

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY 08 DEC -4 AM 10:55

BEFORE THE ADMINISTRATOR

ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

IN THE MATTER OF:)

Lowell Vos)

) Docket No. CWA-07-2007-0078

d/b/a Lowell Vos Feedlot)

Woodbury County, Iowa)

Respondent.)

ORDER REGARDING COMPLAINANT'S MOTION TO WITHDRAW PORTION
OF THE COMPLAINT

On October 24, 2008, The United States Environmental Protection Agency ("Complainant" or "EPA") filed a motion to withdraw Count I of the Complaint. EPA urges that its 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. Motion at 1. Although EPA hollowly states that it "recognizes that withdrawal of Count I at this time would foreclose EPA's ability to seek penalties for the violations alleged in Count I," it still seeks the same, maximum, penalty that it sought in the existing Complaint's two counts. The existing Complaint seeks a total of \$157,000 for the two counts while the motion to withdraw one of the counts leaves the total amount sought unchanged. Although Count I alleges that the Respondent's feedlot discharged pollutants to waters of the United States without having a NPDES permit, EPA now wishes to withdraw its claim that there was unpermitted discharge of pollutants to waters of the United States, even though it "continues to contend that the evidence . . . demonstrates that Respondent's feedlot discharged pollutants to waters of the United States during significant precipitation events . . ." *Id.* at 2. Instead, EPA only wishes to pursue Count II's claim that the Respondent failed to apply for a NPDES permit as required by the Clean Water Act.

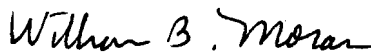
With its view that the penalty sought should be unaffected by cutting the number of counts in half, EPA believes that the practical effect of its requested withdrawal of Count I is that it "will not use evidence from the APEX or SWAT models to argue that Respondent had an ongoing duty to apply for an NPDES permit because his feedlot discharged to waters of the United States." *Id.*

Respondent filed a response to EPA's Motion stating that it does not oppose it "subject to Respondent's reservation of all his rights and defenses available to him, including his rights to utilize all evidence before the Court in this case, including but not limited to evidence from the APEX or SWAT models, to argue in his post-hearing briefs his defense of the remaining portion of the Complaint." Response at 1.

Upon consideration, the Court GRANTS EPA's Motion to withdraw Count I. The Motion is granted with prejudice. Having granted the motion however, it does not follow that the evidence of record is suddenly restricted. Subject to challenges that certain evidence has become irrelevant or immaterial, the record remains as it is, available for either side to draw upon the testimony and exhibits in order to establish or disprove the remaining Count, Count II, as well as for the opportunity to show how such evidence should be considered in assessing any penalty to be imposed, should the alleged violation of Count II be affirmed by the Court. Thus, the Court accepts the Respondent's reservation of its rights to use the entire record in its defense of the remaining count.

Accordingly, subject to the foregoing, EPA's Motion to Withdraw Count I is GRANTED.

So Ordered.



William B. Moran
United States Administrative Law Judge

Dated: December 2, 2008
Washington, D.C.

In the Matter of Lowell Vos d/b/a Lowell Vos Feedlot, Respondent.
Docket No. CWA-07-2007-0078

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order Granting Complainant's Motion to Withdraw Portion of the Complaint**, dated December 2, 2008, was sent in the following manner to the addressees listed below.



Knolyn R. Jones
Legal Staff Assistant

Dated: December 2, 2008

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