UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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BEFORE THE ADMINISTRATOR

TONY L. BROWN and JOSHUA A. BROWN d/b/a RIVERVIEW CATTLE Armstrong, IA Respondents	Docket No. CWA-07-2016-0053 RESPONDENTS' REPLY POST HEARING BRIEF

COME NOW the Respondents, Tony L. Brown and Joshua A. Brown, d/b/a Riverview Cattle, by and through their attorney, Eldon L. McAfee, and submit this Reply Post-Hearing Brief.

INTRODUCTION

Superficially, and as EPA has argued throughout the case, this case may appear to be an easy analysis. Whatever goes into a tile line will come out of the tile line because that is what tile lines do – they transport surface and groundwater from surface inlets and the ground to outlets. That is, if runoff from Riverview Cattle feedlot went into the tile inlet in the swale by the feed yard on June 17, 2014, it had to come out and go into the East Fork of the Des Moines River, a water of the U.S. But as the evidence has shown, this case is not that simple. Riverview Cattle has shown that because of the actual field, river, and other conditions on June 17, 2014, it cannot be assumed that whatever went into the tile inlet would have come out at the river. Most importantly, it has been shown that EPA failed to do its job in investigating and proving whether there was an actual discharge of pollutants to the East Fort of the Des Moines River on June 17, 2014.

While there are many disputed facts in this case, there are undisputed facts. First, it is undisputed that on the day of EPA's inspection, June 17, 2014, the manure pit at the Riverview Cattle feed yard overflowed. It is also undisputed that the pit overflow reached the swale southeast of the feed yard and that EPA took samples of the runoff in the swale. It is also undisputed that EPA did not go to the East Fork of the Des Moines River, the water of the U.S., to locate the tile outlet to determine if there was a discharge to the river from the tile line where they had sampled pollutants at the tile intake in the swale and if there was, to observe or sample any discharge. In between these undisputed facts are the many facts that are disputed, and both Complainant and Respondent have presented the facts that support their positions. It will of course be up to this Court to evaluate that conflicting testimony and evidence.

As noted in Respondents' Initial Post-Hearing Brief, there can be no dispute that if EPA inspectors on June 17, 2014, on the following day, had went to the river, or at the very least made an effort to go to the river, to locate the tile outlet and if they could locate it, determine if they could observe and sample any discharge, this case would have been resolved. Instead, EPA is asking this Court to rule in its favor based on circumstantial evidence of a discharge to a water of the U.S. EPA correctly argues that circumstantial evidence can be used to prove a discharge. However, the question is whether that circumstantial evidence, which is vigorously challenged by Riverview Cattle, satisfies EPA's burden of proof when direct evidence was available and not pursued.

Finally, as with any reply brief, the goal in this Reply Brief is to adequately address all issues, while at the same time not needlessly repeat arguments raised in Respondents' Initial Post-Hearing Brief. With that in mind, Riverview Cattle will reply to those issues raised by EPA in its Reply Post-Hearing Brief that warrant further discussion and analysis. The purpose of this Reply Brief is not to rehash all evidence discussed and argument presented in the Initial Brief, but rather to point out where Riverview Cattle believes EPA in its Reply Brief has presented an argument that Riverview Cattle believes misinterprets the evidence and the law in this case.

ARGUMENT

I. EPA HAS FAILED TO PROVE THAT RIVERVIEW CATTLE DISCHARGED TO A WATER OF THE U.S. IN VIOLATION OF THE CLEAN WATER ACT ON JUNE 17, 2014.

A. CIRCUMSTANTIAL EVIDENCE IS PROBATIVE BUT CANNOT NOT BE RELIED ON IF DIRECT EVIDENCE WAS AVAILABLE BUT NOT UTILIZED BY EPA.

The critical issue in this case, as set out in the Introduction to this Brief, is that EPA was at Riverview Cattle on June 17, 2014 when the manure pit was overflowing and a discharge to a water of the U.S. was allegedly occurring. EPA had the opportunity to observe and sample that alleged discharge and did not do it. Thus, EPA is relying exclusively on circumstantial evidence to prove a discharge to a water of the U.S. At the risk of repeating Respondents' Initial Post-Hearing Brief, *In Re Lowell Vos Feedlot* (EAJA Appeal No. 10-01, Final Decision, May 9, 2011, 15 E.A.D. 314) sets forth two holdings that are directly on point in this case.

First, the EAB ruled that exclusive reliance on circumstantial evidence does not necessarily render a case infirm, because "circumstantial evidence can be effectively used to state a proposition of material fact *in the absence of direct evidence*". *In Re Lowell Vos Feedlot*, 15 E.A.D. 314, 322, citing *In re BWX Techs., Inc.*, 9 E.A.D. 61, 78 (EAB 2000)(italics added for emphasis). In this case, the manure pit was running over on the day EPA was there. EPA was present when the alleged discharge to a water of the U.S. was allegedly occurring. EPA had the golden opportunity to collect a feedlot runoff sample when the discharge was occurring "to ensure accurate assessment of impacts on receiving waters." However, EPA did not take that opportunity and made no attempt to collect any samples at the receiving waters, the East Fork of the Des Moines River, to ensure an accurate assessment of any impact on the receiving waters. Again, this failure to conduct a proper

investigation of direct evidence must render the circumstantial evidence of little or no weight in this proceeding.

