

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 POST HEARING BRIEF</p>
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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 Initial Post Hearing Brief.

INTRODUCTION.

This case begins and centers around EPA's inspection on June 17, 2014. On that day the area of the Riverview Cattle feed yard had experienced a storm that took out electrical power to parts of the area, as well as heavy rain. This heavy rain resulted in the manure pit at the feed yard overflowing, something that the Browns testified had never happened before. EPA proceeded with the inspection and testified that the overflow from the feed yard was entering a tile intake near the feed yard. EPA took samples of this runoff at the tile intake. EPA determined that the tile drained south to the East Fork of the Des Moines River, the closest water of the U.S. The Browns testified that they told EPA that they did not know the exact location of the tile outlet. EPA did not go to the river to locate the tile outlet to observe or sample any discharge from the tile line where they had sampled pollutants at the tile intake.

As is apparent from the five days of testimony represented by the 1,292 page transcript in this case, and the lengthy and detailed Complainant's Post-Hearing Brief, this case has numerous disputed facts as to whether there has been a discharge of pollutants from Riverview Cattle to the East Fork of the Des Moines River on June 17, 2014, and whether there were other such discharges before and after that date. However, there can be no dispute that if EPA inspectors on June 14, 2017 had simply went to the river to at least make an effort 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. In other words, if the EPA inspectors would have just properly done their job on that day we would have either known if there was a discharge from Riverview Cattle in violation of the Clean Water Act. Because of that failure, we do not know and are left to spend countless hours and resources evaluating circumstantial evidence. Riverview Cattle should not

be penalized any more than they have been for EPA's failure to conduct a proper inspection on June 17, 2014.

Because of the numerous disputed facts and instances of conflicting testimony regarding what took place on June 17, 2014, as well as a conversation on April 20, 2018 between Mr. Seth Draper and Tony Brown as to whether Tony Brown admitted to a violation of the Clean Water Act on June 17, 2014, this Brief contains numerous excerpts from the Hearing Transcript, instead of summarizing those statements and citing to the Hearing Transcript. This was done in an effort to make sure the testimony is accurately presented, including the context of the testimony.

#### SUMMARY OF FACTS & SUMMARY OF THE CASE.

The facts of this case were set out in detail to this Court at Hearing starting on December 12 and ending on December 18, 2018. Those facts are also covered in this Brief under each Argument Point. A summary of those facts is:

1. Riverview Cattle feed yard began operating in 2001 and gradually expanded to its capacity and layout that is the subject of this action.
2. Riverview Cattle had no compliance issues or inspections from either the Iowa DNR or EPA until the EPA inspection on June 17, 2014.
3. On June 17, 2014, EPA conducted an inspection on and determined Riverview Cattle had discharged pollutants to the East Fork of the Des Moines River due to an overflow of the manure pit on that date.
4. Riverview Cattle does not dispute that the manure pit overflowed that day, but does dispute that EPA has proven that pollutants in that pit overflow reached a water of the U.S., the East Fork of the Des Moines River.
5. EPA subsequently alleged that Riverview Cattle discharged pollutants to a water of the U.S. prior to the manure pit overflow on June 17, 2014.
6. Riverview Cattle disputes that EPA has proven any discharge of pollutants to a water of the U.S. prior to the manure pit overflow on June 17, 2014.

#### BACKGROUND OF APPLICABLE LAW

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."

To prove such a violation, EPA must prove that Riverview Cattle actually discharged pollutants from their feedlot to waters of the U.S. Without such proof, EPA's case fails as a matter of law and fact. This legal standard was clarified in the 2005 *Waterkeeper Alliance v. U.S. EPA* decision. In that case, the court ruled in pertinent part:

"The Clean Water Act authorizes the EPA to regulate, through the NPDES permitting system, only the discharge of pollutants. The Act generally provides, for example, that "Except as in compliance [with all applicable effluent limitations and permit restrictions,]

the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a) (emphasis added). Consistent with this prohibition, the Act authorizes the EPA to promulgate effluent limitations for - and issue permits incorporating those effluent limitations for - the discharge of pollutants. Section 1311 of Title 33 provides that "effluent limitations ... shall be applied to all point sources of discharge of pollutants," see 33 U.S.C. § 1311(e). Section 1342 of the same Title then gives NPDES authorities the power to issue permits authorizing the discharge of any pollutant or combination of pollutants. See 33 U.S.C. § 1342 (a)(1) ("the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants") (emphasis added); see also 33 U.S.C. § 1342(b) (authorizing states to administer permit programs for "discharges into navigable waters"). In other words, unless there is a "discharge of any pollutant," there is no violation of the Act, and point sources are, accordingly, neither statutorily obligated to comply with EPA regulations for point source discharges, nor are they statutorily obligated to seek or obtain an NPDES permit.

Congress left little room for doubt about the meaning of the term "discharge of any pollutant." The Act expressly defines the term to mean "(A) any addition of any pollutant to navigable waters from any point source, [or] (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." 33 U.S.C. § 1362(12). *Thus, in the absence of an actual addition of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, no statutory obligation of point sources to comply with EPA regulations for point source discharges, and no statutory obligation of point sources to seek or obtain an NPDES permit in the first instance.*" *Waterkeeper Alliance, Inc., et al. v. U.S. EPA*, 399 F.3d 486, 504-505 (2d Cir. 2005) (italics added for emphasis).

The *Waterkeeper* court went on:

*“ . . . the Clean Water Act gives the EPA jurisdiction to regulate and control only actual discharges - not potential discharges, and certainly not point sources themselves. See National Resources Defense Council v. EPA, 273 U.S. App. D.C. 180, 859 F.2d 156, 170 (D.C. Cir. 1988) (noting that "the [Act] does not empower the agency to regulate point sources themselves; rather, EPA's jurisdiction under the operative statute is limited to regulating the discharge of pollutants")”* *Waterkeeper* at 505 (emphasis added).

In addition, as will be discussed in this Brief, a 2018 federal appeals court decision established a standard of de minimis discharges. See *Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737, 749 (9<sup>th</sup> 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 and footnote omitted, but discussed later in this Brief). On February 19, 2019 Petition for Writ of Certiorari in this case was granted by the U.S. Supreme Court on the question of: “Whether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater.” *County of Maui, Hawaii v. Hawai'i Wildlife Fund, et al.*, 139 S.Ct. 1164.

## 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.

As stated in *In Re Lowell Vos Feedlot* (EAJA Appeal No. 10-01, Final Decision, May 9, 2011, 15 E.A.D. 314) 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*, at p. 322, citing *In re BWX Techs., Inc.*, 9 E.A.D. 61, 78 (EAB 2000)(italics added for emphasis). In this case, the sole reliance on circumstantial evidence was of EPA’s choosing, not because there was an absence of direct evidence. EPA had every opportunity to attempt to collect direct evidence to prove a discharge during their inspection on June 17, 2014 but did not take that opportunity. Thus, circumstantial evidence in this case should be given little if any weight.

In the Lowell Vos case, EPA did not have samples of any kind, because, as the EPA reasoned, their inspectors were not able to be on site during a discharge event. The court in that case noted:

“[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* at 324 (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 actually 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.

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

On June 17, 2014, EPA inspectors Trevor Urban and Rickey Roberts conducted an on-site inspection and issued a report, CX-1.<sup>1</sup> At the June 17, 2014 inspection, the focus appeared to be the Bacon Maker site. The lack of attention to the Riverview Cattle operation and the alleged discharge in this case is evidenced by Mr. Urban's extensive testimony about his observations of how fast water in the swale was entering the tile inlet based on his Declaration provided for the Motion for Accelerated Decision, CX-47. However, it is curious that none of that detailed testimony or observations appear in CX-1. Mr. Urban was asked how he could remember these details that were in CX-47 that were not in his report and he replied that he didn't know. Tr. 205:15-20. He was asked if he had notes with those details, and he replied he didn't think so. Tr. 207:24-208:2. In addition, in CX-1 EPA's focus is on the Bacon Maker cattle building and whether Bacon Maker and Riverview Cattle are one operation. See generally the testimony of Mr. Trevor Urban, Tr.198: 3-203:17.

The point is that the Riverview Cattle operation did not garner the attention of EPA until after the inspection, which, along with the other testimony in this case including the failure to observe or take samples of the alleged discharge at the tile outlet, leads one to conclude that the inspectors were not all that concerned about the Riverview Cattle operation and the pit overflow.

Many facts in this case are disputed, but as EPA notes in its Post-Hearing Brief, it is uncontroverted that the manure pit ran over that day. Riverview Cattle received six inches of rain in the 48 hours before. Trevor Urban Testimony, 88:19-89:5, 97:17-22, 143:25-144:8, 145:21-146:2.

Tony Brown testified:

*Q Okay. Then we go to the next morning, June 17. There's been testimony and discussion, I'll call it, about how much rain fell that night.*

*A Sure.*

*Q And I believe Trevor Urban has testified that he was told it was six inches.*

*A Yes.*

*Q Did you tell him that?*

*A I believe Josh did.*

*Q Okay. And Josh will have his chance to testify here, but what's your understanding of where that amount came from?*

*A Josh has a rain gauge at his place as well as the farm. When Grandma lived there, Grandma was -- Grandma kept a journal of -- you know, she's older, so what she did that day, doctor's appointments, what the weather was, rainfall, things like that. So, after Grandma moved to town, to the assisted living, nobody lived in the house for a couple years, but Josh would always -- Josh was always interested in rainfall and numbers and things like that. He talks to a good friend of his a lot that lives north of Swea City, farms a lot of ground up there, so they're always kind of comparing notes and things like that. But Josh is kind of the one that's always interested in rainfall and dumping the gauges out and things like that.*

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<sup>1</sup> Another on-site inspection was conducted on March 29 and 30, 2016 and a report was issued, CX-8. While EPA cites to the March 2016 inspection for sample results and purported discharges from the feed yard, no Notice of Potential Violation was issued. Trevor Urban Testimony, Tr. 234:1-4. And no alleged violations as a result of that inspection are part of this case.

*Today, we have a rain gauge very similar to the one that Josh has always had at Grandma's, and his place, it's right out front -- right to the south of the office in that landscape area where the septic tank is and stuff like that. That's where we keep our rain gauge now.*

*Q But did you have one on June 17, 2014, there?*

*A Up by Grandma's house we did." Tr. 837:8-838:17.*

**Josh Brown testified:**

*"Q Okay. Do you remember talking to either Trevor Urban or Ricky Roberts about how much rain you received?*

*A Yes.*

*Q Who did you talk to?*

*A Both of them.*

*Q And what did you say?*

*A That we had six inches of rain.*

*Q And did you tell them where?*

*A I told them that I had -- I dumped six inches out of my rain gauge in the morning." Tr.993:9-19.*

There was considerable additional testimony from both witnesses, on direct and cross examination as well as in response to questions from the Court. The gist of this testimony is that Riverview Cattle received at least six inches of rain immediately before the June 17, 2014 inspection and that was reported to Trevor Urban that day.

Tony Brown also testified about the variability of rainfall, particularly on the Saturday before the inspection:

*"Q Okay. There's also been quite a bit of testimony about rainfall at Swea City. Tell us your experience regarding that.*

*A So there's a lot of different avenues that we can start on, but the biggest thing is -- and this hits more to the farming and feedlot portion of it. When a storm comes in, especially a thunderstorm, it dumps different amounts of rainfall in different areas, and living there that many years, you know that because it dictates what you do every day. You know, when you head out middle of April to go plant a cornfield and you got two inches of rain in Armstrong and Swea City didn't get any, so we go over to Swea City and we farm over there, we plant those fields.*

*Same thing with Kyle up on the state line. He might not have any rain at the home farm, and two miles down the road he's able to plant. My father-in-law works the same way. They have farms by Swea City, they have farms by Armstrong. You go back and forth, north and south, east to west, depending on where the rain hit and where you can run.*

*I distinctly remember in '14, the weekend prior to our inspection, was what they call Swea City Fun Days. Every year, they have a town celebration, parade, whatnot. So our feedlot's in Armstrong, just outside Armstrong. My wife's grandmother lives two miles east of the feedlot. That Saturday, she was at her house, along with Erin's dad, my wife's dad. It was downpouring at the feedlot. It was downpouring at her house. And they were having a parade in Swea City. I got a call asking where I was at. I said I'm at the farm, in the shop working. And she said, you're going to be late for the parade. And I said, well, how are they going to have a parade when it's downpouring.*

*There was no rain in Swea City that day. They continued with the parade, the park activities. I went over there. I missed the parade. I was there for lunch, left early afternoon, no rain in Swea City and a downpour at the feedlot. So, and as I'm coming to the farm, I live three miles away, I can leave our place and it's dry. I can get to the feedlot, the pavement's wet. I mean, just because it rained in Armstrong doesn't mean it rained in Swea City. And anybody that lives in any area of northwest Iowa or any area, it's the same." Tr. 838:20-840:15.*

The point of Tony Brown's testimony based on his actual experience is that any reliance by EPA on general rainfall data from Swea City, including for computer modeling by Dr. Wang, cannot be assumed to be accurate as to the amount of rainfall received at Riverview Cattle.

