UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

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BEFORE THE ADMINISTRATOR

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| TONY L. BROWN and JOSHUA A. BROWNd/b/a RIVERVIEW CATTLEArmstrong, IA Respondents | Docket No. CWA-07-2016-0053MEMORANDUM IN SUPPORT OF RESPONDENTS’ RESPONSE TO COMPLAINANT’S MOTION FOR ACCELERATED DECISION AS TO LIABILITY  |

COME NOW Respondents, Tony L. Brown and Joshua A. Brown, d/b/a Riverview Cattle, and in support of their Response to Complainant’s Motion For Accelerated Decision As To Liability submits this Memorandum.

Respondents do not object to Complainant’s summarization of the pleadings in this case nor do Respondents disagree with Complainant’s statement of the legal standards for an accelerated decision. 40 CFR § 22.20 is clear and straightforward:

1. General. 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. The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.
2. Effect.

(1) If an accelerated decision or a decision to dismiss is issued as to all issues and claims in the proceeding, the decision constitutes an initial decision of the Presiding Officer, and shall be filed with the Regional Hearing Clerk.

(2) If an accelerated decision or a decision to dismiss is rendered on less than all issues or claims in the proceeding, the Presiding Officer shall determine what material facts exist without substantial controversy and what material facts remain controverted. The partial accelerated decision or the order dismissing certain counts shall specify the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed.

In this case, Complainant’s motion is for liability issues only so it is a motion under 40 CFR § 22.20(b)(2). As will be shown in the remainder of this Memorandum and the accompanying statements in support of Respondents’ Response to EPA’s Motion for Accelerated decision, there are numerous genuine issues of material fact that warrant denial of EPA’s motion.

ARGUMENT

 The only issue in this case is whether there has been any discharge of pollutants from Riverview Cattle’s feed yard to a water of the U.S. in violation of the Clean Water Act.[[1]](#footnote-1) To prove such a violation, EPA must prove that Riverview Cattle actually discharged pollutants from their feedlot to waters of the U.S. Without such proof, EPA’s case fails as a matter of law. This legal standard was clarified in the 2005 *Waterkeeper Alliance v. U.S. EPA* decision. In that case, the court ruled in pertinent part:

“The Clean Water Act authorizes the EPA to regulate, through the NPDES permitting system, only the discharge of pollutants. The Act generally provides, for example, that "Except as in compliance [with all applicable effluent limitations and permit restrictions,] the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a) (emphasis added). Consistent with this prohibition, the Act authorizes the EPA to promulgate effluent limitations for - and issue permits incorporating those effluent limitations for - the discharge of pollutants. Section 1311 of Title 33 provides that "effluent limitations ... shall be applied to all point sources of discharge of pollutants," see 33 U.S.C. § 1311(e). Section 1342 of the same Title then gives NPDES authorities the power to issue permits authorizing the discharge of any pollutant or combination of pollutants. See 33 U.S.C. § 1342 (a)(1) ("the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants") (emphasis added); see also 33 U.S.C. § 1342(b) (authorizing states to administer permit programs for "discharges into navigable waters"). In other words, unless there is a "discharge of any pollutant," there is no violation of the Act, and point sources are, accordingly, neither statutorily obligated to comply with EPA regulations for point source discharges, nor are they statutorily obligated to seek or obtain an NPDES permit.

Congress left little room for doubt about the meaning of the term "discharge of any pollutant." The Act expressly defines the term to mean "(A) any addition of any pollutant to navigable waters from any point source, [or] (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." 33 U.S.C. § 1362(12). *Thus, in the absence of an actual addition of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, no statutory obligation of point sources to comply with EPA regulations for point source discharges, and no statutory obligation of point sources to seek or obtain an NPDES permit in the first instance*.” *Waterkeeper Alliance, Inc., et. al. v. U.S. EPA,* 399 F.3d 486, 504-505 (2d Cir. 2005) (italics added for emphasis).

The *Waterkeeper* court went on:

“. . . *the Clean Water Act gives the EPA jurisdiction to regulate and control only actual discharges - not potential discharges*, and certainly not point sources themselves. See National Resources Defense Council v. EPA, 273 U.S. App. D.C. 180, 859 F.2d 156, 170 (D.C. Cir. 1988) (noting that "the [Act] does not empower the agency to regulate point sources themselves; rather, EPA's jurisdiction under the operative statute is limited to regulating the discharge of pollutants")” Waterkeeper at 505 (emphasis added).

