BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
901 North 5th Street
Kansas City, Kansas 66101

In the matter of:	
Lowell Vos d/b/a Lowell Vos Feedlot Woodbury County, Iowa	Docket No. CWA-07-2007-0078 COMPLAINANT'S POST-HEARING RESPONSE BRIEF
Respondent.	

STATUTES

REGULATIONS

Cases

INTRODUCTON

Pursuant to 40 C.F.R. § 22.26 and to the Presiding Officer's instructions at the evidentiary hearing in this case, TR 1460:14-1642:7, and as modified by his orders dated October 27, 2008, and February 18, 2009, the U.S. Environmental Protection Agency Region 7 (EPA) submits the following Post-Hearing Response Brief. For the reasons set out below and in EPA's Post-Hearing Brief (PHB), because Respondent discharged feedlot wastes into waters of the United States, he should be held liable for his failure to apply for a National Pollutant Discharge Elimination System (NPDES) permit, and the proposed penalty of $157,500 should be assessed.

SUMMARY OF ARGUMENT

Respondent asserts that EPA does not have a cause of action to pursue Respondent's failure to apply for a NPDES permit regardless of whether there has been a discharge of pollutants to waters of the United States. Respondent misunderstands the scope of the Clean Water Act (CWA). He focuses solely on Section 402 of the Act to the exclusion of Section 308, which is the basis for EPA's claims. Respondent's argument relies on a single case in which a court held that Section 402 does not include a cause of action for the failure to apply for a permit. Respondent ignores EPA's claim that he had a duty to apply for an NPDES permit under Section 308 and that duty predated the discharge of pollutants.

Respondent also incorrectly asserts that EPA has been unable to provide proof of a discharge to a water of the United States. Respondent relies exclusively on a case that determined that EPA exceeded its authority to regulate "potential" discharges of pollutants. That case is inapposite for a number of reasons, the least of which is that Respondent's

discharges were actual, not potential. EPA has met its burden of proof to establish that Respondent's feedlot discharged pollutants to a water of the United States and that he failed to apply for an NPDES permit and construct the associated runoff controls.

Finally, Respondent asserts that the only evidence of discharges that EPA has presented is that "water runs downhill." This argument ignores the breadth of the evidence presented that erosional pathways extend all the way, without interruption, from the feedlot to the unnamed tributary (UNT) and Elliot Creek. It ignores the fact that these pathways are formed by flowing water that originates at his feedlot. It ignores that these pathways form and reform every year. It ignores the fact that, despite removal efforts by Respondent, manure is always present on the feedlot. It ignores the fact that he obtained an NPDES permit in 1991 that required him to build runoff controls if he confined more than 1,000 cattle. It ignores the fact that his own engineer determined that hundreds of thousands of cubic feet of wastewater storage is necessary to prevent feedlot runoff from discharging into the UNT and Elliot Creek. Most importantly, it ignores the fact that these controls have never been constructed. This evidence establishes that Respondent's feedlot discharges pollutants to a water of the United States. Respondent was required to apply for an NPDES permit and build the associated runoff controls.

ARGUMENT

I. RESPONDENT MISCONSTRUES THE STATUTORY BASIS FOR COUNT II OF THE COMPLAINT.

Respondent argues that EPA's Complaint must be dismissed as a result of its withdrawal of the discharge without an NPDES permit count (Count 1). Respondent's Post Hearing Brief (RPHB) at 5. This argument is based on the incorrect premise that EPA's only cause of action is under CWA Section 301 (no discharge without an NPDES permit).

Respondent reasons that, because EPA chose to withdraw Count 1, there is no factual or legal basis for liability for Respondent's failure to apply for an NPDES Permit. For reasons set forth below, Respondent's arguments are without merit.

A. Section 308 Of The CWA Supports Count II Of The Complaint.

Respondent incorrectly asserts that EPA's Complaint against Respondent must be dismissed because the CWA does not provide an independent cause of action for a failure to apply for an NPDES permit. *See* RPHB at 7. To support this assertion, Respondent cites EPA's withdrawal of the 301 discharge count and references a federal district court decision that declined to adopt the duty to apply for an NPDES permit as an element of CWA Section 402 liability. *See Environmental Protection information Center (EPIC) v. Pacific Lumber Company,* 469 F.Supp. 2d 803, 226-27 (U.S. Dist. Ct. No. Dist. CA 2007). *EPIC* is inapposite. It deals with the issue of whether the failure to apply for an NPDES permit violates section 402 of the Act. By contrast, Count II of the Complaint is for violation on section 308[1] of the Act, not section 301 nor section 402. Hence, *EPIC* does nothing to support Respondent's arguments.

[1] Sections 402(a)(1) and (3) call for EPA to establish a comprehensive permit program, subject to the requirements in section 402(b), to "issue a permit for the discharge of any pollutants. . . upon the condition that such discharge will meet. . .all applicable requirements under section 301, 302, 306, 307, 308, and 403" of the CWA. In order for EPA's permit program to meet the requirements of Section 402(b), it is necessary for EPA to obtain permit applications well in advance of the CAFO's discharge.

A permit program encompasses more than simply the process of issuing a permit to a particular point source discharger. It involves acquiring all necessary information needed to assess whether to issue a permit to a particular discharger, establishing applicable effluent limitations in the permit, and determining other conditions of the permit, among other things. Congress recognized that collection of information is a fundamental aspect of the NPDES permit program. Congress provided EPA with broad authority under section 308(a)(A) of the Act to require information from point sources "as [the Administrator] may reasonably require" to carry out section 402. The permit program is not only dependent upon obtaining information from point sources for the purpose of establishing the applicable effluent limitations and conditions of the permit, it is also essential for determining compliance with the Act.

