

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

08 SEP 15 AM 10:12

ENVIRONMENTAL PROTECTION  
AGENCY REGION VII  
REGIONAL HEARING CLERK

<p>IN THE MATTER OF  LOWELL VOS  d/b/a LOWELL VOS FEEDLOT  WOODBURY COUNTY, IOWA  Respondent</p>	<p>Docket No. CWA-07-2007-0078</p> <p><b>RESPONDENT'S RESISTANCE TO MOTION TO SUPPLEMENT COMPLAINANT'S PREHEARING EXCHANGE OR IN THE ALTERNATIVE MOTION FOR POSTPONEMENT OF HEARING</b></p>
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COMES NOW the Respondent, Lowell Vos d/b/a Lowell Vos Feedlot, by and through his attorney, Eldon L. McAfee, and for his Resistance to Motion to Supplement Complainant's Prehearing Exchange or in the Alternative Motion for Postponement of Hearing states:

**RESISTANCE TO MOTION TO SUPPLEMENT COMPLAINANT'S  
PREHEARING EXCHANGE**

In support of his resistance to Complainant's Motion to Supplement Complainant's Prehearing Exchange, Respondent states:

1. Based on the information available to Respondent at this time, Respondent agrees with Complainant that the two photos produced by Mr. Prier appear to be relevant, material and probative on one of the primary issues in this matter – that being whether Complainant has evidence of a discharge of pollutants from Respondent's feedlot to a water of the United States.
2. Respondent disagrees with Complainant's assertion that appending the photos to Mr. Prier's inspection report does not create unfair surprise for Respondent.

Mr. Prier's inspection report gives no indication that Mr. Prier had taken photos as evidence of a liquid runoff reaching state waters in that Mr. Prier did not complete the following line on the inspection report: "Pictures Taken? (yes/no)". See attached Exhibit A which is Complainant's Exhibit 15 in Complainant's Prehearing Exchange.

3. Although Complainant did not have had reason to know of the existence of the two photos, Mr. Prier has had possession of these photos since June 23, 2003 and should have disclosed the photos to Complainant at the time his file was transmitted to Complainant when this action was initiated.

4. Failure to timely disclose these photos was misleading to Respondent when Mr. Prier's inspection form which was provided to Respondent failed to disclose the existence of any photos.

WHEREFORE Respondent respectfully requests that Complainant's Motion to Supplement Complainant's Prehearing Exchange be denied and that these two photos not be appended to Complainant's Exhibit 15 of its prehearing exchange. Respondent further respectfully requests such further relief as is deemed equitable and just.

#### **ALTERNATIVE MOTION FOR POSTPONEMENT OF HEARING**

If the Presiding Officer grants Complainant's Motion to Supplement Complainant's Prehearing Exchange, Respondent moves for postponement of the hearing pursuant to 40 C.F.R. §22.21(c). In support of his Motion for Postponement of Hearing, Respondent states:

1. Paragraphs one through four of Respondent's Resistance to Motion to Supplement Complainant's Prehearing Exchange are incorporated by reference in this Motion.

2. Based on the information available to Respondent at this time, Respondent believes there are valid defenses to Complainant's allegations that the two photos are evidence of a discharge of pollutants from Respondent's feedlot to a water of the United States. However, Respondent will require additional time to prepare its defense because the photos significantly and directly affect Respondent's defense to Complainant's claims.

3. Respondent has been preparing for hearing based on the fact that Mr. Prier's evidence of liquid runoff reaching state waters were test kit samples showing 3.0 mg per liter of ammonia. In its Motion, Complainant states that "[t]he inspection form indicated that Mr. Prier had witnessed evidence of liquid runoff from the Respondent's feedlot reached the unnamed tributary thus providing Respondent with notice of the issue." Unless this statement is referring to the test kit samples as the evidence Mr. Prier witnessed, Respondent disagrees with the statement. Mr. Prier did not comment on the inspection form that he had observed or witnessed any liquid runoff from Respondent's feedlot reaching state waters. Rather, his sole comment pertained to the test kit samples taken a distance away from the Respondent's feedlot. In addition, Complainant's summary of Mr. Prier's expected testimony in paragraph I, 3 of Complainant's Prehearing Exchange gives no indication that Mr. Prier would testify that he had witnessed liquid runoff from Respondent's feedlot reaching a water of the state or of the United States.

4. Because of the nature of this alleged visual evidence, Respondent will move for additional discovery pursuant to 40 C.F.R. §22.19(e). This additional discovery will include but not be limited to depositions upon oral questions pursuant to 40 C.F.R.

§22.19(e)(3)(i). Respondent will request depositions upon oral questions of Mr. Prier and may also request depositions of DNR staff Ken Hassenius and Rick Martens who were identified in Complainants Exhibit 16 as being present with Mr. Prier during the inspection on June 25, 2003. If granted by the Presiding Officer, the additional discovery will require additional time to conduct and there will not be sufficient time before the scheduled date of the hearing.

5. In addition, because the two photos are the first visual evidence of an alleged discharge of pollutants from Respondent's feedlot to a water of the United States produced in this case, Respondent's experts will require additional time to prepare for the hearing, including time to inspect the site of Respondent's feedlot to respond to allegations represented by the two photos.

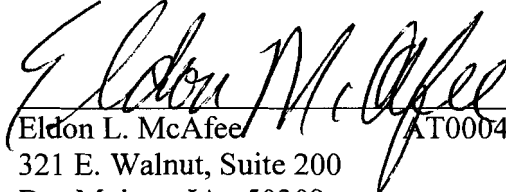
6. The additional discovery may result in additional exhibits to be introduced by Respondent and revisions to Respondent's expert reports and expected testimony.

