

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF  LOWELL VOS  d/b/a LOWELL VOS FEEDLOT  WOODBURY COUNTY, IOWA Respondent.	Docket No. CWA-07-2007-0078  <b>RESPONDENT'S POST HEARING REPLY BRIEF</b>
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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 submits his Post Hearing Reply Brief

ARGUMENT.

I. OVERVIEW OF REPLY TO ARGUMENTS RAISED IN EPA'S POST HEARING BRIEF

The first and most basic question after reading EPA's Post-hearing Brief is: if the evidence that Vos' feedlot discharged is "overwhelming", why did EPA withdraw its claim of unpermitted discharge of pollutants to waters of the United States? See EPA's Post Hearing Brief p. 10 ("The evidence that pollutants from Respondent's feedlot discharge to Elliot Creek and its unnamed tributary ("UNT") is overwhelming.") EPA's initial brief is replete with allegations of how often Vos' feedlot had to discharge to Elliot Creek. But, as discussed in Vos' initial brief, those allegations are not supported by proof of an actual discharge and are largely based on circumstantial evidence that was collected to support a computer model to prove unauthorized discharges. See Vos' Post Hearing Brief, pp. 11 and 12. When problems with the computer modeling were exposed at the hearing, EPA withdrew the claim (Count 1). However, as noted in Vos' Post Hearing Brief at page 6, the basis for Count 2 (Failure to Apply for a NPDES Permit) is identical in substance and nearly word-for-word as Count 1. In withdrawing Count 1 EPA seemingly recognized that the evidence of discharges is not as "overwhelming" as it now alleges.

Before discussing specific allegations made by EPA in its Post Hearing Brief, it is important to analyze several background issues. First, EPA's Post Hearing Brief accurately states that EPA must prove its claim of a violation of the Clean Water Act by a preponderance of the evidence. EPA must show that "the factual prerequisites exist for finding a violation of the regulatory requirements." *Bricks Inc.*, 11 EAD 224 at 226 (EAB 2003). And, all evidence considered under this standard must be reliable, credible, and in the record. See *U.S. v. Lapinski*, 993 F.2d 1531 (1st Cir. 1993)(Court stated that the relevant evidentiary standard was preponderance of the evidence and then evaluated each

item of evidence in the record for reliability and evaluated witness testimony for credibility). It is also important to briefly revisit the statutory and regulatory background applicable to this case. That background has been extensively briefed in both Vos' and EPA's Post Hearing Briefs. However, a clarification of a few key points helps put this case in perspective. First, the 1976 EPA regulations required an animal feeding operation to apply for a NPDES permit only if the operation discharged in the event of a precipitation event that was less than the 25-year, 24-hour storm event. See Vos' Post Hearing Brief, p. 4. Then, the 2003 changes to the EPA regulations would have required all operations housing more than 1,000 head to apply for a NPDES permit by February 13, 2006 unless the operation could prove to EPA that it had no potential to discharge. That standard was thrown out in *Waterkeeper* and EPA eventually modified the rules to eliminate that standard and instead require CAFOs that discharge or propose to discharge to apply for a NPDES permit. *Waterkeeper Alliance, Inc., et. al. v. U.S. EPA*, 399 F.3d 486, 504-505 (2d Cir. 2005). In this action EPA is essentially continuing to impose the "no potential to discharge" standard by asking this Court to accept evidence of a discharge that is limited primarily to topographical elevations and flowpaths and is totally void of any specific, actual proof a discharge.

In its initial brief, EPA defends its lack of proof of an actual discharge to waters of the U.S. by citing the 2007 Environmental Appeals Board decision of *In the Matter of Leed Foundry, Inc.* 2007 WL 1934721 (2007). While Vos agrees that it is not practical for EPA to camp out at a site 24 hours a day, seven days a week in order to obtain evidence of a discharge, the assumptions that EPA has made without the benefit of any on-site sampling or visual observation of pollutants being discharged to a water of the U.S. falls far short of their burden to prove that there was an actual discharge from Vos' feedlot to waters of the U.S. Contrary to the current case, the respondent in *Leed Foundry* conceded that it did not have a permit, but needed one. *Id.* at 7. In this case, while Vos agrees that he did not have a NPDES permit during the time he had more than 1,000 head in his feedlot, he vigorously denies that he needed one. The only disputed claim on this issue in *Leed Foundry* was whether there were in fact discharges. That claim has been withdrawn in this case.