EPA's permit application requirements in 40 C.F.R. § 122.21 are an exercise of these authorities. EPA enforcement authority includes authority to seek penalties for violating section 308, *i.e.*, failing to provide information required by EPA pursuant to section 308 including failure to submit a permit

The CWA is premised on the prohibition against the unauthorized discharge of pollutants to waters of the United States from point sources, and it establishes the NPDES permit as the mechanism by which point sources are authorized to discharge. In order to receive an NPDES permit, a discharger must first apply. The duty to apply is found in 40 C.F.R. § 122.21(c), which is authorized by Section 308 of the Act. CAFOs that discharge must apply for NPDES permit coverage in advance of discharging. *See In re Service Oil Co.*, Docket No. CWA-08-2005-0010 (ALJ Biro August 3, 2007), at 24, *aff'd*, 2008 WL 2901869 (EAB 2008).

Respondent's claim that "nothing in the Act establishes or authorizes an affirmative duty to obtain permit coverage- even where there is a discharge" is without merit.

B. EPA Proved that Respondent Discharges To The UNT, And The *Waterkeeper* Decision Does Not Apply.

Respondent hangs his hat on a misapplication of the Second Circuit's holding in *Waterkeeper Alliance et. al. v. EPA*, 399 F.3d 486 (2d Cir. 2005). *See* RPHB at 10-11. He argues that because EPA has "no proof" that Respondent's feedlot discharged to waters of the United States, Count II must fail.[2] He is wrong for two reasons. First, *Waterkeeper* stands solely for the proposition that EPA cannot require a CAFO to apply for a permit based on a potential to discharge. Complainant is not making such an argument in this case. To the contrary, Count II of the Complaint is premised upon the proof of actual discharges of feedlot waste to waters of the United States. Second, as discussed in detail in

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application when required to do so. *See* CWA section 309(c)(1)(A), (c)(2)(A), (d) and (g)(1)(A) and *See In re Service Oil*, 13 E.A.D. ___, No. CWA 07-02 (U.S.EPA July 2008).

[2] Interestingly, in defending its argument that the CWA does not contain an affirmative duty to apply for an NPDES permit, Respondent states that in *Waterkeeper* "the only question addressed in the court's decision was whether 'the EPA exceeded its statutory jurisdiction by requiring all CAFO's to either apply for NPDES permits or otherwise demonstrate they have no potential to discharge.'" RPHB at 8. However, Respondent attempts to stretch this decision beyond that question to argue that, pursuant to *Waterkeepers*, EPA has failed to meet its burden to demonstrate discharges have reached waters of the United States.

Section II below and in its PHB, EPA put forth substantial evidence of discharges to the UNT and Elliott Creek.

Respondent has relied upon the *Waterkeepers* court's statement: "Thus, in the absence of an actual addition of any actual pollutant to navigable waters. . . there is no statutory obligation of the point sources to comply with EPA regulations for point sources and no obligation of point sources to seek or obtain an NPDES permit in the first instance." *Id* at 505. This statement must be understood in the context of the question that was before the court. The question was whether EPA is authorized to require a point source to seek and obtain an NPDES permit for merely the potential to discharge.[3] The court held that potential to discharge alone is not a sufficient basis for requiring an NPDES permit. However, the court made clear that actual dischargers must have a permit. While holding that EPA is authorized to require only actual, as opposed to potential dischargers to apply for permits, the court did not reach the issue of what evidence EPA must present to demonstrate that a CAFO actually discharges. *Id* at 506, n. 22.

The *Service Oil* decision provides guidance on the burden of proof EPA must meet to demonstrate that Respondent discharge feedlot pollutants to the UNT and Elliot Creek. The ALJ in *Service Oil* held that a respondent had violated section 308 for failing to apply for and obtain and NPDES permit. Significant to the present case, the administrative law judge (ALJ) in *Service Oil* held that the respondent had discharged pollutants to a water of the United States based on circumstantial evidence. *See In re Service Oil Co.*, Docket No. CWA-08-2005-0010 (ALJ Biro August 3, 2007), *aff'd*, 2008 WL 2901869 (EAB 2008).

[3] "Because we find that EPA lacks statutory authorization to require potential dischargers to apply for NPDES permits. . ." 39 F.3d at 506, n. 22.

Considering the mass of circumstantial evidence EPA has presented, it is appropriate for this Court to determine that Respondent discharges to waters of the United States and therefore had a continuing duty to apply and obtain an NPDES permit. The duty continued until the cause of the violation was addressed. *See, e.g., Gwaltney of Smithfield., Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49, 57 (1987) ("a reasonable likelihood that a past polluter will continue to pollute" in the future is a continuous or intermittent violation); *American Canoe Ass'n v. Murphy Farms, Inc.*, 412 F.3d. 536 (4th Cir. 2005) (CWA violation continues where corrective measures are insufficient to eliminate the real likelihood of repeated discharges).

II. RESPONDENT DISCHARGED FEEDLOT WASTES TO THE UNT AND ELLIOTT CREEK.

The proximity of Respondent's CAFO in relation to waters of the United States, the lack of adequate runoff controls, and other factors, including an observed discharge to the UNT, provide overwhelming circumstantial evidence that Respondent illegally discharged feedlot-related pollutants to Elliot Creek and its unnamed tributary whenever significant precipitation occurred. *See* EPA PHB at 13-14 for further discussion.

A. Respondent's Brief Admits He Could Not Eliminate Runoff.

Respondent's statutory duty was to prevent all discharges, not to merely to limit runoff. EPA recognizes that Respondent frequently scrapes his feedlot. However, even in his post-hearing brief, Respondent does not argue that Respondent was able to eliminate all runoff from his feedlot. *See* RPHB at 11. He argues that he implements "real world practices" to minimize runoff. *Id.* He regularly scrapes feedlot pens to minimize runoff from his pens. *Id.* Mike Vos testified that the lots are pretty much bare after he scrapes. *Id.* and TR 996. However, he also testified that manure is always present. TR 1011:12-20.

