

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7

Tony L. Brown and)
Joshua A. Brown) Docket No. CWA-07-2016-0053
d/b/a Riverview Cattle)
Armstrong, Iowa)
Respondents) COMPLAINANT'S
) MOTION TO SUPPLEMENT
) PREHEARING HEARING
) EXCHANGES

Background

On May 10, 2016 EPA filed an administrative Complaint against Respondents for alleged violations of Section 301 of the Clean Water Act, 33 U.S.C. § 1311, specifically, for the discharges of feedlot related pollutants to waters of the United States without an NPDES permit.

Per the Presiding Officer's Prehearing Order of November 14, 2016, supplements to prehearing exchanges submitted pursuant to 40 C.F.R. 22.19(f) were allowed to be submitted without motion if filed more than 60 days prior to any scheduled hearing date. Complainant filed its Prehearing Exchange on January 6, 2017, and the Rebuttal Prehearing Exchange on March 31, 2017, and a First Supplemental Prehearing Exchange on April 10, 2018.

By the Presiding Officer's Order dated April 10, 2018, the hearing is now scheduled for June 18-22, 2018, and the date to supplement the prehearing exchanges without motion and permission of the Presiding Officer passed on April 19, 2018.

By letter dated May 15, 2018 (See Attachment), counsel for Complainant transmitted to counsel for Respondents a request for additional information that was in the possession of and only available from the Respondents or Dallas Heikens, a witness for Respondents, (CX to CX), or referenced by Respondents own previous submittals or prehearing exchanges but provided

in its entirety. EPA's May 15, 2018 letter stated and requested the following:

“1. Copies of the results of all sampling data related to the contents of the manure pit and any other process wastewater that was sampled at the Riverview facility (from 2011 to the present).

2. A complete copy all hydrological or engineering assessments for the Riverview facility, along with all supporting materials (including any hydrological assessment of surface runoff from facility, including into the manure pit, quantities of process wastewater that would be generated by surface runoff, etc.).

3. The source of the rainfall data in RX 6 (described as “North Farm rainfall, June 2014”) be identified.

4. If the rainfall data was generated at either the Riverview Cattle or Bacon Maker facilities, provide complete copies of all facility rainfall data for the period from January 2011 to August 2014.”

Respondents have provided information responsive to Items 1 and 2 of EPA's May 15, 2018 request. This newly obtained information is now submitted as Complainant's requested exhibits CX 54 and CX 55. Counsel for Respondents has also identified the source of the precipitation data described in Respondents' prehearing exchange, RX 6, and requested by Items 3 and 4 of EPA's May 15, 2018 request. This information is from an internet based product named “Climate Field,” which allows farmers to get estimates of the precise precipitation data for their farm for purposes of determining fertilizer and herbicide application rates, etc. “Climate Field” is marketed by The Climate Corporation, and the product description may be found here: <https://climate.com/features>. Counsel for Respondents has stated that the information set forth in RX 6 is the location specific information purchased by Respondents from Climate Field for the “North Farm” location of the Riverview facility. Counsel for Respondent has not provided complete copies of all facility rainfall data for the period from January 2011 to August 2014 as

requested by Item 4. Rather, counsel for Respondent has stated that Respondents have information from spring of 2014 through August of 2014 and are working with the vendor to provide this information as soon as it is available.

Motion

Pursuant to 40 C.F.R. 22.19(f), supplements to prehearing exchanges may be made if a party determines that previously submitted information “is incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party pursuant to this section.” Complainant is now requesting approval to supplement its previous prehearing exchanges to complete the record and to include the information provided by Respondents in response to EPA’s May 15, 2018 request. Evidence of bad faith, delay tactics, or undue prejudice may warrant the denial of a supplement to a prehearing exchange (See, *In the Matter of: New York State Department of Transportation, Docket No. CWA-02-2016-3403*, 02/16/2018 Order on Motion to Supplement, pg. 2). A discussion of each submitted exhibit follows, with an explanation of why Complainant respectfully believes these disqualifying factors are not present, and accordingly, Complainant requests that the offered exhibits be allowed by the Presiding Officer.

