines point sources as: "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft from which pollutants are or may be discharged."
Generally, point sourcers are identifiable objects and outlets such as pipes or ditches through which water containing pollutants can flow and be measured and regulated. On the other hand, non-point sources usually are open areas from which it would be impossible readily to identify a single source of pollution, for example, runoff of pesticides and fertilizers from farm and forest lands.\textsuperscript{44}

Concentrated animal feeding operations are the one cause of agricultural pollution specifically included within the definition of point sources.\textsuperscript{45} Therefore, every feedlot operation with an existing or potential runoff of pollutants into the nation's waters is subject to the provisions of the FWPCA and must obtain a permit.

\textbf{NPDES Permit}

An NPDES permit is not a grant of permission to pollute\textsuperscript{46} but instead regulates what and how much substance may be discharged.\textsuperscript{47} The permit designates effluent limitations for the livestock waste control structure described and is issued for a maximum of five years.\textsuperscript{48}

The permit defines the operator's legal obligations under the FWPCA.\textsuperscript{49} The permittee must meet a detailed compliance schedule if unable immediately to achieve the standards.\textsuperscript{50} All permits are issued subject to conditions.\textsuperscript{51} A permit may be conditioned upon the private installation, use, and maintenance of monitoring and reporting equipment.\textsuperscript{52} A problem permittee whose facility causes periodic complaints of violation or who, because of his facility's location finds compliance with regulations difficult, must keep records of all samples for three years and report to the administering agency.\textsuperscript{53} The federal or state permit-issuing au-

\begin{footnotes}
\footnote{44. See \textit{Federal Environmental Law} at 765-67; \textit{Wisconsin Feedlots} at 774-75.}
\footnote{46. \textit{Toward Cleaner Water} at 1-2.}
\footnote{47. Id. at 2.}
\footnote{48. 33 U.S.C. § 1342(b) (1) (B) (Supp. III, 1973). See \textit{Toward Cleaner Water} at 12.}
\footnote{49. \textit{Federal Environmental Law} at 728.}
\footnote{50. \textit{Toward Cleaner Water} at 12. See note 94 and accompanying text.}
\footnote{52. 33 U.S.C. § 1318 (Supp. III, 1973).}
\footnote{53. See \textit{Nebraska Dep't of Environmental Control Rules and Regulations, Pertaining to the Issuance of Permits Under the Nat'l Pollutant Discharge Elimination Sys. R. 8.05} (effective June 10, 1974) [hereinafter cited as \textit{NPDES Rules}].}
\end{footnotes}
authority may enter a feedlot operation at any reasonable time to determine whether to require livestock waste control facilities and to evaluate whether existing facilities are effective.\textsuperscript{54}

**EXEMPTIONS FROM THE FEDERAL PERMIT SYSTEM**

On December 22, 1972 and May 22, 1973, the EPA promulgated regulations\textsuperscript{55} governing the issuance of NPDES permits by the EPA or by a state with permit issuing authority, indicating that all discharges of pollutants from all point sources are unlawful without a permit, unless exempted by the regulations.\textsuperscript{56}

The current regulations provide extensive exclusions for: discharges of pollutants from agricultural and silvicultural activities including irrigation return flow and runoff from orchards, cultivated crops, pastures, rangelands and forest lands.\textsuperscript{57} These are considered exempted point sources. Exemptions do not apply to federally regulated feedlots exceeding certain animal population quotas.\textsuperscript{58}

In *Natural Resources Defense Council v. Train*,\textsuperscript{59} the U.S. District Court for the District of Columbia held that the FWPCA does not give the EPA Administrator discretion to exempt entire classes of point sources from the National Pollutant Discharge Elimination System permit requirement. The Administrator may no longer lawfully exempt animal confinement facilities below a certain animal population from complying with the FWPCA.\textsuperscript{60} Therefore, all feedlot operations are now affected by the Act.

**THE NEBRASKA ENVIRONMENTAL PROTECTION ACT**

The Nebraska Environmental Protection Act\textsuperscript{61} provides the


\textsuperscript{55} 40 C.F.R. §§ 124, 125 (1974).


\textsuperscript{57} 40 C.F.R. § 125.4(j) (1974).