Importantly, Respondent also stockpiled the scraped manure inside the pens, where the piles were exposed to the elements, and could still run off the feedlot. TR 1012-1015. Scraping merely concentrated the manure within the pens. It didn't remove it as a source of pollutant runoff to Elliott Creek. Furthermore, Respondent argues that winter bedding is placed away from areas within the pens that are subject to runoff. RPHB at 11 and TR 1005-07. The counter to this statement, of course, is that other portions of the pens are subject to runoff and cattle have access to them.

In his brief, Respondent implies that EPA witnesses testified that the lots were clean. RPHB at 11 referencing TR 114 and 324-325. When EPA's inspector testified that Respondent operated a "well kept lot," he was referring to the health of his animals and not to his compliance with the CWA. TR 132:9-20. Contrary to Respondent's assertion at page 11 of his Brief, Stephen Pollard never testified that Respondent's lots were well kept. In fact, the pages Respondent cites show that Pollard testified that it was his opinion that manure would still be present despite Respondent's scraping efforts. *See* TR 324-325.

B. The Evidence Shows That Respondent Discharged Feedlot Wastes To The UNT And Elliot Creek.

Respondent asserts that EPA's evidence is limited to five specific dates and that the information collected on these dates is suspect because, he alleges, it was collected to support computer modeling and unpermitted discharges. RPHB at 12. EPA's Complaint alleged unpermitted discharges and that Respondent failed to apply for an NPDES permit. The information collected during the site visits was intended to support both counts. EPA recognizes that errors were identified in its runoff modeling efforts. However, the abandonment of the use of the model and the unpermitted discharge count has no bearing on the reliability and credibility of the observations made in the field. The observations

made at Respondent's feedlot show that Respondent discharged and continues to discharge feedlot wastes to the UNT and Elliot Creek. Furthermore, the observations support that the discharges result from rainfall events that are less than 25-year/24-hour storms.[4]

C. On June 25, 2003, IDNR Inspectors Observed A Discharge[5] Of Pollutants To The UNT.

1. Prier Witnessed a Discharge Through a Telephoto Camera Lens.

Respondent's statement that Mr. Prier did not use any means of assisting him in accurately seeing the discharge from Respondent's feedlot to the UNT is misleading. *See* RPHB at 12. At the start of the hearing the Presiding Officer provisionally denied EPA's motion to amend its prehearing exchange to allow it to enter two newly discovered photographs of the discharge into evidence.[6] TR 6:22-24. The Presiding Officer ordered that Mr. Prier could not make any reference to the two photographs during his testimony. TR 928:17 – 929:14. Mr. Prier was further admonished not to testify to anything related to the photographs including the fact that he viewed the discharge through a telephoto lens. *See Id.* EPA made an offer of proof that Mr. Prier was able to view the discharge with a

[4] As discussed in EPA's PHB and discussed further in Section III below, Respondent's feedlot did not receive a 25-year/24-hour storm between January 1, 1991, and May 31, 2008. See EPA PHB at 12 and CX 46. Respondent raises an argument that if Respondent discharged it was only a result of an event that was greater than the 25-year, 24-hour. Therefore, he argues, prior to the 2003 CAFO revisions to the CAFO regulations, he was exempted from the definition of a large CAFO. RPHB at 18-19. Because the facility has not received a rain event of this magnitude since at least 1991, any discharge of pollutants from the feedlot was a violation of the CWA and subject to the duty to apply for a permit.

[5] The observed discharge was from a storm that was less than a 25-year, 24-hour storm. Respondent argues that EPA did not present any evidence that the discharge that Mr. Prier observed resulted from less than a 25-year, 24-hour storm. Daily rainfall records demonstrate that Respondent's feedlot did not receive a rain event between January 1, 1991, and May 31, 2008, that qualified as a 25-year/24-hour storm therefore any discharge to the UNT or Elliot Creek was a violation of the CWA. *See* CX 46 and EPA PHB at 11-12. As a result, any discharges during this period subjected Respondent to the duty to apply for an NPDES permit and penalties for violating that duty.

[6] It is EPA's position that it was an error that the two photos were excluded. 40 C.F.R. § 22.22(a) requires a showing of "good cause" and that the evidence is probative, relevant, and material. Respondent did not contest "good cause" and admitted the photos where probative, relevant, and material. Nevertheless, the Presiding Officer accepted Respondent's argument that allowing the photos into evidence created unfair surprise and provisionally denied their admission. Unfair surprise is not a test enumerated by 40 C.F.R. § 22.22(a).

device that allowed him to see it clearer. TR 959:1 – 960:6.[7] Because Respondent has raised the distance from which the discharge was observed, called into question the credibility and reliability of Mr. Prier's testimony because of that distance, and he has asserted that Mr. Prier made no efforts to better observe the discharge, EPA asks the Presiding Officer to consider EPA's offer of proof, or the photographs themselves, when weighing Mr. Prier's testimony regarding his observations and description of the discharge.

2. IDNR Sampled the UNT and Concluded that the Pollutants From Respondent's Feedlot Discharged to the UNT.

Respondent asks this Court to grant little weight to the results of the field tests Mr. Prier conducted as a result of observing a discharge to the UNT on June 23, 2003. *See* RPHB at 13-14. He asserts that field kits are merely indicators. Therefore, the information they provide cannot be used in an enforcement case. Respondent applies the wrong burden of proof. Complainant need only prove facts by a preponderance of the evidence. *See*, EPA PHB at 8-9. Mr. Prier testified that he measured ammonia in the UNT that was above background levels and those levels were attributable to the feedlot. Respondent argues that the 3 milligrams per liter (mg/l) of ammonia that Mr. Prier measured in the UNT was not above background because his witness, Mr. Henges, testified that background levels range from 1 to 6 mg/l in Iowa. RPHB at 14. However, Mr. Hentges did not get his figures from published literature. *See* TR 1243:17-25. Mr. Hentges' admitted that his curriculum vitae contains no references to work associated with feedlot runoff and may not include any reference to working on agricultural issues. TR 1242. In other words, his opinion was not based on published literature nor on work experience.

