

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7

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

Background

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

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

By the Presiding Officer's Order dated April 10, 2018, the hearing is now scheduled for June 18-22, 2018, and the date to supplement the prehearing exchanges without motion and permission of the Presiding Officer passed on April 19, 2018. On April 12th, 17th, 24th, 26th, and May 1st, counsel for Complainant and Respondents discussed the possible need to amend their respective prehearing exchanges before hearing, and because the hearing schedule would allow limited opportunity to amend without motion, each agreed not to oppose such motions by the other party, if such motions to supplement were filed with adequate time to respond before

hearing. The parties have further agreed to address the admissibility of any supplemental exhibits through discussions on stipulations, with the both parties reserving the right to contest the admissibility of exhibits by motion in limine, or at hearing.

Supplements to previous exhibits

Pursuant to 40 C.F.R. 22.19(f), supplements to prehearing exchanges may be made if a party determines that previously submitted information “is incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party pursuant to this section.” EPA is now requesting approval to supplement previously submitted exhibits to either make the exhibits more complete and informative (CX 20.2.1 to CX 20.2.9 - Data Addendums to Expert Report; CX 45.1 to 45.3 - References), or to meet the exhibit labeling requirements of the November 14, 2017 Prehearing Order (resubmitted statements; CX 46 - S. Draper; CX 47 Statement of T. Urban; CX 48 – Statement of R. Roberts).

New Information obtained from April 25, 2018 visit to IDNR offices or Respondents’ facility

On April 25, 2018, representatives of EPA visited the Iowa Department of Natural Resources (IDNR) office in Spencer, Iowa, and interviewed Lois Benson, inspector for IDNR, and were allowed to review the IDNR files for the Riverview facility. Complete copies of materials requested from IDNR following the April 25, 2018 visit were not emailed to EPA until on April 27 and May 1, 2018, and are now submitted as CX 49 to 52 (CX 49 - Logbook of Lois Benson; CX 50 - IDNR facility database, and CX 51, 52 – Documentation and photos of 2016 and 2017 IDNR Site visits (Note, the material set forth in CX 50.1 was received by EPA by email in April 2017).

Also on April 25, 2018, Ms. Benson, Seth Draper and Dr. Steven Wang visited the

Respondents' Riverview Cattle facility. Pictures taken by Seth Draper during the site visit to the facility documenting the flood stage of the East Fork of the Des Moines River are now submitted as CX 53.

Motion

Complainant moves to supplement its prior prehearing exchanges. Evidence of bad faith, delay tactics, or undue prejudice may warrant the denial of a supplement to a prehearing exchange (See, *In the Matter of: New York State Department of Transportation, Docket No. CWA-02-2016-3403*, 02/16/2018 Order on Motion to Supplement, pg. 2). A discussion of each submitted exhibit follows, with an explanation of why Complainant respectfully believes these disqualifying factors are not present, and accordingly, Complainant requests that the offered exhibits be allowed by the Presiding Officer.

Justification

CX 20.2 - Data Addendums to Expert Report (CX 20). The submitted addendums to CX 20 (CX 20.2.1 to CX 20.2.9) provide Complainant's underlying supporting information for EPA's modelling effort at the Riverview facility, including a detailed explanation of the model's inputs and assumptions for various parts of the facility, as previously described and summarized in the Expert Report of Dr. Steven Wang (CX 20). The planned submittal of this data addendum was discussed with counsel for Respondents on April 12th and 17th (before the 60- day deadline for supplement without motion), but was not submitted until after the April 25th site visit, based on the parties' agreement not to oppose motions to supplement, and to allow Dr. Wang to visit the site before submitting the Data Addendums.

During the April 25, 2018 visit to the Respondents' facility, Dr. Wang was able to visually observe facility conditions and to verify the assumptions used in his modeling of discharges from Respondents' facility. Specifically, based on the April 25th site visit, Dr. Wang was able to conclude it was not necessary to update or amend the findings in his original Expert Report (CX 20). Because the Data Addendum do not present any different findings than those set forth in the previously submitted Expert Report (CX 20), Respondents have already had notice of the findings of Addendum, and the Addendum should be without prejudice to Respondents. Moreover, the Data Addendum provide a basis for Respondents to evaluate the inputs, assumptions, and daily results previously provided in the Expert Report. Because these submittals have been discussed with counsel for Respondents who did not object, and is now submitted with adequate time for Respondents' evaluation before hearing, Complainant believes that the record shows "no bad faith, delay tactics, or undue prejudice" and requests that the exhibits be accepted.

CX 45.1 to 45.3 – References previously cited in CX 45, and that document the effect of "head pressure" that will cause discharge from submerged outlet pipes

These references were previously set forth in CX 45 and are intended to support to Complainant's assertion of the scientific principle that water will discharge from a submerged outlet if elevation of the inlet source is greater than the elevation of the outlet. Although not previously discussed with counsel for Respondents, these exhibits are within the parties' agreement not to contest motions to supplement, and Complainant believes there is no prejudice, nor bad faith, or delay tactics in providing the tribunal exhibits to support this scientific principle.