Tony and Josh Brown testified that they discovered the pit running over the morning of June 17, 2014, prior to the EPA inspectors arriving. As discussed later in this Brief, Tony and Josh Brown, along with Mr. Steve Madden, testified that they had never observed the manure pit running over except for that day.

In its Post-Hearing Brief, EPA appears to allege that because the manure pit has an opening in the southeast corner that allowed the pit to overflow on June 17, 2014, the pit would have overflowed at other times as well. Complainant's Post-Hearing Brief, p. 14. EPA states that the fact that pit overflow was flowing east that day undermines Tony Brown's testimony that the northern manure alley actually slopes west. EPA misunderstands the point of Tony Brown's testimony. Tony Brown explained:

*"This hole that's been talked about in the south wall, I believe it's been claimed that I put it there so the pit would overflow through that hole. Even if that hole wasn't there and the pit got full, it would come out where we just saw the picture of the manure pump backed in down that ramp. They're at the same height. They sit at the top of the eight-foot wall right there.*

*Q Okay. CX-2, page 8.*

*A Yep. So, even if that hole was or wasn't there, if we got enough rain and that pit got full, the manures going to come out that gate. So I didn't purposely put a hole in that wall so it would overflow through that. What that hole is there for, Eldon, if you'll go back to that last -- yeah, that photo if we can call it.*

*Q I just pulled it away from you. I think there's another one that I just want to -- it's pretty much the same photo, if not exactly the same photo.*

*A Yep.*

*Q CX-29.1, okay?*

*A Yep. So, in this area and this will be very similar to how I explained the gate in Pen 1. When I visited the feed yard that -- there was two of them and I took ideas from those feed yards to kind of, as we got past Pen 4, when we built Pens 5 and 6 in that manure area and then, of course, the pit, I took some ideas from their feedlots and helped me with this one, but one thing that's -- I think the main reason why that hole was poured there is this concrete pad where the liquid is standing, in that -- what we'd call the northern manure area, is also sloped so, from the edge of the concrete, which is over here by the bottom of the picture, where you can see, you know, the ripples in the liquid or whatever we talked about, that concrete area slopes back to the west, so that area slopes back into that hole in the wall. And that was built that way so, when we pump out of that northern gate, the pump goes in, the hose comes to the south, there's a load stand there that the manure is pumped into the tankers, and when we take that hose apart, and as any manure pumper will tell you, when you take a hose apart, you're going to get manure that comes out of that hose. And there's no way to get around that. It just, it happens.*

*But when they're pumping hog barns and things like that, they break the hoses open and that manure sits on the ground. This manure is on concrete and able to be pushed back in the pen through that hole. And if you want me to touch on the 20 -- I don't want to go to the 2016 deal because that's really jumping ahead, but we'll talk about this spot again." Tr. 844:22-846:24.*

*Q You've said this slopes back towards the pit, this area where we see water standing, but there is -- it's flowing off of that area to the east, right.*

*A Yep.*

*Q So the pit was overflowing that day?*

*A Yes, it was.*

*Q Okay. How much -- do you know about how much slope there is to that concrete there going back to the west?*

*A Like I said, I'm not good with percentages and slopes and things. That's more Josh's deal because he's into that type of stuff.*

*Q I think the testimony from Mr. Urban and maybe Mr. Roberts also, and maybe Mr. Draper, I'm not sure, but that -- how deep that is right there at that time. Do you know about how deep it was?*

*A I would agree with the three of them that it's probably one or two to three inches.*

*Q Okay.*

*A If you'd step into it, it would probably come up to the tip of your boot." Tr.848:11-849:7.*

In summary, Tony Brown did not testify that the manure pit didn't overflow through the southeast opening in the pit wall on June 17, 2014. What he said was that this opening was not put there for that purpose. It was put there to allow surface runoff to go back into the pit under normal operating conditions. The extreme rainfall and the pit overflow on June 17, 2014 were not normal operating conditions and the pit unfortunately overflowed through this pit opening and flowed east because the westward slope of the concrete was so gradual the pit overflow overcame it to flow east.

Riverview Cattle also does not dispute the pit overflow would have been in water runoff that reached the swale. The critical issue of course is whether the pit overflow reached a water of the U.S., the East Fork of the Des Moines River. The next step in that analysis is whether the pit overflow was in any water that entered the tile inlet in the swale.

Did the pit overflow enter the tile inlet in the swale.

As noted, Mr. Urban testified that the water entered the tile inlet and was flowing pretty quick towards the pipe as evidenced by grass seeds on the water and that it sounded like a rushing waterfall. He testified that he did not take video, but:

*"Had I known that that there were going to be issues with whether or not water was flowing into the drain tile, I probably would have taken some video and made sure that the Browns had seen it and seen everything that I saw. But when people understand and are seeing the same things and you have a meeting of the mind, you just move onto the next thing." Tr. 217:25-218:6.*

Tony Brown testified as follows:

***Q And so was anything going in the pipe that day?***

***A Not to my knowledge.***

***Q Nothing?***

***A Well, it sure didn't sound like a rushing waterfall, so, I mean, I didn't get down there with my hand and hold it there to see if there was anything going in, but the water wasn't moving.***

***Q Okay. You realize that's different than testimony we've heard?***

***A Yeah.***

***Q Okay. You were with Mr. Urban when he took this photo, right?***

***A Yes.***

***Q Did he say anything to you about hearing a rushing waterfall?***

***A No, and if you think about that statement, a rushing waterfall. So, if there was any way to open a valve to that inlet, that pipe would be empty. Water would fall. It would sound like a rushing waterfall.***



*But, if there's water going in that inlet through these holes, it would be -- if it's working properly, it's going to be full. That pipe's going to be full and you won't hear water going in an inlet, unless you just opened it up and it's just starting to take water, to my knowledge. Other people would probably say different, but that's common sense that if that pipe is working properly and taking water, you wouldn't be able to hear it if the system's working, if it's full of water." Tr. 856: 23-858:2 (emphasis added)*

Josh Brown testified:

*"Q Okay. You've heard all the testimony about a rushing waterfall. What did you hear?*

*A There was -- I didn't hear anything. There was no water pouring in or however they said that, but, I mean, you'd hear, if it was running, you'd hear it, but I -- there was -- I did not hear it." Tr. 994: 24 995:4.*

Tony Brown also testified that the seeds on the grass stayed on the surface of the water, didn't rush into the pipe, and Mr. Urban was able to take a sample without getting seeds in the sample. Tony Brown Testimony, Tr. 860:3-23.

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

If the pit overflow in fact entered the tile inlet, then the next step is whether the pit overflow travelled through the tile line to the East Fork of the Des Moines River. Of course, to determine that, the tile outlet would have to be located. Mr. Urban and Mr. Roberts did not do that. Mr. Urban testified he wanted to take samples at the river and told the Browns that multiple times. Tr. 134: 16-25. However, in response to a question from the Court about the location of where he determined it was too muddy to get across the cornfield, he stated they did not pursue sampling because:

*"THE WITNESS: And we couldn't get across there. And, you know, based on -- I would have loved to have found the exit point from Sample 1, but I took them at their word that they had never seen it and they had lived there their whole lives; and combined with the fact that I couldn't traverse that; the fact that I had holding time issues; and we were running out of daylight; I felt that I had enough with the sample.*

*And we discussed this, you know, the State of Iowa considers once it goes into a tile, that's the water of the US. Of course, EPA would like to get the sample where it actually enters a flowing body of water, but I just couldn't get to it." Tr. 138:23-139:11.*

Tony Brown testified about the discussion of where the tile outlets were located:

*"Q . . . Were you asked where that tile outletted?*

*A They asked if we know where the tile lines ran.*

*Q And what did you say?*

*A South to the river.*

*Q What was said then?*

*A There was -- they never asked us if they -- if we could go down there, if we could take them there. And, you know, if Trevor would have asked, you know, obviously, it was muddy that day, if he would have said, Mr. Brown, can we get down to the river any other way, we would've jumped on the four-wheeler, the side-by-side, something to get down there because, if you think about this, there's a grass fence line on every field and it's shown in the photos. So, if you wanted to get down there, you could walk down the grass fence line because grass is more, I don't know what the term is, but, when you get rain, you can walk on top of grass. It's like walking out in your yard. You can still walk on that.*

*There's a buffer strip along that river. It was seen in the aerial photos three days prior to them showing up. We could have walked on that fence line. We could have walked up the river in the buffer strip, just like we did in 2016. There was nothing dangerous about that, but it was never talked about. They never*

*talked about having to pull their life jackets out and go down there and how dangerous it was. Zero discussion about actually walking to the river and taking a sample.*

*Q I believe it's been -- Mr. Urban testified that -- of course, you didn't own that land in --*

*A Right, Mueller's did.*

*Q Do you believe they could have gotten permission?*

*A I could have called them. Q Did they ask?*

*A No, not once. Q All right.*

*A That's what I mean. There're so many questions that weren't asked that would have been asked that day. It wouldn't have been just one question to get there. It would have been, whose land is it? Who do we have to call? How can we get there? None of those were talked about." Tr: 861: 2-862:22*

Tony Brown went on to testify about Mr. Urban's decision not to go to the river to look for the tile line outlet and sample any runoff from the tile outlet. Josh Brown, Dawn Brown and Gary Brown were all present during the conversation and also testified as to Mr. Urban's comments. Josh Brown Testimony, Tr. 996:7-20; Dawn Brown Testimony, Tr.783:3-18; Gary Brown Testimony Tr. 764:16- 767:9. Tony Brown's testimony summarizes the discussion as follows:

*"Q And what did Mr. Urban say about going down to the river?*

*A That he was not going to do that. It was too hot and this comment I think has been beat on the whole time, but the fact that he said he was too fat and too lazy to go down there, I wouldn't have wanted to walk down there that day because it was hot. We were sweating. And he said it to lighten the mood, just like he said up here. I agree 100 percent, what they used for icebreakers, I'd do it in my job if I had that job. But it was the fact that we didn't go down there and whether it was because it was too hot, it was that statement, maybe he thought it was too -- it was going to take too much time. I don't know, but if that's what needed to happen, they should have done what they did in 2016 and came back the next day." Tr. 864:12-865:2.*

Mr. Urban and Mr. Roberts also testified that they felt it was too muddy, unsafe, and they couldn't get to the river to look for the outlet, as evidenced by Mr. Roberts' boot coming off in the mud when they were sampling in the cornfield where a tile line outletted just south of Bacon Maker's confinement cattle building. Trevor Urban Testimony, Tr. 138:2-22; 141:4-10, 191:3-193:9; Rickey Roberts Testimony; Tr.248:11-20, 261:10-262:8. When asked if he and Mr. Urban considered moving to another spot in the field away from the tile outlet, Mr. Roberts testified:

*"Q Do you believe it would've been a different condition in the field if you had moved away from that area a little bit?*

*A That's possible, it could be. I don't know their farming technique, so I don't know how much organic matter is in the soil, but when I first stepped off of it, I was not near the pipe. I was to the east of it, I believe was the direction and I didn't sink down very far there, but by the time I got close to where the water was flowing down, and my boot came off.*

*Q So it -- I guess I'm asking did you or Mr. Urban consider moving away from that area to walk down to the river?*

*A Well, we usually don't cross other people's property to do samples. We do that, we try to walk back up to the stream or get permission from those folks. And the Browns indicated at that time that they did not own that property down there.*

*Q Okay. But my question again, did you consider the field conditions would be different if you walked somewhere else other than where your boot got stuck?*

*A I was looking for the end, and as a drain tile, where it drained into the river, our logical choice would be to go down to the river and try to find it from there if the conditions would allow and be safe.*

*Q And you considered them unsafe?*

*A Yes, I did." Tr. 262:10-263:13.*

Tony, Josh and Gary Brown were present with Mr. Urban and Mr. Roberts when his boot allegedly came off due to the muddy conditions that they considered unsafe. None of them observed his boot coming off. Josh Brown Testimony, Tr. 997:3-6; Gary Brown Testimony, Tr. 764:2-9; and Tony Brown's testimony that refutes EPA's contention that area was unsafe or impassable:

*Q Mr. Roberts testified, and so did Mr. Urban, that down by your Dad's cattle building, what's been called the MCB, that he sunk in the mud and his boot almost came off. Did you witness that?*

*A No. And if he did, that wouldn't have anything to do with how muddy the field would be.*

*Q What do you mean?*

*A If you look where he took that sample, it's down in the culvert area, so, of course, you're going to have soil sediments, soft soil down there. But up in the field, it's a completely different deal.*

*You've got a lot of water running through there. Up in the field -- you know, you can walk over a field even if it's had a foot of rain. You're just going to have mud on your shoes, but you're not going to sink out of site. It's not quicksand. Our soil types aren't like that." Tr: 862:23-863:14.*

As Tony Brown stated, one option would have been to come back the next day when they had more time, just as they did in on March 30, 2016 when EPA wanted a sample after a rain event. Even more intriguing as to the allegation that they would not have been able to find the tile outlet on June 17, 2014 is EPA's testimony about how easy it was to find in 2016.<sup>2</sup> One has to question that if it was that easy to find in 2016, wouldn't it have been just as easy to find in 2014? We don't know because EPA refused to go look.

