UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Tony L. Brown and Joshua A. Brown	)	**Docket No. CWA-07-2016-0053**
d/b/a/ Riverview Cattle,	)	
	)	
Respondents.	)	

ORDER ON COMPLAINANT'S MOTION FOR ACCELERATED DECISION AS TO LIABILITY

I. PROCEDURAL HISTORY

The United States Environmental Protection Agency ("EPA"), Director of the Water, Wetlands, and Pesticides Division, Region 7 ("Complainant"), initiated this proceeding on May 10, 2016, by filing a Complaint ("Compl.") against Tony L. Brown and Joshua A. Brown (collectively, "Respondents"), pursuant to the authority granted in 33 U.S.C. § 1319(g). The Complaint alleges that Respondents violated the Clean Water Act[1] ("CWA") on a minimum of six occasions over a five-year period through single or multi-day unpermitted discharges of pollutants from their concentrated cattle feeding operation in Armstrong, Iowa. For these alleged violations, the Complainant seeks the imposition of civil penalties against Respondents not to exceed $96,000.[2] Respondents, though counsel, filed an answer on June 13, 2016. In their Answer, Respondents deny the violations alleged in the Complaint, and otherwise assert defenses to the civil penalty proposed by Complainant.

The parties participated in this Tribunal's Alternative Dispute Resolution process from July 6, 2016, through November 7, 2016, after which, on November 9, 2016, I was designated to preside over the litigation of this matter. On November 14, 2016, I issued a Prehearing Order directing the parties to file and serve prehearing exchanges. Consistent therewith, Complainant submitted an Initial Prehearing Exchange on January 6, 2017, with Complainant's proposed

[1] The Clean Water Act is the common name of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387.

[2] The Complaint proposes a penalty "in the amount of up to $16,000 per day for each day during which a violation occurred on or after January 12, 2009, which based on a minimum of six (6) days of discharge violations, results in a maximum penalty of up to $96,000." Compl. ¶ 42. Although the Prehearing Order required Complainant to include in its Rebuttal Prehearing Exchange "a statement specifying the dollar amount of the penalty that Complainant proposes to assess for the violations alleged in the Complaint," it does not appear that Complainant has proposed a specific dollar amount for the penalty.

exhibits ("CX") 1-27;[3] Respondents submitted their Prehearing Exchange on February 27, 2017, with Respondents' proposed exhibits ("RX") 1-13; and Complainant filed a Rebuttal Prehearing Exchange on March 31, 2017, with CX 20.1 and CX 28-43.[4]

Following the submission of the parties' prehearing exchanges, Complainant filed a Motion for Accelerated Decision as to Liability ("Motion for Accelerated Decision" or "AD Mot."), along with a Memorandum and Points of Authority in Support of Complainant's Motion for Accelerated Decision as to Liability ("Accelerated Decision Memorandum" or "AD Mem."), and declarations from Trevor Urban ("Urban Decl."), and Seth Draper ("Draper Decl.") in support of Complainant's Motion for Accelerated Decision, on May 1, 2017. Respondents filed a Response to Complainant's Motion for Accelerated Decision as to Liability ("Response" or "Resp.") on May 30, 2017, along with a Memorandum in Response to Complainant's Motion for Accelerated Decision as to Liability ("Response Memorandum" or "Resp. Mem."), and statements from Respondent Tony Brown ("T. Brown Stat."), Respondent Joshua Brown ("J. Brown Stat."), Gary Brown ("G. Brown Stat."), Dawn Brown ("D. Brown Stat."), and Gerald Hentges ("Hentges Stat."), in support of Respondents' Response. Subsequently, Complainant filed both a Rebuttal to Respondents' Opposition to Motion for Accelerated Decision as to Liability, and a Corrected Rebuttal to Respondents' Opposition to Motion for Accelerated Decision as to Liability ("Corrected Rebuttal" or "Cor. Rebut."), on June 15, 2017, along with a simultaneously filed declaration from Rickey Roberts ("Roberts Decl.").

II. FACTUAL BACKGROUND

Respondents are brothers who own or operate an animal feeding operation for cattle in Armstrong, Iowa, under the trade name Riverview Cattle. Compl. ¶¶ 4, 21, 26; Answer ¶¶ 4, 21, 26; *see also* T. Brown Stat. ¶ 6; Brown Stat. ¶¶ 2, 6 (acknowledging the familial relationship between Respondents). Respondents conduct their operation at a facility ("Riverview Facility") that has six open lots for cattle confinement, and these lots have the capacity to confine approximately 900 cattle. Compl. ¶ 21; Answer ¶ 21. In addition to the confinement lots, the Riverview Facility features a concrete manure pit, which was constructed in 2011,[5] as well as a manure storage area and a feedstock storage area. *See* Compl. ¶ 21; Answer ¶ 21; *see also* CX 20 at 4; T. Brown Stat. ¶ 11; J. Brown Stat. ¶ 11 (discussing construction of the manure pit in 2011). The Riverview Facility is adjacent to a pork production operation, owned and operated by Gary Brown, Respondents' father, under the trade name Bacon Maker.[6] *See* CX 1 at 1-2; G. Brown Stat. ¶ 1. During the period relevant to this proceeding, Respondents did not have a

[3] Notably, Complainant filed a placeholder for exhibit CX 18 when it filed its Initial Prehearing Exchange on January 6, 2017. Complainant subsequently filed CX 18 with its Rebuttal Prehearing Exchange on March 31, 2017.

[4] The filing deadlines for Respondents' Prehearing Exchange and Complainant's Rebuttal Prehearing Exchange were extended, upon request of the parties, by orders issued January 12, 2017, and February 22, 2017.

[5] Although an inspection report submitted by Complainant in CX 1 states that the concrete manure pit at the Riverview Facility was constructed in 2012, *see* CX 1 at 5, Complainant acknowledged in its Accelerated Decision Memorandum that this manure pit was constructed in "late 2011," AD Mem. at 17.

[6] Notably, the inspection report submitted by Complainant in CX 1 reflects that an EPA inspector initially identified these two facilities as one operation upon inspection in June 2014. *See* CX 1 at 2, 6, 7, 12.

National Pollutant Discharge Elimination System ("NPDES") permit authorizing pollutant discharges. *See* Compl. ¶ 37; Answer ¶ 37.

On or around June 17, 2014, the EPA conducted a compliance inspection of the Riverview Facility ("2014 Inspection"). Compl. ¶ 22; Answer ¶ 22. At the time of the 2014 Inspection, the Riverview Facility was confining approximately 886 cattle. Compl. ¶ 23; Answer ¶ 23. During the 2014 Inspection, an EPA inspector observed an open inlet into a tile drainage system receiving surface runoff and process wastewater from production areas of the Riverview Facility. Compl. ¶¶ 23, 28; Answer ¶¶ 23, 28. Following the 2014 Inspection, the EPA issued Respondents an Administrative Order which directed them to take action to comply with the CWA, including ceasing all unpermitted discharges. Compl. ¶ 33, Answer ¶ 33. At some point following the 2014 Inspection, Respondents blocked the open inlet to the tile drainage system that was observed by the inspector. Compl. ¶ 33, Answer ¶ 33.

On March 29-30, 2016, the EPA conducted a second compliance inspection of the Riverview Facility ("2016 Inspection"). Compl. ¶ 22; Answer ¶ 22. At the time of the 2016 Inspection, the Riverview Facility was confining approximately 900 cattle. Compl. ¶ 23; Answer ¶ 23. Following the 2016 Inspection, the Complainant initiated this proceeding by filing the Complaint.

The Complaint alleges that the Riverview Facility was a medium concentrated animal feeding operation ("medium CAFO"), as defined in 40 C.F.R. §122.23(b)(6), at relevant times. Compl. ¶ 31. The Complaint alleges that prior to Respondents' blockage of the open inlet to the tile drainage system, process wastewater from production areas of the Riverview Facility, containing pollutants, "repeatedly discharged into the East Fork of the Des Moines River and/or its tributaries though the drainage tile system as a result of precipitation events." Compl. ¶ 34. The Complaint further alleges that there were "a minimum of six (6) precipitation events within the last five (5) years that resulted in single and/or multi-day discharges of pollutants from the Riverview Facility through a man-made ditch, flushing system or similar man-made device to the East Fork of the Des Moines River and its tributaries." Compl. ¶ 36. Additionally, the Complaint alleges that the East Fork of the Des Moines River and its tributaries are waters of the United States, Compl. ¶¶ 32, 36, and that the discharges from the Riverview Facility were unpermitted, Compl. ¶ 37. Finally, the Complaint asserts that "Respondents' repeated unpermitted discharges of pollutants (including manure, litter and/or process wastewater) were violations of Section 301 of the CWA, 33 U.S.C. § 1311, and implementing regulations." Compl. ¶ 38.

Notably, the Complaint does not allege a definitive number of violations or discharges, and does not specifically identify the dates of each of the alleged minimum of six precipitation

events resulting in discharges.[7] However, the Complaint alleges that in the three days preceding and including the 2014 Inspection, five to six inches of precipitation occurred at the Riverview Facility, which resulted in process wastewater and manure discharging through the open inlet of the tile drainage system into the East Fork of the Des Moines River and its tributaries. Compl. ¶ 30. With regard to this alleged discharge, the Complaint further alleges that the EPA sampled process wastewater and manure flowing into the inlet of the tile drainage system during the 2014 Inspection, and that the results of this testing reflected elevated levels of pollutants. Compl. ¶ 30. Additionally, the Complaint alleges that the 2016 Inspection "confirmed that the tile drainage system discharges into the East Fork of the Des Moines River." Compl. ¶ 28.

In their Answer, Respondents deny that the Riverview Facility was a medium CAFO, as defined in 40 C.F.R. §122.23(b)(6), during the relevant period. Answer ¶ 31. Respondents further deny discharges of pollutants to the East Fork of the Des Moines River, Answer ¶¶ 23, 28, 33, 37, and more broadly deny the alleged unpermitted discharge of pollutants in violation of the CWA at 33 U.S.C. § 1311, and implementing regulations, Answer ¶ 38. Respondents additionally deny that tributaries of the East Fork of Des Moines River are waters of the United States. Answer ¶ 32.

Addressing the allegations in the Complaint regarding the discharge of pollutants associated with the 2014 Inspection, the Answer states that the

> EPA's visual observations and sample results from the samples taken on June 14, 2014 . . . do not show that a discharge of pollutants from the [Respondents'] animal feeding operation to a water of the U.S. occurred in that no samples of a discharge to a water of the U.S. were taken, nor were there any visual observations of discharges of pollutants to a water of the U.S., even though EPA had the opportunity to take such samples and make such visual observations.