> Secondly, the EAB aptly stated:
> "[i]n response to allegations that the Region should have collected more direct sampling evidence prior to filing the complaint, the Region reasonably explains that feedlots "discharge sporadically" and EPA's location in Kansas City, six hours distant from Vos Feedlot, makes very difficult the collection of samples during actual discharge events. EPA Answer to EAJA Application at 24; see Tr. at 315-16 (*EPA collects feedlot runoff samples only when discharges are actually occurring, to ensure accurate assessment of impacts on receiving waters*)." *In Re Vos Feedlot* at 324 (italics added for emphasis)

Here, as in *In Re Lowell Vos Feedlot*, Respondent is alleging that EPA should have collected more direct sampling evidence. However, unlike in *In Re Lowell Vos Feedlot*, being approximately six hours distant from the Riverview Cattle feedlot was not an issue because the alleged actual discharge event was happening at the exact time EPA was there. EPA's statement in *In Re Vos Feedlot* that it "collects feedlot runoff samples only when discharges are actually occurring, to ensure accurate assessment of impacts on receiving waters" must be applied in this case. On June 17, 2014 at the Riverview Cattle feedlot EPA had the exact factual setting that it said it needed, but didn't have, in the Lowell Vos inspection – the ability to "ensure accurate assessment of impacts on receiving waters." EPA should have, but did not by its own choice, observed and sampled the alleged discharge at the receiving waters.

As discussed in Respondents' Initial Post-Hearing Brief, the absence of direct evidence in this case was not because there was no direct evidence available, the absence was because EPA did not make a reasonable effort to obtain the direct evidence. The alleged discharge was happening on the very day EPA was conducting its inspection, something that apparently doesn't occur all that often, and EPA failed to even attempt to investigate and collect that direct evidence. Riverview Cattle should not have to suffer for EPA's failure to collect the available direct evidence and EPA's circumstantial evidence in this case should be given little if any weight.

B. EPA's INSPECTION ON JUNE 17, 2014 FAILS TO PROVE THERE WAS AN ACTUAL[1] DISCHARGE OF POLLUTANTS TO A WATER OF THE U.S.

As previously noted by both EPA and Riverview Cattle, it is uncontested that the manure pit was running over on June 17, 2014 and that the runoff was entering the swale. However, the

[1] In its Reply Post-Hearing Brief at page 4, EPA correctly notes that Riverview Cattle in its Initial Post-Hearing Brief asserts that the court in *Waterkeeper Alliance, Inc., et. al. v. U.S. EPA*, 399 F.3d 486, 504-505 (2d Cir. 2005) clarified the legal standard for proving a discharge to a water of the U.S. by using the term "actual" discharge. EPA also correctly notes that the Environmental Appeals Board in *In Re Lowell Vos Feedlot*, 15 E.A.D. 314, 321 (EAB 2011), an Equal Access to Justice Act case, rejected that argument. Riverview Cattle realizes and respects that this Court is bound by the EAB's decision in that case. At the same time, Riverview Cattle is raising the issue because it believes the appropriate standard is an "actual" discharge and that that standard was properly set out in *Waterkeeper Alliance*. Thus, even though the EAB rejected the argument *in In Re Lowell Vos Feedlot*, given the passage of time since the *Waterkeeper Alliance* decision in 2005 and the EAB's decision in In Re Lowell Vos Feedlot in 2011, and because the term "actual" seems to find its way into discussion of a discharge of pollutants to waters of the U.S., Riverview Cattle believes the *Waterkeeper Alliance* decision is worthy of review.

issue is whether the pit overflow entered the tile inlet in the swale. EPA alleges that the water was flowing into the tile inlet like a rushing waterfall and that Riverview Cattle has admitted that in the pleadings in this case. Riverview Cattle disputes that characterizations of admissions by Riverview Cattle in the pleadings and presented testimony disputing EPA's testimony about the rapid flow of water into the inlet and whether any entered the inlet at all. In addition to the points on this issue in Riverview Cattle's Initial Post-Hearing Brief, it is important to note that EPA failed to take any video or sound recording of water entering the tile inlet. Although EPA gives reasons for not doing that, in light of EPA's failure to sample or observe any alleged discharge at the river those reasons do not hold up considering the importance to its case of proving that water was entering the tile inlet and that it was entering at a rapid rate.

No direct evidence of a discharge to the East Fork of the Des Moines River.

EPA continues to allege that Tony Brown admitted to Mr. Draper during an EPA site visit on April 20, 2018 that Riverview Cattle discharged from the manure pit to the East Fork of the Des Moines River on June 17, 2014. Complainant's Reply Post-Hearing Brief, p. 21-22. As noted in Riverview Cattle's Initial Post-Hearing Brief, Tony Brown unequivocally denied making any such admission. Respondents' Initial Post-Hearing Brief, pp.12-13. Also as presented in Riverview Cattle's Initial Post-Hearing Brief, it simply makes no sense whatsoever that Tony Brown would make such an admission given Riverview Cattle's vigorous defense in this case. One must question EPA's reasoning, and even its motive, in continuing to not just bring this up but going beyond that and emphasizing this line of argument in an attempt to prove its allegations.

EPA's failure to sample or even observe the discharge point of the tile outlet is a crucial missing element in this case. EPA alleges that it could not sample or observe the tile outlet because:

- EPA inspectors could not get to the tile outlet because:
  - Of the muddy field conditions
  - The tile outlet was not on Riverview Cattle's or the Brown's land.
- EPA inspectors were told by the Brown's they did not know where the tile outlet was
- There was not enough time on June 17, 2014 to get samples taken and to the lab within the required sample holding times.

Complainant's Reply Post-Hearing Brief, pp. 5-7.

