

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10

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HEARINGS DIVISION
EPA-10-HEARD-10

In the matter of:)
)
)
Bruneau Cattle Co.,) DOCKET NO. CWA-10-2007-0016
)
Owyhee County, Idaho,)
) COMPLAINANT'S PREHEARING
) EXCHANGE
Respondent.)
_____)

Pursuant to 40 C.F.R. § 22.19, and the Presiding Officer's Order of May 16, 2007, Complainant Environmental Protection Agency ("EPA") submits this Prehearing Exchange. EPA respectfully reserves the right to supplement this Prehearing Exchange if necessary prior to hearing with proper notice to Respondent.

I. WITNESSES.

1. Joe Roberto. Mr. Roberto is an EPA inspector. He inspected the Bruneau Cattle facility on February 28, 2006. His inspection report is included in this Prehearing Exchange as Exhibit C1. He will testify regarding this observations during the inspection.
2. Robert Grandinetti. Mr. Grandinetti is an EPA inspector who accompanied Mr. Roberto on his inspection. He will testify regarding his observations during the inspection.
3. Gary McRae. Mr. McRae is a former employee of EPA who worked for EPA until 2006 as an Agriculture Specialist. He has inspected the Bruneau Cattle Co. facility, and he will testify regarding the connection of the South Side Canal to the C.J. Strike Reservoir and the nature of

the flow in the canal.

4. John Bilderhack. Mr. Bilderhack is a civil engineer who worked for the Idaho State Department of Agriculture as a dairy and beef cattle feed lot inspector until 2006. He inspected the Bruneau Cattle facility on several occasions, and he will testify regarding his observations during those inspections. His inspection report is attached as Exhibit C2.

5. Sandra Doty. Ms. Doty is a hydrologist with SAIC in Denver, Colorado. Ms. Doty will testify as an expert regarding runoff from the Bruneau Cattle property. Her expert report summarizing her conclusions is attached as Exhibit C4. Ms. Doty's curriculum vitae ("CV") is attached as Exhibit C11.

6. Dr. Stephanie Harris. Dr. Harris is a Veterinarian in the U.S. Public Health Service detailed to the EPA Region 10 Laboratory located in Port Orchard, WA. She is a Diplomat of the American College of Veterinary Preventive Medicine. Dr. Harris will testify as an expert witness regarding the public health effects of cattle waste runoff. Dr. Harris' CV is attached as Exhibit C13.

7. Leigh Woodruff. Mr. Woodruff is an environmental scientist with EPA. He works in the Total Maximum Daily Load ("TMDL") Program for Region 10, and he is located in the Boise Office. Mr. Woodruff will testify as an expert witness regarding the nutrient problems in the C.J. Strike Reservoir, and the impact of feed lot runoff on the water quality of the Reservoir. His CV is attached as Exhibit C12.

8. Lloyd Oatis. Mr. Oatis is a financial analyst with EPA Region 10. Mr. Oatis will testify regarding the economic benefit enjoyed by Respondent as a result of non-compliance. Mr. Oatis' CV is attached as Exhibit C14.

9. EPA reserves the right to call all fact witnesses named by Respondent.

II. EXHIBITS.

For purposes of the list of documents below, "Complainant's Exhibit No." is abbreviated as "C___." The documents themselves are labeled "Complainant's Ex. No."

- C1 Inspection Report (February 2006)
- C2 Idaho State Department of Agriculture ("ISDA") Inspection Report (June 6, 2006)
- C3 ISDA Notice of Noncompliance (July 11, 2006)
- C4 SAIC Expert Report (September 27, 2006)
- C5 ISDA Inspection Report (August 28, 2006)
- C6 ISDA Inspection Report (November 2, 2006)
- C7 ISDA Inspection Report (November 29, 2006)
- C8 Notice of Intent ("NOI") (October 29, 1989)
- C9 National Pollutant Discharge Elimination System ("NPDES") Permit (May 27, 1997)
- C10 NPDES Permit application (April 5, 2003)
- C11 CV for Sandra Doty
- C12 CV for Leigh Woodruff
- C13 CV for Dr. Stephanie Harris
- C14 CV for Lloyd Oatis
- C15 Impaired Waters List for C.J. Strike Reservoir

III. ESTIMATE REGARDING LENGTH OF HEARING.

Absent lengthy cross-examination, Complainant estimates that it will require

approximately two to two and one-half days to put on its case in chief. The length of time required for rebuttal testimony and cross examination of Respondent's witnesses will depend on the numbers and substance of documents and witnesses disclosed in Respondent's Prehearing Exchange.