In the *Leed Foundry* case, a critical and distinguishing fact is that there were two samples of storm water leaving the site that showed the existence of pollutants. *Id.* at 10, 12. One was taken by EPA during a site visit and one was the respondent's own sample taken to submit with his NPDES permit application. *Id.* As has been discussed, there are no such samples in this case which show a discharge of pollutants from the Vos feedlot, in spite of the numerous opportunities for EPA to obtain samples.

The Court in *Leed Foundry* stated that "the notion that EPA must sample each site and demonstrate that such pollutants are actually flowing from the facility is rejected as unduly burdensome and defies common sense." *Id.* at 11. However, this theory of common sense and the idea that Vos may be forced to pay a substantial civil penalty based on common sense assumptions that water flows down hill does not comport with established notions of justice and evidentiary standards. Vos asserts that it defies common sense for EPA to be at the site on two different occasions for the express

purpose of gathering evidence for this case and not take samples of what it later testified was feedlot pollutants in Elliot Creek and in fields between the feedlot and the unnamed tributary. Why wouldn't EPA, if so convinced that discharges were occurring, take samples when the opportunity to take those samples was readily available? It would appear that EPA would prefer to show the relative elevations of the feedlot and the surface waters and the flow paths between the two using aerial photography and other circumstantial evidence rather than get into the field of actual scientifically supported proof such as laboratory samples.

Putting aside for a moment EPA's failure to properly sample alleged discharges when the opportunity was there, perhaps the best rebuttal to EPA's simplistic approach to proof in this case is Mike Beavers' real-world testimony about the condition of the unnamed tributary near his home. As noted in Vos' initial brief at pages 16 and 17, Mr. Beavers has lived down stream from the Vos feedlot for 22 years on a farmplace within 100 yards of the unnamed tributary and for the last 15 to 16 years he and his son have trapped minnows, chubs, and crawdads from the creek near their home. They do this for several months during the summer just about every weekend and check their traps about every three days and have never had a problem getting chubs and minnows due to the condition of the water. Mr. Beavers has never noticed manure or other contaminants in the creek and when his ability to make that observation was questioned by counsel for EPA, he responded that he has lived on a farm his whole life and has worked in a hog confinement. When asked if he would know what feedlot runoff would look like, he replied: "I'm pretty sure I think I'd know what it was." If, as the *Leeds* decision suggests, we are to look to evidence other than sampling, then the testimony of Mike Beavers trumps EPA's allegations of what had to have happened based on aerial photos and other circumstantial evidence.

When all of the evidence is considered in this case, EPA's allegations fail for lack of reliable and credible proof of a discharge that would require an NPDES permit.

II. EPA FAILED TO MEET ITS BURDEN TO PROVE THAT VOS DISCHARGED POLLUTANTS TO A WATER OF THE UNITED STATES AND THEREFORE DID NOT PROVE THAT VOS VIOLATED HIS DUTY UNDER THE CLEAN WATER ACT TO APPLY FOR AN NPDES PERMIT.

In the remainder of this reply brief Vos will address and clarify points as they were raised in Vos' Post Hearing Brief. Where there were no similar arguments raised by EPA, Vos will simply note that. To aid the Court in assessing Vos' response to EPA's Post Hearing Brief but avoid duplicating arguments raised in Vos' Post Hearing Brief, this brief will set out EPA's main points and note for the Court where those points were addressed in Vos' initial brief, as well as providing additional response where necessary.

EPA did not address the issues raised by Vos regarding EPA's withdrawal of Count I of the Petition (see Vos' Post Hearing Brief, pp. 5 – 9) and therefore Vos will not repeat those arguments in this brief. Also, EPA did not address the issue of Vos qualifying as a newly defined CAFO under the EPA rule (see Vos' Post Hearing Brief,

pp. 18 -19) other than in a footnote on p. 5 of their brief and a short discussion on p. 6. Accordingly, Vos will not repeat his arguments in this brief.