\textsuperscript{59} 7 E.R.C. 1881 (1975).

\textsuperscript{60} Id. at 1887.

\textsuperscript{61} NEB. REV. STAT. §§ 81-1502 et seq. (Cum. Supp. 1974), amending NEB. REV. STAT. §§ 81-1501 et seq. (Reissue 1971). See also Comment, The
statutory authority for Nebraska environmental law, including
state implementation of federal law.\textsuperscript{62}

In 1971, the Nebraska Environmental Protection Act established the Environmental Control Council,\textsuperscript{63} a policy-making body; and the Department of Environmental Control (DEC),\textsuperscript{64} a regulatory and enforcement agency. The sixteen-member council adopts all standards, rules and regulations after giving public notice and holding a public hearing.\textsuperscript{65} An attorney representing agricultural interests should pay particular attention to the notices offered and be prepared to support or attack any changes in environmental standards at the public hearings. The DEC, headed by a Director, is subdivided into four bodies: the Air, Solid Waste, Water and Agricultural Pollution Control Divisions.\textsuperscript{66}

### The Agricultural Pollution Control Division

In 1971, the Agricultural Pollution Control Division established two major goals: (1) to set feasible deadlines by which Nebraska feedlot operators must comply with permit requirements, (2) to adopt rules and regulations for the Department of Environmental Control and for the livestock industry.\textsuperscript{67}

To achieve these goals, the DEC with its Agricultural Pollution Control Division adopted Rules and Regulations for Livestock Waste Control.\textsuperscript{68} The Nebraska rules and regulations for livestock waste control differ from those of other states and from the federal NPDES by their emphasis on initial voluntary compliance. Voluntary compliance is to be achieved by requiring the operator of each proposed or existing livestock operation to apply to the Nebraska Department of Environmental Control for a determination of the facility’s pollution potential.\textsuperscript{69} The DEC Agricultural

\begin{footnotesize}
\begin{enumerate}
\item \textit{Nebraska Environmental Protection Act: Effects and Implications for the Nebraska Community}, 7 Creighton L. Rev. 263 (1974).
\item \textit{NEB. REV. STAT. § 81-1504(4) (Cum. Supp. 1974).}
\item \textit{NEB. REV. STAT. § 81-1503 (Cum. Supp. 1974).}
\item \textit{Id. § 81-1502(6)-1504 (Cum. Supp. 1974).}
\item \textit{NEB. REV. STAT. § 81-1505(16) (Cum. Supp. 1974).}
\item \textit{DEPT OF ENVIRONMENTAL CONTROL, WHAT IS STATE GOVERNMENT DOING ABOUT NEBRASKA'S ENVIRONMENT} at 5 (1975).
\item \textit{Interview with Richard Hansen, Legal Counsel of the Nebraska Dep't of Environmental Control, and Lanny Icenogle, Chief of the Agricultural Pollution Control Division, in Lincoln, Nebraska, March 6, 1975 [hereinafter cited as Hansen and Icenogle Interview], memoranda on file with Creighton Law Review.}
\item \textit{Livestock Wastes.}
\item \textit{Id. R. 5.}
\end{enumerate}
\end{footnotesize}
Pollution Control Division makes an on-site inspection\(^7^0\) of each applicant's feedlot facility.

**NEBRASKA PLAN FOR CONTROL OF LIVESTOCK WASTE**

Before passage of the Federal Water Pollution Control Act Amendments of 1972, Nebraska had already initiated a statewide permit system to control the discharge of livestock waste into the waters of the state.\(^7^1\)

As required by the 1972 Federal Water Pollution Control Act Amendments, Nebraska incorporated the NPDES permit program into its existing livestock waste control system.\(^7^2\) Consequently, Nebraska livestock operators must comply with a combination of state and federal environmental control law.\(^7^3\)

The Nebraska plan for livestock waste control is comprised of the Nebraska Environmental Protection Act;\(^7^4\) Rules and Regulations Pertaining to Livestock Waste Control,\(^7^5\) effective June 25, 1975; National Pollutant Discharge Elimination System Regulations,\(^7^6\) effective June 10, 1974, and Nebraska Rules of Practice and Procedure,\(^7^7\) effective April 3, 1975.