[7] Please note that the transcript incorrectly cites Respondent's attorney, Mr. McAfee, as making the offer of proof. The content and context of the offer of proof clearly indicates that it was actually EPA's attorney, Mr. Breedlove that made the offer. *See* TR 959:1-960:6.

Respondent's attack on Mr. Prier's testimony fails for three reasons. First, Mr. Prier's opinion that background levels in northwest Iowa are 0.5 to 1.0 mg/l is based on the hundreds of samples he has taken while investigating feedlots in northwest Iowa. TR 892. Second, immediately prior to conducting the field sampling, Mr. Prier had observed water flowing from the feedlot's settling basin, through the terrace, crossing the crop field and into the UNT. *See* TR 887-888. The discharge was brown in color and as it cascaded into the UNT it created foam in the creek. *See* TR 888. The settling basin is designed to discharge. *See* TR 1405:20-21 and TR 1358:3-22. Respondent did not provide any testimony that he has ever taken any steps to remove water from the settling basin to prevent it from discharging and the feedlot had received approximately 1.82 inches of rainfall the days preceding the site visit. CX 46. Finally, Mr. Prier provided uncontested testimony that the pH he measured in the UNT was lower than background levels, which is also indicative of the presence of manure. *See*, TR 893 and EPA PHB at 13-14.

The appropriate test is whether it is more likely than not that Respondent was discharging pollutants to the UNT and Elliot Creek on June 23, 2005. EPA has met this burden.

3. The Discharge Mr. Prier Observed Was Not From a Broken Drainage Tile.

Respondent attempts to obfuscate that Mr. Prier observed a discharge from Respondent's feedlot into the UNT. RPHB at 13. Respondent claims that the discharge Mr. Prier observed was "just water" and it came from a broken drainage tile line. *See* TR 1417. This self-serving conclusion is contradicted by Mr. Prier's observation that the discharge originated at the point where it flowed through the terrace that forms the settling basin, flowed down through the crop field and into the UNT. *See* TR 887-888.

Respondent's claim that the discharge was "just water" is contradicted by Mr. Prier's observation that the discharge was brown in color and as it cascaded into the UNT it created a foaming sensation. TR 888. As discussed in subparagraph 3 above, sampling results indicate that the discharge observed by Mr. Prier contained more than "just water."

D. EPA Inspector Observations On May 31, 2006 Show That Respondent's Feedlot Discharges To The UNT And Elliot Creek.

1. Respondent's Witness's Testimony Corroborates EPA Inspector's Conclusion that the Pathways Between the Feedlot and the UNT are Formed by Flowing Water.

Mr. Sena testified that the erosional pathways he observed between the feedlot and the UNT were formed by flowing water and concluded that pollutants feedlot would discharge as a result of significant rains. *See* TR 69-94 and CX 23. Curiously, Respondent references the testimony of his witness, Mr. Hentges, that the erosional pathways identified in CX 23 are not necessarily permanent or long term and occur during rapid runoff events. TR 1277-78 and RPHB at 14. This reference corroborates the conclusions made by EPA that the pathways form as a result of flowing water during significant rain events. The aerial photography and ground observations demonstrate that these pathways form and reform annually between the feedlot and the UNT as a result of rain events as described by Mr. Hentges. *See* EPA PHB at 12-21, CX 1 Pollard – CX 4 Pollard, and CX 6 Pollard . Every year the same pathways were present leading from the edges of Respondent's feedlot to the UNT. Respondent offers no evidence to the contrary.

2. The Evidence EPA Adduced to Show that Discharges Occurred Meets the Applicable Burden of Proof.

Respondent repeatedly refers to EPA's lack of sampling data. *See, e.g.*, RPHB at 14. Sampling of feedlot effluent is one of several possible pieces of evidence that can be

used to establish a discharge. Respondent focuses on this one piece of evidence that was not collected by EPA, while largely ignoring the substantial body of evidence that EPA and the state did collect. With regard to the water samples, first, as discussed above, the State did collect a water sample. Second, EPA did not collect a sample of its own for good reason. Mr. Pollard testified that EPA does not take samples when discharges are not occurring because any sample would be an inaccurate reflection of the impact of the discharges on the receiving water. *See* TR 315:10-3:16:7. The water in a stream flows and, unless the feedlot is actively discharging at the time of sampling, the contaminants have already moved downstream; thus the sample would under-report the actual impact of the discharge. *See Id.* It had not rained prior to or during the May 31, 2006, inspection nor during Mr. Pollard's visits. Therefore the feedlot was not discharging at those times so it was not appropriate to sample.

Because of the large amount of evidence of a discharge EPA adduced at hearing, it was not necessary for EPA to supply sampling data to meet its burden of proof that discharges occurred and that Respondent had a duty to apply for an NPDES permit and build the associated controls. *See In re Service Oil Co.*, Docket No. CWA-08-2005-0010 (ALJ Biro August 3, 2007), *aff'd*, 2008 WL 2901869 (EAB 2008).

E. EPA Observations On March 11, 2008 Corroborate That Respondent's Feedlot Discharges Pollutants to the UNT And Elliot Creek.

1. Respondent Has Not Built Runoff Controls to Alter Runoff Therefore Conditions Observed on March 11, 2008, Are Relevant.