IV. LOCATION OF HEARING.

Complainant proposes Boise, Idaho for the hearing location. Court rooms are available in Boise. It is the nearest city to the site with an airport. Respondents' counsel is located in Boise and many of the witnesses are located within a short driving distance.

V. QUESTIONS POSED BY PRESIDING OFFICER.

1) State the factual basis for the allegation in paragraph 8 of the complaint that Bruneau Cattle Co.'s, ("Respondent") beef cattle feeding operation ("the Facility") is an "animal feeding operation" as defined in 40 C.F.R. § 122.23 (b)(1).

According to information provided by Respondent, the Facility confines between 4,000 and 7,000 beef cattle for more than 45 days in any 12-month period in pens lacking vegetative growth during the normal growing season.

2) Refer to paragraph 4 of the answer and provide a copy of the former NPDES permit held by Respondent and a copy of the 2003 application for coverage referred to therein or of the Notice of Intent, if coverage was sought under a general permit. State whether there is a general permit that might cover Respondent's facility.

See Exhibits C8-10. There is no NPDES general permit currently available in Idaho authorizing the discharge of wastewater from a concentrated animal feeding operation ("CAFO").

Respondent did not seek coverage under the 1997 CAFO general permit.

3) State when the former NPDES permit and any extensions thereof expired and whether the application referred to in paragraph 4 of the answer was in conformance or intended to be in conformance with 40 C.F.R. § 122.23(g)(1).

The complaint covers the time period December 2001 to December 2006. The CAFO general permit that was in force in December 2001 expired on April 27, 2002. Respondent was not covered under that permit. On April 5, 2003, Respondent applied for an individual NPDES permit. No permit has been issued to Respondent.

4) Provide a copy of the report of NPDES inspection of Respondent's facility conducted on February 8, 2006, including any notes, photographs, or other attachments.

See Exhibit C1.

5) Provide the factual basis for the assertion in paragraph 12 of the complaint that Respondent's Facility is a "concentrated animal feeding operation" as defined in 40 C.F.R. § 122.23(b)(2), and is a point source according to Section 502(14) of the Act, 33 U.S.C. § 1362(14).

See Answer to Number 1 above. A CAFO is a point source under 33 U.S.C. § 1362(14) ("The term point source means . . . concentrated animal feeding operation.")

6) State the factual basis, including documents, summaries of testimony, and photographs, for the assertion in paragraph 16 of the complaint that the South Side Canal, which originates outside of and passes over, across, or through Respondent's Facility and flows into the C.J. Strike Reservoir (which flows into the Snake River - an interstate water), is a navigable water as defined in Section 502(7) of the CWA, 33 U.S.C. 1362(7), and part of the waters of the United States as defined by 33 U.S.C 1362(7) and 40 C.F.R. § 122.2. Provide the information, including summaries of testimony, documents, and photographs to support the conclusion that the South Side Canal conveys pollutants from Respondent's Facility to the C.J. Strike Reservoir.

Mr. McRae will testify regarding the South Side Canal and how it is a tributary to the C.J. Strike Reservoir, which is an impoundment of the Snake and Bruneau Rivers. The Snake River flows into the Columbia River. The Columbia River flows into the Pacific Ocean.

7) State the factual basis, including any documents, summaries of testimony, and photographs, charts, or maps for the allegation in paragraph 17 of the complaint that the Facility's North Pens have discharged process wastewater in the South Side Canal at least 13 times in the last five years and that these pollutants flow into the C.J. Strike Reservoir and waters downstream of the Reservoir. Respond to the assertion in paragraph 10 of the

answer that Respondent conducted maintenance of the berm in the fall of 2005 and has since built up the berm prior to the filing of EPA's complaint so that no further discharges will occur.

See Expert Report of Sandra Doty, Exhibit C4.

8) State the factual basis, including photographs, documents, maps, or charts and summaries of testimony, for the allegations in paragraph 18 of the complaint that the Facility's South Pens discharge process wastewater to a field and a pond to the north of the South Pens, which overflows and enters a tributary to the C.J. Strike Reservoir. Identify the tributary and explain where it flows into the C.J. Strike Reservoir.

See Exhibits C1 and C2. In the EPA Inspection Report, it states that the south pens discharge to the field to the north. This information was provided to EPA by Respondent during the inspection. Respondent informed EPA inspectors that the south pens discharge to the field to the north and ultimately to the pond in those north fields. The pond discharges via a culvert to a tributary of C.J. Reservoir. Drainage from the pond is prevented by a piece of plastic over pieces of wood.

9) State the factual basis, including documents, summaries of testimony, and photographs, maps or charts for the allegations in paragraph 19 of the complaint that on a daily basis for the last five years the Facility's Office Pens discharge process wastewater into the South Side Canal which flows into the C.J. Strike Reservoir and into waters downstream of the Reservoir.