The Nebraska plan has two unique features:

1. The Agricultural Pollution Control Division conducts an on-site inspection to evaluate each feedlot facility's pollution potential.\(^7^8\)

2. No livestock operation is exempted on the basis of a minimum population quota.\(^7^9\)

**THE PROCESS OF OBTAINING A PERMIT**

**INITIAL APPLICATION**

The first procedure a livestock operator must follow is to apply for a permit to the Department of Environmental Control. Every livestock operator must request an inspection of his facility by the

\(^7^0\) Id. R. 6.

\(^7^1\) *Hansen and Icenogle Interview*, March 6, 1975.


\(^7^5\) *Livestock Wastes*.

\(^7^6\) NPDES Rules.

\(^7^7\) *NEBRASKA DEPT. OF ENVIRONMENTAL CONTROL RULES OF PRACTICE AND PROCEDURE* (1975) [hereinafter cited as *R.P.P.*]

\(^7^8\) *Livestock Wastes* R. 6.

\(^7^9\) Id. R. 1, 5.
Agricultural Pollution Control Division\textsuperscript{80} if he has a present or potential pollution discharge into the state's waters.\textsuperscript{81} Thus every livestock operator\textsuperscript{82} has an affirmative duty to: (1) request an inspection to determine if livestock waste control facilities are required, and (2) apply to the DEC for an NPDES permit when livestock wastes discharge into the state's waters.\textsuperscript{83}

\textbf{INSPECTION}

The Agricultural Pollution Control Division conducts an on-site inspection after notice to the permit applicant.\textsuperscript{84} The Agricultural Pollution Control Division determines whether the operation is discharging pollutants, thus requiring livestock waste control facilities and/or an NPDES permit.

The Agricultural Pollution Control Division compels the construction of livestock waste control facilities if runoff from the livestock operation without such controls would:

1. create a nuisance, or
2. violate the Nebraska Water Quality Standards, or
3. discharge into waters of the state, or
4. violate the Nebraska Environmental Protection Act.\textsuperscript{85}

Even if building a livestock waste control facility is not required, the operator may be compelled to obtain an NPDES permit. Permits are mandated for all who discharge pollutants from a point source. Thus if the operation is discharging livestock wastes into the state's waters, an NPDES permit will be required.\textsuperscript{86}

\textbf{PUBLIC NOTICE AND HEARINGS}

As required by the 1972 Federal Water Pollution Control Act Amendments, Nebraska encourages public participation in the procedures associated with water pollution control.\textsuperscript{87} The state provides public notice of all applications, tentative determinations, proposed effluent limitations on pollutants and compliance dates, be-

\begin{itemize}
  \item \textsuperscript{80} Id. R. 5.
  \item \textsuperscript{81} Id. R. 1.
  \item \textsuperscript{82} The Nebraska definition of "livestock operation" means "the feeding or holding of beef cattle, dairy cattle, horses, swine, sheep, poultry and other livestock in buildings, lots, pens, pools or ponds." \textit{Id.} R. 1.
  \item \textsuperscript{83} Id. R. 5.
  \item \textsuperscript{84} Id. R. 6, \textit{Scoop in Nebraska} at 19.
  \item \textsuperscript{85} Id. R. 14, 2.
  \item \textsuperscript{86} Id. R. 3.
  \item \textsuperscript{87} 33 U.S.C. § 1342(j) (Supp. III, 1973); \textit{Toward Cleaner Water} at 15-17.
\end{itemize}
before an NPDES permit is issued or denied by the Department of Environmental Control.\textsuperscript{88} Nebraska offers a thirty-day comment period in which the general public may request a hearing concerning the proposed issuance of any NPDES permit.\textsuperscript{89} The Environmental Protection Agency receives a copy of the proposed state permit and may veto its issuance.\textsuperscript{90}

Procedure if No Controls Required

Construction of livestock waste control facilities is not required when the Agricultural Pollution Control Division certifies that the operation is not polluting the state's waters or creating a nuisance.\textsuperscript{91}

An operator whose livestock facilities do not pollute the state's waters may, upon certification by the Director of the DEC, receive a permit to operate without constructing control facilities.\textsuperscript{92} For any changed circumstances, such as expansion of his operation, the livestock operator must request another inspection by the Agricultural Pollution Control Division.\textsuperscript{93}

Construction of Control Facilities

If the Agricultural Pollution Control Division requires construction of livestock waste control facilities, the operator receives two compliance dates: a final date for submission of construction plans for approval, and a compliance schedule for completion of the control devices.\textsuperscript{94} Compliance schedules must achieve construction within a specified time, with all construction completed by the state and federal July 1, 1977 deadline for use of best practicable control technology.