Respondent argues he did not meet the definition of a large CAFO on March 11, 2008, therefore photos taken and observations made on this date are not relevant or material. RPHB at 15. Respondent misses the point. The issue is whether pollutants from

his feedlot reach the UNT. That is a factual determination that is independent of his status as a CAFO. If the environmental conditions at his feedlot (*e.g.*, no containment and runoff gullies leading to the UNT are the same today as when he had more than 1,000 head of cattle) it is further evidence that his hilltop feedlot discharges to the creek below. EPA recognizes that Respondent had fewer than 1,000 head of cattle during the March 11, 2008, facility visit and has not alleged CWA violations on or around that date. However, the record is clear that Respondent did not build runoff controls. Except for the number of cattle, the conditions at the feedlot and the surrounding area are essentially the same as they were during the period of noncompliance. As a result, Mr. Pollard's observations, photographs, and testimony regarding runoff flow paths, pollutant movement from the feedlot towards the UNT, and the effectiveness of control structures are relevant and material. In fact, evidence that pollutants discharge to the UNT when only 90 cattle were present further proves that Respondent discharges when the feedlot confined more than 2,000.[8]

2. The Presence of Feedlot-related Materials in Erosional Features Demonstrates that Pollutants are Reaching the UNT and Elliot Creek.

Respondent again attempts to raise the lack of sampling data as an issue. *See* RPHB at 15-16. As described above, EPA takes water quality samples when discharges are occurring because the samples better represent the impact discharges have on the stream.[9]

Respondent's Brief focuses on feedlot-related materials identified by Mr. Pollard within erosional features between the feedlot and the UNT. *Id.* Respondent challenges

[8] Respondent testified that there were approximately 90 cattle present in March of 2008. TR 1400.
[9] Respondent raises the same argument regarding foaming water identified downstream of Respondent's feedlot. *See* RPHB 16. EPA response is the same, the feedlot was not discharging at the time so a sample would not have accurately measured the impact of the feedlot on the stream. *See*, TR 335. A sample collected at that time would under-report the impact that the discharges are having on the stream.

whether the material was manure and the lack of confirming samples, but he errs in his belief that manure is the only pollutant of concern. The CAFO regulations apply to more than just manure. The regulations prohibit the discharge of all manure, litter, and process wastewater generated by the CAFO. 40 C.F.R. § 122.23(a). Process wastewater, among other things, includes any water which comes into contact with any raw materials, products, byproducts including manure, litter, feed, milk, eggs, or bedding. 40 C.F.R. § 122.23(a). The materials identified in Mr. Pollard's March 2008 runoff pathway photos are clearly related to the production area (i.e., manure, feed, or bedding) of the feedlot, even if it was not manure. Respondent has offered no evidence to the contrary.

To meet the definition of a pollutant, the runoff water merely needs to come in contact with manure, litter, feed, or bedding. As a result, any water that came in contact with materials before or after they ended up in the erosional features would meet the definition of process wastewater. The actual composition of the material is less relevant than its presence in the erosional pathway. The fact that it was there at all demonstrates that Respondent's scraping efforts and limited runoff controls do not prevent pollutants from leaving the feedlot and that they wind up in erosional pathways that flow to the UNT and Elliot Creek.

F. EPA Observations On July 1, 2008[10] Corroborate That Respondent's Feedlot Discharges Pollutants To The UNT And Elliot Creek.

1. Pollutants From Feedlot Were Identified Within the Southern Gullies.

[10] Respondent again argues that any observations made at a time when Respondent did not meet the definition of a large CAFO are irrelevant and immaterial. Again, Respondent misses the point. The issue is whether pollutants from his feedlot reach the UNT. That is a factual determination that is independent of his status as a CAFO. If the environmental conditions at his feedlot - - *e.g.*, no containment and runoff gullies leading to the UNT are the same today as when he had more than 1,000 head of cattle, it is further evidence that his hilltop feedlot discharges to the creek below. Rather than repeat EPA's response to Respondent's argument, please see Section II.E.1, above.

Respondent again attempts to assail EPA for not collecting samples of low lying areas where runoff has collected. RPHB at 17. These areas were stagnant, smelled of manure, and attracted a large number of flies. TR 192-193. Common sense dictates that a fetid, fly infested, pool of water collected in a low lying area along a flow path that is directly below a feedlot wherein almost a thousand animals are confined, without any runoff controls, is more likely than not related to the thousands of pounds and gallons of excrement those animals generate daily. Respondent again argues under the misconception that the *Waterkeeper* decision dictates that sampling is required for CWA jurisdiction. Again, the test is whether it is more likely than not pollutants from the feedlot discharged into the UNT. Common sense dictates that the next significant rain event will cause water to flow through the erosional pathway and pollutants from the feedlot or the festering low-lying areas will be carried to the UNT. In other words, pollutants from Respondents feedlot will discharge to a water of the United States. Mr. Hentges agreed that the flowpath observed in these photographs was present in years past so the conditions observed in July 2008 are relevant to the period of noncompliance. *See* TR 1253: 13-23. Mr. Hentges also agreed that dissolved pollutants would be carried away in the water. TR 1249:21-24.

2. Mr. Pollard's Direct Observation of Pollutants Within Erosional Flowpaths is More Persuasive than Respondent's Interpretation of Mr. Pollard's Photographs.

Respondent's rebuttal of Mr. Pollard's conclusions regarding the presence of pollutants within the southern erosional pathway to the UNT consists solely of Mr. Hentges review of Mr. Pollard's photographs. RPHB at 16. Mr. Hentges admitted that pictures do not show as much as the photographer sees, and he admitted on cross examination that he was not present when Mr. Pollard made his observations. TR 1245:15-1246:2. Mr.

Hentges also testified that the photographer would provide a better explanation of what the photos show. TR 1247:17-25. His observations regarding Pollard's photos are therefore of limited value.

Mr. Hentges had an opportunity to directly observe, even sample, the areas at issue. He visited Respondent's feedlot approximately 2 ½ weeks before the hearing. TR 1222:21-1223:1. Despite the imminent hearing, Mr. Hentges did not bother to walk the flowpaths at issue in this case. *See* TR 1223:2-25. Respondent is in the untenable position of having to rebut the personal observations made by Mr. Pollard with Mr. Hentges's review of photos when he had the opportunity to view the areas first hand. Although Respondent knew that the southern flowpath from the feedlot to the UNT and the pollutants identified within it would be an important issue in the case, his expert did not take the time to walk it or make any personal observations of that feature which lies at the heart of this litigation.