Lastly, Complainant submits a picture of the type of sampling bottle used by EPA to take the samples during EPA’s June 17, 2014 inspection. This exhibit will be offered at hearing to support the expected testimony of Trevor Urban regarding the depth of process wastewater with the swale at the time he took Sample 1, as identified in EPA’s 2014 inspection report (CX 1).

Justification

CX 54 - Respondents' sampling data of contents of Manure Pit.

These sample results were just provided by Respondents on May 23, 2018. Because these sampling data are the Respondents' own information, was in their sole possession, Complainant's intent to file a motion to supplement to include these materials has been discussed with counsel for Respondents, who did not object, and these materials are now submitted with adequate time for Respondents' evaluation before hearing, Complainant believes that the record shows "no bad faith, delay tactics, or undue prejudice." Accordingly, Complainant requests that this exhibit be accepted to supplement.

CX 55 - Respondents' Hydrological and engineering analysis of surface runoff from Respondents' facility

These materials were just provided by counsel for Respondents on May 25 and May 31, 2018. These submittals are the information of Respondents' own engineer, Ms. Dallas Heikens. Ms. Heikens is listed as an expert in Respondents' prehearing exchange whose expected testimony will include "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." This information is thus directly relevant and probative to Ms. Heikens' expected testimony, as well as the expected testimony of EPA's expert (Dr. Steven Wang).

Because these submittals were prepared by the Respondents' own engineer, were in her sole possession, Complainant's intent to file a motion to supplement to include these materials has been discussed with counsel for Respondents, who did not object, and these materials are now submitted with adequate time for Respondents' evaluation before hearing, Complainant believes that the record shows "no bad faith, delay tactics, or undue prejudice." Accordingly,

Complainant requests that the submitted materials be accepted to supplement.

CX 56 – Picture of type of sampling bottle used by EPA during EPA’s June 17, 2014 inspection of Respondents’ facility

Mr. Urban is expected to testify that when taking Sample 1 at the inlet to the drain tile during the 2014 Inspection (CX 1), he fully submerged the sample bottle below the surface of the process wastewater within the swale, without touching the bottom of the swale, where the bottom of the inlet to the drain tile would be located. A sample bottle will be also brought to the hearing for demonstrative purposes. The sample bottle will be offered to demonstrate the depth of the swale below the surface of the water, and thus the storage capacity and volume of process wastewater within the swale before it would drain to the bottom of the inlet of drain tile. This exhibit is thus probative of both the number of days of discharge and volume of discharges, when they occurred. The subject of Mr. Urban’s testimony, including sampling, was included in the initial prehearing exchange, and there is no prejudice to Respondents in providing this additional advance notice of the expected content of Mr. Urban’s testimony. Because this exhibit is merely a demonstrative reference for a matter that Mr. Urban’s expected testimony will independently and fully describe, there is no prejudice to Respondents from its acceptance.

For the reasons stated above, Complainant requests that the Presiding Officer grant its motion to supplement its prehearing exchanges with the additional exhibits described above. These exhibits provide more complete information on the issues before the Presiding Officer, and on positions previously asserted by EPA. Because this motion is made well in advance of the scheduled commencement of the hearing on June 18, 2018, contains information in the possession of Respondents’ or Respondents’ witnesses or otherwise familiar to Respondent, and because Respondents would not be prejudiced by its granting, it is requested that the Presiding

Officer grant Complainant's motion and accept the offered submissions.

Lastly, if Respondents provide the precipitation data for Respondents facility that was requested by Items 3 and 4 of EPA's May 15, 2018 letter, and referenced in Respondents' RX 6, EPA may seek leave to further amend its prehearing exchanges to include that information.

Requested Additional Exhibits:

Complainant now requests the acceptance of the submittal of the following additional exhibits, to supplement the previously submitted prehearing exchanges:

CX 54 - Respondents' sampling data of contents of Manure Pit

CX 55 - Hydrological and engineering analysis of surface runoff from Respondents' facility

CX 56 - Picture of sample bottle

RESPECTFULLY SUBMITTED this 1st day of June, 2018.