The crux of EPA's case has been from the beginning, and continues today to be, the unauthorized discharge of pollutants to a water of the U.S. See EPA's Post Hearing Brief, pp. 9 - 26. However, several other points are raised by EPA which should be briefly addressed before getting to the central issue. First, Vos does not dispute that he is a person for purposes of the Clean Water Act. EPA also extensively briefed the issue of whether Elliot Creek and the unnamed tributary are waters of the United States. See EPA Post Hearing Brief, pp. 22 -24. As noted in footnote 2 on page 9 of Vos' Post Hearing Brief, Vos agrees that Elliot Creek is a water of the U.S. And, although EPA did not cross examine Vos or any of Vos' witnesses on the issue, Vos did not present any evidence that the unnamed tributary does not connect to Elliot Creek. As noted in Vos' Post Hearing Brief in footnote 2 on page 10, the only question on the issue comes from the apparently mistaken modeling information prepared by EPA's modeling expert witness. At pages 24 to 26 of its Post Hearing Brief, EPA alleges that Vos did not apply for a NPDES permit until December 2, 2005. Vos does not dispute that fact. Finally, at pages 21 and 22, EPA alleges that Vos was a "point source" under the Clean Water Act. As noted by EPA, Vos testified at the hearing that he had more than 1,000 head at his feedlot until reduced the number of cattle to fewer than 1,000 on February 19, 2007. Accordingly, Vos does not dispute that his feedlot was a point source until February 19, 2007. EPA has agreed to February 19, 2007 as the date Vos came into compliance by reducing the number of head to less than the point source threshold of 1,000 head. See EPA Post Hearing Brief, p. 31 and Tr. 679.

EPA's allegations regarding pollutant discharges (pp. 9 to 26) are addressed in Vos' Post Hearing Brief at pages 9 to 18. In the Post Hearing Brief Vos first discusses the standard set in *Waterkeeper* that the duty to apply for a NPDES permit applies only for actual discharges, not potential discharges. See Vos' Post Hearing Brief, pp. 10 – 11. Vos then rebuts in detail EPA's evidence of five alleged discharge events on pages 10 through 18. In addition to the discussion in the Post Hearing Brief, the following points raised by EPA merit specific response and clarification:

- a. "Operational History", "IDNR determined that Respondent's facility required but did not have, adequate runoff containment to contain feedlot runoff resulting from a 25-year, 24-hour precipitation event or 5 inches of rain." See EPA's Post Hearing Brief, pp. 10-11. Contrary to this statement, IDNR did not make this determination and did not require Vos to obtain a NPDES permit in 1991. As noted on page 20 of Vos' Post Hearing Brief, the 1991 permits did not establish a duty for compliance unless structures were built. Further, DNR took no steps to require Vos to obtain these permits or to carry forward once the permits were obtained. See Vos' Post Hearing Brief, p. 21.
- b. "Precipitation" See EPA's Post Hearing Brief, pp. 11-12. EPA, using rainfall records in the record in this case, alleges that Vos never had a

precipitation event greater than the 25-year, 24-hour storm event from January 1, 1991 to May 31, 2008. See EPA's Post Hearing Brief, p. 11. First, this allegation is not based on rainfall amounts specific to the Vos feedlot. Second, this information, although in the record, was not presented at hearing by any of EPA's witnesses and therefore EPA's use of this information as presented in their Post Hearing Brief was not subject to cross examination and analysis at the hearing.

- c. "Existing terraces and settling basins" See EPA's Post Hearing Brief, p. 12. EPA notes that Vos did in fact construct some controls but questions the adequacy of those controls. Vos does not contend that the basin and terrace were designed to control the 25 year, 24 hour storm. However, these structures, along with the crop field below these structures, serve to control feedlot runoff. The key point is that these controls are not taken into account in EPA's simplistic approach to proving a discharge.
- d. "2003 IDNR Assessment" See the testimony of Mike Beavers. Vos rebutted this alleged discharge event at pages 12 to 14 of his Post Hearing Brief. EPA alleges that the solids settling basin on the west side of the feedlot was discharging to the unnamed tributary and alleges that the "terrace was performing as designed" in allowing a discharge. What EPA fails to recognize is that any discharge from the basin flowed into the cornfield below the basin and that this cornfield acted to control any runoff from the feedlot. That is why it was critical for Mr. Prier to follow accepted sampling procedure, which includes taking a sample of the alleged discharge at the point he believed it was entering the unnamed tributary, as well as samples upstream and downstream from the alleged discharge point as will be discussed below. Mr. Prier failed to take those critical steps.

