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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region VII
901 North 5th Street
Kansas City, Kansas 66101

In the matter of:)	
)	DOCKET NO. CWA-07-2007-0078
)	
Lowell Vos)	
)	COMPLAINANT'S REPLY TO
)	RESPONDENT'S RESISTANCE TO
)	MOTION TO SUPPLEMENT
)	COMPLAINANT'S PREHEARING
)	EXCHANGE and RESPONSE TO
)	MOTION FOR POSTPONEMENT OF
)	HEARING
d/b/a Lowell Vos Feedlot)	
Woodbury County, Iowa)	
)	
Respondent.)	
_____)	

Complainant herein replies to Respondent's Resistance to Motion to Supplement Complainant's Prehearing Exchange and also responds to Respondent's alternative Motion for Postponement of Hearing.

Background

On September 5, 2008, Complainant filed a motion to supplement its prehearing exchange. The motion was filed ten days before this matter is scheduled to go to hearing in Des

Moines, Iowa. On September 9, 2008, Respondent filed a response to the Complainant's motion and also filed an alternative motion to postpone the hearing. This matter is set for hearing on September 15, 2008.

RESPONSE TO RESPONDENT'S RESISTANCE TO MOTION TO SUPPLEMENT
COMPLAINANT'S

1. Respondent requests that Complainant's motion to supplement its prehearing exchange be denied. The rationale for denial is "unfair surprise." Respondent alleges that the surprise is a result of Mr. Jeff Prier's failure to indicate on an inspection form that he had taken photos of a discharge and subsequent failure to timely disclose the photos.

2. Complainant is empathetic to Respondent's argument since Complainant itself only learned of the existence of the photos a few days ago. However, Complainant urges the Court to consider that Respondent listed Mr. Prier as a witness in its April 7, 2008, Initial Prehearing Exchange. The photographs that Respondent seeks to keep out of the record were taken by one of its own witnesses.

3. Complainant asserts that the threshold question in 40 C.F.R. 22.22(a) for determining if supplemental documents may be entered into evidence is whether the Complainant had good cause for failing to provide the additional documents at least 15 days before the hearing date. Respondent implicitly recognized in its Response that Complainant had good cause in noting that Complainant did not have reason to know of the existence of the two photos. Complainant further asserts that any alleged negligence on the part of the Iowa Department of Natural Resources (IDNR) does not extend to Complainant. Complainant does not have control over IDNR's actions or IDNR's files and IDNR is not a party to this litigation.

RESPONSE TO RESPONDENT'S MOTION FOR POSTPONEMENT FOR HEARING

1. Complainant asserts that the hearing should not be postponed. It is unfortunate for Respondent that its defense has been undermined by material, relevant, probative, and yes, prejudicial evidence. However, the relief Respondent seeks is inappropriate.

2. Respondent seeks additional time to request depositions upon oral questions from Mr. Prier and Mr. Ken Hessenius. Mr. Prier and Mr. Hessenius are both listed as witnesses in Respondent's April 7, 2008, Initial Prehearing Exchange. It appears that Respondent seeks to postpone the hearing to allow an opportunity to request to depose its own witnesses.

3. The Complaint in this matter was filed over a year ago and Respondent has had five months since naming Mr. Prier and Mr. Hessenius as witnesses to seek information from them. Now, six days before the hearing, Respondent seeks additional time to determine what evidence may be provided at hearing by witnesses that are listed in its own prehearing exchange.

4. Finally, Complainant takes exception with Respondent's references to Complainant's summary of Mr. Prier's expected testimony. Complainant's summary of Mr. Prier's testimony states that he has inspected Respondent's facility and will testify regarding his observations. The summary of the expected testimony encompasses Mr. Prier's observation of a discharge from Respondent's feedlot during one of those inspections.

Conclusion

For the reasons stated above and the reasons stated in its Motion to Supplement Complainant's Prehearing Exchange, Complainant requests that the Presiding Officer grant its motion to supplement its prehearing exchange. Also for the reasons stated above, Complainant further requests that the Presiding Officer deny Respondent's motion to postpone the hearing.

RESPECTFULLY SUBMITTED this 10th day of September, 2008.

A handwritten signature in black ink, appearing to read "J. Daniel Breedlove", written over a horizontal line.

J. Daniel Breedlove
Assistant Regional Counsel
Region VII

CERTIFICATE OF SERVICE

I certify that the foregoing "Reply to Respondent's Resistance to Motion to Supplement Complainant's Prehearing Exchange and Response to Motion for Postponement of Hearing" was sent to the following persons, in the manner specified, on the date below:

Original and one copy by hand delivery:

Kathy Robinson
Regional Hearing Clerk
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Kansas City, Kansas 66101

Copy, by pouch mail and facsimile:

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Dated: 9/10/2008

Kimberly K. [Signature]
U.S. EPA Region VII