

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 7  
901 NORTH FIFTH STREET  
KANSAS CITY, KANSAS 66101

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	Docket No. CWA-07-2007-0076
ALAN ZELLMER	)	
	)	
d/b/a A TO Z FEEDERS	)	
	)	COMPLAINT, NOTICE OF
CASS COUNTY, IOWA	)	PROPOSED PENALTY AND
	)	NOTICE OF OPPORTUNITY
	)	FOR HEARING
	)	
Respondent,	)	
	)	
Proceedings under Section 309(g) of the	)	
Clean Water Act, 33 U.S.C. § 1319(g)	)	
_____	)	

**COMPLAINT**

**Jurisdiction**

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g), and in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22.

2. This Complaint serves as notice that the United States Environmental Protection Agency ("EPA") has reason to believe that Respondent has violated Sections 301, 308, and 402 of the CWA, 33 U.S.C. §§ 1311, 1318 and 1342, and regulations promulgated thereunder.

### **Parties**

3. The authority to take action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), is vested in the Administrator of EPA. The Administrator has delegated this authority to the Regional Administrator, EPA Region 7, who in turn has delegated it to the Director of the Water, Wetlands and Pesticides Division of EPA Region 7 (“Complainant”).

4. Respondent is Alan Zellmer d/b/a A to Z Feeders, an individual authorized to conduct business in the state of Iowa.

### **Statutory and Regulatory Framework**

5. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, *inter alia*, Section 402 of the CWA, 33 U.S.C. § 1342. Section 402 of the CWA, 33 U.S.C. § 1342, provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to that Section.

6. The CWA prohibits the discharge of “pollutants” from a “point source” into a “navigable water” of the United States, as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362. Section 502 of the CWA states that “navigable waters” means the waters of the United States.

7. “Pollutant” is defined by Section 502(6) of the CWA, 33 U.S.C. § 1362 to include, *inter alia*, biological materials and agricultural waste discharged to water.

8. “Point source” is defined by Section 502(14) of the CWA, 33 U.S.C. § 1362 to include “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation . . . from which pollutants are or may be discharged.”

9. Section 308(a) of the CWA, 33 U.S.C. § 1318(a), states in pertinent part that “whenever required to carry out the objective of this chapter, including but not limited to (1) developing or assisting in the development of any...limitation, prohibition, or standard of performance under this chapter; (2) determining whether any person is in violation of any such...limitation, prohibition, or...standard of performance; (3) any requirement established under this section; or (4) carrying out sections 305, 311, 402, 404 (relating to state permit program), 405, 504 of the [CWA] –

(A) the Administrator shall require the owner or operator of any point source to (i) establish and maintain records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods...(iv) sample such effluents...;

and (v) provide such other information as he may reasonable be required...”

10. To implement Sections 301, 308 and 402 of the CWA, 33 U.S.C. §§ 1311, 1318 and 1342, the EPA promulgated regulations codified at 40 C.F.R. § 122. Under 40 C.F.R. § 122.1, a NPDES permit is required for any point source that discharges or proposes to discharge into waters of the United States.

11. The EPA’s specific regulation of CAFOs began March 18, 1976, when the EPA promulgated regulations requiring, *inter alia*, all AFOs to apply for an NPDES permit if they confined grater than 1,000 cattle and discharged to waters of the United States as a result of precipitation events with less than a 25-year/24 hour frequency/intensity. 41 Fed. Reg. 11458 (1976). The 1976 regulations were in effect until the current CAFO regulations became effective on April 14, 2003. The 2003 CAFO regulations, *inter alia*, retained the definition of an AFO in the 1976 regulations and eliminated the 25-year/24-hour frequency/intensity discharge exemption to the permitting requirement. *See*, 68 Fed. Reg. 7176 (2003).

12. “Animal feeding operation” or “AFO” is defined by 40 C.F.R. § 122.23(b)(1) as a lot or facility where animals have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any twelve-month period, and where crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

13. “Concentrated animal feeding operation” or “CAFO” is defined by 40 C.F.R. § 122.23(b)(2) as an animal feeding operation that is defined as a Large CAFO in accordance with 40 C.F.R. § 122.23(b)(4).