EPA alleges that because, according to Sioux City Airport rainfall records, the amount of rain received preceding DNR's June 25, 2003 visit also occurred 21 other times while Vos had more than 1,000 head in his feedlot, we can conclude that the settling basin discharged those 21 times. Aside from the obvious lack of proof of these allegations and aside from the fact that this evidence was not presented through a witness at hearing, it is interesting to note that EPA is asking the Court to conclude discharges occurred based solely on precipitation amounts when EPA has decided not to present evidence of discharges based on computer modeling. The computer modeling evidence presented at hearing was supposed to predict discharges more accurately than precipitation data alone by taking into account other factors such as soil type, vegetation conditions, topographical factors, management conditions, and weather factors other than precipitation. See Ex. C-43, pp. 5 – 8. By relying on precipitation amounts alone, it would seem EPA has reduced the level of proof from where it started.

EPA also states that the record is silent as to any dewatering of the basin by Vos. While EPA is correct in that statement, the record is also silent as to any proof that Vos did not dewater the basin. EPA has the burden of proof to show a discharge and had every opportunity to cross examine Vos on his management of the feedlot. EPA's cross examination of Vos consisted of nine questions that were solely about the number of head in his feedlot. Tr. 1455-1456. EPA failed to take the opportunity with Vos, and all of the other witnesses during the six day hearing, to establish this element of its case.

Finally, EPA also notes that DNR took a downstream field sample that EPA asserts shows higher than background levels of ammonia. See EPA Post Hearing Brief at p. 13-14. As noted at pages 13 and 14 of Vos' Post Hearing Brief, both Mr. Prier and Mr. Hentges testified that field test kit samples cannot be used for enforcement purposes. They are simply an indicator and must be followed with samples for laboratory analysis. Beyond that, Mr. Hentges disagreed with Mr. Prier and testified that the level of ammonia in this field test kit sample was in the range he would expect. See Vos' Post Hearing Brief, p. 14. This disagreement between experts could have easily been avoided. Mr. Prier testified that had he been at Vos' feedlot that day for enforcement purposes, he would sample upstream, downstream and at the point of discharge. See Vos' Post Hearing Brief, pp. 12-13. Mr. Hentges agreed that this would be the proper sampling procedure. By taking a field test kit sample downstream from the alleged discharge, Mr. Prier took only an initial step towards one-third of the proper sampling procedure – a downstream sample. Had he followed the proper procedure we would know whether the field test kit sample actually showed a background level of ammonia at Vos' location because we would have a sample upstream from the alleged discharge. Based on the evidence in the record, Mr. Prier and EPA have no reliable basis for asserting that the field test kit sample is higher than background levels for the area of Vos' feedlot and have no basis for using it as proof of an actual discharge.

- e. "Aerial photography demonstrates continuous discharge path to UNT"  
See EPA's Post Hearing Brief, p. 17. EPA again relies on circumstantial evidence of a discharge. Relying on aerial maps without some support of proof of an actual discharge does not comply with the standard set out in *Waterkeeper*. This is a critical enforcement issue for feedlot producers such as Vos. Sanctioning this approach by EPA in effect rewards EPA for not taking additional steps to gather sampling and other on-site information to prove a violation of the Clean Water Act. If EPA can meet their burden of proof with aerial photos, there is no reason for them to gather additional evidence such as samples. As previously noted in this brief and in Vos' Post Hearing Brief, EPA had ample opportunity to take

samples to verify its allegations based on aerial photography but clearly refused to do so. Vos cannot be subjected to a violation for the failure to apply for an NPDES permit when EPA refused to use reasonable opportunities to obtain proof of an actual discharge.