Howard Bunch
Counsel for Complainant
Sr. Assistant Regional Counsel
U.S. Environmental Protection Agency
Region



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7**

11201 Renner Boulevard
Lenexa, Kansas 66219

May 15, 2018

By email only

Eldon McAfee (counsel for Tony L. Brown and Joshua A. Brown, dba Riverview Cattle)
Brick Gentry, PC
6701 Westown Parkway, Suite 100
West Des Moines, IA 50266-7703

Re: Request for Information

Dear Eldon:

EPA has been in the process of reviewing the record for the Riverview Cattle facility, owned and operated by Tony and Joshua Brown. On behalf of the United States Environmental Protection Agency, Region 7, I am writing to request items of information from your clients to complete the record for the Riverview facility.

EPA's review of the facility record, including information recently obtained from Lois Benson (IDNR), indicates that the Browns have routinely sampled the contents of the manure pit at the Riverview cattle facility. EPA's discussions with IDNR also indicate that in 2016 the Browns contracted with Ms. Dallas Heikens to evaluate the Riverview facility and to prepare a draft NDPEs permit application that, ultimately, was not submitted to IDNR. Ms. Heikens' work on the permit application was described by IDNR to EPA as including a hydrological assessment of the facility, including estimates of surface runoff into the manure pit on the north side of the Riverview facility. Although Heikens is listed as a witness in the current proceeding with your clients, the Browns' prehearing exchange did not include any of the information related to Ms. Heikens' development of the permit application. Based on this, EPA is requesting that the Browns provide the following to EPA:

1. Copies of the results of all sampling data related to the contents of the manure pit and any other process wastewater that was sampled at the Riverview facility (from 2011 to the present).
2. A complete copy all hydrological or engineering assessments for the Riverview facility, along with all supporting materials (including any hydrological assessment of surface runoff from facility, including into the manure pit, quantities of process wastewater that would be generated by surface runoff, etc.).

Finally, based on EPA's review of Respondents' Initial Prehearing Exchange and exhibits, EPA requests:

3. The source of the rainfall data in RX 6 (described as "North Farm rainfall, June 2014") be identified.
4. If the rainfall data was generated at either the Riverview Cattle or Bacon Maker facilities, provide complete copies of all facility rainfall data for the period from January 2011 to August 2014.

EPA would like to request that by Thursday, May 17, 2018, the Browns provide an answer to whether they will provide the requested information and, if possible, provide copies of the requested information by Monday, May 21, 2018. If your clients decline to provide the requested information, EPA will consider whether to request



the information pursuant to Section 308 of the Clean Water Act, or because of the relatively short time before the hearing, by motion to the Presiding Officer pursuant to 40 CFR 22.19(e).

If you have any questions on these requests, please do not hesitate to call me.

I look forward to talking to you tomorrow.

Sincerely,

A handwritten signature in blue ink, appearing to read 'H. Bunch', with a long horizontal flourish extending to the right.

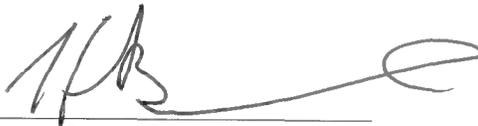
Howard C. Bunch
Sr. Assistant Regional Counsel
Region 7, USEPA
(913) 551-7879

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2018, I filed via the E-filing system the original of this Motion to Supplement to Prehearing Exchanges to the Office of Administrative Law Judges Hearing Clerk, and sent by email to Mr. Eldon McAfee, Esq, counsel for Respondents.

Eldon McAfee (counsel for Tony L. Brown and Joshua A. Brown, d/b/a Riverview Cattle)
Brick Gentry, PC
6701 Westown Parkway, Suite 100
West Des Moines, IA 50266-7703

Email: Eldon McAfee <Eldon.McAfee@brickgentrylaw.com>

A handwritten signature in black ink, appearing to read 'HB', followed by a long horizontal line that ends in a circular flourish.

Howard Bunch
Sr. Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 7
11201 Renner Boulevard
Lenexa, Kansas 66209
(913) 551-7879
bunch.howard@epa.gov