The method or facility to be constructed for livestock waste control is within the discretion of the operator if his system is designed by a registered professional engineer, by the United States Soil Conservation Service (SCS), or by another qualified person, so long as the facilities are designed to meet the requirements.\textsuperscript{95} The SCS designs facilities for those operations consisting of ten acres or less unless the DEC gives the SCS authority to design facilities for operations larger than ten acres.\textsuperscript{96}

\textsuperscript{89} NPDES Rules R. 6.06.
\textsuperscript{91} Livestock Wastes R. 14.
\textsuperscript{92} Id. R. 10.
\textsuperscript{93} Id. R. 19, 11.
\textsuperscript{94} Id. R. 8, Hansen and Icenogle Interview, March 6, 1975.
\textsuperscript{95} Livestock Wastes R. 7.
\textsuperscript{96} Hansen and Icenogle Interview, July 10, 1975.
The Soil Conservation Service will provide financial assistance for the construction of livestock waste control facilities in the sixty-one Nebraska counties subject to the Great Plains Conservation Program. In addition, cost-sharing may be available from the Agricultural Conservation Program administered by the SCS. Currently, five of the twenty-four Nebraska Natural Resources Districts furnish some type of cost-sharing: Upper Elkhorn, Lower Elkhorn, Middle Missouri Tributaries, Lower Platte North and Papio. The Nebraska DEC acknowledges the substantial costs of constructing livestock waste facilities and attempts to suggest less expensive alternative structures or aid the operators to locate financial assistance.

All waste control plans must be approved by the Agricultural Pollution Control Division before construction may begin. The owner of a proposed pollution control system must also comply with any local zoning laws. Various waste control facilities may be constructed: debris basins, diversion terraces, holding ponds, liquid manure storage pits and disposal lagoons.

Following approval of the construction plan, the Agricultural Pollution Control Division issues a state construction permit which authorizes construction of the control facility. No work on any pollution control system may commence without the construction permit.

99. Scoop in Nebraska at 24.
100. Id.
101. Hansen and Icenogle Interview, March 6, 1975.
104. See generally Scoop in Nebraska at 8-12. All livestock waste control systems must be designed to control the runoff from a 10-year—24-hour storm; i.e., the maximum rainfall event expected to occur during a 24-hour period over a 10-year recurrence cycle. In Nebraska this rainfall ranges from 2.9 in the Panhandle to 4.7-5.1 in Douglas County and the southeastern tip of the state. Livestock Wastes R.1, Appendix A.
Upon completion of a livestock waste control facility, the operator receives certification by the Soil Conservation Service or by a qualified professional engineer that the system constructed meets the DEC approved plans and specifications.\textsuperscript{106}

**Significance of a Permit**

A properly constructed and managed livestock operation should not pollute. A person required to comply with NPDES procedures and to construct livestock waste control facilities receives a permit certifying that he is in compliance with the Nebraska and NPDES rules and regulations.\textsuperscript{107}

In the alternative, if, after inspection by the Agricultural Pollution Control Division, an operator is not required to construct livestock waste control facilities, he receives a letter certifying that he is in compliance with the rules and regulations. In either case, the permit or the letter affords him a presumption\textsuperscript{108} that he has not created a nuisance.

If the DEC passes more stringent regulations while a permit is in effect, the complying operator has one year in which to conform to the new regulations.\textsuperscript{109}

**PROCEDURES FOR ENFORCEMENT**

**Administrative Remedies: State**

The DEC, with the guidance of its legal counsel and the cooperation of its Agricultural Pollution Control Division, conducts administrative hearings\textsuperscript{110} to achieve voluntary compliance\textsuperscript{111} with the Nebraska livestock waste control plan. The Director at

\textsuperscript{106} Id. R. 9.

\textsuperscript{107} Id. R. 10.