Answer at 5. Respondents further assert that the allegations with regard to the discharge associated with the 2014 Inspection, even if proven, cannot be proof of discharges on other dates, stating that "[d]ue to real world variability in precipitation and runoff that may or may not occur from any particular event, EPA cannot extrapolate one event as proof of discharges on other days." Answer at 5. As a result, they argue that even if Complainant's allegations regarding the alleged discharge associated with the 2014 Inspection are proven, this would result in "at the most proof of one discharge event." Answer at 5.

[7] The vagueness of the allegations in the Complaint with regard to the number of alleged violations and days of violation raises questions with regard to whether the Complaint comports with the requirements for a complaint set forth in the rules governing this proceeding, at 40 C.F.R. Part 22, which require that a complaint include "[a] concise statement of the factual basis for *each* violation alleged," 40 C.F.R. § 22.14(a)(3) (emphasis added), and, "[w]here a specific penalty demand is not made, the number of violations (where applicable, days of violation) for which a penalty is sought," 40 C.F.R. § 22.14(a)(4)(ii). Notably, the Complaint proposes a penalty "in the amount of up to $ 16,000 per day for each day during which a violation occurred on or after January 12, 2009, which based on a minimum of six (6) days of discharge violations, results in a maximum penalty of up to $96,000." Compl. ¶ 42. The Complaint does not set forth a specific penalty demand, and therefore, should include the number of violations for which a penalty is sought and the respective days of violation. Nevertheless, the sufficiency of the Complaint has not been challenged and I, therefore, need not address this issue further at this stage of the proceedings.

III. REQUEST FOR ORAL ARGUMENT

In their Response, Respondents request the opportunity for telephonic oral argument on the Motion for Accelerated Decision. *See* Resp. at 2. Complainant, in its Corrected Rebuttal, opposes this request. *See* Cor. Rebut. at 1. This proceeding is governed by 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 ("Rules of Practice"), which provide that "[t]he Presiding Officer . . . may permit oral argument on motions in [his/her] discretion." 40 C.F.R. § 22.16(d). This authority is consistent with Rule 78(b) of the Federal Rules of Civil Procedure ("FRCP"), which states that a court "may provide for submitting and determining motions on briefs, without oral hearings." Fed. R. Civ. Pro. 78(b). Rule 78(b) has been construed by some federal courts as recognizing the discretion of a trial court with respect to granting oral argument on motions for summary judgment in particular. *See, e.g.*, *Bratt v. Int'l Bus. Machs. Corp.*, 785 F.2d 352, 363 (1st Cir. 1986) ("[A] district court should have 'wide latitude' in determining whether oral argument is necessary before rendering summary judgment.") (quoting *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 411 (1st Cir. 1985)); *Spark v. Catholic Univ. of America*, 510 F.2d 1277, 1280 (D.C. Cir. 1975) ("We . . . adopt the construction of the Rules which permits the District Court to dispense with oral arguments in appropriate circumstances in the interest of judicial economy . . . .").

In the present matter, Respondents have not advanced arguments in support of their request for telephonic oral argument on the Motion for Accelerated Decision, and this request has been objected to by Complainant, *see* Cor. Rebut. at 1. The parties have had ample opportunity to assert their arguments and reply to opposing arguments in their written submissions. Furthermore, there is no indication from the parties' submissions regarding the Motion for Accelerated Decision, or from the record, that oral argument would be beneficial to the adjudication of the Motion for Accelerated Decision. Accordingly, exercising the discretion granted by the Rules of Practice with consideration for judicial economy, Respondents' request for telephonic oral argument is DENIED.

IV. STANDARD OF REVIEW

With regard to accelerated decision, the Rules of Practice provide that:

> The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

40 C.F.R. § 22.20(a). As the standard for accelerated decision under 40 C.F.R. § 22.20(a) is reflective of the standard for summary judgment under Rule 56 of the FRCP, jurisprudence relating to Rule 56 provides applicable guidance for motions for accelerated decision. *See P.R. Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 607 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995) ("Rule 56 is the prototype for administrative summary judgment procedures, and the jurisprudence that has grown up around Rule 56 is, therefore, the most fertile source of information about administrative summary judgment."). Accordingly, the Environmental

Appeals Board has consistently relied upon Rule 56 and jurisprudence regarding summary judgment for guidance in adjudicating motions for accelerated decision under the Rules of Practice. *See, e.g., Consumers Scrap Recycling, Inc.*, 11 E.A.D. 269, 285 (EAB 2004); *BWX Techs., Inc.*, 9 E.A.D. 61, 74-75 (EAB 2000); *Clarksburg Casket Co.*, 8 E.A.D. 496, 501-02 (EAB 1999).

Under Rule 56, summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The governing substantive law determines which facts are material for summary judgment, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). A factual dispute is genuine if the evidence is such that a reasonable factfinder could return a verdict for the nonmoving party. *Id*.

Rule 56 requires a party asserting that a fact cannot be or is genuinely in dispute to support its assertion by:

> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
>
> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1). The party moving for summary judgment bears the initial responsibility of informing the tribunal of the basis for its motion, and identifying materials in the record demonstrating the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323.

In considering a motion for summary judgment, the evidence of the nonmoving party is to be believed, and all justifiable inferences are to be drawn in favor of the nonmoving party. *Anderson*, 477 U.S. at 255. When contradictory inferences may be drawn from the evidence, summary judgment is inappropriate. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002). However, in opposing a properly supported motion for summary judgment, the nonmoving party may not rest upon mere allegations or denials in its pleadings to demonstrate a genuine issue of material fact. *Anderson*, 477 U.S. at 248-49.

Applying the jurisprudence for summary judgment to the present matter, Complainant, as the party moving for accelerated decision as to liability, bears the initial responsibility of informing this Tribunal of the basis for its motion, and identifying materials in the record demonstrating the absence of a genuine issue of material fact with regard to liability. *See Celotex Corp.*, 477 U.S. at 323. In considering Complainant's Motion for Accelerated Decision, the evidence of Respondents, the non-moving party, is to be believed, and all justifiable inferences are to be drawn in Respondents' favor. *See Anderson*, 477 U.S. at 255.

V. GOVERNING SUBSTANTIVE LAW

The CWA, 33 U.S.C. §§ 1251-1387, as amended, was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In furtherance of this objective, the CWA prohibits "the discharge of any pollutant by any person," except as otherwise provided for in its provisions. 33 U.S.C. § 1311(a).[8]

The definition of "discharge of a pollutant" for relevant provisions of the CWA encompasses "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The term "pollutant" is defined by the CWA to include, among other meanings, " . . . solid waste, . . .biological materials, . . . and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). In turn, "navigable waters" are defined by the CWA as "the waters of the United States." 33 U.S.C. § 1362(7). Additionally, "point source" is defined by the CWA as "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, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

Notwithstanding the general prohibition against pollutant discharges in 33 U.S.C. § 1311(a), the CWA establishes the National Pollutant Discharge Elimination System ("NPDES") permit program, allowing the EPA, and states qualified by the EPA, to issue permits for the discharge of pollutants. 33 U.S.C. § 1342(a)-(b). The regulations implementing the NPDES permit program with relation to concentrated animal feeding operations ("CAFOs") provide that "[a] CAFO must not discharge unless the discharge is authorized by an NPDES permit." 40 C.F.R. § 122.23(d)(1). Pursuant to the regulations, to obtain such authorization a "CAFO owner or operator must either apply for an individual NPDES permit or submit a notice of intent for coverage under an NPDES general permit." *Id*.

The regulations define an animal feeding operation as a lot or facility where,

> (i) Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and
>
> (ii) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

40 C.F.R. § 122.23(b)(1).[9] The definition of a CAFO provided for in the regulations encompasses an animal feeding operation that is defined as a "Large CAFO" or as a "Medium

[8] The definition of "person" in the CWA includes "an individual." 33 U.S.C. § 1362(5). Respondents have admitted that they are each a person within this definition. *See* Compl. ¶ 4; Answer ¶ 4.

[9] Pertinent to this matter, Respondents have admitted that the Riverview Facility is an animal feeding operation. *See* Compl. ¶ 21; Answer ¶ 21.

CAFO." 40 C.F.R. § 122.23(b)(2). Relevant to the allegations at issue in this matter, a Medium CAFO is defined by the regulations to include an animal feeding operation with "300 to 999 cattle other than mature dairy cows or veal calves," where either of the following conditions is met:

> (A) Pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device; or
>
> (B) Pollutants are discharged directly into waters of the United States which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

40 C.F.R. § 122.23 (b)(6). Further, the regulations define the "production area" of an animal feeding operation as the area including "the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas." 40 C.F.R. § 122.23(b)(8). Additionally, "process wastewater" is defined by the regulations as including "spillage or overflow from . . . washing, cleaning, or flushing pens, barns, manure pits, or other [animal feeding operation] facilities," as well as "any water which comes into contact with any raw materials, products, or byproducts including manure, litter, feed, milk, eggs or bedding." 40 C.F.R. § 122.23(b)(7).

The CWA establishes several enforcement mechanisms for violation of the prohibition against pollutant discharges in 33 U.S.C. § 1311(a), including the assessment of administrative penalties. *See* 33 U.S.C. § 1319(g). For purposes of calculating administrative penalties, the CWA provides that "a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation." 33 U.S.C. § 1319(g)(3).

VI. PARTIES' ARGUMENTS

a. Complainant's Motion for Accelerated Decision and Accelerated Decision Memorandum

In its Motion for Accelerated Decision, Complainant asserts that "Respondents discharged [a] pollutant on no fewer than four events, including the date of EPA's June 17, 2014 inspection; and May 12 - 22, 2011; June 10 - 16, 2011; June 19 - 23, 2011,"[10] and further states that "there is no genuine issue of material fact with respect to [Respondents'] liability for violations of the Clean Water Act." AD Mot. at 2. In its Accelerated Decision Memorandum, Complainant clarifies that it seeks accelerated decision as to liability with regard to four alleged violations relating to the discharge of pollutants from the Riverview Facility to the East Fork of the Des Moines River during the four aforementioned discharge events, for which it asserts it has

[10] The Complainant's Motion for Accelerated Decision fails to state the location where Respondents allegedly discharged pollutants during each of the four discharge events, although it identifies the East Fork of the Des Moines River as a water of the United States. *See* AD Mot. at 2-3.

established a "prima facie case beyond any genuine issue of material fact." AD Mem. at 4. Accordingly, although it is not titled as such, Complainant's Motion for Accelerated Decision is a partial motion for accelerated decision with regard to liability, as it addresses only four of the alleged minimum of six single or multi-day discharges of pollutants in the Complaint. *See* Compl. ¶ 36; AD Mot. at 2-3; AD Mem. at 4, 24. This is consistent with language contained in Complainant's Motion for Accelerated Decision, which asserts that Complainant has modeling evidence calculating a minimum of 50 days of discharge from the Riverview Facility to the East Fork of the Des Moines River between May 2011 and July 2014, and that Complainant otherwise "reserves the right to . . . establish liability for additional discharge events."[11] AD Mot. at 2 n.1.

