

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

C&S ENTERPRISE, L.L.C. Respondent	RESPONDENT'S INITIAL PREHEARING EXCHANGE  Docket No. CWA-07-2018-0095
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COMES NOW the Respondent, C&S Enterprise, L.L.C., by and through its attorney, Eldon L. McAfee, and pursuant to, and in accordance with the specific requirements of, the Presiding Officer's Prehearing Order of April 17, 2018 submits this Initial Prehearing Exchange:

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

(1) Mr. Scott Morrow and Ms. Carol Morrow. Representatives of Respondent and fact witnesses. Mr. Scott Morrow and Ms. Carol Morrow are expected to testify regarding the answers and defenses in Respondent's Answer and Request for Hearing and in reply to the testimony of Complainant's witnesses, including regarding whether discharge of fill and/or dredged material to waters of the U.S. occurred as alleged by EPA, any allegations by EPA that Respondent's actions had an adverse effect on water quality in violation of the Clean Water Act, and communications that occurred with EPA and the Army Corps of Engineers (ACE) during inspections of the property regarding the alleged violations. Further, Mr. Morrow and Ms. Morrow are expected to testify about the lack of economic benefit they received by taking the actions 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 of fill and/or dredged

material to waters of the U.S. occurred as alleged by EPA, whether the alleged actions affected jurisdictional waters under the Clean Water Act, issues arising from USDA NRCS matters that impacted Respondent's actions as they pertain to EPA's allegations, and any allegations by EPA that Respondent's actions had an adverse effect on water quality in violation of the Clean Water Act. See Mr. Hentges' report as Exhibit RX 1 to this Initial Prehearing Exchange.

(3) Mr. Mark Seaton, Deep River, Iowa. Fact witness. Mr. Seaton is a contractor and business partner of the Morrows. He is expected to testify as to his work on the C&S property as it relates to the allegations of EPA.

(4) Ms. Regina Leer, Keswick, Iowa. Fact witness. Ms. Leer is a retired employee of the Natural Resources Conservation Service and currently farms with her family. She is expected to testify about her communications with Respondent regarding his actions on the subject property pertaining to the allegations of EPA.

Respondent reserves 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: Gerald Hentges Report

RX 2: Gerald Hentges CV

RX 3: Aerial Photograph

RX 4: USDA FSA Farm Records

RX 4, 1/2 12/13/2013

RX 4, 2/2 10/30/2014

RX 5: Aerial Photographs  
RX 5, 1/27 1930s  
RX 5, 2/27 1950  
RX 5, 3/27 1960  
RX 5, 4/27 1970  
RX 5, 5/27 1980  
RX 5, 6/27 1990  
RX 5, 7/27 2002  
RX 5, 8/27 2004  
RX 5, 9/27 2005  
RX 5, 10/27 2006  
RX 5, 11/27 2007  
RX 5, 12/27 2008  
RX 5, 13/27 2009  
RX 5, 14/27 2009 reduced scale  
RX 5, 15/27 2010 cir  
RX 5, 16/27 2010  
RX 5, 17/27 2011 cir  
RX 5, 18/27 2011  
RX 5, 19/27 2013 cir  
RX 5, 20/27 2013  
RX 5, 21/27 2014 cir  
RX 5, 22/27 2014  
RX 5, 23/27 2015 cir  
RX 5, 24/27 2015  
RX 5, 25/27 2016 cir  
RX 5, 26/27 2016  
RX 5, 27/27 2017

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 1 to 1 1/2 days. An interpreter will not be needed for any of Respondent's witnesses.

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 Respondent's 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, there was no discharge of pollutants to a water of the U.S. in that the alleged tributary of Deep Creek is not a water of the U.S. Further, Respondent's actions were minimal and do not qualify as "discharge of fill material" as the terms "fill material" and "discharge of fill material" are defined in 40 C.F.R. §232.2 and as required pursuant to 40 C.F.R. §232.3(b). Further, Respondent's actions were minimal and are exempt under 40 C.F.R. §232.3, including but not limited to 40 C.F.R. § 232.3(c)(1) and (c)(3).

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, Respondent submits that the evidence and testimony will show that any activity of Respondent on the subject property, does not qualify as "fill material" or "discharge of fill material", nor was there an activity requiring a permit because there was no activity within or involving a water of the U.S. Further, even if Respondent's activities are found to be in or involving a water of the U.S., those activities were minor drainage and exempt as normal farming

activities which were part of an ongoing farming operation, as well as and including routine drainage maintenance.

**C) all factual information relevant to the assessment of a penalty and any supporting documentation.**

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 13<sup>th</sup> day of July, 2018.

BRICK GENTRY, P.C.



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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that on this 13<sup>th</sup> day of July, 2018, I filed via the OALJ E-filing system the original of this Respondent's Initial Prehearing Exchange to the EPA Headquarters Hearing Clerk, and sent by email Mr. Chris Muehlberger, counsel for Complainant.

Chris Muehlberger

Assistant Regional Counsel

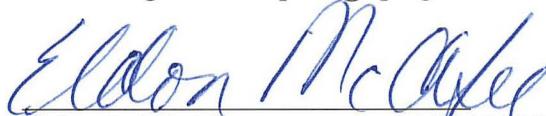
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