EPA’s Allegations of a Discharge to Waters of the U.S. on June 17, 2014

Central to the issue in this case of whether there was an actual discharge of pollutants from the Riverview Cattle feed yard to waters of the U.S. is the adequacy of EPA’s investigation on June 17, 2014. As noted in the statements of Tony Brown and Josh Brown, EPA inspectors had every opportunity, and beyond that had the legal duty, to gather the best evidence available on that day to determine if there was an actual discharge to a water of the U.S., i.e., the East Fork of the Des Moines River. However, the EPA inspectors voluntarily chose to take the easy route and take samples at the most accessible location, but which was not a water of the U.S. As will be discussed more fully in this Memorandum, the adequacy of an investigation by an investigating authority is a genuine issue of material fact. *Powell v. City of Chi. Human Rights Comm'n*, 389 Ill. App. 3d 45, 54, 329 Ill. Dec. 179, 187, 906 N.E.2d 24, 32 (2009).

 It is uncontroverted that EPA did not sample for pollutants from Riverview Cattle’s feed yard at the tile outlet at the East Fork of the Des Moines River during the investigation on June 17, 2014 but instead chose to rely exclusively on samples taken at the tile inlet. (Declaration of Trevor Urban and Statements of Tony and Josh Brown, ¶6) It is also uncontested in this case that EPA made no visual observations of a discharge at the tile outlet at the East Fork of the Des Moines River during the investigation on June 17, 2014. (Declaration of Trevor Urban and Statements of Tony and Josh Brown, ¶6) Mr. Urban and Mr. Roberts were told by Tony and Josh that all of the tile lines in the area drained south to the East Fork of the Des Moines River. (Statements of Tony and Josh Brown, ¶5) Had Mr. Urban and Mr. Roberts investigated further that day, they could have located the tile line outlets because during the March 2016 investigation Mr. Urban and Mr. Draper were able to locate the outlets in less than 30 minutes. (Statements of Tony and Josh Brown, ¶5; Statement of Gary Brown, ¶2) EPA had the opportunity and there were no weather or other conditions on June 17, 2014 that prevented them from locating, observing, and sampling the tile outlets, they simply chose not to do so. (Statements of Tony and Josh Brown, ¶6, ¶8, and ¶9; Statement of Gary Brown, ¶3) The inspection was not confrontational, but rather was very cordial and the Browns cooperated to every extent with Mr. Urban and Mr. Roberts. (Statements of Tony and Josh Brown, ¶6; Statement of Gary Brown, ¶3; Statement of Dawn Brown, ¶2) This is exemplified by Mr. Urban’s apparently lighthearted comment at the conclusion of the inspection, a comment that drew chuckles, that he was “too fat and too lazy” to go to the river and take samples. (Statements of Tony and Josh Brown, ¶6; Statement of Gary Brown, ¶3; Statement of Dawn Brown, ¶2) Contrary to Mr. Urban’s Declaration, Mr. Roberts did not sink into the mud in the cornfield to the top of his boot but rather the mud came up to shoe-top height on his boots, something to be expected given the amount of rain that had fallen. (Declaration of Trevor Urban ¶9; Statements of Tony and Josh Brown, ¶7) Riverview Cattle agrees that their manure pit had overflowed on June 17, 2014 and that that the tile intake drained the area where that overflow occurred. However, Tony and Josh Brown disagree with Mr. Urban regarding the rate at which the water was entering the tile intake, and if it was in fact entering the tile intake. (Statements of Tony and Josh Brown, ¶4) Tony and Josh observed that the water was moving very slowly, if at all, and that there was no sound like a “rushing waterfall.” (Declaration of Trevor Urban ¶4; Statements of Tony and Josh Brown, ¶4) In fact, a photo taken by Tony Brown and provided to EPA shortly after the inspection shows that even though the discharge from the pit had ceased on June 17, the water level at the tile inlet had not gone down at all over the 24 hours after that. (Statements of Tony and Josh Brown, ¶4)

As stated in *In Re Lowell Vos Feedlot* (EAJA Appeal No. 10-01, Final Decision, May 9, 2011, 15 E.A.D. 314) exclusive reliance on circumstantial evidence does not necessarily render a case infirm, because “circumstantial evidence can be effectively used to state a proposition of material fact *in the absence of direct evidence*”. *In Re Lowell Vos Feedlot*, at p. 322, citing *In re BWX Techs., Inc*., 9 E.A.D. 61, 78 (EAB 2000)(italics added for emphasis). Interestingly, EPA in its Memorandum cites this same paragraph for the proposition the circumstantial evidence it collected on June 17, 2014 is sufficient to sustain its motion. However, EPA chose to omit the Vos court’s ruling that “circumstantial evidence can be effectively used to state a proposition of material fact in the absence of direct evidence.” Here, the sole reliance on circumstantial evidence was of EPA’s choosing, not because there was an absence of direct evidence available. In the Lowell Vos case, EPA did not have samples of any kind, because, as the EPA reasoned, their inspectors were not able to be on site during a discharge event. The court in that case noted:

“[i]n response to allegations that the Region should have collected more direct

sampling evidence prior to filing the complaint, the Region reasonably

explains that feedlots “discharge sporadically” and EPA’s location in

Kansas City, six hours distant from Vos Feedlot, makes very difficult the

collection of samples during actual discharge events. EPA Answer to

EAJA Application at 24; see Tr. at 315-16 (*EPA collects feedlot runoff*

*samples only when discharges are actually occurring, to ensure accurate*

*assessment of impacts on receiving waters*).”