\textsuperscript{108} Id. R. 10, 23. The DEC will testify on behalf of any protected operator. The burden of proof rests upon the one challenging the protected permittee. \textit{Hansen and Icenogle Interview}, April 7, 1975.

\textsuperscript{109} \textit{Livestock Wastes} R. 22.

\textsuperscript{110} \textit{Neb. Rev. Stat.} § 81-1507 (Cum. Supp. 1974); for the specific procedures see DEC rules of practice used solely for administrative hearings. \textit{R.P.P.}

his discretion\textsuperscript{112} hold administrative proceedings\textsuperscript{118} upon request by the DEC, an NPDES applicant, a permittee or any interested person,\textsuperscript{114} whenever there is an alleged violation of an effluent standard,\textsuperscript{115} permit condition\textsuperscript{116} or administrative order.\textsuperscript{117} Any interested party who raises pertinent issues may intervene in a hearing.\textsuperscript{116}

Enforcement may be accomplished informally by stipulation, agreed settlement, consent order or default.\textsuperscript{119} Costs and fees are apportioned between the parties.\textsuperscript{120} A dissatisfied party may request a rehearing before the Director\textsuperscript{121} or appeal to the Lancaster County District Court.\textsuperscript{122}

**Administrative Remedies: Federal**

The EPA's enforcement authority enables the Administrator to

\textsuperscript{112} Neb. Rev. Stat. § 81-1507(1); R.P.P. R. 23.
\textsuperscript{115} Violation of an effluent standard may be indicated by water pollution damage affecting the public and personal welfare of Nebraska citizens or pollution damage which is imminent or which has occurred. R.P.P. R. 23.
\textsuperscript{116} An NPDES permittee or applicant may request a determination for cause to revoke, modify or deny an NPDES permit. Neb. Rev. Stat. § 81-1507(3) (Cum. Supp. 1974); R.P.P. R. 23.
\textsuperscript{117} Neb. Rev. Stat. § 81-1507(1) (Cum. Supp. 1974). In lieu of an administrative hearing, the Director may issue a compliance order, but the alleged violator may request an administrative hearing within thirty days. Id.
\textsuperscript{118} R.P.P. R. 28. Leave to intervene gives the intervenor the full status of the original parties. Id. R. 28(2).
\textsuperscript{119} R.P.P. R. 44.
\textsuperscript{120} Costs of official DEC administrative hearing transcripts are borne proportionately by the parties. R.P.P. R. 50. If a party requests DEC to follow the rules of evidence used in the state district court, he must pay costs incurred, including court reporting services. Id. R. 51. A subpoenaed witness is entitled to the same fee as is paid for like service in the District Court of Nebraska. The fee is paid by the party requesting the testimony. Id. R. 59.
\textsuperscript{121} Id. R. 48. The motion for rehearing must be filed within ten days after receipt of the Director's decision. Id.
exercise control over state NPDES permit plans by vetoing a proposed individual permit which fails to comply with state law or EPA regulations or which would adversely affect waters of another state. In addition, the Administrator may revoke a state's permit-issuing authority in general, for its failure to comply with federal requirements. Such revocation must be preceded by a public hearing and a period of up to ninety days in which the state may take corrective action. If a state fails to act when a feedlot operator violates the state NPDES plan, the EPA may issue administrative orders. EPA supervision thus ensures meaningful state enforcement.

JUDICIAL REMEDIES: STATE

If DEC's administrative hearings fail to achieve voluntary compliance, jurisdiction passes to the appropriate state district court. The state attorney general or a county attorney prosecutes the suit at the DEC Director's request.

Civil

Any person convicted of a specified NPDES-related violation is subject to an injunction and/or civil penalty of not more than $5,000 per day of violation. When a violation results in fish or wildlife death, the state may recover additional replacement funds.