Mr. Urban also stated that he did not believe that the tile outlet would have been submerged in 2014. Tr. 176:23-177:3. Dr. Wang testified that he believed the outlet was above the river level on June 17, 2014. Tr. 629:22-630:23. Mr. Hentges testified that comparing CX-1.5, p. 39 and RX-27, photos of the river level at the bridge south of the tile outlet, testified that he would assume the tile outlet was submerged on June 17, 2014. Tr. 1154:18-1160:22. The effect of the tile outlet being submerged on outflow is discussed in this Brief. At this juncture, it is important to note EPA's testimony that they do not believe it was submerged on the day of the inspection. The question then is, wouldn't it have been accessible for sampling just as it was on March 29-30, 2016?

Ms. Lois Benson with the Iowa DNR was asked about EPA's failure to obtain a sample at the East Fork of the Des Moines River. She testified regarding the Iowa DNR's protocol:

*"A It's pretty much the same no matter whether it's a little tiny creek or whether it's great big, like the east fork. We try to get as many samples as we can. If it's a known -- or if we believe we know where the discharge is coming from, we try to get a sample of the actual discharge, and then we always go -- we have to have an upstream sample that we think at least is going to be clean in our minds. It doesn't always happen that way, but we believe it would be upstream of whatever the facility is that might be discharging and then we always have to have a downstream sample. And then, if there's any doubt about what else could be contributing, we go sample all of those places in between too. Any tributaries, any other facilities, anything to rule all those out." Tr.1037:24-1038:13.*

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<sup>2</sup> Mr. Urban testified that he couldn't believe how obvious it was and was critical of the Browns stating he felt they were "disingenuous to me, a little bit." Tr. 173: 14-17. However, 2016 was the first year the Browns had farmed the land next to the River, other than years ago when their father Gary Brown farmed it, where the tile outletted and as of the March 29-30 inspection, they had not yet been in that field to do fieldwork. Therefore, they would not have had the chance to see the tile outlet as alleged by EPA. Tr. 897:6-899: 6.

When asked what DNR's protocol is for a situation like this where the location of the tile outlet is not known, she stated:

*"A Well, if you're missing any of those puzzle pieces, it's worthless basically. If I came back to the office without, for example, an upstream or a downstream or a known one of those things, I could perhaps go back and pursue it at another point in time, but if I'm missing any of those pieces of the puzzle, it's worthless. My boss would say, go back, it's -- you can't prove anything if you don't have all of those pieces."*  
Tr. 1038:18-1039:1

Finally, Mr. Gerald Hentges, in his professional opinion after reviewing the evidence, stated that the tile outlet should have been observed on the day of the inspection. Tr. 1154:15-17.

Because of EPA's unjustified failure to locate and sample the tile outlet on June 17, 2014, EPA has failed to prove that Riverview Cattle discharged pollutants to a water of the U.S. in violation of the Clean Water Act.

Indirect or circumstantial evidence.

As noted, "circumstantial evidence can be effectively used to state a proposition of material fact in the absence of direct evidence". In *Re Lowell Vos Feedlot*, at p. 322, citing *In re BWX Techs., Inc.*, 9 E.A.D. 61, 78 (EAB 2000). Because EPA failed to collect or even attempt to collect direct evidence of a discharge to waters of the U.S. on June 17, 2014, circumstantial evidence should not be considered, or at least it should be given minimal weight. Because of this failure, EPA had no choice but to attempt to rely on circumstantial evidence in this case. That circumstantial evidence is:

1. On April 20, 2018 Tony Brown admitted to Mr. Draper "they had a problem that day, and they discharged." Complainant's Post-Hearing Brief, p. 35.
2. The tile line was functioning as it should have been on June 17, 2014. Complainant's Post-Hearing Brief, p. 35.
3. The difference in elevation between Riverview Cattle and the East Fork of the Des Moines River proves that process wastewater from Riverview Cattle would flow to the River. Complainant's Post-Hearing Brief, p. 36.
4. Mr. Seth Draper's observation that grass was moving near the tile outlet that was underwater. Complainant's Post-Hearing Brief, p. 39.
5. That even if the tile line was prevented from discharging when it was underwater it would discharge when the river level goes back down. Complainant's Post-Hearing Brief, p. 40.

Each of these allegations of circumstantial evidence will be addressed:

1. Regarding the alleged admission to Mr. Draper on April 20, 2018, Tony Brown testified:  
*"Q Did you say to Mr. Draper that day that you had had a problem on June 17, 2014?"*  
*A Yes.*  
*Q Did you say that the pit had overflowed on June 17, 2014?"*  
*A Yes.*  
*Q Would you have used the word "discharge"?"*  
*A Could have, yes.*  
*Q Did you say to him that the runoff either reached the river or that it had discharged to the river?"*

*A No.*

*Q I believe Mr. Draper's testimony was is that you didn't deny it went to the river. Did he ask you or did he say that it went to the river and then you did not argue, or how did that go?*

*A No. We didn't talk about if it went to the river or if it didn't go to the river. I would not discuss that with Seth at that time.” Tr. 916:10-917:3. (emphasis added)*

Mr. Draper’s testimony, on cross examination was:

*“Q And I think you said at that point that Mr. Brown said you testified something like he said they had had a problem that day, and I assume referring to June 17, 2014, and that they had discharged?*

*A That's right.*

*Q And do you believe he was referring to discharging to the river?*

*A Considering the totality of our discussions throughout that day, yes, I believe that's what he said. That's what he meant.*

*Q And then I believe you went on to say in answer to a question from Ms. McCoin that he didn't deny that it went to the river, if I'm --*

*A Right. I mean, I didn't hear that statement from him, no.*

*Q Did you ask him if he had discharged to the river?*

*A Considering that we were talking throughout the day about the case, the facts of the case, what's point source, was not point source, where did the run off go, enters the swale, and then for the facility to admit to me that they discharged throughout -- considering that we've now been working on this case almost four years, I couldn't imagine that he didn't mean anything other than a discharge to the river.*

*Q So it's your testimony to this Court that Mr. Brown, after having worked on this case for four years, as you just said, having spent a lot of money to defend himself in this case, that about two months prior to when the hearing was scheduled that he admitted the very essence of this case to you that he had discharged? That's your testimony?*

*A Yes.” Tr.496:20-498:2 (emphasis added).*

There was further detailed testimony about the discussion with Tony Brown in response to the Court’s questions about the conversation, including testimony that Tony Brown related part of the conversation to Lois Benson regarding “30 – 45 days of violation.” Seth Draper Testimony, Tr. 498:4-501:21.

On further cross examination Mr. Draper continued to allege that Tony Brown had admitted a discharge to the river:

*“Q Mr. Draper, as an enforcement officer with the Environmental Protection Agency, knowing that there was a hearing coming up, that he was represented by counsel, were you at all uneasy about that conversation that you had evidently initiated?*

*A I didn't ask him if he discharged that day. He volunteered that information. He asked me what point source versus non-point source pollution was at the manure pit. As far it pending to the June 17, 2014, inspection and saying that they had a problem that day on the way back to the manure -- the access road to the Bacon Maker MCB, I understood that to be freely given, and I don't -- I guess maybe should I have stopped him as far as saying like whoa, we can't talk about this. I don't know. I've never been put in that situation where --*

*Q I guess I'll just finish up with again, it's your testimony to this Court that he essentially admitted the very violation that he was being charged with and what was the subject of a hearing coming up in less than two months?*

*A I was -- it's -- I was dumbfounded, yes.” Tr. 502:5-503:1 (emphasis added).*

Ms. Lois Benson of Iowa DNR testified:

*Q* Okay. There's been quite a bit of testimony about discussions that occurred between Mr. Seth Draper and Tony Brown. Were you present for any discussions between those two that day on site?

*A* Yes, some of them. We walked around together on the site sometimes and sometimes we were together, sometimes we broke off in groups, but --

*Q* Did you --

*A* It's possible, yes.

*Q* I'm sorry, I don't mean to interrupt.

*A* It's okay.

*Q* Did you at any time hear Tony Brown tell Seth Draper that he in fact -- or I'll try -- that he had -- he being Riverview Cattle, had discharged to the river on June 17, 2014?

*A* No.

*Q* Okay. Did you hear Seth Draper ask him whether he had?

*A* No." Tr. 1040:16-1041:9.

As further evidence of Tony Brown's understanding of the discharge issue, Ms. Lois Benson testified:

*Q* Sure. And, of course, Riverview Cattle, at the time of the June 20 -- June 17, 2014, inspection, did they have an NPDES permit?

*A* No, they wouldn't have. They didn't have one, nor do they now.

*Q* Okay. And we'll put some things up from your file in a minute, but to your knowledge, have --well, yeah, to your knowledge, have they considered it?

*A* Yes.

*Q* Okay. And have you worked with them on that?

*A* Uh-huh, yes.

*Q* Okay. Do you know why they haven't gotten one?

*A* Well, there's pros and cons, but I know one reason Tony told me is that this is a permit that allows you to discharge and if your -- if you are built to a certain level and then it gives you -- it's like an umbrella, it gives you a cushion, an excuse sort of. It gives you a way to discharge. **And at one point, Tony told me he never wanted to discharge, so he said, why do I need it? I don't plan to ever discharge.**" Tr. 1043:8-1044:6. (emphasis added)

It is inconceivable, considering the conflicting testimony and the circumstances surrounding their discussion, that Tony Brown would have admitted to discharging to the East Fork of the Des Moines River on June 17, 2014 as Mr. Seth Draper alleges that he did during their conversation on April 20, 2018. The Court in its direct questioning of Mr. Draper gave him every opportunity to qualify his statement that Tony Brown in effect confessed to a violation of the law, a violation that Tony and Josh Brown have vigorously denied and resisted, but he declined that opportunity.

2. As EPA notes, Riverview Cattle is not claiming the tile line was plugged in RX-32 and RX-33, but it was obviously restricted by sediment and would flow at a reduced rate. Tony Brown Testimony, Tr. 906: 4-8; Gerald Hentges Testimony, Tr. 1277:2-1278:12.

On cross examination on the issue of the restriction in the tile line, Mr. Hentges was questioned about the outflow during the EPA inspection on March 29, 2016:

*Q* All right. CX 8.6, page 39. Does it look like that pipe where it says Sample 9, location is flowing pretty good?

*A* Yeah, it looks like it's coming out of it." Tr. 1284:3-6 .