As set out in Respondents' Initial Post-Hearing Brief, the Browns' testimony rebutted each one of these alleged reasons for EPA not locating the tile outlet:

- The field conditions were muddy, but were not such that the EPA inspectors could not have made it through the cornfield to the tile outlet. The inspectors could have walked the field in a location different than where they alleged Mr. Roberts boot came off or the Browns could have taken them to the river.
- The tile outlet was not on Brown's land, but it would not have been an issue to get permission from the landowner to go to the outlet
- The Brown's did not know exactly where the tile outlet was other than it had to be south of the cattle yard at the river. Further, EPA testified that it was very easy to find the tile outlet during the second inspection on March 29 and 30. If it was that easy to find then, it wouldn't have been too difficult to find on June 17, 2014.

- If there was not enough time on June 17 to locate the tile outlet, take a sample and get it to the lab in time, EPA could have come back the next day like they did on March 30, 2016. Trevor Urban testified that that wasn't possible because "we had three other inspections to do so we had to move to the next facility" and because more precipitation was forecasted so the muddy conditions weren't going to get any better. Tr. 213:3-12. Putting aside the claim that muddy conditions prevented EPA from getting to the tile outlet, to claim that EPA could not complete the investigation because the inspectors had to move on to other inspections is not a valid reason for not adequately completing this inspection and simply chose not to make all reasonable efforts to gather critical direct evidence.
  Respondents' Initial Post-Hearing Brief, pp. 9-12.

In addition to the Browns' testimony, Ms. Lois Benson of the Iowa DNR testified about the DNR's sampling protocols to prove a discharge to a water of the U.S. See Respondents' Initial Post-Hearing Brief, pp. 11-12, citing Tr. 1037:24-1038:13, 1038:18-1039:1. EPA alleges in its Reply Post-Hearing Brief on page that Ms. Benson's testimony about the Iowa DNR's position on enforcement of violations without sampling does not change the evidentiary standard in this case. Ms. Benson has fifteen and one-half years of experience with the Iowa DNR as an Environmental Specialist. Tr. 23:18-24:15. In that position she spends about seventy-five percent of her time in compliance and enforcement with the thousands of animal feeding operations in her jurisdiction. Tr. 26:19-21, 27:16-25. She testified in both the EPA's case-in-chief and also provided direct examination testimony in Riverview Cattle's defense. On cross examination by EPA she expounded on her direct examination testimony cited in Respondents' Initial Post-Hearing Brief:

"Q You were testifying about sampling and the types of samples you would take in order to pursue an enforcement action.

A Yes.

Q If there was a reason that you could not get access to take a sample, for example, you know, would that be a good reason to not take one?

A I've never had a case where I couldn't get access that I can think of.

Q What if you saw runoff from a facility entering a tile line? Would you take a sample there at the inlet to the tile line?

A I would take a sample at the inlet and then we are always required to go to where it outlets. I mean, we may walk miles and miles and, you know, we take -- we have aerial photos and we have to figure out where that outlets.

Q Isn't a tile line considered a Water of the State in Iowa?

A It can be, but we -- if I came back without an outlet or without an end product, it would just be thrown away." Tr. 1057:17-1058:13 (emphasis added).

Ms. Benson's testimony that she's never had a case where she couldn't get access to take a sample and that DNR environmental specialists like her may walk miles and miles to figure out where an outlet is directly contradicts the EPA inspector's testimony that because of the combination of factors "there was no way I could get there." (The quoted language is from testimony of Mr. Trevor Urban cited in Complainant's Reply Post-Hearing Brief at page 6 and Tr. 135:18-137:11.) There was a way he and Mr. Roberts could get there; they just did not make the effort.

EPA also alleges that Mr. Hentges' opinion that the tile line should have been observed the day of the inspection does not change the evidentiary standard in this case. Complainant's Reply Post-Hearing Brief, page 7. Mr. Hentges made a similar statement in the case of *In the Matter of*

Lowell Vos d/b/a Lowell Vos Feedlot, Docket No. CWA-07-2007-0078 2009, WL1670391(ALJ Moran June 8, 2009). In the Initial Decision at page 19, the Court stated:

> "In Respondent's view, Hentges ultimately stated that sampling was the only reliable way to establish whether a discharge of pollutants actually occurred. *Id.* The Court agrees with Respondent's assessment. It is possible feedlot pollutants reached the UNT [unnamed tributary], but the issue is whether EPA proved that by a preponderance of the credible evidence."

EPA's unjustified failure to sample at the river does not meet any evidentiary standard for proving a discharge of pollutants to a water of the U.S. as required under the Clean Water Act.

EPA alleges in its Reply Post-Hearing Brief at page 5 that Riverview Cattle mischaracterized EPA's testimony as to why the inspectors didn't go to the river as limited to the muddy conditions. The transcript testimony of all witnesses will speak for itself, but Riverview Cattle set out the testimony of the witnesses which included all of the reasons EPA gave in its briefs. It appears to Riverview Cattle that Mr. Urban's testimony along with that of Mr. Roberts focuses on the muddy conditions. In any event, the testimony of the Browns, primarily Tony Brown, rebuts all of EPA's reasons for not going to the river.

EPA also alleges that that the tile outlet would not have been submerged on June 17, 2014, primarily based on calculations by Dr. Wang. Complainant's Reply Post-Hearing Brief, p. 25. Riverview Cattle disputes this based on Mr. Hentges' analysis of photos of the river levels. Respondents' Initial Post-Hearing Brief, p. 11. In any event, as noted in Respondents' Initial Post-Hearing Brief at page 11, if the outlet wasn't submerged on June 17, 2014 it would have been accessible for sampling just as it was on March 29-30, 2016

To conclude the analysis of testimony on this issue, in Respondents' Initial Post-Hearing Brief at page 9, the following testimony, testimony that EPA inaccurately criticizes Riverview Cattle for its description of the question from the Presiding Officer, Mr. Urban gives all of the reasons set forth above in this Brief for not going to the river and concludes: "I felt I had enough with the sample." Tr. 138:23-139:11. This statement, along with Mr. Urban's light-hearted statement as testified to by Josh, Dawn and Gary Brown and specifically, Tony Brown at Tr. 864:16-17, that he was "too fat and too lazy to go down there", seems to sum up the attitude of EPA's inspectors that day – why make any effort to go to the river to gather direct evidence of a discharge to a water of the U.S. when they had circumstantial evidence, albeit questionable and disputed circumstantial evidence, that was much easier to obtain.