In Re Vos at 324 (italics added for emphasis)

 EPA’s justification for not taking samples in that case supports Respondent’s claims of a deficient investigation in this case. It is uncontroverted that the manure pit was overflowing on June 17, 2017 when Mr. Urban and Mr. Roberts were there. What is contested is whether the discharge was reaching the receiving water, the East Fork of the Des Moines River. Just 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. (Statement of Gerald Hentges, ¶4, and Statement of Opinion of Gerald Hentges, Respondents’ Exhibit RX 2 accompanying Respondents’ Prehearing Exchange)

EPA went a step further than it did in the Vos case – albeit somewhat hesitantly as noted in Tony and Josh Brown’s Statements – but it fell far short of its stated policy in the Vos case to sample the discharge “to ensure accurate assessment of impacts on receiving waters.” (Statements of Tony and Josh Brown, ¶6) EPA in fact made no determination during the June 17, 2014 inspection of any impact on the receiving waters from the discharge.

 This failure to sufficiently investigate the alleged discharge presents a genuine issue of material fact making this case inappropriate for the summary judgement type relief requested by EPA. See [*McCormick Construction Co., Inc. v. United States*, 12 Cl. Ct. 496, 498 (1987)](https://advance.lexis.com/document/?pdmfid=1000516&crid=fcbd7eb9-e3d4-4d72-8a0d-65d19035ad08&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A3Y20-TKF0-0004-S01W-00000-00&pddocid=urn%3AcontentItem%3A3Y20-TKF0-0004-S01W-00000-00&pdcontentcomponentid=6322&pdshepid=urn%3AcontentItem%3A7XWY-JSP1-2NSD-M358-00000-00&pdteaserkey=sr1&ecomp=z4ntk&earg=sr1&prid=20d04c2b-ad15-4484-8e72-021cb87076c5) (denying motion for summary judgment on differing site condition claim where issue was the reasonableness of plaintiff's site investigation efforts and adequacy of government data supplied to the plaintiff); *[Brechan Enterprises, Inc. v. United States](https://advance.lexis.com/document/?pdmfid=1000516&crid=fcbd7eb9-e3d4-4d72-8a0d-65d19035ad08&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A3Y20-TKF0-0004-S01W-00000-00&pddocid=urn%3AcontentItem%3A3Y20-TKF0-0004-S01W-00000-00&pdcontentcomponentid=6322&pdshepid=urn%3AcontentItem%3A7XWY-JSP1-2NSD-M358-00000-00&pdteaserkey=sr1&ecomp=z4ntk&earg=sr1&prid=20d04c2b-ad15-4484-8e72-021cb87076c5)*[, 12 Cl. Ct. 545, 551 (1987)](https://advance.lexis.com/document/?pdmfid=1000516&crid=fcbd7eb9-e3d4-4d72-8a0d-65d19035ad08&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A3Y20-TKF0-0004-S01W-00000-00&pddocid=urn%3AcontentItem%3A3Y20-TKF0-0004-S01W-00000-00&pdcontentcomponentid=6322&pdshepid=urn%3AcontentItem%3A7XWY-JSP1-2NSD-M358-00000-00&pdteaserkey=sr1&ecomp=z4ntk&earg=sr1&prid=20d04c2b-ad15-4484-8e72-021cb87076c5) (issue of whether a reasonable contractor would have anticipated the actual conditions at the job site raised questions of sufficiency of government data and adequacy of contractor’s site investigation, which were “peculiarly fact-intensive”, making summary judgment inappropriate). The following court stated it most succinctly and clear:

“Plaintiff asserts the principal question here, whether the commission met its obligation under the ordinance to conduct an adequate investigation of plaintiff's complaint, is one of law and we should, therefore, review the case de novo. The ordinance does not provide that the commission must perform an "adequate" or "reasonable" investigation, but it is a logical inference that any investigation required should be adequately and reasonably performed. The ordinance does not define an "investigation," what its scope should be or how much effort the commission should expend on an investigation, and plaintiff is correct that there is no case law addressing what constitutes an adequate investigation. But this is because it is a question of fact dependent on the circumstances of each case, not of law.”
*Powell v. City of Chi. Human Rights Comm'n*, 389 Ill. App. 3d 45, 54, 329 Ill. Dec. 179, 187, 906 N.E.2d 24, 32 (2009)

The voluntary refusal of EPA to go to the site where the tile lines outlet to the East Fork of the Des Moines River during the inspection on June 17, 2014 when a discharge was occurring from the Riverview Cattle manure pit is a failure to conduct a reasonable inspection which presents a genuine issue of material fact that requires the denial of EPA’s motion for an accelerated decision.

