

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII

901 North 5th Street

KANSAS CITY, KANSAS 66101

07 OCT -4 AM 10:43

ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

)
IN THE MATTER OF:)

ALAN ZELLMER)
d/b/a A TO Z FEEDERS)

CASS COUNTY, IOWA)

Respondent)

) Docket No. CWA-07-2007-0076

) RESPONSE TO MOTION TO DISMISS
)
)
)
)

EPA'S RESPONSE TO RESPONDENT'S MOTION FOR DISMISSAL

The United States Environmental Protection Agency ("EPA") filed an Administrative Complaint and Opportunity to Request a Hearing ("Complaint") against Alan Zellmer, doing business as A to Z Feeders ("Respondent") on August 14, 2007. In paragraph 1 of Defenses to Proposed Civil Penalty in Respondent's Answer and Request for Hearing, received September 20, 2007, Respondent makes a statement that could be construed as a motion for this Court to dismiss the Complaint. Pursuant to 40 C.F.R. § 22.16(b), EPA hereby files its Response. For the reasons stated below, EPA respectfully requests denial of Respondent's motion.

The Respondent's Motion to Dismiss should be denied because (1) it does not meet the requirements for a motion under the Consolidated Rules; and (2) the Complaint establishes a prima facie case against the Respondent.

Pursuant to 40 C.F.R. § 22.16(a) Motions, “[a]ll motions, except those made orally on the record during a hearing, shall: (1) Be in writing; (2) State the grounds therefore, with particularity; (3) Set forth the relief sought; and (4) Be accompanied by any affidavit, certificate, other evidence or legal memorandum relied upon.” Respondent failed to include in its Answer affidavits, certificates, other evidence or legal memorandum which it relied upon to establish that Respondent was not subject to statutory and regulatory requirements. Therefore, Respondent’s motion should be dismissed because it does not meet the requirements of 40 C.F.R. § 22.16(a).

In addition, 40 C.F.R. § 22.20(a) provides that “the Presiding Officer, upon motion of the respondent, may at any time dismiss the action. . . on the basis of failure to establish a prima facie case or other grounds which show no right to relief upon the part of the complainant.” According to In re: Commercial Cartage Company, Inc., CAA Appeal No. 93-2, at 7 (EAB, Feb. 22, 1994), “In determining whether dismissal is warranted, all factual allegations in the complaint should be presumed true, and all reasonable inferences therefrom should be made in favor of the complainant.”

At no time pertinent to the Complaint did the facility have adequate storm-water runoff controls to prevent the discharge of feedlot pollutants to waters of the United States. The 25-year/24-hour storm exemption referenced in Respondent’s answer is inapplicable. The absence of storm-water retention structures, EPA inspector observations of erosional features, precipitation data, and Iowa Department of Natural Resource inspector observations of pollutant discharges in conjunction with stormwater runoff modeling demonstrate that Respondent’s facility discharged pollutants to waters of the United States as a result of precipitation events that

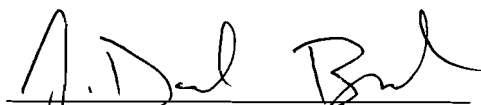
were a mere fraction of the 25-year/24-hour threshold. Respondent's assertion that its facility was in compliance with EPA regulations because the facility was not required to have a National Pollutant Discharge Elimination System permit until July 31, 2007, is not supported by the facts. EPA's Complaint sets forth the factual allegations that establish a prima facie case against Respondent.

In summary, Respondent's Answer is not accompanied by any affidavit, certificate, other evidence or legal memorandum relied upon to establish that the Respondent was not subject to the statutory and regulatory requirements. Furthermore, the Answer does not provide sufficient justification to overcome the presumption that all of Complainant's allegations are true as required by the decision in Commercial Cartage. EPA has satisfied its burden of establishing a prima facie case in the Complaint.

Based on the foregoing, EPA respectfully requests that Respondent's Motion to Dismiss the EPA's Complaint be DENIED.

Respectfully Submitted,

U.S. ENVIRONMENTAL PROTECTION AGENCY



J. Daniel Breedlove
Assistant Regional Counsel
U.S. Environmental Protection Agency
901 North 5th Street
Kansas City, Kansas 66101
(913) 551-7172