G. Aquatic Life Assessment Performed On August 5, 2008[11] Corroborates Conclusion That Pollutants From Respondent's Feedlot Discharged To The UNT And Elliot Creek.

1. Sampling Data Not required for CWA jurisdiction.

Again, Respondent's rebuttal of EPA's evidence relies on the argument that sampling is required for CWA jurisdiction. RPHB at 17. As stated before, this is a misinterpretation of the scope of the *Waterkeepers* decision and runs counter to the holding in *Service Oil.* As explained in detail in EPA's PHB, there really is no other explanation for the low fish numbers and diversity identified August 5, 2008, except for the presence of

[11] Respondent again argues that any observations made at a time when Respondent did not meet the definition of a large CAFO are irrelevant and immaterial. Again, Respondent misses the point. The issue is whether pollutants from his feedlot reach the UNT. That is a factual determination that is independent of his status as a CAFO. If the environmental conditions at his feedlot - - *e.g.*, no containment and runoff gullies leading to the UNT are the same today as when he had more than 1,000 head of cattle, it is further evidence that his hilltop feedlot discharges to the creek below. Rather than repeat EPA's response to Respondent's argument, please see Section II.E.1, above.

Respondent's feedlot, and Respondent offers no plausible explanations in his Brief. Mr. Hayes eliminated barriers and adjacent cropland as the cause. Respondent's large feedlot is the only feedlot upstream of the assessment point. It has no runoff controls and is immediately above these streams. Clearly defined discharge pathways form and reform each year and flow from the feedlot to the UNT.

2. Mr. Hayes' Testimony is More Persuasive and Credible than that of Respondent's Neighbor and Friend.

Respondent argues Mr. Hayes' testimony is rebutted by Respondent's witness, Mr. Beavers. RPHB at 17. He is wrong because Mr. Beavers's does not contradict Mr. Hayes' findings. Mr. Hayes has performed hundreds of routine fish inventories in the 21 years he has been working as a fisheries biologist. *See* TR 709. All of these assessments have been performed in Iowa streams. About 80 % of the assessments have been of small, wadeable streams like Elliot Creek. TR 711. Mr. Hayes is in the unique position to compare what he found in Elliot Creek with similarly sized and situated streams in Iowa. Mr. Hayes performed the stream assessment according to standardized protocols. TR 715-16. In the 200 or so stream assessments he has performed, he could not recall as low of abundance in a 500-foot segment and did not ever recall seeing that few of fish. *See* TR 786:19-24.

Respondent attempts to rebut Mr. Hayes' testimony with statements from Respondent's neighbor and personal friend, Mr. Mike Beavers. Mr. Beavers testified that he has caught minnows and chubs in UNT. Nothing in Mr. Beaver's testimony contradicts Mr. Haye's expert opinion regarding the health of the UNT. As Mr. Hayes testified, fish are migratory and it would not surprise him that fish would be found in the UNT when conditions are conducive. *See* TR 781. In regard to crayfish, Mr. Hayes testified that he would be surprised if crayfish were found in the UNT but also testified that they do move

so it is hard to predict. *See* TR 781. The aquatic life assessment performed on August 5, 2008, identified conditions indicative of a severely impacted stream. Mr. Hayes is a fisheries biologist with 21 years of experience, and his opinion that the most likely cause of the impact was chronic contamination from Respondent's feedlot should be given great weight. [12]

III. RESPONDENT'S FEEDLOT IS NOT A "NEWLY DEFINED CAFO."

Respondent argues that he has never discharged and, even if he has, there is no evidence that the discharges resulted from storms that were less than a 25-year, 24-hour storm. RPHB at 19. As a result, Respondent argues that his feedlot qualifies as a "newly defined CAFO." *Id.* EPA agrees with Respondent's assessment of the federal CAFO regulations in that a facility that was designed and operated to contain all runoff except the runoff associated with a 25-year, 24-hour storm prior to April 14, 2003, would meet the definition of a "newly defined CAFO." EPA further agrees that a "newly defined CAFO" would not be required to apply for an NPDES permit until February 27, 2009. But there our agreements end. Respondent's reliance on the "newly-defined CAFO" designation fails for several reasons.

A. Respondent's Feedlot Does Not Have The Runoff Controls To Meet The Definition Of A "Newly Defined CAFO."

Respondent argues that EPA has presented no credible evidence that he has discharged from anything less than a 25-year, 24-hour storm therefore he is a "newly

[12] The Presiding Officer noted the Mr. Hayes was a credible witness who did not seem to have an agenda. TR 796:23-25.

defined CAFO." RPHB 19. However, there is no basis to conclude that Respondent's feedlot was ever constructed or operated to prevent runoff from lesser storm events.[13]

1. Respondent's 1991 NPDES Permit Required Him to Build Controls in Order to Contain All Runoff Except that Associated With a 25-year, 24-hour Storm.

Respondent proffered no evidence that the feedlot has the required runoff controls. The 1991 NPDES and construction permits clearly required the construction of 25-year, 24-hour storm containment if Respondent intended to confine up to 2,000 cattle. *See* CX 9. However, when faced with the cost necessary to build the controls, Respondent put the construction "on the shelf." TR. 1400 and RPHB at 19. He decided not to construct the controls necessary for 25-year, 24-hour containment. Instead, he expanded his herd. *See* TR 1406-1407.

2. Respondent Registered in the Iowa Plan in 2001 Because He Did Not Have Adequate Controls to Contain a 25-year, 24-hour Storm and Needed an NPDES Permit.