EPA’s Allegations of Additional Discharges to Waters of the U.S.

In addition to asking this Court to find that as a matter of law and without any evidentiary hearing that a discharge in violation of the Clean Water Act occurred on June 17, 2014, EPA is also asking this court to find that there is no genuine issue of material fact that discharges occurred on additional dates. The only evidence EPA can present is rainfall data from the nearest available rainfall reporting station which EPA is using to argue that the Riverview Cattle feed yard received 3.34 inches of rain from June 15 -17.[[2]](#footnote-2) However, during the inspection on June 17, 2014, Tony and Josh told the EPA inspectors that the Riverview Cattle feed yard had received approximately six inches of rain in the days before June 17, 2014. (Statements of Tony and Josh Brown, ¶ 2). This statement is consistent with Respondents’ Exhibit RX 7 which is their neighbor’s NPDES permit records for his cattle feed yard which is located 2 miles north of the Riverview Cattle feed yard and Respondents’ Exhibit RX 8 which is the online weather records for Estherville, Iowa which is 12 miles west of Respondents’ feed yard. (Mr. Ulrich utilizes the Estherville weather records for his NPDES permit reporting requirements.) (Statements of Tony and Josh Brown, ¶ 3). These records show 4.97 inches of rain was received from June 14 through June 16. (Respondents’ Exhibit RX 7 and RX 8). As evidenced by the fact that Mr. Ulrich uses the Estherville weather records for his NPDES permit and not the Swea City records, and as evidenced by the Brown’s personal experience of actual rainfall, including on June 14, 2017 (on that date Tony Brown and his family were in Swea City where no rainfall was recorded while the Riverview Cattle feed yard received substantial rainfall as did the Estherville reporting station (1.15 inches) as evidenced by Respondents’ Exhibits RX 7 and RX 8. (Statements of Tony and Josh Brown, ¶ 3 and Respondents’ Exhibits RX 7 and RX 8). These differences in rainfall data are a genuine issue of material fact. In addition, in support of its claim for a minimum of three additional discharge events EPA is claiming that prior to the installation of a concrete manure basin by Riverview Cattle in 2011, there were no controls and discharges would have occurred during these additional precipitation events. However, before the concrete manure pit was built in 2011, manure from the Riverview Cattle feed yard was retained by a 4 feet high concrete wall around the feed yard. (Statements of Tony and Josh Brown, ¶11) This wall did not have any discharge points in the area where manure was retained before the concrete manure pit was installed. (Statements of Tony and Josh Brown, ¶11.)

In conclusion, as noted by Respondents’ expert witness, Mr. Gerald Hentges, 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. (Statement of Gerald Hentges, ¶5.)

WHEREFORE, because there are genuine issues of material fact as to Respondent’s liability, Respondent respectfully moves the Presiding Officer for an Order dismissing Complainant’s Motion For Accelerated Decision As To Liability, and for such further relief that is equitable and just.

RESPECTFULLY SUBMITTED this 30th day of May, 2017.

BRICK GENTRY, P.C.

 \_\_/s/ Eldon L. McAfee\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of May, 2017, I filed via the E-filing system the original of this Memorandum in Support of Respondents’ Response to Complainant’s Motion for Accelerated Decision as to Liability and sent by email to Mr. Howard Bunch, counsel for Complainant.

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 Eldon L. McAfee

1. In its Memorandum, EPA seems to emphasize that Respondents admitted that during the inspection EPA observed and documented an open inlet into the drainage system at the Riverview Cattle feedyard that received surface runoff from the feedyard and from an estimated 20 acre drainage area. EPA also noted that Tony Brown had stated in a response to EPA that the Browns immediately took action on June 17, 2014 to stop the discharge from the concrete manure pit. (Complainant’s Memorandum, pp. 10-11 citing Respondents’ Answer, ¶28 and Complainant’s Exhibit CX 4, p.2) The key to these responses and to the critical issue in this case is the difference between a discharge from the manure pit and the observance of the tile inlet and a discharge to a water of the U.S., which is the East Fork of the Des Moines River in this case. Areas around the manure pit including the tile inlet are not waters of the U.S. and any discharges to those areas are not violations of the Clean Water Act. In their Answer, Respondents denied any discharge of pollutants to a water of the U.S. In addition, in their Statements, Tony and Josh Brown clarified that the area drained by the tile inlet is 54 acres, an area including crop ground which is obviously much larger than the feedyard itself. (Statements of Tony and Josh Brown, ¶10) [↑](#footnote-ref-1)
2. EPA is including the day of the in inspection which ignores a 1.15 inch rainfall on June 14 at the Estherville reporting location. [↑](#footnote-ref-2)