14. “Large CAFO” is defined according to 40 C.F.R. § 122.23(b)(4)(iii) as an animal feeding operation that stables or confines more than “1,000 cattle other than mature dairy cows or veal calves.”

15. “Waters of the United States” are defined in 40 C.F.R. § 122.2 to include intrastate rivers and streams, and tributaries thereto.

16. The Iowa Department of Natural Resources (“IDNR”) is the agency within the state of Iowa with the delegated authority to administer the federal NPDES Program. The EPA maintains concurrent enforcement authority with delegated state NPDES programs for violations of the CWA.

### **Factual Background**

17. Respondent is a “person” as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

18. Since approximately 1990 and at all times relevant to this Complaint, Respondent was the owner and/or operator of an animal feeding operation ("Facility") that is located in Section 9 of Township 76 North, Range 37 West, in Cass County, Iowa.

19. At all times relevant to this Complaint, the Facility confined and fed or maintained cattle for a total of 45 days or more in any twelve-month period.

20. Neither crops, vegetation, forage growth, nor post harvest residues were sustained over any portion of the Facility's feeding areas at any time relevant to this Complaint.

21. At all times relevant to this Complaint, the Facility was an AFO as defined by 40 C.F.R. § 122.23(b)(1), and as that phrase is used in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

22. Inspectors from EPA inspected the Facility on or about April 19, 2006.

23. At the time of the April 19, 2006, inspection, the Facility confined approximately 1,500 head of cattle. The number of cattle confined and fed at the Facility was greater than 1,000, therefore the Facility is a Large CAFO as that term is defined in 40 C.F.R. § 122.23(b)(4).

24. At all times relevant to this Complaint, Respondent confined greater than 1,000 head of cattle and therefore the Facility was a Large CAFO at all times relevant to this Complaint.

25. Respondent applied for an NPDES permit on or about February 23, 2006, and received an NPDES permit on January 23, 2007. Prior to February 23, 2006, Respondent had neither applied for nor received an NPDES permit for the Facility.

26. Runoff from a majority of Respondent's feeding areas flows south approximately 1,700 feet through a defined drainage path through a crop field and then discharges into an unnamed tributary of Indian Creek. The runoff then flows approximately 1 mile to the point where it discharges into Indian Creek, a perennial stream

27. Indian Creek is a water of the United States, as defined by 40 C.F.R. Part 122.2

28. The Facility did not have adequate livestock waste control facilities to prevent the discharge of animal waste to Indian Creek. Discharges of feedlot runoff from the Facility contain ammonia, fecal coliform and other pollutants typically associated with feedlots.

29. Since Respondent began operations in approximately 1990 and until at least April 19, 2006, the Facility did not have adequate livestock waste control facilities to prevent the discharge of animal waste to Indian Creek.

30. Based on the size of the Facility, the distance from the Facility to Indian Creek, and the slope and condition of the land across that distance, the Facility discharged wastewater containing pollutants into Indian Creek as a result of significant precipitation events since Respondent began operations in approximately 1990 until at least April 19, 2006.

### **Findings of Violation**

#### **Count I**

##### **Unpermitted Discharge of Pollutants to Waters of the United States**

31. The facts stated in paragraphs 17 through 30 above are herein incorporated.

32. Based on the size of the Facility, the lack of adequate runoff control structures, the distance from the Facility to Indian Creek, and the slope and condition of the land across that distance, the Facility discharged wastewater containing pollutants into Indian Creek as a result of significant precipitation events since Respondent began operations around 1990. Precipitation records demonstrate that there have been a minimum of 7 precipitation events within the last 5 years that have resulted in the discharge of pollutants from the Facility to Indian Creek. None of these precipitation events qualified as 25-year/24-hour storms and many resulted in multi-day discharges.