Prior to that, the Court questioned Mr. Hentges about CX-8.6, p. 39:

*“JUDGE COUGHLIN: Before you move that photo, if it were clogged, if the line were clogged, would it*

*flow like what I'm looking at now?*

*THE WITNESS: It could but at a reduced rate just because the capacity of the pipe is less.*

*JUDGE COUGHLIN: At a reduced rate than what I'm looking at right now?*

*THE WITNESS: It's all kind of relative, but the -- any kind of sediment build up in the pipe would just allow less water to flow at a given time.*

*JUDGE COUGHLIN: Okay. Well, when you look at this photo, for example, that's been up on the screen.*

*THE WITNESS: Yeah.*

*JUDGE COUGHLIN: And you're looking at the water coming out of there.*

*THE WITNESS: Um-hmm.*

*JUDGE COUGHLIN: Would you form an opinion that was clogged or blocked in any way?*

*THE WITNESS: It doesn't seem like it is. I'm not sure of the exact date when they they dug that tile up. This may be after that.*

*JUDGE COUGHLIN: I think there is a, and it is hard to see, I think there is a date stamp on there.*

*MR. BIERI: May -- I'm sorry.*

*THE WITNESS: Yeah, this is --*

*MR. BIERI: April 12th.<sup>3</sup>*

*THE WITNESS: I'm not sure when the redid the tile lines and abandoned that main tile that was connected to the inlet in the swale. But, you know, it's always hard to say, Your Honor, because, I mean, you know, if there is a plug in here reducing the flow by half, I mean, the pipe is only half full, maybe it should be -- maybe if the plug wasn't there it would be flowing pipe full.” Tr. 1277:2-1278:12.*

And prior to that testimony, Tony Brown testified that the flow from the tile outlet in CX-8.6, p. 39:

*“Q Okay. Could you also describe here for me the -- how would you describe the flow coming out of the plastic tile?*

*A Pretty good flow.*

*Q Okay. And what about the steel?*

*A It looks like there's also pretty good flow coming out of that too.” Tr. 900:15-21.*

In its Post-Hearing Brief, at page 39, EPA cites to Mr. Hentges statement that the tile line does not seem to be blocked in this photo. However, EPA fails to cite to the remainder of his answer to the Court’s question: “I'm not sure of the exact date when they they dug that tile up. This may be after that.” Tr. 1277:22-23. Mr. Hentges was making the point that the Browns had this tile line dug up where the restriction was photographed in RX-32,33. Tony Brown did not testify as to an exact date but stated that the tile work was done in the “spring of 2016”. Tr. 906:22, See the entire line of questioning on the tile work that was done and when it was done at Tr.905:2-908:18. Although we don’t know an exact date, we do know it was done in the spring of 2016 which was about the same time, and could well have been before CX-8.6, p. 39 was taken.

In any event, it stands to reason that a restriction that impedes flow will affect any flow from the tile outlet, and in a manner more than just increasing the number of days of a discharge, e.g., flow reversal similar to when the outlet is submerged or reduction in head pressure if the

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<sup>3</sup> According to the transcript, Mr. Bieri and the Court were questioning Mr. Hentges about CX-28.6, p. 39, which is dated March 29, 2016. Tr. 1274:4-7, CX-8.6, p.5.

restriction results in a trickle of water downgrade from the restriction. Gerald Hentges Testimony, Tr. 1272:19-23, Tr. 1275:12-1276:4

3. EPA argues that the difference in elevation between Riverview Cattle and the East Fork of the Des Moines River proves that process wastewater from Riverview Cattle would flow to the River. Complainant's Post-Hearing Brief, p. 36. This argument was rebutted by Mr. Gerald Hentges on cross examination:

*Q All right. You are saying that water in the pipe that's 34 feet above that outlet will not discharge into the river. That's what you're telling us here today, correct?*

*A No, of course it would, but there's no evidence that the water in the pipe was 30-foot higher. For one thing it's inconclusive whether there was any water in the pipe at all coming from the swale. The other thing is that water has to drop five feet, it gets into the pipe and it flows, and short of being, you know, just a gusher going in or the head level in the swale, the water level in the swale being above the pipe, and you can see a vortex, **there is not a 30-foot a head on it.** We don't know what the head was on that pipe that day, a partially plugged pipe. The water could have backed up and only been 20-30 foot away. At a typical slope for a tile line of one-half of one percent, that could have been three-four hundred feet away." Tr. 1270:19-1271:12 (emphasis added).*

On further cross examination, Mr. Hentges testified:

*Q You are saying, you are telling this Court that if that line is submerged, even at all, no water in that pipe will make it into the river, correct?*

*A No, no. I'm saying that it depends on the height of the river level above the bottom of the pipe compared to the elevation in the pipe where the water is solid water, not just trickling. **It doesn't build up a head until it fills that pipe.**" Tr. 1272:16-23. (emphasis added)*

On redirect examination, Mr. Hentges concluded:

*Q Mr. Hentges, Mr. Bieri just before our break was discussing with you, asking you about different assumptions regarding the head pressure, the level of the river, et cetera. **Isn't that the problem, we just don't know?***

*A Yes, it is in this case. We're just not sure where those site levels were.*

*Q And thus do we know whether anything would have come out or not?*

*A No, we don't." Tr. 1279:17-1280:1. (emphasis added)*

On final re-cross examination Mr. Hentges testified:

*BY MR. BIERI:*

*Q So, if you have water trickling into a pipe, let's say it's a foot submerged, eventually that head pressure that's trickling into the pipe will get to the point where some of the water in the pipe can discharge below the water. Would you agree with that?*

*A Well, again, if it doesn't have somewhere else to flow, if it's only a foot of head and the water is very close to flowing, yes. If it's backed up some distance, you know, these systems are notorious for having dead spots where it's just level or even at a negative; you know, a collapse of the trench or problems with the piping.*

*So, flowing out once the head levels are seated in the pipe, elevation of the head is exceeded into the pipe by the elevation of the river is one pathway. Another -- but there other things that could happen, particularly under high head conditions.*

*Q All right. CX 8.6, page 39. Does it look like that pipe where it says Sample 9, location is flowing pretty good?*

*A Yeah, it looks like it's coming out of it." Tr. 1283:11-1284:6.*



4. Regarding Mr. Seth Draper's observation that on April 20, 2018 grass was moving near the tile outlet that was submerged, Tony Brown testified that he was with Mr. Draper and Dr. Wang at the tile outlet and that they all got no closer than standing on the bank and contrary to their observations, he did not see anything coming out of the tile line. Tr. 914:15-915:7.

Further contradiction to the undocumented observations of Mr. Draper and Dr. Wang on April 20, 2018 are the documented observations of Tony Brown, Josh Brown and Mr. Hentges that on May 22, 2018 the tile outlet was submerged and was not discharging. And on October 11, 2018, Tony Brown observed the tile outlet and it was submerged and not discharging.

First, on May 22, 2018, just a little over a month after the visit by Mr. Draper and Dr. Wang, the tile outlet was observed by Josh Brown, Tony Brown and Gerald Hentges, none of whom observed a discharge coming from the submerged outlet in they approximately one hour they were there. See RX-14 to RX-26, Josh Brown Testimony, 1009:12-1010:19; Tony Brown Testimony, Tr. 917:4-921:16; Gerald Hentges Testimony, Tr. 1150:19-1152:24. Grass was placed on the water and it was not observed to move. RX-24, 25; Tony Brown Testimony, Tr. 920:8-21; Josh Brown Testimony, Tr. 1010:10-19; Gerald Hentges Testimony, Tr.1151:2-1152:6. Josh Brown held his hand over the end of the outlet and did not feel any water coming out. RX-26, Tr. 1009:21-1010:9.

Then, on October 11, 2018, Tony Brown observed the tile outlet that was again submerged. RX-34 to RX-46, Tr. 921:17-925:19. As Josh Brown had done on May 22, 2018, Tony Brown placed his hand over the end of the submerged tile outlet and did not feel or observe any flow out of the tile line. RX-41, 42; Tr. 923:12-925:9.

5. EPA alleges that even if the tile line was prevented from discharging when it was submerged, it would discharge when the river level goes back down. This issue was the object of much discussion in Mr. Hentges' testimony at the close of the hearing. Although EPA vigorously cross-examined Mr. Hentges, no testimony was elicited from Dr. Wang despite his criticism of Mr. Hentges' opinion on head pressure.

Mr. Hentges testified:

*Q And you talked about performances. Is there a difference in performance between the perforated plastic tiles versus the older clay tile?*

*A Yes. It's my understanding the perforated plastic tile is more efficient that moving, moving the water.*

*Q You've testified regarding the -- I believe you call them laterals, is that right, or pattern?*

*A Right. When I talked about a pattern network it's -- I call the individual tile lines that make up a system of tile lines, individual laterals. Some of the industry don't call them that, but they are generally evenly spaced and then they connect to a header pipe which is the discharge pipe or connects to a discharge pipe.*

*Q What effect would a restriction in what you've called a header pipe or the main pipe have on water flowing through it in relation to the laterals?*

*A Well, there is a few different things that could happen. I mean, it ceases, it may cease to function altogether and the water just sits in the line, or depending on the configuration the water may end up flowing to another network of laterals, and if there is no water in those then the large drain is plugged, you know, it may just infiltrate back into the ground in the adjacent laterals.*

*Q And would that mean whatever was in there would not reach the outlet which in this case is the east fork of the Des Moines River?*

*MR. BIERI: Objection to the form as leading, Judge.*

*JUDGE COUGHLIN: Sustained. Just rephrase, Mr. McAfee.*

*MR. McAFEE: Thank you, Your Honor. BY MR. McAFEE:*

***Q What effect would what you just described have on the outlet?***

***A Well, if a header line or a line that was collecting all this water was plugged and the system would back up, then the water wouldn't reach it.***

*Q And where is the outlet in this case, to your knowledge?*

*A My understanding is the outlet is at the east fork of the Des Moines River.*

*Q Okay. Now I want to move to -- you've heard the discussion talking about the outlet.*

*JUDGE COUGHLIN: Before you do can I--*

*MR. McAFEE: Yes.*

*JUDGE COUGHLIN: -- ask one question?*

***If the system is backed up or something else is preventing it from reaching the main line to the disjoint point, would there be any signs to show that?***

***THE WITNESS: There may or may not be. It kind of just depends on the system. I mean, if there is percolating water, infiltrating water above the line it will continue to infiltrate down. If the water table is up it will add to that water that the area will be swamp it. Generally, there's not much surface indications because of the -- the length of time it takes for the water table, and this is all pretty -- happening pretty slowly. So, water is moving very slowly in these deposits and, you know, maybe days or weeks, and oftentimes before some expression at the surface like a ponded water would show, the water just simply moves out. The water table lowers and it just infiltrates into the ground." Tr. 1147:23-1150:13 (emphasis added).***

On cross examination, Mr. Hentges testified:

***"Q All right. And then when the river drops, let's say what you say is true, when the river drops all that water in the pipe eventually will discharge into the river, correct?***

***A No, not necessarily. What happens in a situation like that and, frankly, I'll just say I think on that day, on June 17, 2014, I think the head was a lot higher than three feet above pipe, but I don't know that. But that pressure putting back and that water building up in there, it's either got to get to an elevation where it's higher than the river or it begins to flow into the pattern tile system, particularly if it's dry.***

***The rainfall infiltration and inflow from the river takes quite amount of time to reach these high lines. Clay loam soils like this, it may be several days to weeks. So, that system is sitting there ready to drain water doesn't have any, this water is flowing into it, and in many cases because it's perforated it just infiltrates into the ground." Tr. 1271:13-1272:7 (emphasis added)***

And:

***"Q And then when the river goes down the pipe will discharge.<sup>4</sup>***

***A Well, it could. I mean, there is another phenomenon here that we see a lot, and that's flow reversal. So, when you have a high river level, not where it normally is but a high flow, surface water -- instead of the groundwater flowing to the river now the river water is flowing to the alluvial system around the river, and it's higher than the groundwater that's 50-100 feet back, so there's a flow river. So, now the river feeds the groundwater table, and, you know, those -- it takes awhile to develop. It will mass a long time, and eventually it evens out and the water, groundwater settled back down and comes to its original elevation.***

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<sup>4</sup> EPA cites this question, but not the accompanying answer, as the first transcript reference for the statement that "it would discharge when the river goes back down. Hentges Test., TR 1275:10-11, . . ." Complainant's Post-Hearing Brief, p. 40.

*I mean, in the meantime these tile line systems are swamped. They don't flow. They don't do anything. They just sit there. And if it happens slow enough the water in them it filtrates back into the ground. So, I mean that's a possibility, too."* Tr. 1275:10-1276:4. (emphasis added)

The cross examination continued:

*"Q So, if you have water trickling into a pipe, let's say it's a foot submerged, eventually that head pressure that's trickling into the pipe will get to the point where some of the water in the pipe can discharge below the water. Would you agree with that?*

*A Well, again, if it doesn't have somewhere else to flow, if it's only a foot of head and the water is very close to flowing, yes.<sup>5</sup> If it's backed up some distance, you know, these systems are notorious for having dead spots where it's just level or even at a negative; you know, a collapse of the trench or problems with the piping.*

*So, flowing out once the head levels are seated in the pipe, elevation of the head is exceeded into the pipe by the elevation of the river is one pathway. Another -- but there other things that could happen, particularly under high head conditions."* Tr. 1283:11-1284:2. (emphasis added)

As is evident from the extensive examination of Mr. Hentges on this opinion, it is a critical issue in this case and an opinion that may seem to be counter intuitive. EPA's approach from the outset of this case has been that if pollutants went into the tile inlet in the swale, it was a foregone conclusion that those pollutants would discharge from the outlet into the East Fork of the Des Moines River. For example, see Mr. Trevor Urban's testimony at Tr. 138:23-139:11 that considering all the problems he saw with obtaining a sample at the river, he felt he had enough with the sample at the tile inlet. Mr. Hentges' testimony illustrates that it is not a foregone conclusion and in the real-world water, especially groundwater, does not always flow like one might think.<sup>6</sup> For that reason, among others, EPA's failure to observe and sample the tile outlet on June 17, 2014 calls into question reliance all of the other evidence presented.