EPA argues that the failure to sample at the tile outlet does not result in a failure to prove an unauthorized discharge. Complainant's Reply Post-Hearing Brief, p. 7. EPA cites to *In Re Lowell Vos Feedlot*, 15 E.A.D. 314 (EAB 2011), *In the Matter of Leed Foundry,* Docket Nos. RCRA 03-2004-0061, CWA 03-2004-0061, 2007 WL 2192945 (ALJ Moran, April 24, 2007), and *Environmental Protection Information Center v. Pacific Lumber Co.*, 460 F. Supp.2d 803 (N.D. Cal. 2007). Complainant's Reply Post-Hearing Brief at p. 7.

In Re Lowell Vos Feedlot as it applies to this case is discussed in the next section. *In the Matter of Leed Foundry* has been extensively cited by EPA in this case, as it was in *In the Matter*

of Lowell Vos d/b/a Lowell Vos Feedlot, Docket No. CWA-07-2007-0078 2009, WL1670391(ALJ Moran June 8, 2009). In the Initial Decision in that case the Court noted that the facts in *Leed Foundry* were distinguishable from the Vos feedlot. *In the Matter of Lowell Vos,* pp. 6-7. The Court found the distinguishing factor to be that runoff exiting the *Leed* site moved directly to the municipal storm sewer, a system designed and intended to convey discharging storm water, instead of through a corn field. *Id.* The Court stated, "a corn field is not analogous to a storm sewer." *Id.* The Riverview Cattle case presents facts closer to those of *Leed* than the facts in *Lowell Vos* did due to the tile inlet and tile line that drained to the East Fork of the Des Moines River, i.e., it can be argued that a tile line is like a storm sewer. However, several facts still distinguish Riverview Cattle from *Leed.* First, there was cornfield and grass, albeit not as much as in *Lowell Vos*, between the concrete feed yard and the swale. Tony Brown Testimony, Tr. 849:21-852:19. Second, the tile line is not the same as a storm sewer. While both are designed to transport water to a discharge point, the underground tile line is not a solid line like a storm sewer but rather has openings that allow ground water to infiltrate into the tile line, as well as potentially out if it during conditions of flow reversal. See Gerald Hentges Testimony regarding tile line function, Tr. 1146:4-1150:13[2], and additional testimony regarding flow reversal, Tr. 1272:19-23, Tr. 1275:12-1276:4. Finally, there is no evidence in *Leed* that there was any restriction in the storm sewer or at the outlet of the storm sewer like was testified to in this case, i.e., the sediment restriction in the tile line and the river level obstructing the tile outlet at various times.

Finally, EPA cites *Environmental Protection Information Center v. Pacific Lumber Co.*, 460 F. Supp.2d 803, 819 (N.D. Cal. 2007), stating the court "rejected the argument that plaintiffs 'must conduct sampling of the runoff before it reached the discharge locations to prove that the sediment was added at the [*sic*] that discharge location,' and instead held that they 'need not conduct sampling above the road prism in order to demonstrate a discharge.' " Complainant's Reply Post-Hearing Brief at p. 7. EPA did not quote the sentence following the first quoted language which is: "PALCO argues that without a point of comparison EPIC cannot prove that the pollutant was added or discharged." *Environmental Protection Information Center v. Pacific Lumber Co.*, 460 F. Supp.2d at 819. EPA also did not cite this language later in the opinion: "EPIC offers evidence collected at twelve different discharge points on thirteen separate occasions to establish violations of section 301(a). Pl's Mot. at 41. To prove each discharge, EPIC offers eyewitness observations at each of the sites as well as photographic and video documentation of some of the discharges. . . . EPIC also measured the turbidity levels at many of the alleged points of discharge." *Id.* These quotes show that a closer reading of the opinion reveals that the holding on the alleged unauthorized discharges is the exact opposite of what EPA is alleging in Riverview Cattle. In fact, the plaintiff had evidence at the alleged water of the U.S. *Environmental Protection Information Center v. Pacific Lumber Co.*, 460 F. Supp.2d at 819 and 824. The quoted language cited by EPA in its Reply Post-Hearing Brief is the defendant arguing that the plaintiff needed samples of the runoff before it reached the discharge locations to compare with evidence of the discharges at the point of discharge to the jurisdictional water. *Environmental Protection Information Center v. Pacific Lumber Co.*, 460 F. Supp.2d at 819. EPA's citation of this case for support for its argument is contrary to the holding of the case.

[2] As a point of clarification, EPA in its Reply Post-Hearing Brief at p. 25 was critical of Mr. Hentges for testifying to the concept of flow reversal for the first time on cross examination. However, Mr. Hentges testified to the concept of flow reversal on direct examination at Tr. 1148:13-23.

Indirect or circumstantial evidence.