In support of its Motion for Accelerated Decision, Complainant asserts that for each of the four alleged discharge events for which it seeks accelerated decision, it has demonstrated beyond any issue of material fact:

> (1) that Respondents discharged "pollutants" when the precipitation generated process wastewater flowed from their facility into a drain tile that discharges into the East Fork of the Des Moines River[;] (2) that the East Fork of the Des Moines River is a "water of the United States;" (3) that Respondents' animal feeding operation facility is a concentrated animal feeding operation and thus a "point source," and; (4) that [Respondents'] discharges were not authorized [by] a permit issued under the authority of CWA Section 402.

AD Mem. at 4. Complainant asserts that in order to establish a prima facie case for the alleged violations of the CWA at 33 U.S.C. § 1311(a), it must demonstrate by a preponderance of the evidence, that Respondents "(1) are each a person; (2) that discharged a pollutant; (3) from a point source; (4) into navigable waters; and (5) without an NPDES permit or other authorization under the [CWA]." AD Mem. at 4-5. Complainant argues that it has demonstrated each of these elements for the alleged violations, by a preponderance of the evidence. AD Mem. at 5.

In support of its assertion that it has established a prima facie case with regard to the four alleged violations at issue, Complainant notes that Respondents admitted in their Answer that (1) they are persons pursuant to 33 U.S.C. § 1362(5), AD Mot. at 2; AD Mem. at 5 (citing Answer ¶ 4); (2) the East Fork of the Des Moines River is a water of the United States, AD Mot. at 3; AD Mem. at 5 (citing Answer ¶ 32);[12] and (3) Respondents did not have an NPDES permit, AD Mot. at 3; AD Mem. at 5 (citing Answer ¶ 37). With regard to establishing the remaining elements for the alleged violations at issue, Complainant acknowledges that Respondents' deny discharging a

[11] Notably, contrary to the allegations in the Complaint, which broadly allege unpermitted discharges over a five-year period from May 2011 to May 2016, Complainant asserts in its Accelerated Decision Memorandum that the alleged unpermitted discharges would have ended "sometime between July 2014 and March 2015," and otherwise clarifies that it "is not currently asserting any violations occurred after July 2014." AD Mem. at 14.

[12] In its Accelerated Decision Memorandum, Complainant erroneously states that "[i]n their Answer, Respondents jointly admit that the East Fork of the Des Moines River and its tributaries are waters of the United States, as defined by 40 C.F.R. Part 122." AD Mem. at 21 (citing Answer ¶ 32). In their Answer, Respondents only admit that the East Fork of Des Moines is "a water of the United States as defined by 40 C.F.R. Part 122.2," and otherwise deny that tributaries of the East Fork of the Des Moines River are waters of the United States as defined by 40 C.F.R. Part 122.2. Answer ¶ 32.

pollutant from the Riverview Facility, and otherwise dispute the basis for which Complainant argues that the Riverview Facility constitutes a point source. *See* AD Mot. at 2-3; AD Mem. at 2, 13, 20. Nevertheless, Complainant asserts that it has established these elements, and that there is no genuine issue of material fact with regard to the four alleged discharge events at issue in its Motion for Accelerated Decision. *See* AD Mem. at 4.

With regard to establishing that Respondents discharged a pollutant during the four alleged discharge events at issue in its Motion for Accelerated Decision, Complainant asserts that the evidence establishes that Respondents discharged process wastewater resulting from precipitation from the Riverview Facility into the East Fork of the Des Moines River on each of the four alleged discharge events. AD Mem. at 4. For the alleged violation associated with the 2014 Inspection, Complainant argues that the discharge of pollutants from the Riverview Facility is established by the observations of inspectors during the 2014 and 2016 Inspections; photographs taken, and sample testing performed, during the 2014 Inspection; the physical features and use of the tile drainage system at the Riverview Facility; and Respondents' statements and admissions regarding the 2014 Inspection. *See* AD Mem. at 10-12.

Complainant argues that with regard to the alleged discharge associated with the 2014 Inspection, this discharge is evidenced by the observations of Inspector Trevor Urban, who, Complainant purports, observed process wastewater and manure associated with a precipitation event flowing from a manure pit at the Riverview Facility into a swale entering a drain tile during the 2014 Inspection. AD Mem. at 7, 9, 11-12. Additionally, Complainant asserts that photographs taken during the 2014 Inspection depict process wastewater flowing from the manure pit into a swale. AD Mem. at 10 (citing CX 29.1-29.5). Complainant states that Mr. Urban sampled the process wastewater contained in the observed swale during the 2014 Inspection, and that the sampled water revealed "elevated levels of pollutants associated with beef animal feeding operations entering into the drain tile system." AD Mem. at 10. Complainant asserts that these pollutants entered the East Fork of the Des Moines River through the tile drainage system, on the basis that inspectors located the terminal outlet of the tile drainage system on the banks of the East Fork of the Des Moines River during the subsequent 2016 Inspection of the Riverview Facility, and observed the outlet discharging water into the East Fork of the Des Moines River at that time. AD Mem. at 12. Complainant further argues that the downward elevation gradient of the tile drainage system observed by inspectors during the 2016 Inspection "facilitates drainage between the swale [and] the East Fork of the Des Moines River." AD Mem. at 12. Likewise, referencing maps of the tile drain system provided by Respondents, Complainant asserts that Respondents, or their neighboring operation, Bacon Maker, added lateral lines to the tile drain system in 2010, 2011, and 2012, suggesting this system was operational. *See* AD Mem. at 12-13 (referencing maps in CX 1.10 and CX 8.10).

Additionally, Complainant argues that further support for its allegations regarding the discharge associated with the 2014 Inspection comes from Respondents' admissions and statements. Complainant notes that Respondents acknowledged "discharges" in a Response to a Request for Information issued following the 2014 Inspection, AD Mem. at 10-11 (citing CX 4 at 2), and that Respondents otherwise admitted in their Answer that during the 2014 Inspection the EPA "observed and documented 'an open inlet into the tile drainage system at the Riverview Facility that received surface runoff and process wastewater from the Riverview Facility

production areas, and from an estimate 20 acre drainage area,' " AD Mem. at 11 (quoting Compl. ¶ 28, citing Answer ¶ 28). Complainant concludes that the evidence it has presented establishes that "there is no genuine issue of material fact that the process wastewater and runoff draining from Respondents' facility into the swale and into the drain tile, as observed and document[ed] during EPA's 2014 inspection, discharged to the East Fork of the Des Moines River." AD Mem. at 13.

With regard for the three alleged discharge events in 2011, Complainant acknowledges that the "EPA was not present during the discharge events in 2011 for which Complainant now seeks an accelerated decision." AD Mem. at 23. However, Complainant asserts that:

> There is no genuine issue of material fact that it rained often at Respondents' facility, and over the period of violations there were an additional many precipitation events with precipitation totals comparable to, or greater than, the precipitation which caused the discharges from the swale observed by EPA during the 2014 Inspection.

AD Mem. at 16. On this basis, Complainant argues that the three alleged discharge events in 2011 are established by precipitation data reflecting rainfall on the dates of the alleged 2011 discharge events that is comparable to rainfall occurring between June 15-17, 2014, the three-day period including the date of the 2014 Inspection and two days prior. AD Mem. at 15. Specifically, Complainant asserts that verified precipitation data from a location in Swea City, Iowa, approximately five miles from the Riverview Facility, reflects that a total of 3.34 inches of rain fell between June 15-17, 2014, the three-day period prior to and including the date of the 2014 Inspection. AD Mem. at 15. In contrast, Complainant asserts that precipitation data from the same location reflects 3.64 inches of rain from May 12-22, 2011; 3.51 inches of rain from June 10-16, 2011; and 3.3 inches of rain from June 19-23, 2011, the dates of the alleged 2011 discharge events. AD Mem. at 15. Complainant argues that based upon the evidence establishing the discharge of pollutants from the Riverview Facility to the East Fork of the Des Moines River during the alleged discharge event associated with the 2014 Inspection, it can be presumed that the Riverview Facility also discharged pollutants to the East Fork of the Des Moines River on the aforementioned dates of the three alleged 2011 discharge events, given similar rainfall at these times. *See* AD Mot. at 15-16.

Notably, Complainant acknowledges that the manure pit present at the Riverview Facility at the time of the 2014 Inspection was not constructed until "[s]ometime at the end of 2011," and therefore was not present during the alleged discharge events in May-June 2011. AD Mem. at 16. Addressing this structural change to the Riverview Facility, Complainant argues that prior to the installation of the manure pit in late 2011, all surface runoff from the cattle pens at the Riverview Facility would have flowed directly into the swale observed during the 2014 Inspection, and discharged to the Des Moines River through the tile drain system. AD Mem. at 17. Complainant argues that this proposition is supported by aerial photographs of the Riverview Facility taken on April 17, 2011, contained in CX 28, that purportedly depict "visible drainage patterns from runoff from the facility into the swale." AD Mem. at 16-17. Based upon this evidence, Complainant concludes that it has established the alleged 2011 discharges from the Riverview Facility beyond any issue of material fact. AD Mem. at 17.

Turning to the remaining element of establishing that the Riverview Facility was a point source at the time of the alleged discharges, Complainant argues that the evidence establishes that the Riverview Facility was a Medium CAFO at the time of the four alleged discharges, and therefore was a point source within the meaning of 33 U.S.C. § 1362(14) as a CAFO. *See* AD Mem. at 18-21. Complainant asserts that evidence establishes that the Riverview Facility was a Medium CAFO within the meaning of 40 C.F.R. § 122.23(b)(6), because it (1) confined more than 300 head of cattle for more than 45 days at the times of the alleged discharges, AD Mem. at 19-20, and (2) discharged pollutants into waters of the United States through a man-made ditch, flushing system, or other similar man-made device, AD Mem. at 20-21.

Complainant argues that the evidence establishes that the Riverview Facility was confining more than 300 head of cattle for more than 45 days at the time of the alleged discharge associated with the 2014 Inspection, based upon the reported number of cattle at the Riverview Facility during the 2014 Inspection (CX 1 at 4); headcounts in untitled records from the Riverview Facility and a neighboring operation (CX 1.7);[13] headcounts from monthly expense reports submitted by Respondents (RX 9); and industry standard practices (discussed in CX 34). AD Mem. at 19-20. Further, it argues that headcounts from monthly expense reports submitted by Respondents (RX 9), an aerial photograph of cattle confined at the Riverview Facility from June 2011 (CX 28.7, discussed in Draper Decl. ¶ 24), and industry standard practices (discussed in CX 34), support its assertion that the Riverview Facility was confining more than 300 head of cattle for more than 45 days at the time of the alleged discharges in 2011. AD Mem. at 19-20. Complainant also asserts that "Respondents have failed to provide evidence or legal support that they did not contain more than 300 head of cattle for 45 days or more," and concludes that there is no genuine issue of material fact with regard to this issue. AD Mem. at 20.