33. The flow of wastewater from Respondent's Facility to Indian Creek constituted unauthorized discharges of pollutants from a point source to waters of the United States. The discharges are violations of Sections 301 and 402 of the Clean Water Act, 33 U.S.C. §§ 1311 and 1342, and implementing regulations.

#### **Count 2**

##### **Failure to Apply for a NPDES Permit**

34. The facts stated in paragraphs 17 through 30 above are herein incorporated.

35. Based on the size of the Facility, the lack of adequate runoff control structures, the distance from the Facility to Indian Creek, and the slope and condition of the land across that distance, the Facility discharged wastewater containing pollutants into Indian Creek as a result of significant precipitation events since Respondent began operations around 1990. Precipitation records demonstrate that there have been a minimum of 7 precipitation events that have resulted in the discharge of pollutants from the Facility to Indian Creek during the last 5 years. None of these precipitation events qualified as 25-year/24-hour storms and many resulted in multi-day discharges.

36. Large CAFOs that discharge have the duty to apply for a NPDES permit. 40 C.F.R. § 122.21 (a). Respondent's Facility discharged pollutants without a NPDES permit in violation of Sections 301 and 402 of the Clean Water Act, 33 U.S.C. §§ 1311 and 1342, and implementing regulations on or before August 23, 2002. Respondent had a duty to apply for a NPDES permit 180 days prior to discharging any pollutants to waters of the United States but did not apply for a permit until February 23, 2006.

37. Respondent's failure to apply for a permit is a daily violation of Section 301, 308, and/or 402 of the CWA, 33 U.S.C. §§ 1311, 1318, and/or 1342, and implementing regulations.

### **Relief**

38. Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), authorizes the administrative assessment of civil penalties in an amount not to exceed \$10,000 per day for each day during which the violation continues, up to a maximum total penalty of \$125,000. Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule of 2004, as mandated by the Debt Collection Improvement Act of 1996, and the EPA's implementing regulations at 40 C.F.R. Parts 19 and 27, civil administrative penalties of up to \$11,000 per day for each day during which a violation continues, up to a maximum of \$157,500, may be assessed for violations of CWA Sections 301 and 402, 33 U.S.C. §§ 1311 and 1342, that occur after March 15, 2004.

39. Based on the foregoing Finding of Violations, and pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), EPA, Region 7 hereby proposes to issue a Final Order Assessing an Administrative Penalty against the Respondent for the violations cited above, in the amount of up to \$11,000 per day for each day during which a violation occurred on or after January 31, 1997, up to a maximum of \$137,500, and \$11,000 per day for each day during which a violation occurred on or after March 16, 2004, up to a maximum of \$157,500.

40. The proposed penalty is based upon the facts stated in this Complaint, the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, ability to pay, any prior history of such violation, the degree of culpability, economic benefit or savings resulting from the violation, and such other matters as justice may require.

41. The penalty proposed in this Complaint is based upon the best information available to EPA at the time that the Complaint was issued. The penalty may be adjusted if the Respondent establishes bona fide issues of ability to pay, or other defenses relevant to the appropriate amount of the proposed penalty.

42. As required by Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4), prior to the assessment of a civil penalty, EPA will provide public notice of the proposed penalty, and reasonable opportunity for the public to comment on the matter, and present evidence in the event a hearing is held.

43. The EPA has notified the state of Iowa regarding this proposed action by mailing a copy of this document to the Iowa Department of Natural Resources.

**NOTICE OF OPPORTUNITY TO REQUEST A HEARING**

**Answer and Request for Hearing**

44. Respondent may request a hearing to contest any material fact contained in the Complaint above or to contest the appropriateness of the proposed penalty set forth therein. Such a hearing will be held and conducted in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22, a copy of which is enclosed herein.