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<sup>5</sup> EPA cites the bolded portion, but not the unbolded portion, of this question and answer as the other transcript reference for the statement that "it would discharge when the river goes back down. Hentges Test., . . . TR 1283:11-18." Complainant's Post-Hearing Brief, p. 40.

<sup>6</sup> As noted in the "Background of Applicable Law" portion of this Brief, on February 19, 2019 Petition for Writ of Certiorari was granted by the U.S. Supreme Court in County of Maui, Hawaii v. Hawai'i Wildlife Fund, et al., 139 S.Ct. 1164, on the question of: "Whether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater." There have been other cases on this issue that were decided both in-line with and contrary to Hawai'i Wildlife Fund v. County of Maui, 886 F.3d 737 (9th Cir. 2018) on the issue that has been accepted by the U.S. Supreme Court. See Upstate Forever v. Kinder Morgan Energy Partners, L.P., 887 F.3d 637 (4th Cir 2018) (followed), Tennessee Clean Water Network, et.al. v. TVA, 905 F.3d 436 (6th Cir. 2018)(contrary), and Kentucky Waterways Alliance v. Kentucky Utilities Co., 905 F.3d 925 (6th Cir. 2018)(contrary). While these cases do not involve the alleged discharge of pollutants to a navigable water via a tile line as we have in this case, they nonetheless present a similar broad issue as we have in this case -- the question of the Clean Water Act's regulation over groundwater. If the Court deems these cases worthy of further discussion, Riverview Cattle would welcome the opportunity to participate in that discussion and whether the U.S. Supreme Court's ultimate decision on the question presented affects the outcome of this case.

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 PRIOR TO JUNE 17, 2014.

A. EPA's RELIANCE ON COMPUTER MODELING IS MISPLACED IN THIS CASE AS EVIDENCE OF DISCHARGES TO A WATER OF THE U.S. IN VIOLATION OF THE CLEAN WATER ACT BECAUSE OF VARIABILITY IN SITE SPECIFIC FACTORS.

“In this new world of computer modelling, an oft-quoted remark made in the 1970s by the statistician George Box remains a useful rule of thumb: ‘**all models are wrong, but some are useful**’. He meant, of course, that while the new simulations should never be mistaken for the real thing, their features might yet inform us about aspects of reality that matter.” (emphasis added) Dec. 16, 2013  
<https://aeon.co/essays/all-scientific-models-are-wrong-but-some-at-least-are-useful>

Although no witness testified at hearing to this quote, Mr. Gerald Hentges' testimony fits squarely within this quote's meaning. Mr. Hentges' testimony shows that all models are wrong if used for the wrong purpose, such as this EPA enforcement action, but still useful for planning purposes.

In spite of Complainant's criticism of Mr. Gerald Hentges' qualifications, he has experience with the issues in this case that uniquely qualify him to provide expert testimony. Mr. Hentges is a Senior Geologist for Terracon. In his work at Terracon, while it is true as pointed out by the Petitioner that Hentges has not offered any articles on modeling nor has he had research funded or received any research grants concerning modeling, that is because Mr. Hentges is a hydrogeologist who actually works in the field, solving real world issues, not as a captive expert for a governmental agency.

Mr. Hentges works primarily in services and ground water studies. He works for private clients but also cities, counties and state governments. Tr. 1119:1-9. His work every day encompasses issues related to solid waste, site assessments, determination of soil or ground water contaminations, wetlands assessments and design services and ground water modeling. He also provides assessments and expert testimony in the livestock industry. Tr. 1119: 1-9. Mr. Hentges testified extensively concerning his experience with computer modeling such as surface water runoff, stream restoration and stabilization, contaminate transport, sediment transport, groundwater modeling and groundwater modeling for the determination of head levels, flow direction, contaminate dispersion and remediation as well as dewatering. Tr. 1122:20-1123:5. Forty-five percent of Mr. Hentges' work involves various types of models from statistical models to water quality models. Tr. 1209:5-18. Specifically, 25% to 30% of his work throughout the years has involved runoff models for surface groundwater interaction models relevant to this action. Tr. 1209:20-23. He also is well versed and an expert regarding issues related to the Clean Water Act. Tr. 1210:18-24.

It is obvious Mr. Hentges has extensive experience in his field and utilizes his experience on an everyday basis to provide the services, consultation and information to clients of varying

backgrounds to individual clients and municipalities. His experience is not limited to theoretical research but real-world research. In his report, RX-2, he outlined detailed opinions in this matter as follows:

*"Q Could you read that statement of opinion, the paragraph under the heading entitled Statement of Opinion?"*

*A Yes. "The EPA complaint states that process water containing pollutants for production areas at the Riverview facility repeatedly discharged into the east fork of the Des Moines River and/or its tributaries through the drainage tile system as a result of precipitation events.*

*"The complaint indicates the discharges represent a violation of the Clean Water Act. The actual discharges were not qualified by evidence such as laboratory analysis of water quality or sediment concentration of nutrients in the discharge to the east fork or the Des Moines River.*

*"The alleged harm is only quantified by conjecture based on photographs and a mathematical model. . . .*

*"A scientific determination must be based on data that meets the minimum criteria for environment assessment and testing in order to become evidence of an actual release to the environment."*

*. . . "Accordingly, the information presented by EPA in this case is not sufficient to support EPA's claim that Riverview Cattle violated the requirements of the Clean Water Act." Tr. 1125:25-1127:10.*

Supporting his opinions, he recited various concerns he had regarding the modeling done by the EPA which is used to support its position of penalties and monetary fines for theoretical discharges of contaminated water. While the Riverview Cattle recognizes that, in certain circumstances hydrologic modeling has been allowed as circumstantial evidence of discharges, that does not mean that the evidence can carry the burden of proof. See, e.g., *In re San Pedro Forklift, Inc.*, 15 E.A.D. 838, 2013 WL 1784788, at \*30 (EAB 2013); *Leed Foundry*, 2007 WL 2192945, at \*19-20. None of those cases deals with whether such information alone is sufficient to satisfy the government's burden.

Mr. Hentges testified that he is knowledgeable in the use of both the curve number model and the HEC-RAS model in that he uses those models to generate general answers to stream flow volume and actual stage and actual elevation of water. Tr. 1169:19-1170:3. He testified that those models have limitations in that it is impossible to calibrate and check every design model so "generally you just add a large safety factor and, you know, based on the use of these models or the experience of the modeler, you know, they come pretty close." Tr. 1169:19-1170:3. Mr. Hentges testified that he is not familiar with using computer modeling for enforcement purposes such as those at issue in this matter. Tr. 1170:16-21. He was critical of using modeling generally when he stated:

*"Q And what was that opinion, I mean just generally regarding modeling?"*

*A Right. In general, the modeler is showing contamination from the feedlot also had not calibrated the model to any site-specific data, and we used average values published in the literature, and, you know, again I think that happens a lot on the design end when you're just trying to get an idea, but to answer specific questions and be with a degree of accuracy you would need to justify a violation of the law it's a bit of a stretch." Tr. 1171:4-14.*

In addition, Mr. Hentges pointed out that models are only as reliable as the site-specific calibration or "ground truthing" of the modeler. Tr. 1172:5-1173:10. He pointed out that the calibration process is not only critical, it can also be a time consuming and costly process. Tr. 1172:5-1173:10. Nevertheless, many of the parameters are highly sensitive to the accuracy of the

model. Tr. 1173:3-10. They require accurate, site specific inputs. Tr. 1173:3-10. In this matter, that was not necessarily accomplished. He stated that Dr. Wang did not use site-specific data for several of the input parameters. Tr. 1173:11-14.

Mr. Hentges pointed out the following issues with Dr. Wang's modeling and the failure to use site-specific information that affect its reliability:

- The curve number model groups 6,000-8,000 different soil types into only four groups. Tr. 1173:18-24. That generates general assumptions about the actual characteristics of the soil. Tr. 1173:25-1174:6. This number is used to calculate a critical element of the model – runoff. Tr. 1173:25-1174:6. These general characteristics ignore local conditions.
- A specific concern was the infiltration rate used by Dr. Wang of category “D” which had an infiltration rate of zero to 0.15 inches per hour. Tr. 1175:2-16. This is compared to site-specific data from the Emmett County soil survey showing that the canisteo soil in the area has an infiltration rate of 0.15-2 inches per hour. Tr. 1175:2-16. Infiltration rate is an important and sensitive input parameter to runoff models. Tr. 1175:17-23. As Mr. Hentges stated, it is also a very easy parameter to verify by taking soil borings to verify infiltration. Tr. 1175:17-1176:23. Doing so would be necessary to give the modeler a high degree of confidence in their simulation and give some assurance that such an important input parameter as infiltration was a legitimate number. Tr. 1176:21-23.
- While Dr. Wang did visit the site, he did no testing nor did he collect samples to evaluate his infiltrate parameters. Tr. 1177:23-1178:15. He simply used generic soil data. Tr. 1175:2-1178:15.
- Dr. Wang's use of RADAR data for HEC-RAS modeling and his use of rain data from Swea City for the curve number model. Tr. 1179:4-1180:7. It was the RADAR data he used infiltration figures. Tr. 649:5-18. Mr. Hentges points out that his approach is inconsistent and there can be a wide discrepancy in readings, as evidenced by prior testimony of spotty rain events in June of 2014. Tr. 1179:4-1180:7. The failure to have site-specific data renders the conclusions suspect in that, if rainfall estimates are higher, runoff is increased. Tr.1180:8-17.
- After the sensitivity model is complete and the modeler has collected data to support parameters, predictions are made as to the ultimate goal; in this case a discharge. Then the modeler would verify the model by actually going out and measuring the rainfall and discharge on a particular date to determine if the model is consistent with reality. Tr. 1185:15-1186:18. This is the ultimate test for the modeler and it was not done here.
- Mr. Hentges stated any model is subject to question and it is incumbent on the modeler to answer those questions and to produce a model that is consistent with reality. 1185:15-1186:18.
- Mr. Hentges also pointed out in his testimony that the level of accuracy and verification can change with the assignment. When asked about why soil borings and additional verification of site-specific data would be necessary, he stated:

*“Q All right. Have you ever suggested to anyone that they should -- that let's say Ms. Heikens in this case she should go out and take core samples all over the Riverview facility to design stormwater runoff controls?”*

*A No, and it always depends on the type of project. I testified earlier that I use the curve number method, and I use the HEC-RAS method. I use the rational method which is even a quicker and less sophisticated than the curve number method. But, you know, if you want to*

*permit 80-foot high concrete dam above a major city you're not going to use the curve number method.*

*If you're going to start to determine when people break the law and fine them for it, I would say you use a more sophisticated method, a method based on sampling and documentation." Tr. 1232:4-20.*

Mr. Hentges is correct, modeling should only be used to predict what may happen, not what has happened to look at imposing liability for actions which are not seen but are "predicted". The failure to use absolute care in developing a model to predict such actions renders the results flawed and subject to manipulation. The testimony in this matter showed the danger of that manipulation.

As further evidence of the problems that can arise from a failure to take care as to inputs used as parameters, the failure of a basic assumption can render the entire model suspect. This is very apparent as related to Exhibit CX-20.3. This is an Exhibit that was only mentioned by Dr. Wang in his testimony. Tr. 558:24-559:1. CX-20.3 details flow directions for storage area and storage calculations. These calculations were used in modeling whether discharges occurred. Simply stated, they are not consistent with site-specific data and, as Mr. Hentges has testified, can render the model to be incorrect.