Additionally, on the basis of its allegations that the Riverview Facility discharged pollutants into the East Fork of the Des Moines River from a tile drainage system, Complainant argues that the Riverview Facility discharged pollutants into waters of the United States through a man-made ditch, flushing system, or other similar man-made device, and was therefore a Medium CAFO within the meaning of 40 C.F.R. § 122.23 at the time of the four alleged discharges. *See* AD Mem. at 18, 20-21. In support of this assertion, Complainant argues that "[t]he drain tile which drained the swale [at the Riverview Facility] is clearly a 'man-made device,' as described by 40 C.F.R. § 122.23(b)(6)." AD Mem. at 20. While noting that Respondents deny that a tile drainage system is a man-made ditch, flushing system, or other similar man-made device, Complainant asserts that this denial is not supported by a legal or factual basis. AD Mem. at 20. As a result, Complainant concludes that it has established that the Riverview Facility was a Medium CAFO, and therefore is a point source at the time of the four alleged discharges. AD Mem. at 19-20.

Accordingly, Complainant argues that it has established the disputed elements with regard to the alleged four discharges at issue in its Motion for Accelerated Decision, and has established a prima facie case for the four alleged violations associated with these discharges.

[13] Although the Complainant suggests that the untitled records in CX1.7 relate to the Riverview Facility, these records are identified in the inspection report in CX 1 as records for both Riverview Cattle and Bacon Maker, a neighboring operation. *See* CX 1 at 4, 14.

See AD Mem. at 4-5, 23. Complainant further suggests that the Respondents have not supported an affirmative defense that would excuse liability. *See* AD Mem. at 21-24. Instead, Complainant asserts that the defensive arguments raised by Respondents in their Answer amount to an argument requiring direct evidence of actual discharges through water sampling and visual observation to establish a CWA violation. AD Mem. at 22. Complainant asserts that such defensive arguments fail because CWA violations may be established by circumstantial and inferential evidence, and otherwise do not require sampling evidence for purposes of establishing the discharge of a pollutant. AD Mem. at 22-23 (citing *Lowell Vos Feedlot*, 15 E.A.D. 314, 321-22 (EAB 2011) and *Leed Foundry, Inc.*, 2007 EPA ALJ LEXIS 13, at *49 (April 24, 2007)). As a result, Complainant concludes that it is entitled to accelerated decision with regard to the four alleged violations presented in its Motion for Accelerated Decision. AD Mem. at 4.

b. Respondents' Response and Response Memorandum

In their Response, Respondents argue that with regard to this proceeding "there are genuine issues of material fact supporting Respondents' claims that [they] did not violate the Clean Water Act." Resp. at 1. Likewise, in their Response Memorandum, Respondents assert that "there are numerous genuine issues of material fact that warrant denial of EPA's motion." Resp. Mot. at 2. Respondents identify the controversy in this matter as surrounding the issue of "whether there has been any discharge of pollutants from Riverview Cattle's feed yard to a water of the [United States] in violation of the Clean Water Act." Resp. Mem. at 2. Respondents argue that the evidence submitted by Complainant is insufficient to establish that there was a discharge of pollutants from the Riverview Facility to a water of the United States, either on the date of the 2014 Inspection, or on the dates of the alleged 2011 violations. *See* Resp. Mem. at 5-9.

i. Alleged Violation Associated with the 2014 Inspection

With regard to the alleged violation on the date of the 2014 Inspection, Respondents argue that the evidence presented by Complainant does not establish that there was a discharge of pollutants from the Riverview Facility to a water of the United States, and more specifically, that such evidence is insufficient because of the EPA's failure to conduct a sufficient investigation at the time of the 2014 Inspection. *See* Resp. Mem. at 3-7. Respondents acknowledge that the manure pit was overflowing at the Riverview Facility during the 2014 Inspection, and that a tile intake drained this overflow. Resp. Mem. at 5,6. However, Respondents dispute the observations of Mr. Urban regarding the overflow from the manure pit during the 2014 Inspection, referenced by Complainant. Citing to their statements accompanying their Response, Respondents state that contrary to Mr. Urban's report, that he observed process wastewater flowing into the drain tile and heard the process wastewater entering the drain tile with a sound "like a rushing waterfall into a deep pipe," *see* Urban Decl. ¶ 4, they observed the water from the overflow "was moving very slowly, if at all, and that there was no sound like a 'rushing waterfall," Resp. Mem. at 5 (citing T. Brown Stat. ¶ 4; J. Brown Stat. ¶ 4). In support of their statements regarding the draining of the overflow from the manure pit, Respondents cite to a photograph reportedly taken by Respondent Tony Brown the day following the 2014 Inspection, in CX 2 at 3, which Respondents assert depicts that "even though the discharge from the [manure] pit had ceased [on the date of the 2014 Inspection], the water

level at the tile inlet had not gone down at all over the 24 hours after that." Resp. Mem. at 5 (citing T. Brown Stat. ¶ 4; J. Brown Stat. ¶ 4).

Furthermore, Respondents assert that "[j]ust because contaminated water may have been entering the tile inlet on June 17, 2014 does not mean that those contaminants exited the tile line and were discharged to the East Fork of the Des Moines River." Resp. Mem. at 6. Instead, Respondents contest Complainant's assertion that the discharge from the manure pit on the date of the 2014 Inspection reached the East Fork of the Des Moines River, citing to evidence from Gerald Hentges, a consulting hydrologist and proposed expert witness, in support of their position. Resp. Mem. at 6 (citing RX 2; Hentges Stat. ¶ 4). In his statement of opinion, in RX 2, Mr. Hentges notes that wastewater runoff from the Riverview Facility was not observed or confirmed to be discharging to the East Fork of the Des Moines River during the 2014 Inspection, RX 2 at 3, and otherwise observes that in photographs taken during the 2014 Inspection, the wastewater "appears to be pooled and not flowing," RX 2 at 2. Additionally, Mr. Hentges asserts in his statement of opinion, that based upon the height of the East Fork of the Des Moines River during the 2014 Inspection, as it was reported by the EPA in its inspection report, it is likely that the outlet of the tile drainage system was submerged at the time of inspection. RX 2 at 3. He further opines that based upon flow data from the date of the 2014 Inspection for the East Fork of the Des Moines River from a wastewater treatment facility upstream from the outlet of the tile drain system at the Riverview Facility, "[if] the tile line outfalls were submerged by the flow in the river, a discharge would not have occurred due to the head pressure of water in the river pushing back on the water in the tile line." RX 2 at 3. Likewise, in his statement, Mr. Hentges states that field tile lines, such as those observed at the Riverview Facility, are "subject to naturally occurring variables such as water exiting the tile lines through the perforations into the soil due to backflow pressures if the end of the tile line is submerged, such as in this case due to the high river level." Hentges Stat. ¶ 4.

Respondents further argue the EPA's 2014 Inspection was deficient, and that such deficiency presents a genuine issue of material fact warranting denial of Complainant's Motion for Accelerated Decision. Resp. Mem. at 6-7. Respondents note that the EPA did not perform sampling for pollutants at the outlet of the tile drain during the 2014 Inspection, and instead relied upon samples taken at the inlet of the tile drain. Resp. Mem. at 4. Further, Respondents note that the EPA "made no visual observations of a discharge at the tile outlet at the East Fork of the Des Moines River during the [2014 Inspection]". Resp. Mem. at 4. Citing to statements filed simultaneous to their Response from Respondent Tony Brown, Respondent Josh Brown, and Gary Brown, Respondents assert that Respondents Tony and Josh Brown provided EPA inspectors with information regarding the location of the tile drain outlet during the 2014 Inspection, and that the EPA inspectors had the opportunity to locate, observe, and sample the tile drain outlets during the 2014 Inspection, but failed to take such actions which may have resulted in direct evidence relevant to this matter. Resp. Mem. at 4 (citing T. Brown Stat. ¶¶ 5-6, 8-9; J. Brown Stat. ¶¶ 5-6, 8-9; G. Brown Stat. ¶¶ 2-3). Respondents argue that these circumstances demonstrate that the 2014 Inspection was deficient, and that this deficiency in conducting the 2014 Inspection presents a genuine issue of material fact which requires denial of Complainant's Motion for Accelerated Decision. Resp. Mem. at 6-7.

ii. *Alleged Violations in 2011*

Additionally, with regard to the alleged violations in 2011, Respondents contest that the evidence submitted by Complainant establishes the alleged discharges, and identify multiple areas of factual dispute regarding the evidence submitted by Complainant in support of such alleged discharges. Respondents refute the precipitation data for June 15-17, 2014, used by Complainant as the basis for its allegation that discharges occurred on dates in 2011 with similar rainfall. *See* Resp. Mem. at 8-9. Respondents note that at the time of the 2014 Inspection, they reported that the Riverview Facility had received approximately six inches of rain in the days prior to the inspection, substantially greater rainfall than the 3.34 inches of rain that Complainant asserts had fallen on June 15-17, 2014. Resp. Mem. at 8 (citing T. Brown Stat. ¶ 2; J. Brown Stat. ¶ 2). Respondents further assert that their estimate of rainfall is consistent with rainfall records from a nearby property and online weather records for a location 12 miles from the Riverview Facility, which reflect that 4.97 inches of rain fell from June 14-16, 2014. Resp. Mem. at 8 (citing RX 7 and RX 8). Respondents argue that "[t]hese differences in rainfall data are a genuine issue of material fact" regarding the alleged 2011 violations. Resp. Mem. at 8-9.

Furthermore, contrary to Complainant's suggestion that there were no discharge controls at the Riverview Facility prior to the installation of the concrete manure pit in 2011, Respondents state that the manure in the feed yard at the Riverview Facility was retained by a four-foot wall around the feed yard prior to construction of the manure pit, and that this wall "did not have any discharge points in the area where manure was retained before the concrete manure pit was installed." Resp. Mem. at 9 (citing T. Brown Stat. ¶ 11; J. Brown Stat. ¶ 11). Finally, citing to the statement of hydrologist Gerald Hentges, Respondents argue that with regard to the alleged 2011 discharges, "there are too many unknown environmental factors on these additional dates of alleged discharge to allow them to be summarily used to find that discharges to a water of the U.S. actually occurred." Resp. Mem. at 9 (citing Hentges Stat. ¶ 5).