45. To avoid being found in default, which constitutes an admission of all facts alleged in the Complaint and a waiver of the right to hearing, Respondent must file a written answer and request for hearing within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing. The answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in this Complaint with respect to which Respondent has any knowledge, or shall clearly state that Respondent has no knowledge as to particular factual allegations in this Complaint. The answer shall also state (a) the circumstances or arguments which are alleged to constitute the grounds of defense; (b) the facts that Respondent disputes; (c) the basis for opposing any proposed relief; and (d) whether a hearing is requested. Said answer shall be filed with the following:

Regional Hearing Clerk  
United States Environmental Protection Agency, Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101

46. Failure to admit, deny or explain any material factual allegation in this Complaint constitutes an admission of the allegation.

47. A hearing upon the issues raised by this Complaint and the answer may be held if requested by Respondent in the answer. If Respondent does not request a hearing, the Presiding Officer may hold a hearing if issues appropriate for adjudication are raised in the answer.

48. In any hearing on the proposed penalty for this Complaint, members of the public to whom EPA is obligated to give notice of this proposed penalty action, will have the right, under Section 309(g)(4)(B) of CWA, 33 U.S.C. § 1319(g)(4)(B), to be heard and present evidence on the merits of the proposed CWA penalty assessment. If no hearing is held, EPA will issue a Final Order Assessing Administrative Penalties pursuant to the CWA, and only members of the public who submitted timely comments on the proposed penalty assessment will have an additional thirty (30) days to petition to set aside the said Order and to hold a hearing thereon. The EPA will grant the petition and will hold a hearing only if the petitioners' evidence is material and was not considered by EPA in the issuance of the Final Order.

49. If Respondent fails to file a written answer within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing, Respondent may be found in default. Such default by Respondent constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. A Default Order may thereafter be issued by the Presiding Officer and the civil penalties proposed herein shall become due and payable unless the record clearly demonstrates that the requested relief is inconsistent with the CWA.

#### **Informal Settlement Conference**

50. Whether or not Respondent requests a hearing, an informal conference may be requested in order to discuss the facts of this case, the proposed penalty, and the possibility of settlement. To request a settlement conference, please contact:

J. Daniel Breedlove  
Assistant Regional Counsel  
United States Environmental Protection Agency, Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101  
Telephone (913) 551-7172

51. Please note that a request for an informal settlement conference does not extend the thirty (30) day period during which a written answer and request for a hearing must be submitted.

52. The EPA encourages all parties against whom a civil penalty is proposed to pursue the possibilities of settlement as a result of informal conference. Any settlement which may be reached as a result of such a conference shall be embodied in a written Consent Agreement and Final Order issued by the Regional Judicial Officer, EPA, Region 7. The issuance of such a Consent Agreement and Final Order shall constitute a waiver of Respondent's right to request a hearing on any matter stipulated therein.

53. If Respondent has not filed an answer within the thirty (30) day time period allowed by this Notice, the penalties proposed above may be assessed by the entry of a Default Order.

8/14/07  
Date

William A. Spratlin  
William A. Spratlin  
Director  
Water, Wetlands and Pesticides Division

8/13/07  
Date

J. Daniel Breedlove  
J. Daniel Breedlove  
Assistant Regional Counsel

CERTIFICATE OF SERVICE

I certify that on the date indicated below, I hand delivered the original and one true copy of this Complaint and Notice of Opportunity for Hearing to the Regional Hearing Clerk, United States Environmental Protection Agency, 901 North 5<sup>th</sup> Street, Kansas City, Kansas 66101.

I further certify that on the date noted below I sent by certified mail, return receipt requested, a true and correct copy of the signed original Complaint and Notice of Opportunity for Hearing and a copy of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. Part 22, and a Small Business Fact Sheet to:

Eldon McAfee  
Beving, Swanson & Forrest, P.C.  
321 E. Walnut St., Suite 200  
Des Moines, IA 50309

Without copy of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. Part 22, and a Small Business Fact Sheet to

Mr. Alan Zellmer  
A to Z Feeders  
56393 Highland Road  
Atlantic, Iowa 50022.

Kenneth Hessenius  
Field Office Supervisor  
Field Office #3  
Iowa Department of Natural Resources  
1900 North Grand Avenue  
Spencer, Iowa 51301.

8/14/07  
Date

J. Dal Paul