7. Based on all of the factors presented in this Motion, there is good cause shown for a postponement of the hearing pursuant to 40 C.F.R. §22.21(c).

WHEREFORE, Respondent respectfully requests that if Complainant's Motion to Supplement Complainant's Prehearing Exchange is granted, Respondent's Motion for Postponement of Hearing be granted pursuant to 40 C.F.R. §22.21(c). Respondent further respectfully requests such further relief as is deemed equitable and just.

Dated this 9th day of September, 2008.

BEVING, SWANSON & FORREST, P.C.

  
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ATTORNEYS FOR RESPONDENT

**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing instrument was served upon each of the attorneys of record of all parties to the above-entitled cause herein at their respective addresses disclosed on the pleadings of record on the 9<sup>th</sup> day of September, 2008

By:  U.S. Mail  FAX  
 Hand Delivered  Overnight Courier  
 Federal Express  Other: \_\_\_\_\_

Signature: Nancy Franklin

Original and one copy to:  
Kathy Robinson  
Regional Hearing Clerk  
U.S. EPA  
901 North 5<sup>th</sup> Street  
Kansas City, KS 66101

A copy by regular U.S. Mail and facsimile to:  
Judge William B. Moran  
U.S. Environmental Protection Agency  
Office of Administrative Law Judges  
1200 Pennsylvania Ave., N.W.  
**Mail Code 1900L**  
Washington, D.C. 20005

A copy by regular U.S. mail and email to:  
J. Daniel Breedlove  
Asst. Regional Counsel  
U.S. EPA  
Region VII  
901 North 5<sup>th</sup> Street  
Kansas City, KS 66101

080908

# EXHIBIT A

(18)

## On-Site Open Cattle Feedlot Inspection Form

Facility Name: Lowell Vos Feedlot

Inspection Date: 6/25/03

Facility Owner/ Operator: Lowell Vos

Persons present during inspection: Jeff Pricer

GPS Readings Taken? - (yes/no) - Reading(s)

x - 4715844  
y - 0736038

### Animal Units at Facility in Open Feedlot:

Current: 1500  
Number of Pens: 10

Capacity: 2700  
Number of Pens: 10

Proposed: none

Operation Year Round? (yes/no)

If no, how long? \_\_\_\_\_

Percent Year Round: \_\_\_\_\_

Additional Stock Ground Used in Winter: \_\_\_\_\_ (in acres)

40

### Distance to Surface Water Bodies:

Watershed #1: \_\_\_\_\_ in feet (measured/estimated) - Designated Use Classification: \_\_\_\_\_

Watershed #2: \_\_\_\_\_ in feet (measured/estimated) - Designated Use Classification: \_\_\_\_\_

Watershed #3: \_\_\_\_\_ in feet (measured/estimated) - Designated Use Classification: \_\_\_\_\_

*small stream drainage to west of lot*

### Drainage Area of Feedlot:

*east lots drain to north + back to the same area as west lots*

Drainage Area: 25 in acres (measured/estimated)

Additional Clean Water Drainage: \_\_\_\_\_ in acres (measured/estimated)

Comments: lots are located on hill top.

### Runoff:

Solids Reaching State Waters? (yes/no)

Comments if answer is yes: \_\_\_\_\_

Evidence of Liquid Runoff Reaching State Waters? (yes/no)

Comments if answer is yes: measured 310 mg/l ammonia at bridge SW of facility

Test Kit Samples Taken? (yes/no) - Results: 3.0 mg/L ammonia 7.4 pH

Laboratory Samples Taken? (yes/no)

Pictures Taken? (yes/no)

### Land Use in Runoff Area:

Cropland: (yes/no)

Grass Filter: (yes/no)

Road Ditch: (yes/no)

Does Runoff (solids or liquids) impact neighboring property? (yes/no)

Comments on Land Use in Runoff Area: \_\_\_\_\_

Comp. Ex. 15

- Talked to NRCS -

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**Wells Located on Site:**

380' - 265' - Denota

Well #1 (Deep/Shallow) Distance to Feedlot: \_\_\_\_\_ in feet (Measured/Estimated)

Well #2 (Deep/Shallow) Distance to Feedlot: 200 in feet (Measured/Estimated)

Well #3 (Deep/Shallow) Distance to Feedlot: \_\_\_\_\_ in feet (Measured/Estimated)

Comments (if any) on Condition of Well: \_\_\_\_\_

**Man-Made Conduits:**

Man-Made Conduit Present for Discharging Manure Solids or Liquids? (yes/no)

If yes, explain or describe: \_\_\_\_\_

Surface Tile Intakes Present in Runoff Area? (yes/no)

If yes, explain or describe: No

Subsurface Tile Lines Present in Runoff Area? (yes/no)

Does a Stream Originate Outside of and Traverse the Operation? (yes/no)

If yes, describe: \_\_\_\_\_

**Evaluation of Current Manure Control Facilities:**

Solids Settling Structures Present? (yes/no) - (concrete/earthen)

If yes, describe: \_\_\_\_\_

Dimensions: \_\_\_\_\_ in feet (measured/estimated)

Runoff Control Basin Present? (yes/no) Year Constructed (if known): \_\_\_\_\_

If yes, describe: \_\_\_\_\_

Dimensions: \_\_\_\_\_ in feet (measured/estimated)

**Manure Handling Methods:**

Manure Solids Scraping? (yes/no) - Frequency of Removal: 1 Wk. times/year

Stockpiling in Pens? (yes/no)

Stockpiling Outside of Pens? (yes/no) - State location: \_\_\_\_\_

Acres available for manure application: 2500

**Other Comments:**

In-House Priority Assessment - \_\_\_\_\_ points (high/medium/low)

On-site Priority Assessment - \_\_\_\_\_ points (high/medium/low)

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