On the basis of the identified factual issues in dispute regarding the alleged violation on the date of the 2014 Inspection and the alleged 2011 violations, Respondents conclude that there are genuine issues of material fact regarding Respondents' liability. *See* Resp. Mem. at 9. As a result, Respondents request that Complainant's Motion for Accelerated Decision be dismissed. Resp. at 2; Resp. Mem. at 9.

c. **Complainant's Corrected Rebuttal** [14]

In its Corrected Rebuttal, Complainant argues that with regard to its Motion for Accelerated Decision, "Respondents have either failed to cite to materials in the record in support of their denials, or have failed to show that the materials cited do not establish the absence of a genuine dispute." Cor. Rebut. at 2. Therefore, Complainant contends that I "should consider the essential facts of Complainant['s] prima facie case as presented in the Motion are

[14] Complainant filed its Corrected Rebuttal on June 15, 2017, subsequent to filing its initial Rebuttal on the same date. The Corrected Rebuttal is substantially similar to the initial Rebuttal, but reflects some textual revisions. Accordingly, for purposes of judicial economy, only Complainant's Corrected Rebuttal is discussed in detail in this Order.

undisputed," and grant it accelerated decision as to liability for the four counts addressed in its Motion for Accelerated Decision. Cor. Rebut. at 2. Alternatively, in its Corrected Rebuttal, Complainant requests that it be granted accelerated decision "on the prima facie elements of EPA's claim." Cor. Rebut. at 2.[15]

i. *Alleged Violation Associated with the 2014 Inspection*

Complainant argues that there is no genuine issue of material fact with regard to the alleged violation for discharge on the date of the 2014 Inspection, based upon the evidence it presented in moving for accelerated decision, as well as Respondents' failure to present contradictory evidence in their Response. Cor. Rebut. at 8. Addressing the disputed elements of the alleged violation on the date of the 2014 Inspection, Complainant asserts that it has established that (1) Respondents discharged pollutants from the Riverview Facility to the East Fork of the Des Moines River though the tile drain system, *see* Cor. Rebut. at 4-8, and (2) that the Riverview Facility was a point source at the time of this discharge as a medium CAFO, *see* Cor. Rebut. at 3-4, 8.

In its Corrected Rebuttal, Complainant reasserts that the alleged discharge associated with the 2014 Inspection is supported by Mr. Urban's observations during the 2014 Inspection and sampling data from this inspection. *See* Cor. Rebut. at 4-6. Complainant specifically notes that Mr. Urban reported observing the water level in the swale at the Riverview Facility drop significantly over several hours during the 2014 Inspection due to draining into the tile drain. Cor. Rebut. at 5 (citing Urban Decl. ¶ 4). Complainant further asserts that Mr. Urban's observations with regard to the swale draining into the tile drain are corroborated by the observations of Rickey Roberts, an EPA inspector accompanying Mr. Urban during the 2014 Inspection, as reflected in his declaration. Cor. Rebut. at 5 (citing Roberts Decl. ¶ 4). Complainant acknowledges that the evidence it has supplied with regard to establishing the alleged discharge of pollutants associated with the 2014 Inspection requires inference "that the pollutants from Respondents' facility that entered the drain tile also exited the drain tile." Cor. Rebut. at 14. Nevertheless, Complainant asserts that this inference is "supported by the uncontroverted evidence cited by Complainant describing the design and purpose of drain tile (drop in elevation, lateral lines installed by Respondents, observed discharge at outfall)." Cor. Rebut. at 14. In response to Respondents' argument that the evidence from the 2014 Inspection is inadequate because of the EPA's failure to conduct a sufficient investigation, Complainant asserts that "Respondents have attempted to construct a new evidentiary burden regarding the EPA's obligation to conduct a perfect inspection." Cor. Rebut. at 14. Complainant refutes Respondents' assertion that inspectors were informed of the location of the outlet of the tile drain during the 2014 Inspection, and otherwise asserts that the inspectors' ability to observe the outlet of the tile drain during the 2014 Inspection was constrained by the uncertainly of its location and

[15] Although Complainant does not expand on what such requested relief would entail, it appears to be a request for an order providing a declaratory ruling with regard to the disputed elements of liability pertaining to the four counts addressed in the Motion for Accelerated Decision.

limitations on the holding time for samples. Cor. Rebut. at 14 (citing Urban Decl. ¶¶ 8-10; Roberts Decl. ¶¶ 9-11).[16]

Complainant further contests the evidence offered by Respondents to dispute the alleged discharge associated with the 2014 Inspection, including Respondents' observations of the overflow from the manure pit and hydrological evidence offered by Mr. Hentges. Addressing the Respondents' claim that the alleged discharge associated with the 2014 Inspection is inconsistent with Respondents' observations of the overflow from the manure pit during the inspection and a photograph of tile inlet taken the day following the 2014 Inspection, Complainant argues that such evidence is insufficient to create an issue of material fact with regard to this alleged violation. *See* Cor. Rebut. at 5-6. Complainant suggests that Respondents' observations during the 2014 Inspection are insufficient to rebut the observations of Mr. Urban and Mr. Roberts at the time of sampling during the inspection, because, based upon Mr. Robert's report, "Respondents were not in a position to view the inlet at the time the sample was taken of wastewater flowing into the inlet" during the 2014 Inspection. Cor. Rebut. at 6 (citing Roberts Decl. ¶ 5). Likewise, Complainant argues that the photograph of the tile inlet the day following the 2014 Inspection, in CX 2 at 3, "does not show the 'water level' at the time of EPA's inspection, or at the time of sampling on June 17, 2014." Cor. Rebut. at 6. Accordingly, Complainant suggests that this photographic evidence is insufficient to support Respondents' arguments regarding the alleged discharge associated with the 2014 Inspection.

Furthermore, Complainant contests the hydrological evidence from Mr. Hentges cited by Respondents in support of their position that the overflow from the manure pit observed on the date of the 2014 Inspection did not discharge into the East Fork of the Des Moines River. Cor. Rebut. at 7. Complainant refutes Mr. Hentges' assertion that the outlet of the tile drainage system was submerged in the river during the 2014 Inspection, and therefore unable to discharge due to backflow pressure. Cor. Rebut. at 7-8. Complainant argues that "there is no support for the assertion that pollution is stopped by the existence of 'backflow pressure.'" Cor. Rebut. at 7. Additionally, Complainant argues that the evidence submitted by Respondents is insufficient to establish that the outlet of the tile drainage system was submerged in the river during the 2014 Inspection, as the river flow data cited by Mr. Hentges "does not correlate such flow to the level of water within the river, or the elevation of the outfall of the drain tile." Cor. Rebut. at 7. On the contrary, Complainant asserts that it has presented direct evidence that the outlet of the tile drainage system was not submerged during the 2014 Inspection. Cor. Rebut. at 7. Without citing specific photographs, Complainant asserts that photographs taken during both the 2014 Inspection and the 2016 Inspection, submitted in its prehearing exchange, show that the water level of the river was "at bank line, but not above, during the 2014 inspection."[17] Cor. Rebut. at 7 (generally referencing photographs in CX 1; CX 8; CX 29; CX 30). Likewise, in support of its

[16] In their declarations, Mr. Urban and Mr. Roberts note the "extreme saturated conditions of the field soil" at the time of the 2014 Inspection, and otherwise indicate that Mr. Urban "did not feel it was safe to attempt to [locate] the file outlets/draining points." Urban Decl. ¶ 11; Roberts Decl. ¶ 11. However, this description of the field conditions during the 2014 Inspection is seemingly inconsistent with the information recorded on the "Site Safety Check Off List" for the 2014 Inspection, which lists the site accessibility during the inspection as "[g]ood," and otherwise does not appear to note Mr. Urban's reported safety concerns. CX 1 at 181.

[17] Notably, Complainant does not clearly articulate a theory as to how the photographs taken during the 2016 Inspection depict the water level of the river during the 2014 Inspection.

claim that the outlet of the tile drainage system was not submerged during the 2014 Inspection, Complainant generally asserts that the elevation of the outlet of the tile drainage system is greater than the elevation of the riverbank, based upon the observations of Mr. Urban during the 2016 Inspection, documented in CX 8, and undated light detection and ranging radar ("LiDAR") imaging, in CX 33.[18] Cor. Rebut. at 7-8. Complainant, therefore, concludes that "[s]ince the outlet's elevation is higher than the streambank's elevation, this evidence refutes the assertion that outlet was submerged during the bank full flow observed on June 17, 2014." Cor. Rebut. at 8. Accordingly, Complainant argues that there is no evidentiary basis for Mr. Hentges theory regarding the alleged 2014 discharge, Cor. Rebut. at 8, and concludes that Respondents discharged pollutants from the Riverview Facility to the East Fork of the Des Moines River though the tile drain system at the time of the 2014 Inspection, *see* Cor. Rebut. at 3-4, 8.

With regard to the remaining element in dispute relating to the alleged violation associated with the 2014 Inspection, Complainant asserts that it has established that the Riverview Facility was a point source at the time of this alleged violation, as a medium CAFO. *See* Cor. Rebut. at 3-4, 8. Complainant reiterates its position that at the time of the alleged violation associated with the 2014 Inspection, the Riverview Facility met the criteria of a medium CAFO, because the Riverview Facility confined more than 300 head of cattle for more than 45 days at the time of the 2014 Inspection, and the tile drain system at issue at the Riverview Facility is a "man-made device" within the meaning of 40 C.F.R. § 122.23(b)(6). *See* Cor. Rebut. at 3-4, 8.

Complainant asserts that in its Accelerated Decision Memorandum, it established that the Riverview Facility was confining more than 300 head of cattle for more than 45 days at the time of the alleged discharge associated with the 2014 Inspection, based upon the cited reports. Cor. Rebut. at 3. Additionally, Complainant argues that "[b]ased on Respondents' failure to present countering evidence, the facts asserted by EPA should be considered undisputed for purposes of the [Motion for Accelerated Decision]." Cor. Rebut. at 3. Furthermore, Complainant argues that the tile drain system at issue at the Riverview Facility "is clearly a 'man-made device,' as described by 40 C.F.R. § 122.23(b)(6)." Cor. Rebut. at 3. Therefore, Complainant asserts that having already established that Respondents discharged pollutants from the Riverview Facility to the East Fork of the Des Moines River through the tile drain system at the time of the 2014 Inspection, it has also established that the Riverview Facility was a medium CAFO at this time. Cor. Rebut. at 8. Accordingly, Complainant concludes that it has established that the Riverview Facility was a point source at the time of the alleged violation associated with the 2014 Inspection, satisfying the remaining disputed element of this alleged violation. *See* Cor. Rebut. at 8.

ii. Alleged Violations in 2011

Consistent with its arguments regarding the alleged violation associated with the 2014 Inspection, Complainant asserts that it has satisfied the disputed elements of the alleged violations in 2011, having established that (1) Respondents discharged pollutants from the Riverview Facility to the East Fork of the Des Moines River through the tile drain system on

[18] In its Initial Prehearing Exchange, Complainant indicates that the LiDAR imaging provided in CX 33 is from 2016. However, the LiDAR imaging in CX 33 is undated.