Both parties, including Riverview Cattle, have noted that circumstantial evidence can be considered by this Court in this case. Obviously, EPA has emphasized it more than Riverview Cattle. Both parties have also cited to *In Re Lowell Vos Feedlot*, 15 E.A.D. 314, 322 regarding the use of circumstantial evidence. Riverview Cattle has emphasized the following quoted from that case: "circumstantial evidence can be effectively used to state a proposition of material fact *in the absence of direct evidence*"., *In Re Lowell Vos Feedlot*, 15 E.A.D. 314, 322 citing *In re BWX Techs., Inc.*, 9 E.A.D. 61, 78 (EAB 2000)(emphasis added). In its Reply Post-Hearing Brief at page 4 EPA accuses Riverview Cattle of reading a new standard into that quote. Because of all of the factors in this case involving EPA's activities, including EPA's inspection on June 17, 2014, and EPA's continued attempt to argue that Tony Brown subsequently confessed to a discharge to a water of the U.S., Riverview Cattle believes that EPA's failure to collect available direct evidence on June 17, 2014, should not be considered. At the same time, Riverview Cattle recognizes that is a rather extreme position. But at the very least, because the absence of direct evidence in this case is not because the direct evidence wasn't reasonably possible for EPA to obtain, EPA's circumstantial evidence – evidence that is disputed by Riverview Cattle – should be given minimal weight.

The question of whether if the tile outlet was submerged on June 17, 2014 has been extensively discussed in this case, as noted above in this Brief. Based on Mr. Hentges' analysis of the river level photos in this case, Riverview Cattle maintains it was submerged on June 17, 2014. Also receiving extensive attention is whether the submerged tile outlet would have discharged any pollutants in it when it eventually became unsubmerged after June 17, 2014. At page 25-26 of its Reply Post-Hearing Brief, EPA strongly criticizes Mr. Hentges' opinion on this issue. On page 19 of Respondents' Initial Post-Hearing Brief, it is noted that Mr. Hentges' opinion may be counter intuitive. The point being considering EPA's argument that tile lines are designed to drain groundwater to an outlet, an argument that Riverview Cattle does not dispute, Mr. Hentges' opinion of reverse flow may be counter intuitive. Mr. Hentges then explained that the scientific basis for the statement in his report and his testimony at hearing that if the head pressure was higher on the river side than it was on the tile side, the water wouldn't flow out, was common sense. Tr.1267:10-25.[3] Those two statements, one by a witness and one in argument, are not inconsistent as EPA suggests.

It would be an understatement to characterize EPA's criticism as Mr. Hentges being indecisive in his opinion. As noted in Respondents' Initial Post-Hearing Brief at page 19, water and especially groundwater does not always flow like one might predict, especially in a computer model. EPA fails to recognize that Mr. Hentges, as a scientific professional who spends considerable time in the field, has experienced this unpredictability and did not testify that something would happen for sure when the science is not that certain. That is best summarized by Mr. Hentges' testimony, as quoted in Respondents' Initial Post-Hearing Brief at page 16, that due

[3] Although not cited by EPA in its Reply Post-Hearing Brief, the statement at Tr. 1267:25, "[i]t would be flowing into the river", is an error in the transcript, or at the very least a misstatement by the witness, as is clear when read in conjunction with the witness's other testimony on this issue, including the immediately preceding testimony on lines 22-24. The statement should read: "It wouldn't be flowing into the river."

to the river and field conditions on June 17, 2014, we don't know if anything would have come out of the tile outlet that day or any of the following days. Tr. 1279:17-1280:1.

EPA has the burden of proof in this case and EPA has not met that burden to prove that any pollutants that allegedly entered the tile line on June 17, 2014 were discharged to the East Fork of the Des Moines River.

II. EPA HAS FAILED TO PROVE THAT RIVERVIEW CATTLE DISCHARGED TO A WATER OF THE U.S. IN VIOLATION OF THE CLEAN WATER ACT AT ANY TIME OTHER THAN JUNE 17, 2014.

A. COMPUTER MODELING IN THIS CASE IS NOT ACCURATE OR RELIABLE EVIDENCE OF RIVERVIEW CATTLE'S RUNOFF AND DISCHARGE OF POLLUTANTS THROUGH THE TILE LINE TO A WATER OF THE U.S.

Discussions of computer modeling and the parameters of the modeling show the problem with their use. That is, utilizing a theoretical model to predict actual conditions may result in inconsistencies, inadvertent manipulation and an over-reliance on the model rather than on actual observations. That overreliance is readily apparent in the way the June 17, 2014 alleged discharge event was investigated and the failure to obtain actual, documented evidence of a discharge.

In investigating this matter, it appears that the EPA relied on modeling to prove a discharge. The EPA took one sample of water in the swale however that is the only concrete action that occurred on June 17, 2014. At hearing the testimony was that EPA heard water entering the tile inlet however they did not record or document that water entering the tile line simply relying on observations of the inspectors. Likewise, it appears that the EPA relied on two assumptions; that they allegedly heard water entering the tile and that it must have come out. The EPA refused to verify this assumption by actually obtaining evidence at the tile outlet. These assumptions governed the EPA's actions throughout this matter. Therefore, the outcome of the case depends on the correctness and reliability of the modeling conducted and the validity of that modeling.

The reason for the Riverview Cattle's argument concerning discrepancies in rainfall totals is to point out to this Court that in rural Iowa, the difference of a few miles can affect the magnitude of the rain received resulting in drastically different results in the same area. This is not anecdotal information, it is reality. This means that using data from Swea City, a city five miles away, could result in inaccurate information for the modeling based upon rainfall data that was not accurate for the Riverview Cattle site. Obviously, the amount of rainfall at a particular location is critical to a determination of a discharge under any type of modeling. This is the problem with relying only on predications generated by a model and not using actual documented observations in the field.