CX 46 – Statement of S. Draper; CX 47 Statement of T. Urban; CX 48 – Statement of R. Roberts:

These three exhibits were previously submitted as attachments to Complainant’s Motion for Partial Accelerated Decision, or Complainant’s Rebuttal to Respondents’ opposition to that Motion. Complainant now seeks to properly designate these statements as exhibits with no change other than being properly labeled for the scheduled hearing. The submittal of these relabeled statements has been discussed with counsel for Respondents, who did not object. Because these submittals have been previously provided to the court, have been specifically discussed with counsel for Respondents, who did not object, and are now timely submitted to allow response before hearing, Complainant believes that the record shows “no bad faith, delay tactics, or undue prejudice,” and requests that the exhibits be accepted.

CX 49 - Logbook of Lois Benson; CX 50 - IDNR facility database printouts, and CX 51 and 52 – Documentation and Photos of 2016 and 2017 IDNR Site visits:

These exhibits (CX 49-52) were obtained by EPA either during the April 25, 2018 visit to the IDNR office in Spencer Iowa, or emailed to EPA by IDNR after that visit (April 27th and May 1st). These four exhibits are being promptly provided to this tribunal and the Respondents. Moreover, Ms. Benson is listed as a witness by the Respondents, these documents were available upon request from IDNR, document the past interactions between IDNR and the Respondents’ facility, and Respondents’ changes to the facility since EPA’s 2014 inspection. Accordingly, Complainant believes that the record shows “no bad faith, delay tactics, or undue prejudice” to Respondents and requests that the exhibits be accepted as supplements to EPA’s prehearing exchanges.

CX 53 – Photos taken by Seth Draper during April 25th 2018 Site visit:

At the time of EPA's April 25, 2018 site visit, the East Fork of the Des Moines had flooded and was over its banks. Mr. Draper took photographs of the level of the river both from the southern access road (Bacon Maker), and from a bridge at 200th Street. These photos are relevant because the Respondents have raised the impact of the river stage on discharges an issue and the photographs provide a reference to establish the water level of the river during both EPA's 2014 and 2016 inspections. Although not previously discussed with counsel for Respondents, these exhibits are within the parties' agreement not to contest motions to supplement, and Complainant believes there is no prejudice to Respondents, nor bad faith, or delay tactics in providing the tribunal a means of determining the river's appearance at flood stage.

Conclusion

For the reasons stated above, Complainant requests that the Presiding Officer grant its motion to supplement its prehearing exchanges with the additional exhibits described above, and listed hereafter, in order to provide more complete information on positions previously asserted in the earlier filed prehearing exchanges and/or to allow consideration of relevant evidence newly obtained by EPA. Because this motion is made well in advance of the scheduled commencement of the hearing on June 18, 2018, and because Respondents do not object to this motion and therefore would not be prejudiced by its granting, it is requested that this tribunal grant Complainant's motion and accept the offered submissions.

Requested Additional Exhibits:

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

CX 20.2 - Data Addendum to Expert Report (CX 20)

CX 20.2.1 – CN Model, Equations and input descriptions.

CX 20.2.2 - Soil type maps and descriptions

CX 20.2.3 – LiDAR image of area draining into swale

CX 20.2.4 - Storage Capacity for Manure Pit

CX 20.2.5 - Daily Rainfall data utilized in modeling, NCDC Site: SWEA City (See also CX 15, 31).

CX 20.2.6 - Modeling Results for runoff into manure pit

CX 20.2.7 - Evaporation for Open Manure Pit and Swale

CX 20.2.8 – Daily discharge calculations based on Swale Capacity @ 369,048 gallons (Scenario 1 - Road Grade).

CX 20.2.9 – Daily discharge calculations based on Swale Capacity @ 165,636 gallons (Scenario 2 – Field Conditions).

CX 45.1 - Iowa Storm Water Management Manual, Chapter 14- Section 1 General Information for Design of Culverts

CX 45.2 - Iowa Stormwater Management Manual, Chapter 2 – Detention Basin Outlet structures (Section 2C-12)

CX 45.3 - Watershed Engineering – Culverts and Pipe Spillways (Biological and Environmental Engineering, Cornell University)

CX 46 – Statement of S. Draper

CX 47 - Statement of T. Urban

CX 48 – Statement of R. Roberts

CX 49 - Logbook of Lois Benson

CX 50 - IDNR facility database printouts

CX 51 – IDNR database notes and photographs of September 2016 IDNR Site visit

CX 52 – IDNR database notes and photographs of April 2017 IDNR Site visit

CX 53 - EPA April 25, 2018 photos of East Fork of Des Moines River.

RESPECTFULLY SUBMITTED this 2nd day of May, 2018.

/s/

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

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of May, 2018, I filed via the E-filing system the original of this Motion to Supplement to Prehearing Exchanges to the Office of Administrative Law Judges Hearing Clerk, and sent by email to Mr. Eldon McAfee, Esq, counsel for Respondents.

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

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

/s/

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