May 12-22, 2011; June 10-16, 2011; and June 19-23, 2011, *see* Cor. Rebut. at 9-13, and (2) that the Riverview Facility was a point source at the time of these discharges as a medium CAFO, s*ee* Cor. Rebut. at 9-10, 13. As a result, Complainant concludes that there is no genuine issue of material fact with regard to the alleged violations in 2011, and that it is entitled to accelerated decision on these counts. *See* Cor. Rebut. at 13.

In its Corrected Rebuttal, Complainant reasserts its argument that it has established that Respondents discharged pollutants from the Riverview Facility to the East Fork of the Des Moines River through the tile drain system on May 12-22, 2011; June 10-16, 2011; and June 19-23, 2011, on the basis of having established the alleged discharge associated with the 2014 Inspection, and having demonstrated comparable rainfall during the dates of the alleged 2011 discharges as the rainfall causing the discharge associated with the 2014 inspection. Complainant asserts that it "selected three precipitation events in 2011 that are comparable to the precipitation which caused the discharge into the inlet documented during EPA's inspection in 2014." Cor. Rebut. at 12. Complainant suggests that having established the alleged discharge associated with the 2014 Inspection, application of "mathematical logic" compels the conclusion that discharges from production areas of the Riverview Facility also occurred during similar rainfall on the alleged dates of violation in 2011, in the absence of the storage capacity of the manure pit present during the 2014 Inspection. Cor. Rebut. at 12-13. In reasserting this argument in the Corrected Rebuttal, Complainant notably does not address the arguments Respondents raised in their Response Memorandum regarding the precipitation data relied upon by Complainant.

Complainant additionally argues that the alleged discharges from production areas of the Riverview Facility at the time of the alleged 2011 violations are further evidenced by statements made during the 2014 Inspection, and the aerial photographs of the Riverview Facility from April 17, 2011, contained in CX 28. *See* Cor. Rebut at 9-11. Complainant argues that the fact that the tile drain system was functioning during the dates of alleged violations in 2011 has been established by statements made by Tony Brown during the 2014 Inspection, reflecting that the drain tile inlet had been present since he was a child. Cor. Rebut. at 9. Likewise, Complainant reiterates its argument that aerial photographs of the Riverview Facility from April 17, 2011, contained in CX 28, show "visible drainage patterns" indicative of uncontrolled runoff from production areas of Riverview Facility prior to the construction of the manure pit. Cor. Rebut. at 10. Complainant notes that while Respondents denied that runoff occurred from cattle pens at the Riverview Facility prior to the construction of the manure pit, "Respondents fail[ed] to provide any evidence addressing the uncontrolled runoff from other cited production areas." Cor. Rebut. at 11. As a result, Complainant argues that the evidence it has submitted in support of establishing uncontrolled runoff from production areas of the Riverview Facility during the alleged 2011 violations "should be considered undisputed for the purposes of the Motion [for Accelerated Decision]." Cor. Rebut at 11. Furthermore, Complainant contests Respondents' assertion that runoff from cattle pens at the Riverview Facility was contained by a concrete wall prior to the construction of the manure pit. Cor. Rebut at 11. Complainant argues that the aerial photographs in CX 28 reflect cuts in the concrete retaining wall referenced by Respondents, and otherwise reflect overflow draining from the cattle pen area of the Riverview Facility. Cor. Rebut. at 11 (citing photograph CX 28.1). Based upon such evidence, Complainant concludes

that "there is no genuine issue of material fact that discharges from uncontrolled production areas at [the Riverview Facility] would have occurred during the cited precipitation events in 2011, prior to construction of the manure pit." Cor. Rebut at 13.

Complainant additionally argues that it has established that the runoff discharging from the Riverview Facility during the alleged violations in 2011 contained pollutants, despite the absence of sample testing at the time of these violations. *See* Cor. Rebut. at 12. Complainant suggests that it can be inferred that the runoff discharging from production areas of the Riverview Facility during the alleged 2011 violations contained pollutants, based upon sample testing of water from production areas of the Riverview Facility during the 2016 Inspection, reflecting pollutants. Cor. Rebut. at 11-12. Further, Complainant indicates that it can be reasoned that the runoff during these discharges was not pristine given that it exited a contaminated area. Cor. Rebut at 12 (citing *Leed Foundry*, 2007 EPA ALJ LEXIS 13, at *50). Accordingly, Complainant concludes that it has established that Respondents discharged pollutants from the Riverview Facility to the East Fork of the Des Moines River though the tile drain system on the dates of the alleged violations in 2011. Cor. Rebut. at 13.

Finally, with regard to the remaining element in dispute relating to the alleged violations in 2011, Complainant argues that it has demonstrated that the Riverview Facility was a point source at the time of the alleged violations in 2011, as a medium CAFO. *See* Cor. Rebut. at 9-10, 13. Consistent with its argument regarding this element for the alleged violation associated with the 2014 Inspection, Complainant asserts that it has established that the Riverview Facility was a medium CAFO at the time of the 2011 violations, by documenting that the Riverview Facility confined more than 300 head of cattle for more than 45 days at times relevant to the alleged 2011 violations, and discharged pollutants into waters of the United States through a man-made ditch, flushing system, or other similar man-made device. *See* Cor. Rebut. at 9-10, 13. Complainant reiterates its argument that through the evidence it cited in conjunction with its Motion for Accelerated Decision, it has established that the Riverview Facility confined more than 300 head of cattle "between at least May 2011 and May 2012." Cor. Rebut. at 9. Complainant further notes that Respondents did not contest this evidence in their Response by either raising an argument against it or presenting counter evidence, and therefore, Complainant argues that this evidence should be considered undisputed. Cor. Rebut. at 9. Likewise, Complainant reasserts its position that the drain tile by which it alleges Respondents discharged pollutants at the time of the alleged violations in 2011, constitutes a man-made ditch, flushing system, or other similar man-made device. *See* Cor. Rebut. at 9, 13. As a result, Complainant concludes that it has established that the Riverview Facility was a point source at the time of the alleged 2011 violations, and therefore has established the only remaining element in dispute with regard to the alleged 2011 violations.

VII. DISCUSSION

Complainant has not demonstrated that it is entitled to accelerated decision as to liability with regard to either the alleged violation associated with the 2014 Inspection or the alleged 2011 violations. On the contrary, as addressed below, the record reflects genuine issues of

material fact relevant to liability regarding each of the alleged violations at issue in Complainant's Motion for Accelerated Decision. Accordingly, accelerated decision on liability is not warranted on any count of the alleged violations at issue in Complainant's Motion for Accelerated Decision.

a. Alleged Violation Associated with the 2014 Inspection

Complainant has not established an absence of a genuine issue of material fact entitling it to judgment as a matter of law with regard to the alleged violation associated with the 2014 Inspection. Contrary to Complainant's assertions with regard to the alleged violation associated with the 2014 Inspection, the record reflects genuine issues of material fact regarding (1) whether Respondents discharged a pollutant from the Riverview Facility into the East Fork of the Des Moines River at the time of this alleged violation, and (2) whether the Riverview Facility was a point source as Medium CAFO at the time of the alleged discharge associated with the 2014 Inspection. Given these issues of fact regarding essential elements of the alleged violation associated with the 2014 Inspection, accelerated decision as to liability on this count is not warranted.

Counter to the assertions of Complainant in supporting its Motion for Accelerated Decision, the record reflects a genuine issue of fact regarding whether Respondents discharged a pollutant from the Riverview Facility into the East Fork of the Des Moines River at the time of the 2014 Inspection. The evidence cited by Complainant to establish this discharge does not resolve the factual dispute regarding this essential element of the alleged violation associated with the 2014 Inspection. Although the evidence shows the presence of process wastewater, containing pollutants, at an inlet to the tile drain system at the Riverview Facility during the 2014 Inspection, a genuine issue of fact remains with regard to whether this wastewater discharged into the East Fork of the Des Moines River. Accordingly, on this basis, a genuine issue of material fact remains with regard to whether Respondents discharged a pollutant from the Riverview Facility into the East Fork of the Des Moines River at the time of the 2014 Inspection.

In their Answer, Respondents admit that during the 2014 Inspection, an EPA inspector observed an open inlet into a tile drainage system receiving surface runoff and process wastewater from production areas of the Riverview Facility. *See* Compl. ¶¶ 23, 28; Answer ¶¶ 23, 28. Likewise, Respondents further admit that during the 2014 Inspection, an EPA inspector "observed and sampled pollutant discharges emanating from the confinement pens and other production areas into the tile-drainage system at the Riverview Facility." *See* Compl. ¶ 23; Answer ¶ 23. The presence of this wastewater during the 2014 Inspection is further corroborated by the observations of inspectors and photographs taken during the 2014 Inspection, which document the presence of process wastewater at an inlet of a tile drain at the Riverview Facility. *See* CX 1 at 7, 23-24, 50-52, 60-61; Urban Decl. ¶ 4; Roberts Decl. ¶¶ 4-5. Additionally, test results from a sample of this wastewater, taken from the site of drain tile inlet during the 2014 Inspection, reflect the presence of pollutants. *See* CX 1 at 11 (table and narrative discussion addressing test results for Sample 1). The presence of process wastewater, containing pollutants, at the inlet to the tile drain system at the Riverview Facility during the 2014 Inspection is also notably consistent with a written statement made by Respondents following the 2014 Inspection, which acknowledges a discharge from a "cattle pit" during this inspection. S*ee* CX 4 at 2. As a

result, the evidence reveals that wastewater was present and observed at an inlet of the tile drain system at the Riverview Facility during the 2014 Inspection, and that this wastewater contained pollutants. However, the record reflects a genuine issue of fact as to whether the wastewater at the inlet of the tile drain system, which contained pollutants, discharged into the East Fork of the Des Moines River at the time of the 2014 Inspection.

In making its argument that there is no genuine dispute that the wastewater observed at the inlet of the tile drain system during the 2014 Inspection discharged into the East Fork of the Des Moines River as alleged, Complainant relies upon a constellation of circumstantial evidence, including observations from inspectors regarding the flow of the wastewater into the inlet to the tile drain system, the location and elevation of the outlet of the tile drain system, observation of the outlet of the tile drain system during the 2016 Inspection, and the purpose and use of the tile drain system at the Riverview Facility. *See* AD Mem. at 11-13; Cor. Rebut. at 4-8. Notably, in supporting its Motion for Accelerated Decision, Complainant acknowledges its lack of direct evidence on this issue, and concedes that the circumstantial evidence it has presented requires the inference that pollutants present in the wastewater at the inlet to the tile drain system exited from the outlet of the tile drain system into the East Fork of the Des Moines River. *See* AD Mem. at 22; Cor. Rebut. at 13-14. Complainant's exclusive reliance upon circumstantial evidence is not impermissible, as circumstantial evidence may be relied upon as evidence of a material fact.[19] *See BWX Techs.*, 9 E.A.D. at 78 ("[The respondent's] exclusive reliance upon circumstantial evidence did not, by itself, render its case infirm, for circumstantial evidence can be effectively used to state a proposition of material fact in the absence of direct evidence."). However, as previously noted, in adjudicating Complainant's Motion for Accelerated Decision, all justifiable inferences must be drawn in favor of Respondents, the non-moving party. *See supra* p. 6. Considering the evidence in this light, the record reflects that there is a genuine issue of fact as to whether the wastewater at the inlet of the tile drain system discharged into the East Fork of the Des Moines River at the time of the 2014 Inspection.