On April 4, 2001, Respondent registered in the Iowa Concentrated Animal Feeding Operation Registration Program (Iowa Plan). CX12. The reason behind the registration was to allow large CAFO operators an opportunity to install the controls necessary to "retain all manure flows from the feedlot areas and other manure-contributing areas resulting from the '25-year, 24-hour precipitations event'" without the specter of imminent enforcement by IDNR. *See* RX 3 and CX 12. If Respondent already had the controls

[13]Mr. Jeff Prier observed another discharge from Respondent's feedlot 4 days prior to the hearing. The Presiding Officer prevented Mr. Prier from testifying about his observations on the basis that the observations were not material to the case that the Government was presenting. TR 918:22-24. The Presiding Officer allowed EPA to make an offer of proof. EPA's offer of proof stated Mr. Prier would have testified that he drove by Respondent's feedlot 4 days prior to hearing and observed a discharge from the terrace where he had previously observed discharges. He also would have testified that he was able to see pooling of black water from the feedlot in the UNT. He would have testified that it was not raining at the time and that it had rained far less that a 25-year, 24-hour storm the day before. TR 919-920. This was a second instance when IDNR observed a discharge from the feedlot that resulted from less than a threshold storm and therefore goes to the heart of Respondent's defense. As a result the testimony was material.

necessary to contain the 25-year, 24-hour event, then registration would have been unnecessary. Respondent submitted this form because he knew he was required to have an NPDES permit and adequate runoff controls if he confined greater than 1,000 head of cattle. He knew the requirements because he had previously been through the permitting process in 1991. Nevertheless, he expanded the feedlot to approximately 1,500 head without a permit and without runoff controls. *See* CX 12.

3. The June 25, 2003, Discharge Demonstrates that Respondent's Feedlot Lacks 25-year, 24-hour Containment and thus Cannot be a "Newly Defined CAFO."

On June 25, 2003, IDNR performed an on-site assessment of Respondent's feedlot. One of the purposes of the assessment was to evaluate runoff controls. TR 886:13-17. The assessment confirmed that the feedlot lacked the controls necessary to contain the 25-year, 24-hour storm. Furthermore, IDNR did not identify any topographic features that would adequately control runoff. *See* TR 893:25-894:7. IDNR issued its findings to Respondent in a follow up letter on July 2, 2003. CX 16. Respondent did not contest IDNR's conclusion that he did not have adequate containment. TR 896:20-22.

4. Respondent's Proposed Plan Demonstrates that he Needed an NPDES Permit and was Required to Build Runoff Controls to Enable Him to Contain a 25-year, 24-hour Storm.

On or around June 10, 2004, the Natural Resources Conservation Service (NRCS), on Respondent's behalf, submitted a proposed plan to IDNR for the construction of runoff controls structures at Respondent's feedlot. CX20. The proposed plan states that an NPDES permit is required for the feedlot. *Id.* The plan also proposes the construction of three sediment detention basins, three waste storage ponds, and diversions to direct flow into the sedimentation basins. *Id.* Respondent has never had the controls necessary to

contain a 25-year, 24-hour event. If this was not the case, then additional controls proposed by Respondent's consultant and submitted to the NPDES permitting authority would be unnecessary.

5. Respondent's Final Plans Call for the Construction of Extensive Runoff Control Structures to Contain a 25-year, 24-hour Storm.

On December 2, 2005, Respondent finally applied for an NPDES permit. *See* RPHB at 2. Included in the permit application were the final plans for the construction of the runoff control structures necessary to contain the runoff from any storms less than a 25-year, 24-hour event. *See* TR 1087:15-21 and CX 50. The final plans submitted by Respondent's engineer, Mr. Woerner, detail the construction of more than 800,000 cubic feet of runoff storage, diversion berms, and sedimentation basins. *See* CX 50. The construction was necessary to comply with the CWA, and Respondent is now in the untenable position of arguing that he never discharged even though those controls were never constructed.

B. Rainfall Data Makes it Impossible To Conclude That Respondent Only Discharged To The UNT And Elliot Creek As A Result Of Storms Greater Than The 25-year, 24-hour Threshold.

The prominent gully leading from the south edge of Respondent's feedlot to the UNT reforms every year after it is plowed under. It is formed by flowing water. It is beyond peradventure that routine rain and snow melt events caused that gully and other runoff features on Respondent's hillside to form. EPA PHB 11-21. Yet Respondent argues that EPA has presented no credible evidence that the feedlot has discharged. RPHB at 19. The evidence does not support his assertion. The 25-year, 24-hour storm event at Respondent's feedlot is 5.2 inches. *See* CX 23, Attachment 1, pg. 4 of 27. Since 1991 Respondent's feedlot has never received a storm that exceeded this threshold. CX 46 and

EPA PHB at 11-12. IDNR witnessed a discharge from the terrace/settling basin west of the feedlot entering the UNT on June 25, 2003. It had only rained a cumulative 1.82 inches over the four days prior to that date. CX 46 and EPA PHB at 14. There were at least 20 other rain events of 1.82 inches or greater between April 2001, when Respondent exceeded 1,000 head of cattle, and February 2007, when he reduced the number of cattle back below 1,000 head. *Id.* At least six of these rain events predated the April 2003 revision of the CAFO regulations but were after Respondent increased the number of head to approximately 1,500 head and met the definition of a large CAFO.[14] See CX 46 and TR 1406:20-1407:7. Please see Appendix A to this brief for a summary of the dates and precipitation amounts received by Respondent's feedlot.

At a minimum, Respondent violated the duty to apply for an NPDES permit 180 days prior to the June 25, 2003 discharge to the UNT. *See* 40 C.F.R. 122.21(c). The lack of runoff controls, the six storms greater than 1.82 inches prior to June 25, 2003, the first such storm occurred between April 10-13, 2001, and at least 9 similar or larger rain events that occurred between June 25, 2003 and when Respondent applied for his NPDES permit on December 2, 2005, demonstrate that Respondent's violation of his duty to apply for an NPDES permit began in 2000 and continued until he submitted his permit application. *See* CX 46 and *see, e.g., Gwaltney of Smithfield., Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49, 57 (1987) and *American Canoe Ass'n v. Murphy Farms, Inc.*, 412 F.3d. 536 (4th Cir. 2005).