The fact that a model, utilized and "calibrated" after a known discharge, would show an actual discharge, is not a surprise. The June 17, 2014 weather event which caused the pit to overflow, was an anomaly even for Iowa. The deluge of rain in the area caused a multitude of issues not just for Respondent but for other facilities in the area. Likewise, the fact that the model allegedly also predicted what was observed on March 30, 2016 is also not determinative since the inputs can be manipulated, even inadvertently, to achieve the desired consistency. Additionally,

certain measurements and observations specific to the Riverview site were never made which calls into question the reliability of the modeling.

Modeling requires the use of correct infiltration and runoff rates and the verification methods utilized by Dr. Wang fell short of industry standards.

EPA takes exception to Mr. Hentges' criticism of Dr. Wang's modeling which used wide soil classifications and which, in Mr. Hentges' view underestimated infiltration rate and naturally overstated runoff, and his statement that the infiltration rate is "a very sensitive input". Complainants Reply Post-Hearing Brief at page 18. Complainant goes on to say "[h]owever, infiltration rate is not an input to the curve number model at all." Complainants Reply Brief at page 18. EPA goes on to state that "Mr. Hentges is incorrect that a higher infiltration rate "would decrease runoff and affect the output of the model." Complainants Reply Brief at page 18. Dr. Wang's testimony is contradicted by the various sources listed in his report. Riverview Cattle asserts that EPA is advancing an argument intended to confuse the issue.

All parties agreed that the NRCS curve number method is a widely used and efficient method for determining the approximate amount of runoff from a rainfall even in a particular area. It is uncontroverted that only four soil groups exist for over 6,000 types of soil. Within the four individual soil groups those soils have a range of infiltration rates that are based on high, medium and low average infiltration rate values. The soil group chosen is used to determine a curve number which in turn estimates how much of the rainfall is runoff and how much is infiltration. Tr: 563: 15-22. The infiltration in the curve number runoff estimate is based on average infiltration rates for the soil and could be higher or lower. The only way to determine how much water is infiltrating is to measure the infiltration in the soil at the site.

Model inputs are determined from site measurements, and the runoff for a given precipitation amount is estimated. For calibration, the amount of rainfall and the runoff is measured at the site. The curve number calculation of the volume of runoff should closely match the runoff volume measured. If the amount of runoff is not correctly estimated with the equation, then in the model inputs are revised until the runoff volumes match.

In Exhibit CX-20 at page 13, Dr. Wang cites, as a reference, the "National Engineering Handbook, 2004. Estimation of direct runoff from storm rainfall (the "Engineering Handbook"). He goes on to provide an internet link to examine that document: http://www.wcc.nrcs.usda.gov/ftpref/wntsc/H&H/NEHhydrology/ch10.pdf. That document makes the following points concerning runoff:

> On page 10-19, section 630.1003, entitled "Accuracy", the document states:
> **"Major sources of error in the runoff-estimation method include the determinations of rainfall and CN [curve number]. Chapter 4 provides graphs for estimating the errors in rainfall. No comparable means exists for estimating the errors in CN of ungaged watersheds; only comparisons of estimated and actual runoffs indicate how well estimates of CN are being made. Comparisons for gaged watersheds, though not directly applicable to ungaged watersheds, are useful as guides to judgment in estimating CN and as sources of methodology for reducing estimation errors.**

Comparisons of actual and computed runoff are only valid if the role of the runoff equation is carefully defined. When the equation was developed, the most common use was to determine a design discharge (25-year, 100-year, probable maximum flood) based on a synthetic rainstorm. The object was to take a rainstorm that was in some sense representative of the frequency selected for the design flood and transform that into the runoff volume for that same frequency. Thus, the runoff equation can be tested for its ability to transform a rainfall frequency distribution into a runoff frequency distribution. This approach was used by Schaake, et al. (1967) to test the validity of the rational formula. Hjelmfelt (1980b, 1991) applied this approach to test the runoff equation for several watersheds." (emphasis added)

This source totally contradicts the idea that infiltration and runoff are not important factors which must be determined with care. In fact, they are vital to the accuracy of the equations and the predictive value of any model is expressly dependent on the inputs and site observations. This was not done in this case.

The estimates for runoff obtained by the equations Dr. Wang used were not compared to actual runoff at the Riverview Cattle feed yard. There is no testimony from Dr. Wang that he measured actual runoff and he did not. The Engineering Handbook also states on page 10-19:

"Hjelmfelt (1991) showed that the runoff equation served reasonably well as a frequency transformer for the watersheds tested in the Central and Southeastern United States. However, for the one watershed tested in the semiarid Southwest, the agreement was poor. Hjelmfelt (1987) also applied this approach to an urban watershed, Boneyard Creek, Champaign-Urbana, Illinois, with good results. **The runoff equation generally did reasonably well where the runoff was a substantial fraction of the rainfall, but poorly in cases where the runoff was a small fraction of the rainfall; i.e., the CNs are low or rainfall values are small. Curve numbers were originally developed from annual flood flows from experimental watersheds, and their application to low flows or small flood peak flows is not recommended. (See Hawkins, et al. 1985, for a precise measure of small.)** Thus, within limits, the runoff equation performs appropriately as a transformation vehicle between rainfall and runoff frequency distributions." (emphasis added)

EPA must concede that the material cited by Dr. Wang is replete with references to taking actual measurements at the site. While EPA is highly critical of Mr. Hentges, this is exactly the point made by Mr. Hentges – a model is only as good as its inputs. While Mr. Hentges may not have the academic credentials that Dr. Wang possesses, his testimony makes clear that Mr. Hentges is proficient in modeling and that he has real-world, on-the-ground experience with predictive modeling. His opinions are solid.