To understand the problem with Exhibit CX-20.3, reference to Exhibit CX-55.3 is necessary. CX-55.3 is based on actual ground points as testified to by Dallas Heikens, a professional engineer. Tr. 1110:25-1111:6. CX-55.3 shows, by way of arrows, the direction of drainage as determined by Ms. Heikens. That document, when compared to CX-20.3 shows that Dr. Wang's flow directions are directly contradicted by the flow directions determined by Ms. Heikens after an appropriate site visit by her staff. Tr. 1110:25-1111:6. This error by Dr. Wang would directly contradict a basic premise of his model; that the flow of liquid would flow out of the facility as a discharge, but would be directly supported by the operators' description of how the facility actually operates. This contradiction of a basic premise bolsters Mr. Hentges' critique of Dr. Wang's modeling that it did not conform to site-specific information.

Finally, Dr. Wang was asked to address how the central issue in this case, whether a discharge to a water of the U.S. occurred on June 17, 2014, fit into his model. Specifically, on cross-examination, Dr. Wang was asked:

*"Q Okay. Mr. Wang, I just wanted to ask you, you know, is your model based on what happened on June 17, 2014, that the pit ran over that day? Is that a basis of your model?"*

*A It's one of the factor I consider to calibrate the model.*

*Q To determine if a discharge occurred?*

*A Correct.*

*Q Okay. What if a discharge had not occurred that day? How would that affect your model?*

*A Not discharge. But, obviously, it's discharge on that date.*

*Q Pardon me?*

*A So, if not discharged on that date --*

*Q Right.*

*A -- and so you wanted me answer a hypothetical?*

*Q Yes, I guess. Well, okay. I will state that it's in the record that the pit overflowed that day. That's in the record. Part of why we're here is to determine if an actual discharge occurred that day to the east fork of the Des Moines River. Does your model assume one occurred that day?"*

A No.

Q It does not assume a discharge -- there was a discharge to the east fork of the Des Moines River on --

A Oh, yeah, on that day. Yes.

Q Okay. And I'm not trying to confuse things.

A Okay.

Q What if there was no discharge on June 17, 2014? How would your model be affected?

A I cannot answer this one because it's my knowledge to base on the real condition.

Q Okay. And I guess I'll say, and your knowledge is based on the -- you believe that a discharge to the east fork of the Des Moines River did occur on that day?

A Correct." Tr. 664:22-666:10.

The Court then questioned Dr. Wang as to the impact on his model if a discharge did not occur on June 17, 2014:

"JUDGE COUGHLIN: Okay. But that's one of the issues I have to decide. So the question is, if you took that out of the equation, if you will, in other words, your -- it sounds like your modeling, at least in response to this question, is based on a discharge occurring in June, on June 17, 2014.

THE WITNESS: Yes.

JUDGE COUGHLIN: So the question then is, if a discharge didn't occur on June 17, 2014, would that affect your model and, if so, how? And I think what I've understood you to say is that it would affect the model because you would then need to change other inputs? Or have I misunderstood you?

THE WITNESS: No. Yeah, you are right.

JUDGE COUGHLIN: You would need to change other inputs into the model?

THE WITNESS: No, just need to change the manure pit operation, the manure management times.

JUDGE COUGHLIN: The number of times --

THE WITNESS: Yes.

JUDGE COUGHLIN: -- that the manure pit was emptied?

THE WITNESS: Yes.

JUDGE COUGHLIN: Okay.

THE WITNESS: That's the main factor of that, the runoff, because, you know, if you reduce the time of the -- reduce four times to the two times, so that means more water going to flow into the pit and the pit going to overflow into the swale. So that means the volume, the runoff volume into the swale become bigger. So it still would trigger depending upon the condition. So may or may not.

JUDGE COUGHLIN: Okay." Tr.668:17—669:24

Despite this proclamation by Dr. Wang that his model would have to change if no discharge on June 17, 2014 occurred, upon being recalled to the witness stand, his testimony was:

"JUDGE COUGHLIN: Okay? So, my question for you is: were your modeling conclusions conditioned upon water exiting the outlet of the tile drainage system and entering the east fork of the Des Moines River on June 17, 2014?

THE WITNESS: Yes.

JUDGE COUGHLIN: They were?

THE WITNESS: Yeah.

JUDGE COUGHLIN: Okay. In what -- can you synthesize in what way? Or is that too broad a question?

THE WITNESS: Oh, you mean in terms of the stream velocity or stream volume (sic)? I mean, the flow?

JUDGE COUGHLIN: Well, let me ask it this way then, too.



THE WITNESS: Okay.

JUDGE COUGHLIN: So, I'm clear that, yes, it did matter that there was water exiting the outlet -

THE WITNESS: Correct.

JUDGE COUGHLIN: -- entering the east fork of the Des Moines River, as alleged by Complainant, that that was a factor in your modeling conclusions?

THE WITNESS: Yes.

JUDGE COUGHLIN: Okay. So, if that factor was not proven -- let's say, hypothetically. If that was not established that there was this discharge into the east fork of the Des Moines River on June 17, 2014, from the outlet of the drainage system?

THE WITNESS: Yes.

JUDGE COUGHLIN: What impact would that have had on your modeling evidence? Were there things you would need to change --

THE WITNESS: No.

JUDGE COUGHLIN: -- about it --

THE WITNESS: Not at all. Because when I set up my model, I separate the runoff going to the manure pit. And area for -- total area for that section is only about 2.5 acre and on the other side, just talking about 21 acres, roughly. So, I did not change anything at all and it coming out. And runoff volume just exceed -- exceeded the storage -- excuse me -- storage capacity, either for the road grade or the field condition. So, I did not change anything.

JUDGE COUGHLIN: Okay." Tr. 689:5-690:24.

This change in testimony highlights the variability that can occur in modeling depending upon the inputs and assumptions made by the modeler. Even Dr. Wang seems confused as to the effect of the differing assumptions concerning parameters, rainfall, soil types and even the crucial assumption of a discharge. This change in testimony highlights the problem with using the model in this case and seriously undermines the level of confidence the Court can have in Dr. Wang's models which the EPA claims "prove" violations of the Clean Water Act and for which EPA is proposing a penalty of \$96,000.

**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. EPA has alleged that manure discharged from the feed yard through the northern gate of Pen 1. See CX-20.3. As EPA correctly notes, the manure accumulated in the central manure alley behind a 4-foot wall. Complainant's Post-Hearing Brief, p. 11. However, EPA then alleges that the manure would leave Pen 1 under a cattle gate. Complainant's Post-Hearing Brief, p. 12. Tony and Josh Brown however testified that manure did not leave Pen 1 under that gate because the concrete slopes away from the gate.

Testimony of Tony Brown:

"Q Let me also at this point put up CX-28.1. All right. Now that, again, we can see the exhibit number there and which -- is this -- which direction is this photo looking towards?

A You're looking to the south.

Q And so up is south?

A Yep.

Q And that neck you've talked about is there and we can see the gate, right?

A Yep.

**Q Tell us how that concrete was poured and which direction the concrete slopes in Pen 1.**

**A You can kind of see it from that picture. So in between the two waters is the hole in the wall so the sloppier manure can be squeezed into the central manure alley. That pit<sup>7</sup> is sloped from north to south at I'm sure probably a -- I'm not good with grades and percentages, but that was more Josh's deal. It slopes into that hole in the wall so the sloppier manure can run into the central manure alley. So did that answer the question?**

**Q Does the concrete slope towards the gate?**

**A No. It slopes away from the gate." Tr. 819:5-820:2.(emphasis added)**

Testimony of Josh Brown:

**Q You also -- you know this question about the gate in Pen 1, the neck I guess I called it. It looked like a neck to me. You helped pour that concrete, right?**

**A Yeah.**

**Q Okay. Which way does it slope?**

**A It slopes to the south. We had a -- and he'll probably hit me for saying this, but we had an argument about putting that wall there that day because I wanted it, you know, because I'm the one that was watering the cows at the time, so I thought we needed the water. It was there to benefit me." Tr. 998:4-15.**

**Q Okay. I put on the screen CX-28.4 and there may be another one with a little higher view. Is this okay for you to see it?**

**A Yes.**

**Q All right. And what you've just testified to is I'm putting my pen on it, there's water there in the lower left-hand corner of that exhibit. Is that the water you were talking about for the cows?**

**A Yes.**

**Q Okay.**

**A It slopes back to the south probably I'd say six to eight inches.**

**Q And on this exhibit, I think this has been well testified to, but south would be to the right?**

**A Right.**

**Q Because north would be left?**

**A Yes.**

**Q Okay. And it was -- I'm stumbling around here, sorry. When you poured that concrete, that was done to intentionally have it slope that way?**

**A Yes.**

**Q Okay.**

**A And I thought the pen needed, you know, water space in the summertime, so it wasn't going to hurt to have extra water in the summer.**

**Q Okay. We also see in Exhibit 28.4, in what's been called the central manure alley, I'm pointing to it here. It's pretty much -- in this photo, it's pretty much right in the middle -- well, it's in that alley. What is that?**

**A Just slop that we scraped out of the pens that ran down the alleyway.**

**Q And before you had a pit, which this photo was taken in 2011, before you had the concrete pit, is that where it stayed?**

**A Yes, until we loaded it out and mixed it up. We scraped part of the bed pack just to get it soaked up so we can get it hauled out of there.**

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<sup>7</sup> The reference to a pit in this answer is likely an error in the transcript, or at the very least a misstatement, as the witness is testifying about CX-28.1, an aerial photo that was taken before the manure pit had been constructed because the manure pit is not in the aerial photo.

*Q Okay. And during your time on the day-to-day operations, did you ever see it run out of that pit<sup>8</sup> or anything like that?*

*A No” Tr. 998:20-1000:11.(emphasis added)*

In support of its allegations that manure would have not stayed in the central manure alley behind the 4-foot wall but rather would have run out of Pen 1 under the north gate, EPA provides the following:

1. Josh Brown’s testimony that water would back up into Pen 1 as shown in CX-28.1. Complainant’s Post-Hearing Brief, p. 12. Josh Brown’s testimony is:  
*“Q All right. Now, in this picture, CX-28.1, page 1, we’re seeing -- what is this material in Pen 1 that is just to the right of the central alley? It’s a gray material in Pen 1.*  
*A It’s water.*  
*Q That’s water?*  
*A Yes.*  
*Q All right. Why is that water standing there and not in the central alley?*  
*A So there’s manure piled up right in front of that hole right next to the water because, if I didn’t have that manure there, that water that’s in that central alley backs up into Pen 1 because it all slopes to the north. So that’s a loader, so it would push up in there, so for cattle comfort, we’d block it.*  
*Q So you have to block the hole on the -- on the east side of Pen 1, which would normally be used to convey waste into the central manure alley, you have to --*  
*A Yes.*  
*Q -- you had to block it sometimes because there would be so much liquid waste built up in the central manure alley that it would backflow back into Pen 1?*  
*A Yes.” Tr. 1028:14-1029:14.*

This testimony, while viewing CX-28.1, that the central manure alley slopes to the north and that Pen 1 slopes to the central manure alley except when there is enough liquid manure in the central alley to backflow into Pen 1 does not contradict Josh’s testimony that manure remained in the central alley behind the 4 foot wall and did not run out of the north gate of Pen 1.

2. Mr. Draper’s testimony that CX-28.3 shows “Pen 1 to be saturated along its eastern wall.” Complainant’s Post-Hearing Brief, p. 12. This is to be expected given the slope of the slope of Pen 1 and Josh Brown’s testimony noted in the previous paragraph.

Also, note Mr. Draper’s testimony cited by Complainant:

*“Q Thank you. Just to clarify, you testified that you saw evidence of saturated ground within pen one. Can you describe more specifically where you see that?*  
*A It appears that the wall that is -- the blue structure to the bottom of that -- pen one is to the left. The blue structure on the bottom left I believe to be water.<sup>9</sup> Just north of that is much darker than the surrounding area. I believe that to be water or saturated ground.” Tr. 368:7-16.*

EPA’s question and Mr. Draper’s testimony that there is saturated ground, assuming ground refers to soil, in Pen 1 is not correct as Pen 1 is entirely concrete.

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<sup>8</sup> The reference to a pit in this question is likely an error in the transcript, or at the very least a misstatement, as the previous question pertained to the period of time before the manure pit had been constructed.

<sup>9</sup> Throughout the testimony of the witnesses about the blue structures in Pen 1, the term “water” appears in the transcript when it should be “waterer”, a structure that provides water to the cattle.

