

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII

901 North 5th Street

KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

In the matter of:)	
)	
)	
Lowell Vos)	DOCKET NO. CWA-07-2007-0078
d/b/a Lowell Vos Feedlot)	
)	
Woodbury County, Iowa,)	
)	COMPLAINANT'S MOTION
)	TO WITHDRAW PORTION OF THE
)	COMPLAINT
Respondent.)	
_____)	

Pursuant to Rule 22.14(d) 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) moves to withdraw Count I of the Complaint. This motion should be granted because it will result in no prejudice to the Respondent, and will reduce the amount of time and effort the parties will be required to devote to their post-hearing briefs.¹

BACKGROUND

EPA filed the Complaint in this matter on August 14, 2007. The Complaint contains two counts. Count I alleges that Respondent's concentrated animal feeding operation (CAFO)

¹ Respondent's counsel has informed EPA that he does not anticipate opposing this motion, but he reserves the right to oppose.

discharged pollutants to waters of the United States without a National Pollutant Discharge Elimination System (NPDES) permit. Count II alleges that Respondent failed to apply for a NPDES permit as required by the Clean Water Act (CWA). The proposed penalty in the Complaint is \$157,500. Respondent, Lowell Vos, filed his Answer to the Complaint on September 19, 2007. The hearing in this matter was held September 15-22, 2008 in Des Moines, Iowa. At the conclusion of the hearing, the Presiding Officer set a due date of November 10, 2008 for the filing of the initial post-hearing briefs.

ARGUMENT


Complainant seeks to withdraw Count I (Unpermitted Discharge of Pollutants to Waters of the United States) of the Complaint. EPA continues to contend that the evidence presented at hearing demonstrates that Respondent's feedlot discharged pollutants to waters of the United States during significant precipitation events, and thus created an ongoing duty for Respondent to apply for a NPDES permit. Complainant will still seek a penalty of \$157,500. However, EPA will not use evidence from the APEX or SWAT models to argue that Respondent had an ongoing duty to apply for an NPDES permit because his feedlot discharged to waters of the United States.

Forty C.F.R. section 22.14(d) states the Complainant may withdraw any portion of the complaint without prejudice upon motion granted by the Presiding Officer. While the rule is silent regarding a withdrawal with prejudice, it logically follows that 40 C.F.R. § 22.14(d) allows Complainant to withdraw a portion of its complaint at anytime with prejudice. Complainant recognizes that withdrawal of Count I at this time would foreclose EPA's ability to seek penalties for the violations alleged in Count I. Nevertheless, Complainant moves for the Presiding Officer to grant its motion to withdraw Count I of the Complaint.

Granting this motion will not prejudice Respondent because it reduces the number of violations EPA has alleged and therefore reduces Respondent's potential liability. Removing Count I from the Complaint will benefit the parties by allowing them to focus their post-hearing briefs on the facts and law at issue in Count II. Furthermore, the granting of this motion makes clear that EPA does not intend to use evidence from the APEX or SWAT models to prove any elements of the remaining counts in the Complaint.

For the reasons stated above, Complainant seeks to withdraw Count I from the Complaint. Complainant has simultaneously filed a motion to extend the time to file post hearing briefs to allow the parties to evaluate their arguments in light of the withdrawal of Count I and other issues discussed therein.

Respectfully submitted,


for J. Daniel Breedlove
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region VII
901 North 5th Street
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(913) 551-7172

CERTIFICATE OF SERVICE

I certify that the foregoing "Motion to Withdraw Portion of the Complaint" 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
U.S. Environmental Protection Agency, Region VII
901 North 5th Street
Kansas City, Kansas 66101

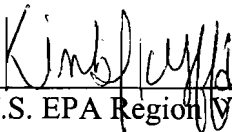
Copy, by pouch mail and facsimile:

Honorable William B. Moran
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EPA Office of Administrative Law Judges
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Dated: OCT 24 2008



U.S. EPA Region VII