The modeling conducted is not accurate enough, site-specifically calibrated or reliable enough to provide any level of assurance that an event did occur (such as a discharge). Those models may be sufficient to provide a method for determining whether a discharge may occur but to determine if an event occurred for purposes of imposing liability and penalties, the model and

the methodology fall far short of the kind of reliability inherently necessary for the EPA to satisfy its burden.

This is not only Riverview Cattle's opinion, but also the opinion of the Iowa Department of Natural Resources, which as previously noted also investigates animal feeding operation discharges. Ms. Lois Benson testified:

"Q Okay. One of the issues in this case or one of the -- you may not be aware of this, but EPA has introduced evidence modeling for additional discharges. Were you aware of that?

A Yes, I'm aware of it.

Q In your work with the Iowa DNR, has the Iowa DNR ever used modeling as proof of additional discharges?

A No. DNR doesn't do that.

Q Do you know why?

A I just took -- I've always been told that we had to have the concrete evidence." Lois Benson Testimony, Tr. 1041:10-21.

B. RIVERVIEW CATTLE DID NOT DISCHARGE TO A WATER OF U.S. PRIOR TO OR AFTER CONSTRUCTION OF THE MANURE PIT.

Before construction of the manure pit, Riverview Cattle scraped the pens and hauled the manure directly to the fields, either themselves or it was hauled by Mr. Steve Madden. Tony Brown Testimony, Tr. 806:13-19; Steve Madden Testimony, Tr. 719:23-720: 25. In its Reply Post-Hearing Brief EPA continues to emphasize that "it is improbable that the central manure alley could retain all of the runoff generated from the pens. Complainant's Reply Post-Hearing Brief, page 13.

- EPA has no visual or sampling evidence of a discharge to a water of the U.S., only computer modeling, to back up the claim that Riverview Cattle was discharging runoff to the East Fork of the Des Moines River. Mr. Draper testified extensively regarding CX-28.5 (Riverview Cattle agrees that in its Initial Post-Hearing Brief at page 27 it mistakenly referred to Mr. Draper testifying to CX-28.3, an aerial image on the same day of the same area as CX-28.5, but nonetheless an incorrect reference). The transcript record speaks for itself, but as Riverview Cattle understands his testimony, he was making the point that the differences in color and shade in the areas in CX-28.5 show that manure was discharging out of Pen 1 to the north. However, he testified that the darker area to the north of the blue structure on the bottom left he believed to be saturated ground. Riverview Cattle continues once again wants to point out, as testified by Tony Brown, that the blue structure is a livestock waterer and that the entire area within Pen 1 is concrete. Again, it is consistent with the Brown's testimony that the darker area within Pen 1 to the north of the blue structure is water or saturated as Pen 1 slopes that direction towards the central manure alley. Respondents' Initial Post-Hearing Brief, pp. 25-32. The most important point is that neither CX-28.5 or CX-28.3, or any other aerial image introduced into evidence, shows a darker area outside of the northern gate on Pen 1. EPA has presented no evidence of manure leaving the northern gate of Pen 1 and the Brown's testimony that all manure was retained in the central manure alley has not been proven by EPA to be incorrect.

- At page 12 of its Reply Brief EPA also claims that CX-20.3, Dr. Wang's depiction of runoff flowing out of the central manure alley and then north out of Pen 1 is not inconsistent with CX-55.3, p. 1. Page 1 of CX-55.3 is Ms. Dallas Heikens' depiction of flow directions based on actual ground points that her office took, and which shows an arrow at the northern gate of Pen 1 pointing to the southeast. EPA claims this arrow is outside of Pen 1. The location of the arrow at the northern end of Pen 1 on CX-55.3 can be argued since the arrow is not entirely within Pen 1, but it is south of the northern gate of Pen 1 and it certainly does not point north as do the arrows in Dr. Wang's depiction of flow direction in CX-20.3. These exhibits, along with the testimony of Tony and Josh Brown that the concrete in Pen 1 was poured to slope to the south away from the north gate and back into Pen 1 and then east into the central manure alley, support Riverview Cattle's contention that before the manure pit was constructed all runoff from the concrete cattle pens was contained in the central manure alley until it was hauled out.
- EPA also states that Riverview Cattle mischaracterizes Tony Browns testimony about why the manure pit was constructed. Again, the transcript trial testimony speaks for itself and is generally from Tr. 805:14 to 832:2. As EPA notes, Tony Brown testified about the amounts of runoff from rainfall which led to the need for a pit. But but he testified about sloppier manure and the need to mix that with dry manure so they could haul it in what is referred to as "scape and haul" vs. after pit was constructed dry manure was scraped and hauled and the sloppier liquid portion went into the pit. Neither Tony nor Josh Brown testified that the manure pit was constructed because of runoff leaving the feed yard.
- The "scrape and haul" system that was used by Riverview Cattle was an issue in *In the Matter of Lowell Vos d/b/a Lowell Vos Feedlot,* Docket No. CWA-07-2007-0078 2009, WL1670391(ALJ Moran June 8, 2009). In that case when the Court was analyzing the difference between Vos's feedlot and *Leed Foundry*, the Court noted that "any fair assessment of pollutants exiting Vos's property must consider both Vos's practice of regularly scraping of the lot and the distance any remaining pollutants in that water would need to travel as it exited the property before reaching U.S. waters." *In the Matter of Lowell Vos,* p. 7. The reference to distance and pollutants exiting the feed lot was an issue in that case because there were no controls on the feedlot such as the concrete walls and central manure alley that are present in Riverview Cattle. More importantly, even without any controls in Vos, the Court recognized the importance of regularly scraping the lot. That practice must also be recognized in this case where there are controls. In addition, this practice of regularly scraping the lots, as with other good management practices used at Riverview Cattle, could not be accounted for in Dr. Wang's computer modeling.