- f. “Gerald Hentges testified that pollutants will likely reach UNT” See EPA’s Post Hearing Brief, pp. 19-20. While EPA correctly states Mr. Hentges’ testimony, EPA fails to state all of his testimony and therefore misrepresents his opinions. Mr. Hentges first agreed that it’s “possible” that pollutants travel down the runoff flowpaths from Vos’ feedlot. Tr. 1308. He then agreed that it’s likely that water from Vos’ feedlot would reach the UNT. Tr. 1308. He then agreed that *if* there were dissolved pollutants entrained in that water, they would reach the UNT. Tr. 1308. The key word is “if”. He further testified that the movement of pollutants depends on several factors including the intensity and amount of rainfall as well as the saturation of the soils. Tr. 1314, 1318-1319. On re-direct examination Mr. Hentges testified that he would need a sample that was collected and analyzed in a laboratory to know if a pollutant had reached the UNT. Tr. 1316. Also, before responding to this line of questioning on day 6 of the hearing, Mr. Hentges testified on cross examination on day 5 of the hearing that he would not admit that the continuous flow paths from the Vos feedlot would allow discharges off the site to reach the UNT. Tr. 1231. He admitted that water leaving the feedlot will flow downhill and likely some of it will make it to the creek. Tr. 1231. Mr. Hentges’ responses to repeated questions from EPA on this issue shows the complicated nature of determining whether a discharge of pollutants from the Vos feedlot has occurred and that proper sampling is the only reliable and credible proof as to whether a discharge has occurred. EPA had every reasonable opportunity to gather and present that proof to this Court but failed to do so.

III. IF THE COURT FINDS THAT A PENALTY SHOULD BE ASSESSED, THE FOLLOWING MITIGATING FACTORS MUST BE TAKEN INTO ACCOUNT.

If the Court determines that EPA has presented sufficient proof to find that Vos violated the Clean Water Act requirements for applying for a NPDES permit and that a civil penalty is warranted, this Court must then determine the amount of the penalty based on the evidence in the record and set the penalty in accordance with any penalty criteria set forth in the Clean Water Act. *In Re Lyon County Landfill*, 10 EAD 416 (2002), *aff’d Lyon County Landfill v. EPA*, 406 F.3d 981 (8<sup>th</sup> Cir. 2005). Section 309 of the Clean Water Act provides factors to be considered when assessing a civil penalty including;

- (1) the nature, circumstance, extent and gravity of the violation,
- (2) the ability of the violator to pay,
- (3) any prior history of such violations,

- (4) the degree of culpability of the violator,
  - (5) the economic benefit or savings resulting from the violation and
  - (6) such other matters as justice may require.
- 33 U.S.C. §1319(g)(3).

a. Nature, Circumstance, Extent and Gravity Of The Violation

In its Post Hearing Brief, EPA claims that the proposed penalty is justified because Vos has discharged “ammonia, phosphorous, fecal coliform and other feedlot related pollutants” into the unnamed tributary and Elliot Creek. See EPA’s Post Hearing Brief, p. 34. However, as mentioned above and at the hearing, EPA did not take any samples of these alleged discharges to prove that any ammonia, phosphorous, fecal coliform or any other pollutant ever entered either the unnamed tributary or Elliot Creek from Vos’ feedlot. Therefore, the evidence in the record provides no proof that any of the above mentioned pollutants were ever discharged from Vos’ feedlot into a water of the U.S. Vos, in extensive detail, rebuts EPA’s evidence of the five alleged discharges in his initial brief on pages 12 to 18.

EPA also states that Vos ignored regulatory requirements by failing to apply for a permit, but as was outlined both at the hearing and in Vos’ Post Hearing Brief, the regulations in force did not require Vos to have a NPDES permit until July 31, 2007 because of the 25-year, 24-hour precipitation exemption to NPDES permitting regulations. See Vos’ Post Hearing Brief, pp. 4-5. The remaining allegations in this section of EPA’s Post Hearing Brief are addressed in Vos’ Post Hearing Brief at pages 18 to 21 where Vos explains why he was not required to obtain a permit and in pages 22 to 24 where Vos outlines his participation in the Iowa Plan which provided him with amnesty protection from NPDES permit violations throughout the term of the Iowa Plan, ending on April 1, 2006.

b. Prior History Of Violations

EPA admits that they are unaware of any previous enforcement actions against Vos that would make this factor relevant in determining the amount of penalty assessed, if any.

