

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 7  
11201 RENNER BOULEVARD  
LENEXA, KANSAS 66219

BEFORE THE ADMINISTRATOR

Tony L. Brown and )  
Joshua A. Brown ) Docket No. CWA-07-2016-0053  
d/b/a Riverview Cattle )  
Armstrong, Iowa )  
Respondents )  
)  
) **COMPLAINANT'S MOTION FOR**  
) **ACCELERATED DECISION AS TO**  
) **LIABILITY**

The United States Environmental Protection Agency, Region 7 ("EPA" or "Complainant") respectfully submits the following Complainant's Motion for Accelerated Decision as to Liability. Accompanying this Motion is a Memorandum and Points of Authority in Support of this Motion.

Pursuant to Rule 22.20(a) of the Consolidated Rules of Practice, the Presiding Officer may render an accelerated decision as to all or any part of the proceeding at any time "if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." As in federal practice, the purpose of such a motion is to pierce the pleadings and assess the proof in order to see whether there is a genuine issue for trial. A party may not rest upon mere denials of the adverse party's pleadings when opposing such a motion. *In re Labarge, Inc.*, Docket No. CWA-VII-91-W-0078 (1997).

If the non-moving party fails to address the moving party's assertions of fact – or establish that there is a genuine factual dispute - by citing to specific materials in the record, the

court may grant an accelerated decision. *In Re: Polo Development, Inc., et al.*, Docket No. CWA-05-2013-0003 (2015), *citing* FCRP 56(c)(1). Likewise, with respect to affirmative defenses raised by the Respondent, the non-moving party must overcome the moving party's claims that the defenses lack factual support by citing to specific evidence in the record. *Id.* If unable to demonstrate a genuine factual dispute concerning affirmative defenses, the court may strike the defenses. *Id.*

In the present case, there is no genuine issue of material fact with respect to Respondent's liability for violations of the Clean Water Act. Thus, EPA is entitled to an accelerated decision pursuant to 40 C.F.R. § 22.20 concerning the following issues:

1. Respondents are each a "person" as defined by 33 U.S.C. § 1362(5), which states a "person" is defined as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." In the answer, Respondents admit that each is a "person" as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5). Answer, ¶ 4.
2. Respondents discharged 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. <sup>1</sup> The CWA defines the term pollutant as, among other things, "agricultural waste" discharged into water. 33 U.S.C. § 1362(6). The NPDES requirements for CAFOs apply with respect to all animals at the operation and all manure, litter, and process waste water generated by those animals, regardless of the type of animal. 40 C.F.R. § 122.23(a). The definition of process waste water includes, among other things, any water that comes into contact with any raw materials, products, or byproducts, including manure, litter, feed, or bedding. 40 C.F.R. § 122.23.b(7). Respondents have denied that they discharged pollutants. Answer, ¶ 24. However, as summarized in the attached Memorandum, for each of the described four events, EPA contends this element of the violation has been established, based on the Respondents' admissions and the evidence in the record.

---

<sup>1</sup> In addition to the discharges for which Complainant seeks an accelerated decision on liability, as set forth in Complainant's prehearing exchanges, EPA's expert (Dr. Steven Wang, CX 20, Expert Report) has applied established models for estimating the volume of surface runoff generated by rain events, and calculated that a minimum of 50 days of discharge from Respondents' CAFO to the East Fork of the Des Moines River between May 2011 and July 2014. Complainant reserves the right to introduce this evidence at any hearing for the appropriate penalty on this matter, and to establish liability for additional discharge events.

3. The East Fork of the Des Moines River is “a water of the United States.” Answer, ¶ 32.
4. Respondents’ facility is a point source. The CWA defines a “point source” 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) and 40 C.F.R. § 122.2 (emphasis added). Respondents admit that at all times relevant the facility’s feedlot confined and fed or maintained cattle for a total of 45 days or more in any twelve-month period. Answer, ¶ 25. Respondents admit that neither crops, vegetation, forage growth, nor post-harvest residues were sustained over any portion of the feeding areas. Answer to the Complaint ¶ 24. Respondent admit that at all relevant times his feedlot was an animal feeding operation as defined by 40 C.F.R. § 122.23(b)(1), and as that phrase is used in Section 502(14) of the CWA, 33 U.S.C. § 1362(14). Answer, ¶ 26.

Respondents have not admitted that they confined greater than 300 head of cattle and their feedlot was a Medium CAFO at all times relevant to the Complaint. Answer, ¶ 24. However, as summarized in the attached Memorandum, EPA contends this element of the violation has been established, based on the Respondents’ admissions and the evidence in the record, and Respondents’ feedlot was a Medium CAFO and a “point source” as defined in 33 U.S.C. § 1362(14) and 40 C.F.R. § 122.2 at all relevant times.

5. Respondents admit they did not have a CWA Section 402 permit from the Iowa Department of Natural Resources authorizing discharges of pollutants. Answer, ¶ 37.

Respectfully submitted,

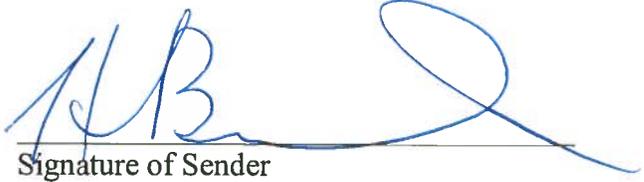


Howard C. Bunch  
Office of Regional Counsel  
Sr. Assistant Regional Counsel  
U.S. Environmental Protection Agency  
11201 Renner Boulevard  
Lenexa, Kansas 66219  
913-551-7879

CERTIFICATE OF SERVICE

I hereby certify that on this 15<sup>th</sup> day of May 2015, I sent via the OALJ E-filing system the original and one copy of this Motion, and sent one true and correct copy via email to Mr. Eldon McAfee, Esq, counsel for Respondents.

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



Signature of Sender