See Exhibit C4. The expert report details under what climatic circumstances discharges would be expected to flow from the north and south pens. The pens containing the horses are located contiguous with the South Side Canal and allow the horses to have direct access to the water.

This direct access resulted in a daily discharge of pollutants to water of the United States.

10) Provide the factual basis for the assertion in paragraph 20 of the complaint that each day the horses referred to therein have come into contact with the South Side Canal resulted in discharges of process wastewater to the waters of the United States. Respond to the assertion that despite numerous inspections over the past 30 years by EPA and State agencies, Respondent had never been informed that the presence of the horses violated the

CWA.

Anytime livestock has direct access to the water there is by definition no containment for waste runoff into the water, and the livestock defecate directly in the water or immediately next to it. It is Respondent's responsibility to understand and comply with the law.

11) Provide a copy of any documents supporting the assertion in paragraph 21 of the complaint that the process wastewater discharge from the Facility is a pollutant and contains pollutants defined under Section 502(6) of the Act, 33 U.S.C. § 1362(6).

See Exhibit C1. Cow and horse manure are pollutants under 33 U.S.C. § 1362(6) ("pollutant" means . . . solid waste, . . . biological materials . . . and agricultural waste discharged into water.") (*See Concerned Area Residents for the Environment v. Southview Farm and Richard Popp*, 834 F. Supp. 1410 (W.D.N.Y. 1993), *rev'd on other grounds*, 34 F.3d 114 (2d cir. 1994), *cert. denied*, 115 S. Ct. 1793 (1995) (argument rejected that manure is not a pollutant because it was not "discarded" but is instead used as a fertilizer).

12) Explain the basis for the assertion in paragraph 23 of the complaint that the alleged violations "constitute no fewer than one thousand eight hundred thirty eight (1,838) days of violations (at least 13 days for the North Pens, 1,825 days for the Office Pens)."

There are 365 days in a year. During the five-year statute of limitations, there were 1,838 days. Each day Respondent's horses had direct access to the water, they were violating the CWA. In addition, evidence to be adduced at hearing will show that Respondent discharged at least thirteen times from his north pens.

13) Provide documents, summaries of testimony, or other information, for the assertion in paragraph 26 of the complaint that Respondent's alleged discharges of manure-laden animal waste to waters of the United states contain significant levels of both fecal coliform and *Escherichia coli* (*E. coli*) bacteria, which indicates a "possible presence of a number of pathogens (such as *E. coli* 0157: H7 and *Salmonella*) as well as parasites (such as *Cyptosoridium*)." State the factual basis for the assertion that the animal wastes in Respondent's alleged discharges cause illnesses resulting in gastroenteritis, fever, kidney

failure, and even death. Provide the factual basis for the assertion that animal wastes have high nutrient levels that can cause decreased oxygen levels in receiving waters adversely impacting the development and maturity stages of many fish species indigenous to the Pacific Northwest (including Salmon species as endangered or threatened under the Endangered Species Act).

Dr. Stephanie Harris will provide expert testimony regarding the nature of CAFO wastewater runoff and its effects on the environment.

14) Provide a copy of any documents supporting the assertion that the C.J. Strick Reservoir is listed by the State of Idaho as impaired for excess nutrients.

See Exhibit C15.

15) Specify the penalty Complainant is seeking in this proceeding. State the consideration, if any, given to Respondent's ability to pay the proposed penalty and provide a copy of any documents used in determining Respondent's ability to pay, if such a determination was made.

Paragraphs 24-28 of the Complaint set forth EPA's rationale for the proposed penalty. The following elaborates on the rationale set out in the Complaint. Complainant proposes an administrative penalty of Seventy Five Thousand Dollars (\$75,000). The Agency has never issued a penalty policy for use by Presiding Officers in determining penalties under the CWA.¹ Consequently, Presiding Officers rely on the wording of the statutory penalty factors set out in § 309(g)(3),² and Complainant's proposed penalty is based on the applicable § 309(g)(3) penalty factors.³ These are: the nature, circumstances, extent, and gravity of the violation, or violations,

¹The Consolidated Rules of Procedure require that the Presiding Officer, in addition to considering the applicable statutory penalty factors, "shall consider any civil penalty guidelines issued under the Act." 40 C.F.P. § 22.27(b). Since the Agency has not issued any specific Clean Water Act penalty policy guidelines applicable to the present action, this section is inapplicable.

²33 U.S.C. § 1319(g)(3).

