

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219

BEFORE THE ADMINISTRATOR

<p>TONY L. BROWN and JOSHUA A. BROWN d/b/a RIVERVIEW CATTLE Armstrong, IA</p> <p>Respondents</p>	<p>Docket No. CWA-07-2016-0053</p> <p>RESPONDENTS' INITIAL PREHEARING EXCHANGE</p>
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COMES NOW the Respondents, Tony L. Brown and Joshua A. Brown., by and through their attorney, Eldon L. McAfee, and for their Initial Prehearing Exchange:

1. A) **Witnesses Respondents intend to call:**

(1) Mr. Tony Brown and Mr. Joshua Brown. Respondents and fact witnesses. Mr. Tony Brown and Mr. Joshua Brown are expected to testify regarding their answers and defenses in Respondents' Answer and Request for Hearing and in reply to the testimony of Complainant's witnesses, including regarding whether any discharge from the Respondents' feedlot during the applicable time period to a water of the United States in violation of the Clean Water Act has occurred, the applicability of EPA's evidence of a discharge beyond the specific day or days the evidence was obtained, any allegations by EPA that Respondents' feedlot has had an adverse effect on water quality, and communications that occurred with EPA during EPA's inspections in 2014 and 2016. Further, Mr. Tony Brown and Mr. Joshua Brown are

expected to testify about the lack of economic benefit they received by not building runoff control structures as alleged by EPA.

(2) Gerald T. Hentges, P.G., Senior Hydrologist, Terracon Companies, Inc. Expert witness. See attached curriculum vitae. Mr. Hentges will testify in reply to the testimony of Complainant's witnesses, including regarding whether any discharge from the Respondents' feedlot during the applicable time period to a water of the United States in violation of the Clean Water Act has occurred, the applicability of EPA's evidence of a discharge beyond the specific day or days the evidence was obtained, and any allegations by EPA that Respondents' feedlot has had an adverse effect on water quality. See Mr. Hentges' report attached to this Initial Prehearing Exchange.

(3) Dallas Heikens, P.E., Jacobsen-Westergard & Assoc. Expert witness. See attached profile. Ms. Heikens is expected to testify regarding her observations at the feedlot as a result of the engineering work she has done for the Respondents, including her site visits to the Respondents' feedlot, as these activities relate to the claims against Respondents in this case.

(4) Ms. Lois Benson, Iowa Department of Natural Resources, Environmental Specialist, Animal Feeding Operations and Water Supply. Fact witness and non-retained expert. See file:///C:/Users/emcafee/Downloads/fo3_staff.pdf. Ms. Benson is expected to testify as to Respondents' compliance with the Clean Water Act as implemented by the Iowa DNR. Her testimony may also include her numerous interactions with Respondents in her role as an Environmental Specialist for the Iowa DNR and her observations during EPA's inspections in 2014 and 2016. She may also testify as to Respondents' precipitation documents and exhibits.

(5) Mr. Gary Brown and Mrs. Dawn Brown. Fact witnesses. Mr. Gary Brown and Mrs. Dawn Brown are Tony and Joshua Brown's father and mother and are expected to testify about conditions at the feedlot during the applicable time period of this action, including but not limited to at the time of the EPA's site inspections. These witnesses may also testify regarding communications in their presence that occurred with EPA during the site inspections.

(6) Mr. Steve Madden and Mr. Joe Madden, Armstrong, Iowa. Fact witnesses. The Maddens are neighbors of the Respondents and apply manure from the feedlot and deliver corn stalk bales to the feedlot. They are expected to testify as to the conditions maintained at the Respondents' feedlot during the applicable time period of this action.

(7) Mr. Jerry Ulrich, Armstrong, Iowa. Fact witness. Mr. Ulrich has a cattle feedlot near the Respondents' feedlot and recorded the rainfall information in Respondents' Exhibit 7. He is expected to testify about that rainfall data and other weather conditions in June 2014.

(8) Mr. Derek Anderson, Anderson Tiling, Armstrong, Iowa. Fact witness. Mr. Anderson does field tiling for the Respondents and is expected to testify regarding the field tile at issue in this case, including its condition.

Respondents reserve the right to call any fact witnesses named by Complainant in its Prehearing Exchange or Rebuttal Prehearing Exchange.

B) Documents and exhibits Respondent intends to introduce into evidence:

RX 1: Photograph of 2011 basin construction

RX 2: Gerald Hentges Statement of Opinion

RX 3: Gerald Hentges CV

RX 4: Dallas Heikens Profile

RX 5: City of Armstrong NPDES Monthly Operation Report, May and June, 2014

RX 5, 1/10 June 2014 cover sheet

RX 5, 2/10 June 2014 data

RX 5, 3/10 June 2014 data

RX 5, 4/10 June 2014 data

RX 5, 5/10 June 2014 data

RX 5, 6/10 May 2014 cover sheet

RX 5, 7/10 May 2014 data

RX 5, 8/10 May 2014 data

RX 5, 9/10 May 2014 data

RX 5, 10/10 May 2014 data

RX 6: North Farm rainfall, Climate Field, June 2014

RX 7: Ulrich Feedlot NPDES Quarterly Report, April, May and June, 2014

RX 8: Weather Underground June Weather for Estherville, IA; the complete weather data for June 2014 can be found online at: https://www.wunderground.com/history/airport/KEST/2014/6/17/MonthlyHistory.html?req_city=Estherville&req_state=IA&req_statename=Iowa&reqdb.zip=51334&reqdb.magic=1&reqdb.wmo=99999