III. ANY DISCHARGE TO A WATER OF THE U.S. FROM RIVERVIEW CATTLE ON JUNE 17, 2014, OR AT ANY OTHER TIME ALLEGED BY EPA, CAN BE CHARACTERIZED AS A DE MINIMIS DISCHARGE AND THEREFORE NOT A VIOLATION OF THE CLEAN WATER ACT.

As previously noted, the only issue in this case is whether there has been any discharge of pollutants from Riverview Cattle's feed yard to a water of the U.S. in violation of the Clean Water Act. 33 U.S.C. §1362(12) defines the "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." In its Reply Post-Hearing Brief EPA disagrees with Riverview Cattle's citation to the following ruling in *Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737, 749 (9th Cir. 2018): "We hold the County liable under the CWA because (1) the County discharged pollutants from a point source, (2) the pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water, and (3) the pollutant levels reaching navigable water are more than de minimis." (emphasis added). As EPA correctly noted in footnote 1 on page 2 of its Reply Post-Hearing Brief, the Court in that case stated in the text of the opinion and not in a footnote as stated in Respondents' Initial Post-Hearing Brief at page 34, that: "[w]e leave for another day the task of determining when, if ever, the connection between a point source and a navigable water is too tenuous to support liability under the CWA." Complainant's Reply Post-Hearing Brief, p. 40.

Riverview Cattle stated in its Initial Post-Hearing Brief that there are no reported cases on the de minimis discharge standard as suggested, but left for another day, in *Hawaii Wildlife Fund v. County of Maui*. However, EPA quoted *International Union v. Amerace Corp., Inc.*, 740 F.Supp. 1072, 1083 (D. N.J. 1990), "the Clean Water Act recognizes neither a good faith nor a de minimis defense." EPA's cited quote from this federal district court decision is correct. But EPA did not go on to note the Court's footnote 11 where the Court states: "Harvard relies on *Arkansas Poultry Federation v. United States Environmental Protection Agency*, 852 F.2d 324, 329 (8th Cir.1988). However, Arkansas Poultry is inapposite here because *it involved liability for violations of the prohibited discharges standard* and not the categorical pretreatment standards." (emphasis added). The *Arkansas Poultry* holding should not be inapposite in this case that involves liability for alleged violations of the prohibited discharge standard under the Clean Water Act. The citation to the *Arkansas Poultry* case is:

> "Petitioner also argues that the 1987 definitions are inconsistent with the Act because an industrial user may be held liable for "interference" or "pass through" when its discharge may be only a de minimis cause of the POTW's NPDES permit violation. We note, however, that at oral argument, in response to a specific question from the bench, counsel for EPA conceded that the regulations require more than de minimis causation. This response may lack specificity, but it is nonetheless sufficient to answer petitioner's argument: an industrial user will not be held liable if its discharge is only a de minimis cause of the POTW's NPDES permit violation." *Arkansas Poultry Federation v. United States Environmental Protection Agency*, 852 F.2d 324, 329 (8th Cir.1988).

Neither *International Union* nor *Arkansas Poultry* are factually and legally directly on point with Riverview Cattle. But the *Arkansas Poultry* case was interpreted by the district court in *International Union* to stand for a decision based on prohibited discharges which therefore sets the court's statement that the Clean Water Act does not recognize a de minimis defense apart from the facts of *Hawaii Wildlife Fund v. County of Maui* as well as the facts of Riverview Cattle.

A de minimis defense under the Clean Water Act is obviously not close to being settled by the courts. But the fact that the court in *Hawaii Wildlife Fund v. County of Maui* referenced a de minimis defense illustrates that the de minimis standard is something that should be considered in this case involving an alleged discharge to a water of the U.S. via a tile line, a discharge that is tenuous because of the dynamics of the tile line and the river water level at the discharge point of the tile line, as well as the even more tenuous alleged discharges from areas of the Riverview Cattle feed yard due to every-day activities of the feed yard such as feed truck and wagon tire tracks.

IV. EPA'S PROPOSED PENALTY IS UNWARRANTED.

In response to EPA's allegations in its Reply Post-Hearing Brief that Riverview Cattle has not presented any evidence that EPA's proposed penalty is unjust or should be reduced, Riverview Cattle asserts that it has presented such evidence and respectfully asks the Court to refer to Respondents' Initial Post-Hearing Brief, pages 34-36. After reviewing EPA's arguments in its Initial Post-Hearing Brief and Reply Post-Hearing Brief, Riverview Cattle firmly believes that the proposed penalty of $96,000 is in fact unjust and should be eliminated entirely.

V. CONCLUSION.

Complainant has failed to meet its burden of proof that Respondent discharged pollutants to a water of the United States in violation of the Clean Water Act. Respondent respectfully requests that this action be dismissed at Complainant's cost and for such further relief as is deemed appropriate in the circumstances.

RESPECTFULLY SUBMITTED this 13th day of May, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of May, 2019, I filed via the OALJ E-filing system the original of this Respondents' Reply Post-Hearing Brief to the EPA Headquarters Hearing Clerk, and sent by email to Ms. Shane McCoin, counsel for Complainant.

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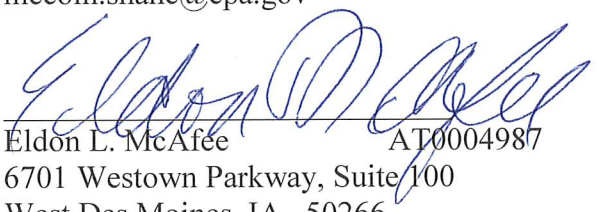

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