³See *In re Larry Richner*, 10 E.A.D. 617, CWA Appeal No. 01-01 (EAB July 22, 2002) ("Because there are no CWA penalty guidelines, a CWA penalty must be calculated based upon

and, with respect to Respondent, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require. The penalty proposed in this case is consistent with other concentrated animal feeding operation (“CAFO”) penalties cases.⁴

The nature, circumstances, extent, and gravity of the violations described above are significant. Respondent has over 4,000 head of cattle in its Facility, yet has had no containment to prevent runoff of process wastewater and has no NPDES permit. The violations resulted in the discharge of significant amounts of manure-laden animal waste to the South Side Canal of the C.J. Strike Reservoir and other tributaries to the Reservoir. Such discharges contain significant levels of both fecal coliform and *Escherichia coli* (*E. coli*) bacteria. The presence of these bacteria indicates the possible presence of a number of pathogens (such as *E. coli* 0157:H7 and *Salmonella*) as well as parasites (such as *Cryptosporidium*). Illnesses caused by these microorganisms can result in gastroenteritis, fever, kidney failure, and even death. Animal

the evidence in the record and the penalty criteria set forth in CWA § 309(g).” slip op. at 23); *In re Britton Construction*, 8 E.A.D. 261, 278 (EAB 1999) (“The statute requires EPA to take into account a number of factors in assessing penalties, such as the extent of the violations and the violator’s culpability, but it prescribes no precise formula by which these factors must be computed.” (citations omitted)).

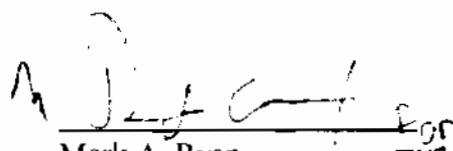
⁴See, e.g., *United States v. The New Portland Meadows, LLC*, Civ. No. 00-507-KI (D. Oregon July 29, 2003) (\$500,000 for multiple years of violations of the CAFO regulation at a horse race track; penalty reduced based on ability to pay); *Community Assoc. for Restoration of the Environment v. Bosma Dairy*, 52 ERC 1167 (E.D. Wash. 2001), *aff’d*, 305 F.3d 943, 55 ERC 1033 (9th Cir. 2002) (\$171,500 penalty, plus \$428,304 attorneys fees and costs assessed for numerous CAFO violations); *In re Robert Wallin*, 10 E.A.D. 18 (EAB 2001) (\$5,500 penalty assessed for one-day discharge of manure wastes from dairy into wetland; EAB increased penalty assessed by RJO to account for ability to pay); *In re Larry Richner*, 10 E.A.D. 617 (EAB 2002) (\$5,500 penalty assessed for one-day discharge of cow manure into unnamed creek).

wastes are also typically high in nutrients which can cause decreased oxygen levels in receiving waters. These decreased oxygen levels can adversely impact many species of fish indigenous to the Pacific Northwest (including salmon species listed as endangered or threatened under the Endangered Species Act) during their developmental stages as well as at maturity. Runoff from Respondent's facility also contains nutrients. The C.J. Strike Reservoir, which is an immediate downstream water body from Respondent's Facility, is listed by the State of Idaho as impaired for excessive nutrients.

By avoiding or delaying the costs associated with implementing waste management controls that would have ensured compliance with the Clean Water Act, Respondent has realized an economic benefit of \$22,570 as a result of his failure to comply with the Act.

EPA presumes that Respondent is able to pay a penalty of \$75,000 based upon the information available at the time of the filing of the Complaint. Respondent has not raised ability to pay as a defense in this case.

RESPECTFULLY SUBMITTED this 15th day of June, 2007.


Mark A. Ryan
Assistant Regional Counsel
Region 10

CERTIFICATE OF SERVICE

I hereby certify that copies of Prehearing Exchange in the Matter of Bruneau Cattle Co., Docket No. CWA-10-2007-0016, were sent to the following persons in the manner indicated:

A true and correct copy hand delivered to:

Carol Kennedy (original plus one copy)
Regional Hearings Clerk
EPA Region 10
1200 Sixth Avenue
Seattle, Washington 98101

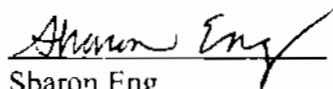
A true and correct copy by U.S. Mail to:

Honorable Spencer T. Nissen
Administrative Law Judge
U.S. EPA Office of Administrative Law Judges
1200 Pennsylvania Ave. NW
Mail Code 1900L
Washington, D.C. 20460

A true and correct copy by U.S. mail to:

Kevin Beaton
Stoel Rives LLP
101 S. Capitol Blvd
Boise, Idaho 83702

Dated: June 15, 2007


Sharon Eng
Environmental Protection Agency
Region 10