The complete Weather Underground weather data for Estherville, IA for the relevant time period of this action can be found online at:

https://www.wunderground.com/history/airport/KEST/2017/2/24/MonthlyHistory.html?req_city=Estherville&req_state=IA&reqdb.zip=51334&reqdb.magic=1&reqdb.wmo=99999

RX 9: Feedlot cattle inventory records

RX 9, 1/11 to 3/11 May 2011 (also for June 2011)

RX 9, 4/11 to 6/11 April 2013

RX 9, 7/11 to 11/11 June 2014

(These records cover the time periods that Complainant has alleged that discharges occurred from Respondents' feedlot. Respondent has records for additional time periods relevant to this action and those records are not being designated as exhibits in the interest of avoiding unnecessary document production, but those records are available and will be designated if necessary.)

RX 10: 2013 feedlot aerial photograph

RX 11: 2011 – 2015 USGS aerial photographs

RX 12: 2015 feedlot aerial photograph

RX 13: Photographs of 2016 building construction

Additional documents, including documents in reply or rebuttal, will be provided as a supplement to this Prehearing Exchange as provided by the Prehearing Order and 40 C.F.R. §22.19. In this Initial Prehearing Exchange Respondent has not duplicated documents and exhibits designated by Complainant in its Prehearing Exchange and accordingly reserves the right to introduce any document and exhibit designated by Complainant in its Prehearing Exchange or that will be designated in its Rebuttal Prehearing Exchange.

C) Statement specifying the amount of time needed to present its direct case;

Respondent submits that the hearing in this case should be held in Des Moines, Iowa pursuant to §22.21(d) and §22.19(d). Respondent estimates that the time needed for his direct case will be 2 days.

2. This paragraph is not applicable to Respondent.

3. A) A copy of any documents in support of the denials made in the Answer;

See the Exhibits Respondent intends to introduce into evidence.

B) A copy of any documents in support of the allegations in Respondents' Affirmative Defenses and an explanation of their arguments in support of such Affirmative Defenses;

See the Exhibits Respondent intends to introduce into evidence.

Regarding an explanation of arguments in support of Affirmative Defenses, in its Answer Respondent stated:

Respondent submits that the EPA's proposed penalty is inappropriate considering the statutory factors and specific facts of this case. In particular, EPA's visual observations and sample results from the samples taken on June 14, 2014, referenced in ¶'s 29 and 30 of the Complaint do not show that a discharge of pollutants from the Respondent's animal feeding operation to a water of the U.S. occurred in that no samples of a discharge to a water of the U.S. were taken, nor were there any visual observations of discharges of pollutants to a water of the U.S., even though EPA had the opportunity to take such samples and make such visual observations. In addition, even if EPA's alleged visual observations and sampling results could be proven to show a discharge to a water of the U.S. on June 14, 2014, contrary to the allegations in ¶'s 36, 37 and 38 of the Complaint, EPA has at the most proof of one discharge event. Due to the real world variability in precipitation and runoff that may or may not occur from any particular event, EPA cannot extrapolate one event as proof of discharges on other days.

Respondent submits that this affirmative statement supports the claimed defenses and that this statement provides a sufficient explanation of its Arguments in support of its defenses. However, to further elaborate, submits that the evidence and testimony will show that EPA representatives conducting the inspection on June 17, 2014 (Respondents' Answer inadvertently and incorrectly states the date as June 14, 2014) had the opportunity to take samples at the point of alleged discharge to a water of the U.S. and expressly declined that opportunity. Further, when EPA returned for a site inspection on March 29 and 30, 2016, the EPA representatives had no difficulty in finding the alleged point of discharge to the water of the U.S., indicating that had they taken the opportunity on June 17, 2014, they could have found the alleged point of discharge and taken proper samples or could have determined it was not possible to take samples due to high water in the river. Finally, Respondents' precipitation records submitted with this Initial Prehearing Exchange show that Complainant's precipitation records used as the basis to extend the alleged discharge event on June 17, 2014 to additional dates are not representative of the rainfall that actually occurred at the Respondents' feedlot. In addition, Respondents' feedlot

inventory records presented as an exhibit in this case introduces another variable that affects Complainant's estimation of discharge events in addition to the one alleged event on June 17, 2014. These facts, in addition to "the real world variability in precipitation and runoff that may or may not occur from any particular event" noted in Respondents' Answer illustrates Respondents' point that EPA cannot extrapolate one event of an alleged discharge to additional days without actual proof of discharge on those days.

C) All Factual Information Relevant to the Assessment of a Civil Penalty.

See Respondent's Answer and Request for Hearing, Defenses to Proposed Civil Penalty, and the information provided in the preceding section of this Initial Prehearing Exchange.

D) At this time, Respondent does not intend to take the position that it is unable to pay the proposed penalty or that the proposed penalty will have an adverse impact on the Respondent's ability to continue in business.

4. This paragraph is not applicable to Respondent.

This Prehearing Exchange will be supplemented, including submission of names of additional witnesses and/or submission of additional exhibits prior to hearing, upon timely notice to the Presiding Officer and to Complainant.

RESPECTFULLY SUBMITTED this 24th day of February, 2017.

BRICK GENTRY, P.C.

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ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of February, 2017, I filed via the E-filing system the original of this Respondents' Initial Prehearing Exchange with the Office of Administrative Law Judges Hearing Clerk, and sent by email Mr. Howard Bunch, counsel for Complainant.

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