Criminal

Any person convicted of a specified NPDES-related violation committed willfully, negligently, or knowingly is guilty of a mis-

123. 33 U.S.C. §§ 1342(b), (d), 1319(a)-(c) (Supp. III, 1973).
124. Id. § 1342(c).
125. Id. § 1319(a) (2).
128. Specified NPDES-related violations include "refusing the right of entry and inspection to any authorized departmental representative, violation of any effluent standards and limitations, filing requirements, monitoring requirements, or water quality standards, or for failure to obtain a permit, or for violation of a permit or any permit condition or limitation or any rules, regulations, or orders of the director." Neb. Rev. Stat. § 81-1508(1) (c) (Cum. Supp. 1974); NPDES Rules R. 1. For any non-NPDES violation, the fine ranges from one hundred dollars to five hundred dollars, with additional costs as the violation continues. Neb. Rev. Stat. § 81-1508(1) (a) (Cum. Supp. 1974).
129. Id. § 81-1508 (3).
130. Id. § 1508 (1) (c).
131. Id. § 1508 (2).
Penalties for criminal convictions consist of a maximum fine of $5,000 per day or a maximum of six months in the county jail.\footnote{133}

**Judicial Remedies: Federal**

The 1972 Amendments grant the EPA Administrator concurrent enforcement authority with state governments.\footnote{134} If an operator fails to comply with the terms of the state NPDES permit plan, EPA may take enforcement action if the state fails to act.\footnote{135} At the EPA's request, the U.S. Attorney General or a U.S. Attorney prosecutes the suit in the appropriate federal district court.\footnote{136}

**Civil**

Federal civil penalties include fines of up to $10,000 per day of violation.\footnote{137} Any infringement is subject to an injunction.\footnote{138}

**Criminal**

For willful\footnote{139} or negligent violations,\footnote{140} federal fines of up to $25,000 per day and of up to a one year prison term punish a

\footnote{132} Specified NPDES-related violations which incur criminal penalties include "willful or negligent violation of water quality standards, effluent standards and limitations, failure to obtain a permit or meet the filing requirements therefor, discharging without a permit or violation of a permit or any permit condition or limitation. . . ." NEB. REV. STAT. § 81-1508(1) (b) (Cum. Supp. 1974); NPDES Rules R. 1. In addition, "[f]or knowingly making any false statement, representation, or certification in any application, record, report, plan, or other document filed pursuant to the National Pollutant Discharge Elimination System, Pub. L. No. 92-500, or for falsifying, tampering with, or knowingly rendering inaccurate any monitoring device or method required under such system" there are criminal penalties. NEB. REV. STAT. § 81-1508(1) (d) (Cum. Supp. 1974); NPDES Rules R. 1.

\footnote{133} NEB. REV. STAT. § 81-1508(1) (b), (d) (Cum. Supp. 1974); NPDES Rules R. 1.

\footnote{134} See U.S. ENVIRONMENTAL PROTECTION AGENCY, ACTION FOR ENVIRONMENTAL QUALITY, STANDARDS AND ENFORCEMENT FOR AIR AND WATER POLLUTION CONTROL, 19 (1973): Toward Cleaner Water at 4-5.


\footnote{136} Id. § 1319(b).

\footnote{137} Id. § 1319(d).

\footnote{138} Id. § 1319(b).

\footnote{139} On February 19, 1974, a federal grand jury in Omaha, Nebraska, returned the first indictment against a feedlot for an illegal discharge under 33 U.S.C. § 1311(a) and 1319(c) (1). United States v. American Beef Packers, Inc., CR 74-0-30 (D.C. Neb. 1974); [The] discharge of any pollutant from any point source by any person shall be unlawful. 33 U.S.C. § 1311(a) (Supp. III, 1973); "Any person who willfully or negligently violates section 1311. . . ." Id. § 1319(c) (1). At trial, the verdict was not guilty. This case illustrates the difficulty of proving a willful or negligent violation in a livestock waste case, when a violator can point to weather conditions, cost diff-
first offense. Federal penalties double for subsequent criminal violations, whereas the state penalties do not change.

**Emergency Powers: State**

The DEC Director may exercise emergency powers to protect the public health and welfare by ordering a person in violation of an effluent standard, permit or administrative order to take effective action immediately to comply.

**Emergency Powers: Federal**

EPA has emergency power to seek an immediate injunction or other action in federal court to stop water pollution substantially endangering the public health or welfare. This provision may be exercised without prior notice or any hearing.

**Citizen Suits**

Private persons have long had a restricted right to file suit under nuisance laws when pollution damages their health or property. The FWPCA permits private citizens to enforce per-

140. “Specifically, violations of 1311, 1312, 1316, 1317, or 1318 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State. . . .” 33 U.S.C § 1319(c) (Supp. III, 1973).