3. Tony Brown's testimony that they installed the manure pit after realizing how much runoff was generated by rainfall on the pens. Complainant's Post-Hearing Brief, p. 12. This statement mischaracterizes Tony Brown's testimony. His actual testimony was that once they realized how much water can fall on an area like that and the runoff that comes off the pens to the central manure alley resulted in sloppier manure to haul. Tony Brown Testimony, Tr. 805:24-806:2, referencing CX-12.6, p. 1, and Tr. 831:1-832:2. The pit was not built because they couldn't contain the manure in the central manure alley behind the 4 foot wall, it was built because of the difficulty in handling the sloppier manure and because of the frequency of hauling it.
4. CX-20.3. Dr. Wang's diagram showing flow from the central manure alley to Pen 1 and then out the north gate. However, compare this diagramed flow to Dallas Heikens' actual "ground points" set out in CX-55.3, p. 1. As discussed in the next paragraph, contrary to EPA's assertions in its Brief, there is an arrow at the north gate of Pen 1 pointing southeast verifying the testimony of Tony and Josh Brown that the concrete at the north gate and in the neck of Pen 1 slopes south away from the gate. Dr. Wang provided no testimony at trial to support how the arrows he placed on CX-20.3 showing the direction of flow from the central manure alley back to Pen 1 and then north out of Pen 1. These arrows are completely opposite of the flow arrows in Ms. Heikens' CX-55.3, p. 1 which are based on actual ground points.
5. CX-55.3. EPA argues that this exhibit prepared by Respondents' engineer, Dallas Heikens, shows "an arrow in Pen 1 pointing northeast . . . indicating that it slopes northeast, confirming that water flows as shown in CX-20.3". Complainant's Post-Hearing Brief, p. 12. EPA is correct that there is an arrow in Pen 1 of CX55.3, p. 1, pointing northeast. However, this arrow simply shows that the concrete in the main area of Pen 1 slopes towards the central manure alley. EPA fails to note that there is an arrow at the north gate of Pen 1 pointing southeast. This arrow shows that the concrete at the north gate and in the neck of Pen 1 slopes south away from the gate as testified to by Tony and Josh Brown.
6. EPA argues that Tony and Josh Brown's testimony that the concrete in the neck at the north gate slopes away from the gate to the south is undermined by "their later placement of an opening on the manure pit to capture that runoff." Complainant's Post-Hearing Brief, p. 12. However, see CX-1.5, p. 35,36. In these photos taken by inspector Trevor Urban during the initial inspection on June 17, 2014, Mr. Urban wrote the following descriptions:
  - a. CX-1.5, p. 35: "Photo of the main feed stock storage area located at the northwest end of the Riverview Cattle facility taken west of lot 1 facing northeast. The bunkers for commodities and ground hay are covered and process wastewater generated from the feed stock storage area will flow east into the manure pit."
  - b. CX-1.5, p. 36: "Photo of the main feed stock storage area located at the northwest end of the Riverview Cattle facility taken north of lot 1 facing southwest. Process

wastewater generated from the feed stock storage area will flow east into the manure pit shown at the top left of the photo.”

In these descriptions of his on-site photos Mr. Urban does not state or even mention any runoff from the north gate of Pen 1. Four and one-half years later at trial, Mr. Urban testified:

*“Q All right. Now, I am publishing CX-1.6 page 36. Can you describe for us what we are looking at here?”*

*A You are looking at the feedstock storage area where they had the corn bales located. And you're looking directly southeast. On the right you can see the cattle in lot one and on the left you can see an open manure pit and you can see an opening right in the middle where just a little bit up and to the left of the red arrow, the end of the red arrow, where process wastewater would flow east into that area.*

*Q All right. And based on your observations, if that pit wasn't there, where would this process wastewater flow?*

*A It would flow straight around lots five and six, into the swale where we were standing for Photo 27.*

*Q And where is that process wastewater in this area coming from?*

*A It's coming off of the feedstock storage area. They have a lot of concrete in their feedstock storage area, plus they have the hardpan you can see where the tractor is driven through where it's a little less hardpan. And then hardpan where they usually have their feedstock stored, but they fed that up, and when they bring in other bales they will utilize it accordingly.*

*Q Uh-huh. And then do we have any manure coming from lot one as well, coming out of lot one?*

*A I don't think you can see manure in this photo coming out of lot one unless you are looking at it right at the, just a little bit to the left and top of the red arrow point that's where it would come out and go into the open manure concrete pit.*

*Q Okay. And so if that concrete manure pit wasn't there, where would the manure that flows out of lot one go?*

*A It would flow down that alley where I said the, looked like the overflow was in Photo 25 and it would flow straight into the swale.” Tr. 110:2-11:17.*

Although he testified at trial that manure would come out of Pen 1 in addition to runoff from the feedstock storage area, he did not make any reference to manure runoff from Pen 1 in his inspection report. These photo descriptions and his trial testimony, when interpreted in conjunction with the Brown’s testimony, show the reason for the placement of the opening in the manure pit was to capture runoff from the feed stock storage area. In addition, although he was not testifying about the opening in the manure pit near the feed stock storage area, Tony Brown testified that after pouring a many concrete walls they realized that it is much easier to box out an opening that cut one in afterwards. Tr. 825:21-826:13. Along those same lines, he testified that he could have put a chain-link fence up instead of a concrete wall, but he liked the permanency of a concrete wall. Tr.844:11-21. It is reasonable to conclude that the opening in the manure pit wall near the north gate to Pen 1 was put there for various practical reasons due to the permanency of concrete, including ease of access to that side of the pit for manure agitation, etc. and runoff from the feed storage area. It is not reasonable to conclude that the opening was put there to capture runoff from Pen 1 when Pen 1 in the neck area

slopes away from the gate by 6 – 8 inches and the manure stayed there “until we loaded it out and mixed it up.” Josh Brown testimony, Tr. 1000: 2-7.

7. CX-52, p. 1 and p. 4. This is a report and a photo taken by Lois Benson during a surprise visit to the feed yard on April 20, 2017. Ms. Benson testified:

*Q And I believe you note there that the pit estimated or pit had estimated one foot or so of manure in it.*

*A Yes.*

*Q And liquid was pouring in from the open lot.*

*A Uh-huh. There should've been some pictures. I took some pictures. It says 1 of 8 there, so I think one of the photos showed it was really coming in. I don't know if you can --*

*Q All right. That's one of the photos. A It doesn't look like one.*

*Q Okay.*

*A There should be one where it was really running.*

*Q I think I've got the one you're talking about.*

*A Okay.*

*Q Is that it?*

*A Yes. It's really, really running. You can see how fast it was filling up the pit.*

*think one of the photos showed it was really coming in. I don't know if you can --*

*Q All right. That's one of the photos. A It doesn't look like one.*

*Q Okay.*

*A There should be one where it was really running.*

*Q I think I've got the one you're talking about.*

*A Okay.*

*Q Is that it?*

*A Yes. It's really, really running. You can see how fast it was filling up the pit.*

*Q And everything was okay when you were --*

*A Fine.” Tr. 1051:18-1052:13.*

The opening in the manure pit by the north gate is visible in this photo, but it does not show any runoff entering the pit from that opening like is shown entering from the open lot.

EPA also alleges that openings on northern wall of the northern manure alley would allow runoff to flow out of the manure alley. Complainant’s Post-Hearing Brief, p. 12. Tony Brown testified as follows regarding these openings, as shown in CX-28.4:

*Q Okay. And why was that hole there? A Well --*

*Q Or both holes?*

*A -- after you pour that many walls and kind of miss your spot that you need a hole for squeegeeing your pen and things like that and the only way to get a hole back in a wall after you pour it is to take the chainsaw with the carbide bit and saw through the wall, which, for simple terms, isn't a whole lot of fun. It's a lot of work. It's hard on equipment. So the more walls we poured, the more concrete we poured, we started to -- there's a way to box out, you might call it, within your two concrete forms, depending on how wide your forms are, you can take a two by six or a two by 12 and you could make a box in there so your concrete doesn't get in that area. So you can kind of plan for where your point needs to be that you need to squeegee through. And the point was, in boxing those out you might call it, is for when the pit was going to be installed so we could flow to the pit.*

*Q At the time this photo was taken, of course, the pit's not there.*

*A Right.*

*Q And was any liquid manure stored at all in this northern manure alley?*

*A Not liquid. We would store solid manure there from either going up and over the wall. And you can kind of see that on the northern wall of Pen 6 right there. When you come up to a wall with a loader and scrape, some goes over the wall. Nobody can be perfect. It just happens. So we put that there so we could scrape and clean that up, either put it in the central manure alley or you can haul it out from that point.*

*Q And are you -- so you would come off of Pen -- or in Pen 6, is that the one I'm pointing to?*

*A Yep. Because a lot of times, like in this picture here, it's a good example because the sloppier manure is in the central manure alley, and when you go in to scrape your solids, you can't just put it up and over the wall like you would on a normal day, so you would need to put it in that northern manure alley or further to the south in the central manure alley to keep the solids from the liquids so you can mix them as they go into the spreader instead of just putting it over the wall and having them all together." Tr. 825:18-827:14. (emphasis added)*

*"Q I think there was quite a bit of testimony then about what these dark areas are here on the north side of the north wall or what I think you've called the exterior wall of the manure alley. Do you know what those are?*

*A By looking at it, I mean, I could guess, but I don't know exactly what it is." Tr.828:11-17. (emphasis added)*

Josh Brown testified:

*"Q Okay. You've heard the testimony about -- I'm pointing to it. It's 28 -- CX-28.4, on the north side of that north wall, right?*

*A Yes.*

*Q Okay. Are there holes in that -- well, excuse me. At this time, were there holes in that wall?*

*A Yes.*

*Q Okay. Go ahead, I'm sorry. Were you going to say something?*

*A Yeah, just guessing, but, you know, when you're scrapping manure, the top of Pen 6's wall has manure on top of it.*

*Q I'm pointing to some areas there, is it -- A Where it's brown, yeah.*

*Q Okay.*

*A And the top of that other wall is clean.*

*Q And what does that tell us, Josh?*

*A Just that there's been no manure over the top of that wall is what I was thinking.*

*Q And would it -- how did the manure get on the top of the wall at Pen 6?*

*A From scraping up with the bucket and lifting it up over the wall." Tr. 1001:6-1002:4.*

*"Q And there might be some on top of the wall then?*

*A Yes.*

*Q Okay. And you don't see that on this wall on the north side of the pen?*

*A No." Tr. 1003: 15-20*

From this testimony it is reasonable to conclude that because only solid manure was stored in the northern manure alley, no manure left the alley through the openings in the northern wall. In addition, any solid manure stored there was stored next to the southern wall of the alley as it was lifted over the wall from Pen 6. As Tony Brown stated, he did not know what the dark areas were in CX-28.4 at the base of the north wall of the northern manure alley. Just as he did not know what the black dots were in that photo. Tr. 828:25-829:5.

Based on this testimony of the Browns, it is not reasonable for EPA to conclude that the dark areas on the north side of the northern wall of the northern manure alley in CX-28.4 are

manure. While there are dark areas in CX-28.4 that are manure, there are many other dark areas that cannot be identified as manure. For example, the dark areas at the base of the corn stalk round bales stored on the eastern feed alley. It takes other collaborating testimony, of which there is none for the areas on the north side of the north wall of the manure alley, to conclude that a dark area is manure.

EPA alleges that the turnaround area just north of the eastern feed alley, tire tracks smearing water out into that areas as seen in CX-12.13, CX-28.3, and CX-28.5, and runoff from the feed alley are evidence of uncontrolled process wastewater that would flow to the swale. Complainant's Post-Hearing Brief, p. 13. However, there is no manure or cattle are in the eastern feed alley, and the feed truck does not drive in manure. Tony Brown testified:

*Q And you've now testified about how you feed them, and at the time, before you had the pit, did you drive through that to feed?*

*A The slop? No.*

*Q Tell us how you fed on a day like that.*

*A If there was slop up there, it's because it had rained, we scraped, and now that manure's waiting to be hauled out with the solid manure on the south. So, on a day like that, what you do is you would either back down -- you'd drive in if you're feeding Pen 1 and then back out, it's only 150 feet. And if you're feeding Pen 2, you would drive in and then back out, so you don't drive through that. And there's two reasons for that: one, the tractor that's used on that feed wagon, it was used for multiple other things, baling, raking hay, I mean, lots of things, so you don't drive the payloader that we feed with or the tractor that we feed with through manure and then unhook it and go take it to the field. I mean, some people would do that. I know guys that would do that, but I don't. I'm kind of a freak about clean windows and things like that. So that's not something that we would do. And there's enough room if you need to, you know, 3 and 4, to feed them. You can drive down, you can turn around down there and come back. So, if you wanted to, you could drive through that, but you'd make a mess. So that's why, you know, clean payloader, dirty payloader. **The payloader that scrapes the manure obviously drives through that, but our feed wagon doesn't.***

*Q Okay. Let's put up CX-28.4.*

*A Just to stop you there, Eldon, as long as that's up there, if we were driving through that on a daily basis with the tractor and feed wagon, if we wanted to be sloppy like that, it would show. The concrete would also -- we would be tracking out of that, so you can see tracks on that. If you wanted to drive through it every day and track up the concrete and get all that manure up in other areas, you could do that, but that aerial photo would show that." Tr. 815:6-816:20. (emphasis added)*

In its Post-Hearing Brief, at footnote 35 on p. 23, EPA disputes Tony Brown's testimony that it was their normal practice to not drive the feed wagon or truck through the central manure alley where manure was stored. EPA fails to recognize that the tracks they see in CX-12.6 are not necessarily the feed wagon tracks but could be the payloader tracks, that there are no tracks in the manure itself, and that the exhibits referenced are aerial photos all taken on the same day, April 17, 2011. Tony Brown's testimony emphasizes that if it was a daily practice it would show in other areas in the aerial photo.