As previously noted, Respondents deny discharging pollutants to the East Fork of the Des Moines River in their Answer. *See* Answer ¶¶ 23, 28, 33, 37. Supporting this denial in their Response Memorandum, Respondents provide circumstantial evidence to counter that cited by Complainant in support of its assertion that the wastewater observed at the inlet of the tile drain system during the 2014 Inspection discharged into the East Fork of the Des Moines River. *See* Resp. Mem. at 3-6. In doing so, Respondents do not rely upon mere denials in their Answer to demonstrate a genuine issue of material fact on this issue, but rather cite to this circumstantial evidence. Indeed, Respondents, as witnesses to the 2014 Inspection, contest the observations of inspectors offered by Complainant regarding the flow of the wastewater into the inlet of the tile drain system, and offer their observations that wastewater overflowing from the manure pit during the 2014 Inspection "was moving very slowly, if at all." T. Brown Stat. ¶ 4; J. Brown Stat. ¶ 4. In support of their observations, Respondents further cite to a photograph they report was taken the day following the 2014 Inspection, which depicts pooled water at the inlet to the

[19] Specifically, within the context of the CWA, discharges may be inferred from circumstantial evidence. *See, e.g.*, *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 120 (2d Cir. 1994) (finding that the fact finder may infer point source discharges from circumstantial evidence); *Lowell Vos Feedlot*, 15 E.A.D. at 314 (holding that the government, in CWA actions, can "use any kind of evidence, direct or inferential, to attempt to establish that an unlawful discharge occurred").

tile drain system observed during the 2014 Inspection. *See* CX 2 at 3; T. Brown Stat. ¶ 4; J. Brown Stat. ¶ 4. Respondents assert that the cited photograph depicts that the water level of the wastewater at the inlet to the tile drain system observed during the 2014 Inspection "hadn't gone down at all over the 24 hours after the inspection." T. Brown Stat. ¶ 4; J. Brown Stat. ¶ 4. Additionally, Respondents submitted evidence from Mr. Hentges, a consulting hydrologist and proposed expert witness, in support of their contention that the wastewater observed at the inlet of the tile drain system during the 2014 Inspection did not discharge into the East Fork of the Des Moines River. Mr. Hentges, as discussed above, opines that based upon flow data from the date of the 2014 Inspection for the East Fork of the Des Moines River from a wastewater treatment facility upstream from the outlet of the tile drain system at the Riverview Facility, a discharge from the tile drain system would not have occurred if the outlet to the tile drain system was submerged "due to the head pressure of water in the river pushing back on the water in the tile line." RX 2 at 3. Mr. Hentges further concludes that based upon the reported height of the East Fork of the Des Moines River during the 2014 Inspection, the outlet to the tile drain system at the Riverview Facility was likely submerged by the East Fork of the Des Moines River at the time of inspection. RX 2 at 3. Further, Mr. Hentges indicates that such "backflow pressure" caused by the submerged tile drain outlet could cause water present in the tile lines to discharge through perforations into the soil. Hentges Stat. ¶ 4.

Notably, as previously discussed, Complainant, in its Corrected Rebuttal, refutes the circumstantial evidence supplied by Respondents in support of their contention that the wastewater observed at the inlet of the tile drain system during the 2014 Inspection did not discharge into the East Fork of the Des Moines River as alleged. *See supra* pp. 17-18; Cor. Rebut. at 6-8. Specifically, Complainant argues that the observations of Respondents, and the cited photograph of the inlet to the tile drain system taken the day following the 2014 Inspection, are insufficient to counter the observations of the inspectors. *See* Cor. Rebut. at 6. Likewise, Complainant refutes Mr. Hentges' assertion that the outlet to the tile drain system was submerged at the time of the 2014 Inspection. *See* Cor. Rebut. at 7-8. However, as previously noted, in adjudicating Complainant's Motion for Accelerated Decision, the evidence of Respondents, the non-moving party, is to be believed, and all justifiable inferences are to be drawn in Respondents' favor. Considering the evidence in this light, Respondents have adequately supported their denial based upon the circumstantial evidence they cited in opposing Complainant's Motion for Accelerated Decision, and have demonstrated that there is a genuine issue of fact regarding whether the wastewater observed at the inlet of the tile drain system during the 2014 Inspection discharged into the East Fork of the Des Moines River. As a genuine issue of fact remains regarding whether the wastewater observed at the inlet of the tile drain system during the 2014 Inspection discharged into the East Fork of the Des Moines River, the material question of whether Respondents discharged a pollutant from the Riverview Facility into the East Fork of the Des Moines River at the time of the alleged discharge associated with 2014 Inspection genuinely remains in dispute in this matter.

In addition to the disputed issue of material fact with regard to whether Respondents discharged a pollutant from the Riverview Facility into the East Fork of the Des Moines River at the time of the alleged discharge associated with 2014 Inspection, the record also reflects an issue of material fact with regard to whether the Riverview Facility was a point source as Medium CAFO at the time of the alleged discharge associated with the 2014 Inspection. As

previously discussed, Complainant alleges that at the time of the alleged violation associated with the 2014 Inspection, the Riverview Facility was a point source, as a medium CAFO. *See* AD Mem. at 18-21; Cor. Rebut. at 3-4, 8. In their Answer, Respondents admit that the Riverview Facility is an animal feeding operation, Answer ¶ 21, but otherwise deny that the Riverview Facility was a medium CAFO, as defined in 40 C.F.R. §122.23(b)(6), during the relevant period, Answer ¶ 31. In supporting its Motion for Accelerated Decision, Complainant argues that it has established that the Riverview Facility was a Medium CAFO, within the meaning of 40 C.F.R. § 122.23(b)(6), at the time of the alleged discharge associated with the 2014 Inspection, on the basis that the Riverview Facility confined more than 300 head of cattle for more than 45 days at the times of this alleged discharge, and discharged pollutants into waters of the United States through a man-made ditch, flushing system, or other similar man-made device. AD Mem. at 19-21; Cor. Rebut. at 3-4, 8. However, as previously discussed, the record reflects a genuine issue of material fact as to whether Respondents discharged a pollutant from the Riverview Facility into the East Fork of the Des Moines River at the time of the alleged discharge associated with 2014 Inspection. Accordingly, a genuine issue of material fact also remains regarding whether the Riverview Facility was a point source as Medium CAFO at the time of the alleged discharge associated with the 2014 Inspection, as the record reflects a factual dispute as to whether the Riverview Facility discharged pollutants into the Des Moines River through the tile drain system at the time of the 2014 Inspection, as alleged.

As the record reflects disputed issues of material fact relating to the alleged violation associated with the 2014 Inspection, Complainant has not established an absence of a genuine issue of material fact entitling it to judgment as a matter of law on this count. As a result, the accelerated decision requested on this count by Complainant is not warranted.

b. <u>Alleged Violations in 2011</u>

Contrary to its assertions, Complainant also has not established an absence of a genuine issue of material fact entitling it to judgment as a matter of law with regard to the alleged violations occurring on May 12-22, 2011; June 10-16, 2011; and June 19-23, 2011. As previously noted, Complainant's theory of liability regarding the alleged violations in 2011 is premised upon having established that the Respondents discharged pollutants from the Riverview Facility to the East Fork of the Des Moines River at the time of the 2014 Inspection. *See* AD Mot. at 15-16; Cor. Rebut. at 12-13 (discussing this theory of liability). Specifically, Complainant contends that the three alleged discharge events in 2011 associated with the alleged 2011 violations are established by regional precipitation data reflecting rainfall on the dates of the alleged 2011 violations that is comparable to the rainfall occurring between June 15-17, 2014, the three-day period including the date of the 2014 Inspection and two days prior. AD Mem. at 15-16; Cor. Rebut. at 12-13. However, as discussed above, the record reflects an issue of material fact with regard to whether Respondents discharged a pollutant from the Riverview Facility into the East Fork of the Des Moines River at the time of the alleged discharge associated with 2014 Inspection. Accordingly, Complainant's reliance upon proving the alleged discharge associated with 2014 Inspection in establishing the alleged 2011 violations raises a genuine issue of material fact regarding the alleged 2011 violations. Notably, the circumstantial evidence cited by Complainant to corroborate the alleged discharges in 2011, including the statements of Respondents at the time of the 2014 Inspection (reflected in CX 1), and aerial

photographs of the Riverview Facility taken on April 17, 2011 (in CX 28), do not otherwise resolve this question of material fact.

Nevertheless, it is worth noting that even if Complainant had definitively established the alleged discharge associated with the 2014 Inspection, upon which the alleged 2011 violations are premised, the record still would reflect a genuine issue of material fact regarding whether Respondents discharged a pollutant from the Riverview Facility into the East Fork of the Des Moines River at the times of these alleged violations in 2011. Even in the absence of a genuine issue of material fact regarding the alleged violation associated with the 2014 Inspection, the record reflects factual disputes regarding the precipitation data employed by Complainant to establish the 2011 discharge events, as well as the physical features of the Riverview Facility at the time of the alleged 2011 discharges. As these factual disputes underlie the determination as to whether the Respondents discharged a pollutant from the Riverview Facility into the East Fork of the Des Moines River at the times of these alleged violations in 2011, a genuine issue of material fact would remain even if Complainant had succeeded in establishing the alleged discharge associated with the 2014 Inspection beyond a genuine issue of fact.