141. $50,000 per day of violation or no more than two years imprisonment. Id.


143. DEC had one emergency case which it took immediately to the Scottsbluff County District Court. The state proceeding, a civil suit seeking only injunctive relief, was dismissed with prejudice because defendant, American Beef, brought its feedlot to full compliance and qualified for an NPDES permit during the trial, and no further damage was imminent or likely. State of Nebraska, ex rel. Higgins v. American Beef Packers, Inc., Civil No. 74-55 (Dist. Ct. June 24, 1974).


146. There is no state authority for a citizen suit. A Nebraska citizen is eligible to file this federally authorized suit as a U.S. citizen. 33 U.S.C. 1365 (Supp. III, 1973). The term “citizen” means a person or persons having an interest which is or may be adversely affected. Id. § 1365(g). Person means an individual, corporation, partnership, association, state, municipal-
personally and directly federal anti-pollution measures. The U.S. Court of Appeals for the Eighth Circuit has indicated that to confer standing in such suits, an injury need only be “identifiable”. 147 The FWPCA grants jurisdiction to U.S. District Courts without regard to amount in controversy or diversity of citizenship. 148 Sixty days after notice to the EPA Administrator, to the state in which the alleged violation occurs and to the alleged violator, a party may bring suit, 149 subject to the limitation that a citizen suit may not commence if the EPA Administrator or the state is prosecuting a court action to require the violator’s compliance. 150

A private citizen may sue on his own behalf any person, including the United States or other governmental agency, who violates an effluent standard, permit condition, or EPA or DEC administrative order. 151 The EPA Administrator is subject to suit for failure to perform any nondiscretionary act or duty. 152 The U.S. District Court may grant the citizen injunctive relief 153 and the appropriate civil penalties 154 authorized under the FWPCA. In such citizen suits, the court may award costs of litigation, including reasonable attorney fees and expert witness fees, whenever it determines that such award is in the public interest. 155

CONCLUSION

Nebraska, by its state plan for livestock waste control, is exercising responsibility for eliminating water pollution as envisioned by the Federal Water Pollution Control Act and the Act’s 1972 Amendments. The National Pollutant Discharge Elimination Sys-

147. “An identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.” Coalition for the Environment v. Volpe, 504 F.2d 156, 168 (8th Cir. 1974). Citing United States v. SCRAP, 412 U.S. 669, 689 n.14 (1973). The plaintiffs alleged only that pollution would increase in the area because of a housing development, and the increase would cause them harm. The court granted them standing to challenge the proposed project, as the property owners walked nearby and drove over the defendant’s property and therefore could claim injury in fact. Id.
149. Id. § 1365(b) (1) (A).
150. Id. § 1365(b) (1) (B). In any such action in a federal court, any citizen may intervene as a matter of right. Id.
151. Id. § 1365 (a) (1).
152. Id. § 1365 (a) (2).
153. Id.
154. Id. § 1365 (a). The court may require the filing of a bond or equivalent security in accordance with Fed. R. Civ. P. 65. Id. § 1365 (d).
155. Id. § 1365 (d).
tem, incorporated into the Nebraska plan, prohibits the discharge of pollutants from a point source into any waters of Nebraska without a permit. The system of permit issuance thus serves to regulate to what extent contaminants may enter the state's waters.

As an animal confinement facility, i.e., feedlot, is expressly a point source, every Nebraska feedlot operator with a present or potential pollution discharge into the waters of the State must apply for an on-site inspection by the Agricultural Pollution Control Division of the Department of Environmental Control. The inspection determines whether the operator must obtain an NPDES permit and/or construct livestock waste controls.

Once a livestock operator has complied with Nebraska's regulations, a monitoring system may be established to ensure that he maintains required standards. Any feedlot operator in violation of effluent limitations, permit conditions or administrative orders may be subject to administrative penalties, injunctions and civil or criminal suits by either state or federal authorities.

Nebraska's regulation of water pollution from livestock waste runoff and other sources serves as an excellent model for effective environmental control by the states, under the Federal Water Pollution Control Act Amendments of 1972.

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