EPA also alleges that runoff from the feed alley flowed directly to the east to the swale through openings in the eastern wall. Complainant's Post-Hearing Brief, p. 13. As Josh Brown



testified, this was done to drain surface water to keep water in a low spot in the feed alley from backing up into the feed. Josh Brown Testimony, Tr. 1007: 6-15. By doing this, the Browns were keeping surface water from the feed which would have created more of a problem than keeping the surface water from the feed.

Because no manure is present in the eastern feed alley, either stored or from the tires of the feed wagon or truck, any process wastewater in that area would be negligible at best and any discharge to a water of the U.S. that might occur would be de minimis under *Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737, 749 (9<sup>th</sup> Cir. 2018).

In conclusion, when all of this evidence is considered, it is reasonable to conclude that before the manure pit was constructed any manure and process wastewater from the central manure alley and Pen 1 stayed in the central manure alley, Pen 1, and the northern manure alley, and did not flow out the northern gate and pollutants were not otherwise discharged to a water of the U.S. . Thus, when all of the evidence is considered on these issues alleged by EPA, EPA has failed its burden of proving that Riverview Cattle discharged to water of the U.S. before the manure pit was constructed.

III. RIVERVIEW CATTLE DID NOT DISCHARGE TO A WATER OF U.S. AFTER CONSTRUCTION OF THE MANURE PIT AND BEFORE THE JUNE 17, 2014 INSPECTION.

Taking all of the evidence that Riverview Cattle did not discharge to a water of the U.S. before the manure pit was constructed, and then add to that all of the testimony that no one observed or was aware of the manure pit overflowing except on June 17, 2014, it is clear EPA has failed to prove Riverview Cattle discharged to the East Fork of the Des Moines River after the manure pit was constructed. Tony Brown Testimony, Tr.840:16-25; Josh Brown Testimony, Tr. 998:1-3; Steve Madden Testimony, Tr.718:5-8. As Tony Brown testified and as discussed in more detail in this Brief, the opening in the southeast wall of the manure pit was not put there to allow for overflow as occurred on June 17, 2014, it was put there to allow surface runoff from the surrounding concrete to enter the pit. Tr. 844:22-846:24. Finally, as Lois Benson testified, Tony Brown declined to get an NPDES permit because he never wanted to discharge and never planned to discharge. Tr. 1043:8-1044:6.

IV. ANY DISCHARGE TO A WATER OF THE U.S. FROM RIVERVIEW CATTLE ON JUNE 17, 2014, OR AT ANY OTHER TIME ALLEGED BY EPA, WAS 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 Post-Hearing Brief EPA repeatedly cites to this proposition, e.g., "[e]ven a small amount of water containing pollutants from Respondent's facility, or a discharge later in time, is the discharge of a pollutant, which is

defined to include *any* addition of *any* pollutant.” Complainant’s Post-Hearing Brief, p. 40 (emphasis in original).

Riverview Cattle firmly believes as presented at hearing and in this Brief that EPA has failed to prove *any* addition of *any* pollutant from the feed yard to the East Fork of the Des Moines River. That said, for EPA to argue that pollutants from tracks from feed wagons squarely fits within the scope of a de minimis standard articulated in a 2018 federal appeals court decision. See *Hawai’i Wildlife Fund v. County of Maui*, 886 F.3d 737, 749 (9<sup>th</sup> Cir. 2018), The Court ruled: “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). In a footnote, the Court noted: “[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.”

Although 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*, the United States Court of Appeals, Sixth Circuit, addressed the issue in a different context in *Kentucky Waterways All. v. Johnson*, 540 F.3d 466, 483 (6<sup>th</sup> Cir. 2008). In this case, organizations brought action alleging that the EPA acted arbitrarily and capriciously when it approved Kentucky's water quality antidegradation rules established pursuant to the Federal Water Pollution Control Act. The case turned on whether the five exemptions as a whole, led to significant, or de minimis degradation of Kentucky’s waterways. The court stated:

“Unless a statute or regulation employs “extraordinarily rigid” language, courts recognize an administrative law principle that allows agencies to create unwritten exceptions to a statute or rule for “de minimis” matters. *Greenbaum v. EPA*, 370 F.3d 527, 534 (6<sup>th</sup> Cir.2004); see also *Ober v. Whitman*, 243 F.3d 1190, 1193–95 (9<sup>th</sup> Cir.2001) (finding that the EPA may “exempt de minimis sources of [a pollutant] from [Clean Air Act] pollution controls”). Under this principle, it is “permissible as an exercise of agency power, inherent in most statutory schemes, to overlook circumstances that in context may fairly be considered de minimis.” *Ala. Power Co. v. Costle*, 636 F.2d 323, 360 (D.C.Cir.1979).” *Kentucky Waterways All. v. Johnson*, 540 F.3d 466, 491 (6<sup>th</sup> Cir. 2008).

The facts of this case, such as alleged discharge from feed truck and wagon tire tracks, present the perfect opportunity for the talk of determining that the connection between a point source, the Riverview Cattle feed yard, and a navigable water, the East Fork of the Des Moines River, is too tenuous to support liability under the Clean Water Act.

#### V. EPA’S PROPOSED PENALTY IS UNWARRANTED.

EPA’s proposed penalty of \$96,000 is unwarranted based on the evidence and testimony in this case because EPA has failed to prove a violation of the Clean Water Act. If the Court finds a violation has occurred, that amount of penalty is excessive and only a minimal amount is justified

due to Respondent's history of no previous violations and Respondent's good faith actions as evidenced at the hearing. Ms. Lois Benson of the Iowa DNR voluntarily testified twice in this case and her testimony clearly shows the concern Iowa DNR has regarding the EPA's actions in this case and that she believes Riverview Cattle makes every effort to meet and exceed the requirements of the Clean Water Act, and any additional Iowa law applicable to the operation. Tony Brown perhaps said it best at the conclusion of his testimony:

*"THE WITNESS: Your Honor, if -- maybe this is out of text or out of play, but can I have two minutes to say something without a question?"*

*JUDGE COUGHLIN: Yes. Sure. Of course.*

*THE WITNESS: And Eldon might hit me later for saying this, but I only have one time to stand up here and talk to Your Honor and you guys from EPA and I just want everybody to hear one thing, is that me as a farmer, a feedlot operator, a young person, I enjoy just as much as everybody else to spend time within our waters, within our environment and things like that.*

*It's never been my intention to wake up in the morning and harm our environment with chemicals, fertilizer, animal feeding operations or anything like that. Like I said prior to this, I've learned a lot through this last four years with the inspections, with talking to Jerry and Dallas and Lois and other people from the industry on waters and things like that. And I don't mean this to be critical or to be pointed at anybody, but if you come out to our farm and you tell me I'm doing something wrong, I'm going to fix it.*

*And I just feel that all the time -- EPA has put so much time and so much effort and I respect you guys. I respect the DNR, I respect the EPA. Everything that you guys have put in front of us, I've learned a lot from and I thank you for that. In saying that, I think if we were to divide all the time we've spent on this to educate 10 farms instead of one farm, it might be money and time well spent. I know, Brit, you're an attorney, we're always going to need EPA attorneys because there's a lot of stuff going on in the environment.*

*But, I mean, I try to do a good job. These pictures from 2014 don't reflect a good job. I'm embarrassed by looking at those. They're disturbing to look at, but it was a bad day, there were disaster areas declared. Not that any of that's an excuse for how any of that looked that day, but there was only so much rain we could hold. Knowing now, yeah, a phone call to Dallas, making that pit bigger, whether the banker will let me make it bigger, I don't know, but I didn't ask. So I guess I'll shut up and I'll let you guys get on with stuff. I appreciate your time, Your Honor. I appreciate you guys with EPA and what you guys have done, but I just needed five minutes to get that off my chest." Tr. 979:9-981:6*

EPA seems to allege in footnote 50 on p. 51 of its Post-Hearing Brief that Respondents should have volunteered more information to EPA during the June 17, 2014 inspection, or at the very least interpreted questions from EPA more broadly. That is a curious accusation given the testimony by Mr. Seth Draper that Tony Brown volunteered an admission that he discharged to the East Fork of the Des Moines River during their conversation on April 20, 2018 and Tony Brown's testimony denying any such admission. Further, Riverview Cattle can make the case that they were prejudiced by EPA's relaxed demeanor during the June 17, 2014 inspection. Tony Brown testified:

*"Q Okay. Mr. Brown, if -- I'll put it this way. If you knew then what you know now regarding the June 17, 2014 inspection, what would you do differently?"*

*A As far as, like, everything or, I mean, what --*

*Q I'm talking about the June 17, 2014, inspection. I believe you've testified it was very conversational, I believe --*

*A Yep.*

*Q -- and I want to make sure I don't misquote your testimony, but that there was no indication there was a violation. Is that your testimony?"*

*A During the inspection, yes.*

*Q And, obviously, we're here today and have been in the trial. If you knew then what you know now, what would you do differently?*

*A We would have -- one, I would have asked more questions. We would have spent more time on certain areas around the farm. Definitely would have just slowed down and just -- if I knew I had a penalty coming to this extent, we would have taken a few different steps.*

*Q Would you have taken your own photos?*

*A Yeah.*

*MR. BIERI: Object to the form. This is leading, but --*

*JUDGE COUGHLIN: Sustained. You could rephrase.*

*MR. McAFEE: Sure.*

*BY MR. McAFEE:*

*Q Would you have done anything differently regarding your activities during the inspection?*

*A Yes.*

*Q What would --*

*A I would have taken my own photos. We probably would have taken our own samples, probably would have recorded the inspection. I would have had more people there to have eyes on it. I mean, I would have liked to have had our DNR officer there. I would have liked to have -- I mean, I can go into extent what I would have done differently, but I don't think anybody wants to hear that. I just think summarizing, to have pictures, conversation, things that were said, not said type of deal. I personally think that all these EPA inspections need to be recorded for both parties." Tr.927:3-928:24 (emphasis added)*

EPA argues that Respondents have produced no evidence to suggest the proposed penalty is unjust. Complainant's Post-Hearing Brief, p. 53. Riverview Cattle believes that when all of the evidence produced in this case is properly evaluated, EPA is completely off-base in this statement.

## VI. 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 15th day of April, 2019.

BRICK GENTRY, P.C.



Eldon L. McAfee AT0004987

6701 Westown Parkway, Suite 100

West Des Moines, IA 50266

Telephone: (515) 271-5916

Facsimile: (515) 274-1488

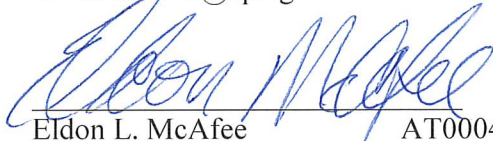
[eldon.mcafee@brickgentrylaw.com](mailto:eldon.mcafee@brickgentrylaw.com)

ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April, 2019, I filed via the OALJ E-filing system the original of this Respondents' Initial Post Hearing Brief to the EPA Headquarters Hearing Clerk, and sent by email Mr. Chris Muehlberger, counsel for Complainant.

Shane McCain  
Assistant Regional Counsel  
U.S. Environmental Protection Agency, Region 7  
11201 Renner Boulevard  
Lenexa, Kansas 66209  
(913) 551-7623  
mccoin.shane@epa.gov

  
Eldon L. McAfee AT0004987  
6701 Westown Parkway, Suite 100  
West Des Moines, IA 50266  
Telephone: (515) 271-5916  
Facsimile: (515) 274-1488  
[eldon.mcafee@brickgentrylaw.com](mailto:eldon.mcafee@brickgentrylaw.com)  
ATTORNEYS FOR RESPONDENTS