c. Culpability Of The Violator

EPA claims that Vos’ degree of culpability was high, stating that he knew he needed a permit and knew that his feedlot discharged into waters of the United States. See EPA’s Post Hearing Brief, p. 35. However, all of Vos’ testimony and actions contradict the claims made by EPA. Although Vos did apply for and receive a permit in 1991, he was not required to do so and only applied because of an anticipated expansion. Tr. 1398. Further, the central issue in this case is whether EPA can prove that there was an actual discharge. Vos denies that there has been a discharge from his feedlot into waters of the U.S. and asserts that EPA has failed to provide any samples or concrete proof of feedlot pollutants from Vos’ feedlot entering a water of the United States, yet



EPA is attempting to use Vos' knowledge of these supposed discharges to prove culpability. Vos' detailed rebuttal of the five discharge events alleged by EPA can be found at pages 12 to 18 of Vos' Post Hearing Brief.

EPA also cites Vos' inability to meet deadlines for the Iowa Plan as evidence of Vos' culpability. The issues associated with the Iowa Plan have already been extensively discussed in Vos' initial brief at pages 22 to 24, and will not be repeated here, except to note that the reason Vos was unable to meet deadlines set by Iowa DNR was due to delays on the part of NRCS in completing the engineering work and because of DNR delays in approving the construction permit. Tr. 1075, 1439, 1422-1440. Vos made every reasonable attempt to meet deadlines of the Iowa Plan. Inability to meet these deadlines because of circumstances beyond Vos' control does not establish culpability.

d. Economic Benefit Or Savings Resulting From The Violation

EPA's allegations in this section of EPA's Post Hearing Brief are addressed in Vos' Post Hearing Brief at pages 24 to 25.

e. Other Matters As Justice May Require

In determining the penalty to be assessed, EPA cites the harm to the environment, which is not a factor listed in the Clean Water Act in determining a civil penalty. See EPA Post Hearing Brief, pp. 31-33. EPA first claims that runoff from Vos' feedlot is harming the environment based on the testimony of Brian Hayes which was specifically rebutted on cross examination of Mr. Hayes and by the testimony of Mr. Beavers, discussed on pages 17 to 18 of Vos' Post Hearing Brief and previously in this brief.

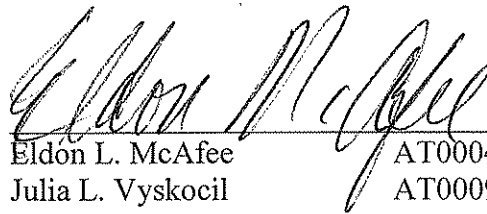
EPA also cites to the testimony of Mike Vos for the proposition that bedding the cattle in the feedlot and spreading that bedding on crop fields during the winter actually "exacerbated the feedlots impact on area streams." EPA Post Hearing Brief, p. 33. In making this claim EPA made assumptions and analyzed written authorities, none of which were presented at the hearing. By taking this approach, EPA has once again deprived this Court of the opportunity for a full analysis of this argument at the hearing. In any event, Vos refers the Court to page 11 of his Post Hearing Brief for a discussion of the benefits bedding provides, as well as to the testimony of Mike Vos. See Vos Post Hearing Brief, p. 11, Tr. 992-1035.

IV. CONCLUSION

Contrary to EPA's assertions, producing sufficient evidence of a discharge, such as sampling, would not require camping out at Vos' feedlot or otherwise result in an unreasonable burden. The critical distinction between this case and authority cited by EPA is that EPA had ample opportunity to support its allegations by sampling or documentation of visual observation of actual discharge of pollutants to a water of the U.S. EPA chose not to take that opportunity and now is asking this Court to approve that refusal. Based on the evidence presented, Vos respectfully requests that this Court rule that Vos did not violate any duty under the Clean Water Act to apply for a NPDES permit as alleged in Count 2 of EPA's Complaint.

Dated this 2nd day of March, 2009.

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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 2<sup>nd</sup> day of March, 2009.

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

Signature: Eldon L. McAfee

Original and one copy to:

Kathy Robinson  
Regional Hearing Clerk  
U.S. EPA  
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A copy by regular U.S. Mail to:

Judge William B. Moran  
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