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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

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)	
)	MOTION TO SUPPLEMENT
)	COMPLAINANT'S PREHEARING
)	EXCHANGE
d/b/a Lowell Vos Feedlot)	
Woodbury County, Iowa)	
)	
Respondent.)	
_____)	

Pursuant to 40 C.F.R. §§ 22.22(a) and the Presiding Officer's February 7, 2008, Prehearing Order, the U.S. Environmental Protection Agency, Region VII (Complainant or EPA), moves for to allow it to supplement its prehearing exchange.

Background

On August 14, 2007, EPA filed an administrative complaint against Respondent for alleged violations of Sections 301, 311, and 402 of the Clean Water Act, 33 U.S.C. §§1311, 1318, and 1342, specifically, for the discharges of feedlot related pollutants to waters of the United States without an NPDES permit.

On February 7, 2008, the Presiding Officer ordered the parties to file their prehearing

exchanges no later than April 7, 2008. Complainant filed its initial prehearing exchange on April 7, 2008, and its supplemental prehearing exchange on August 15, 2008. This matter is scheduled for hearing on September 15, 2008.

40 C.F.R. §§ 22.22(a) states that unless provided at least 15 days before the hearing date the Presiding Officer shall not admit an exhibit into evidence unless the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information. The Prehearing Order allows the parties to supplement their prehearing exchanges, without motion, until 30 days before the date scheduled for hearing. The date to supplement the prehearing exchanges without motion and permission of the Court has passed.

Motion

Complainant moves to append the two attached photos to Complainant's Exhibit 15 which was included in its April 7, 2008, prehearing exchange. The two attached photographs were taken by Mr. Jeff Prier, an Environmental Specialist with the Iowa Department of Natural Resources (IDNR). Mr. Prier is listed by both the Respondent and EPA as a witness expected to testify regarding his inspections of Respondent's feedlot. Mr. Prier took the photos during his performance of an on-site inspection of Respondent's feedlot on June 25, 2003, and at the time that IDNR completed the inspection form (Complainant's Exhibit 15) associated with the inspection.

Justification

During preparation for hearing with Mr. Prier on September 3, 2008, Mr. Prier recalled that he may have taken photos at Respondent's feedlot during the on-site inspection on June 25,

2003. On September 4, 2008, Mr. Prier searched the hard-drive of his computer and identified two photos he took during the June 25, 2003, inspection. These photos were not previously included in the IDNR file for Respondent's feedlot and thus not previously provided to EPA (please see attached email from Jeff Prier transmitting the photos to EPA). EPA transmitted the photos to Respondent's attorney within hours of its receipt of the photos from Mr. Prier (see attached email to Respondent's attorney, Eldon McAfee).

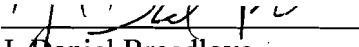
The photos are relevant, material, and probative. The overarching issue in this matter is whether the Respondent's facility discharged. The photographs, in conjunction with the testimony that Mr. Prier will provide at hearing, document the discharge of feedlot runoff to the unnamed tributary of Elliot Creek that is adjacent to Respondent's feedlot.

Appending the photos to the inspection report does not create unfair surprise for the Respondent. Both EPA and Respondent's initial prehearing exchanges list Mr. Prier as a witness. Furthermore, EPA's prehearing exchange included the inspection form (Complainant's Exhibit 15) associated with the June 25, 2003, inspection. The inspection form indicated that Mr. Prier had witnessed evidence of liquid runoff from Respondent's feedlot reaching the unnamed tributary thus providing Respondent with notice of the issue.

Complainant met its burden of due diligence in reviewing IDNR files to ensure that all relevant documents were included in its prehearing exchange. The photos at issue were stored in a manner that made it impossible for EPA to know of their existence. Complainant asks that the Court recognizes that there is "good cause" that the photos were not timely included in its prehearing exchange.

Conclusion

For the reasons stated above, Complainant requests that the Presiding Officer grants its motion to supplement its prehearing exchange with two attached photos.


J. Daniel Breedlove
Assistant Regional Counsel
Region VII

CERTIFICATE OF SERVICE

I certify that the foregoing "Motion to Supplement Complainant's Prehearing Exchange" 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

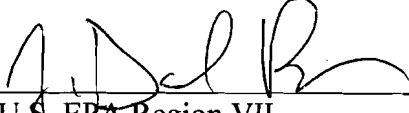
Copy, by pouch mail and facsimile:

Honorable William B. Moran
Administrative Law Judge
EPA Office of Administrative Law Judges
Mail Code 1900L
Aerial Rios Building
Washington, D.C. 20460

Copy, by first class and electronic mail:

Eldon McAfee, Esq.
Beving, Swanson, & Forrest, PC
321 Walnut, Suite 200
Des Moines, Iowa 50309

Dated: 9/5/2008



U.S. EPA Region VII



<Jeff.Prier@dnr.iowa.gov>

09/04/2008 07:24 AM

cc

bcc

Subject: Pictures

History:

 This message has been replied to and forwarded.

These were taken during the onsite assessment. They don't show a great overview of the facility, they are of his discharge though. That was our "evidence" of discharge. Not sure why these weren't in the file or



why they didn't get to you. Lowell Vos 2.jpg Lowell Vos 1.jpg