As previously discussed, in supporting its Motion for Accelerated Decision, Complainant asserts that regional precipitation data reflects that a total of 3.34 inches of rain fell between June 15-17, 2014, the three-day period prior to and including the date of the 2014 Inspection. AD Mem. at 15. Based upon this precipitation data and the evidence it asserts demonstrates a discharge of pollutants from the Riverview Facility at the time of the 2014 Inspection, Complainant argues that it can be presumed that the Riverview Facility also discharged pollutants to the East Fork of the Des Moines River on the dates of the three alleged discharge events in 2011, given comparable rainfall during these periods.[20] *See* AD Mot. at 15-16; Cor. Rebut. at 12-13. Notably, however, the precipitation data employed by Complainant in support of its Motion for Accelerated Decision substantially differs from the allegations asserted by Complainant in the Complaint. In contrast to Complainant's assertion in supporting its Motion for Accelerated Decision that 3.34 inches of rain fell between June 15-17, 2014, Complainant alleges in its Complaint that "an estimated 5-6 inches of precipitation" occurred at the Riverview Facility over the same period. Compl. ¶ 30. Furthermore, in their Response, Respondents dispute Complainant's assertion that 3.34 inches of rain fell between June 15-17, 2014, and they supply evidence to support their contention regarding the rainfall on these dates. *See* Resp. Mem. at 8. Respondents state that during the 2014 Inspection, they reported that the Riverview Facility had received approximately six inches of rain in the days prior to the inspection. Resp. Mem. at 8 (citing T. Brown Stat. ¶ 2; J. Brown Stat. ¶ 2). Additionally, Respondents argue that their estimate of the rainfall during the 2014 Inspection is consistent with local rainfall records, which reflect that 4.97 inches of rain fell from June 14-16, 2014. *See* Resp. Mem. at 8 (citing

[20] Complainant consistently characterizes the precipitation during the three alleged discharge events in 2011 as comparable or similar to the precipitation occurring during June 15-17, 2014. *See* AD Mem. at 15, 17; Cor. Rebut. at 12-13. However, it is notable that the precipitation Complainant alleges occurred during the discharge event from June 19-23, 2011, is 3.3 inches, and is therefore less than the 3.34 inches of precipitation Complainant alleges occurred on June 15-17, 2014. *See* AD Mem. at 15, 17 (discussing precipitation alleged by Complainant in support of its Motion for Accelerated Decision). Furthermore, Complainant does not address the fact that the three alleged discharge events in 2011, namely May 12-22, 2011; June 10-16, 2011; and June 19-23, 2011, are longer in duration than the period from June 15-17, 2014. As a result, it does not appear that Complaint's characterization of the precipitation on these dates is fully supported.

RX 7 and RX 8). Given the Complainant's conflicting assertions regarding the amount of rainfall June 15-17, 2014, and the countering evidence supplied by Respondents regarding the rainfall in the days prior to the 2014 Inspection, the record reflects a genuine issue of fact regarding the precipitation data Complainant relies upon to establish the three alleged discharge events in 2011 associated with the alleged 2011 violations. As a result, even in the absence of a genuine issue of fact regarding the alleged discharge associated with the 2014 Inspection, a genuine issue of material fact regarding whether Respondents discharged a pollutant from the Riverview Facility into the East Fork of the Des Moines River at the times of the alleged violations in 2011 would remain on this basis.

Likewise, the record reflects a genuine factual dispute regarding the physical features of the Riverview Facility at the time of the alleged 2011 discharges. Both parties appear to acknowledge that the concrete manure pit observed at the Riverview Facility during the 2014 Inspection was constructed in 2011, after the alleged 2011 violations. *See* AD Mem. at 16-17; Resp. Mem. at 9; Cor. Rebut at 13. Therefore, the parties agree that there was some change to the Riverview Facility between time of the alleged violations in 2011, and the alleged violation associated with the 2014 Inspection. However, the parties otherwise disagree on the physical features of the Riverview Facility at the time of the alleged violations in 2011.

As previously discussed, Complainant asserts that at the time of the alleged 2011 violations, the Riverview Facility lacked controls to prevent surface runoff from discharging from production areas, *see* AD Mem. at 16-17; Cor. Rebut at 10-13, and that aerial photographs of the Riverview Facility in CX 28, taken prior to the alleged 2011 violations on April 17, 2011, reflect "visible drainage patterns" indicative of uncontrolled runoff from production areas of Riverview Facility prior to the construction of the manure pit, *see* AD Mem. at 15-16; Cor. Rebut. at 10. Notably, Complainant acknowledges the presence of a concrete retaining wall in the cattle pen area of the Riverview Facility, but argues that the aerial photographs in CX 28 reflect cuts in this retaining wall, and otherwise depict overflow draining from the cattle pen area of the Riverview Facility. *See* Cor. Rebut. at 11 (citing photograph CX 28.1).

In contrast, Respondents, citing to their own statements in support, assert that manure in the feed yard of the Riverview Facility was retained by a four-foot wall around the feed yard prior to construction of the manure pit, and that this wall "did not have any discharge points in the area where manure was retained before the concrete manure pit was installed." Resp. Mem. at 9 (citing T. Brown Stat. ¶ 11; J. Brown Stat. ¶ 11). Furthermore, citing to the statement of their proposed expert witness, Mr. Hentges, Respondents more generally argue that "there are too many unknown environmental factors on these additional dates of alleged discharge to allow them to be summarily used to find that discharges to a water of the U.S. actually occurred." Resp. Mem. at 9 (citing Hentges Stat. ¶ 5). Complainant refutes Respondents' position on this point, *see* Cor. Rebut at 11, and notably has submitted modeling evidence by a proposed expert witness, Steven Wang, Ph.D., which purports to consider factors such as the site characteristics and soil composition of the Riverview Facility in calculating discharges. *See* CX 20 at 5-7, 11 (discussing considerations regarding site characteristics and soil composition in modeling). Interestingly, however, contrary to the assertions of Complainant in supporting its Motion for Accelerated Decision, the modeling evidence from Dr. Wang does not appear to calculate

discharges from the Riverview Facility on each of the dates of alleged violation in 2011.[21] *See* CX 20 at 17, 32-33 (providing calculated dates of stormwater discharge to the tile drain system in 2011). Complainant notably does not offer an explanation for its divergence from the modeling evidence it supplied in CX 20 in supporting its Motion for Accelerated Decision.

Considering the diverging evidence submitted by the parties regarding the physical features of the Riverview Facility at the time of the alleged 2011 violations, it is clear that there is a genuine question of fact on this issue. Although the parties submitted evidence to support their positions regarding the physical features of the Riverview Facility at the time of the alleged 2011 violations, neither party has submitted evidence sufficient to dispel this question of fact. Notably, the aerial photographs of the Riverview Facility referenced by Complainant as evidence of the alleged 2011 discharges were reported to be taken prior to the alleged violations in 2011, and these photographs otherwise do not appear to clearly depict actively flowing or discharging wastewater. *See* CX 28 (referenced aerial photographs); *see also* AD Mem. at 16 (reporting the date of these photographs). Therefore, the record reflects a genuine dispute regarding the physical features of the Riverview Facility at the time of the alleged 2011 violations. As determination of the physical features of the Riverview Facility at the time of the alleged 2011 violations is foundational to determining whether Respondents discharged a pollutant from the Riverview Facility into the East Fork of the Des Moines River at the times of the alleged violations in 2011, the record reflects a genuine issue of material fact on this basis.

Accordingly, the record reflects that a genuine issue of material fact remains with regard to liability for each count of the alleged 2011 violations. As Complainant has predicated the alleged 2011 violations on having established the alleged discharge associated with 2014 Inspection, and the record reflects an issue of material fact with regard to whether Respondents discharged a pollutant from the Riverview Facility into the East Fork of the Des Moines River at the time of the alleged discharge associated with 2014 Inspection, the record also reflects that a genuine issue of material fact as to the alleged violations in 2011 on this basis. Additionally, even in the absence of a genuine issue of fact with regard to the alleged violation associated with the 2014 Inspection, the record would still reflect a question of material fact regarding the alleged 2011 violations, based upon the factual disputes regarding the precipitation data employed by Complainant to establish the 2011 discharge events, and the physical features of the Riverview Facility at the time of the alleged 2011 violations. As a result, accelerated decision as to liability regarding these counts is not warranted.

c. Conclusion

Complainant, as the party moving for accelerated decision as to liability, has not met its burden by demonstrating the absence of a genuine issue of material fact with regard to liability. Indeed, the record reflects genuine issues of material fact remain with regard to liability for each

[21] As previously discussed, Complainant alleges discharges occurred on May 12-22, 2011; June 10-16, 2011; and June 19-23, 2011. In contrast, the modeling evidence in CX 20 appears to calculate stormwater discharge to the tile drain system occurring on May 20-23, 2011; May 26-27, 2011; June 10, 2011; June 15-17, 2011; June 19-23, 2011. *See* CX 20 at 17, 32-33 (calculating dates of stormwater discharge to the tile drain system in 2011 under two different model scenarios). As a result, Complainant's own modeling evidence does not appear to reflect the alleged discharges occurring on May 12-19, 2011, and June 11-14, 2011.

of the alleged counts of violation at issue in Complainant's Motion for Accelerated Decision.[22] As a result, it would be inappropriate to grant Complainant accelerated decision as to liability for the counts at issue in its Motion for Accelerated Decision. Further, given the significant issues of fact remaining in this matter regarding each count of the alleged violations, as addressed above, it is not appropriate to render declaratory judgment regarding the disputed elements of these counts, as alternatively requested by Complainant. Accordingly, Complainant's Motion for Accelerated Decision is DENIED.

V. ORDER

1. Respondents' request for oral argument on Complainant's Motion for Accelerated Decision is hereby **DENIED**.

2. Complainant's Motion for Accelerated Decision is hereby **DENIED**.

3. The parties are directed to provide to this Tribunal, no later than **March 30, 2018**, any dates of conflict for counsel and its proposed witnesses during the months of June, July, and September of 2018, in anticipation of scheduling an evidentiary hearing in this matter.

SO ORDERED.

Christine Donelian Coughlin
Administrative Law Judge

Dated:
March 13, 2018
Washington, D.C.

[22] Notably, the parties should be aware that this Order does not contain an exhaustive list of all of the issues of fact remaining in this matter.

In the Matter of *Tony L. Brown and Joshua A. Brown, d/b/a Riverview Cattle*, Respondents.
Docket No. CWA-07-2016-0053

Certificate of Service

I hereby certify that copies of the foregoing Order on Complainant's Motion for Accelerated Decision as to Liability, dated and issued by Administrative Law Judge Christine Donelian Coughlin on March 13, 2018, were sent this day to the following parties in the manner indicated below.

Andrea Priest
Attorney Advisor

Original and One Copy by Hand Delivery to:

Mary Angeles
Headquarters Hearing Clerk
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Ronald Reagan Building, Room M1200
1300 Pennsylvania Ave., NW
Washington, DC 20004

Copies by Regular and Electronic Mail to:

Howard Bunch, Esq.
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 7
11201 Renner Boulevard
Lenexa, KS 66219
Email: bunch.howard@epa.gov
Counsel for Complainant

Eldon L. McAfee, Esq.
Brick Gentry, P.C.
6701 Westown Parkway, Suite 100
West Des Moines, IA 50266
Email: eldon.mcafee@brickgentrylaw.com
Counsel for Respondents

Dated: March 13, 2018
Washington, D.C.