[14] As discussed in Respondent and EPA's post hearing briefs the 2003 revision of the CAFO regulations eliminated the exclusion of operations from the definition of a CAFO those operations that discharge only in the event of a 25-year, 24-hour storm.

IV. RESPONDENT'S 1991 PERMIT SHOWS THAT HE WAS AWARE HE NEEDED A PERMIT AND RUNOFF CONTROLS.

Respondent argues that Respondent's 1991 NPDES and construction permits are not material to this proceeding. RPHB at 19. To support this argument, Respondent relies on overturned and inapplicable judicial interpretation of the CWA and a fundamental misunderstanding of the scope of the CWA.

A. The Precedent Cited By Respondent To Attempt To Exclude The 1991 NPDES Permit Was Overturned.

Respondent relies exclusively on the initial decision *In re Donald Cutler*, Docket No. CWA-10-2000-0188 (December 31, 2002), *rev'd*, 11 E.A.D. 622 (EAB 2004), and essentially asks that this Court ignore that the referenced portion of the decision was overturned by the Environmental Appeals Board (EAB). In *Cutler*, the EAB states "we hold that that in adjudication such as this one, the statutory 'any prior history' factor in the CWA is not limited to five years" and "are unwilling to follow the ALJ in drawing a bright-line rule that automatically excludes certain prior violations from the penalty calculus simply by virtue of their age." 11 E.A.D. at 646-647. There is no language in the Cutler appellate decision limiting its application to wetlands violations as asserted by Respondent. The cases cited by the EAB clarify that the EAB did not intend to limit the decision to Section 404 (*i.e.*, dredge and fill cases) as urged by Respondent.

As in *Cutler*, Respondent's history reflects a pattern of disregard for the regulatory requirements at issue and suggests the Respondent was aware that increasing the number of head of catttle above 1,000 head without an NPDES permit and without the construction of runoff controls would violate the CWA. *See Cutler*, 11 E.A.D. 622 (EAB 2004).

B. As An Operator Of A Point Source Respondent Is Liable Under Section 308 Of The CWA.

Respondent argues that he did not own the feedlot therefore he was not subject to the duty to apply for an NPDES permit. *See* RPHB at 20. He testified at hearing that he did not build the runoff controls required by the 1991 NPDES and construction permits (CX 9) because he did not own the land. *See, e.g.,* TR 1399-1400. Respondent did not purchase the land until 2007. TR 1403:6-9. Respondent increased the size of his herd to between 1,200-1,500 head in 2001 or earlier. *See* TR 1407:4-7 and CX 12.

The duty to apply for an NPDES permit and prevent discharges of pollutants to waters of the United States is not limited to landowners. Section 301 of the CWA prohibits the discharge of any pollutant by any person to a navigable water except in compliance with Section 402 of the CWA. Section 308 of the CWA requires owners and operators of point sources to provide information to EPA so that it may reasonably carry out Section 402 of the CWA. The 1976 regulations required any person proposing to discharge, shall submit and application at least 180 days before the date on which the discharge is to commence. 40 C.F.R. § 122.21(c). The 2003 revisions to the CAFO regulations did not modify this requirement.

The duty to prevent discharges applies to "any person" under Section 301. The duty to apply for an NPDES permit applies to "owners and operators"[15] under Section 308. Any person, which includes owners and operators, that violates these sections is subject to

[15] The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a source. 33 U.S.C. § 1316(a)(4). *Person* means an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof. 40 C.F.R. § 122.2. *Owner or operator* means the owner or operator of any "facility or activity" subject to regulation under the NPDES program. 40 C.F.R. § 122.2.

penalty liability under Section 309. Nowhere within the statutes or regulations applicable to CAFOs is there a distinction between someone that operates a CAFO and a person that owns the land upon which a CAFO is located. Respondent's reliance on his lack of ownership of the land to avoid liability is without merit.

C. Respondent's Statements That He Was In Compliance Are Irrelevant To Determining Liability for Failing to Apply for an NPDES Permit.

On several occasions, Respondent argues that he "knew" he was in compliance. *See, e.g.,* RPHB at 21. The CWA is a strict liability statute. *See* EPA PHB at 3. Good faith efforts to comply are not enough to shield a Respondent from liability and motive is immaterial. *See American Canoe Assoc. v. Murphy Farms, Inc.*, 412 F.3d 536, 539-40 (4th Cir. 2005) and *U.S. v. Fort Pierre*, 580 F. Supp. 1036, 1041 (D.S.D. 1983), *rev'd on other grounds,* 747 F.2d 464 (8th Cir. 1984). However, his compliance history and testimony contradict any claims that he had a good faith basis to believe that he was in compliance with the CWA.

Respondent was issued NPDES and construction permits in 1991, which required the construction of runoff controls if he was to confine greater than 1,000 head. *See* CX 9. Respondent stated he did not want to build controls on land that he did not own so he decided not to build the controls. RPHB at 19. In 2001 or earlier, Respondent nevertheless increased the number of cattle to 1,200-1,500 head (TR 1406-07), but he did not build any runoff controls and he did not reapply for NPDES or construction permits. In 2001 he registered in a state plan that would grant amnesty if he timely obtained an NPDES permit and built controls. He asserts that he did not need a permit because he was in compliance but registered in the plan anyway. IDNR confirmed that he needed runoff controls, and Respondent never protested IDNR's determination. In June of 2004, Respondent sent

IDNR a plan that proposed the construction of three settling basins and three holding ponds. The construction of these structures was proposed because they were needed to prevent the discharges from the feedlot as a result of storms less than a 25-year, 24-hour intensity. In December 2005, Respondent submitted final plans that proposed the construction of over 800,000 cubic feet of storage to contain runoff. These controls have never been built.

When Respondent decided to exceed 1,000 head of cattle he knew or should have know that he had the duty to again apply for an NPDES permit and construct appropriate runoff controls and therefore was not in compliance.

D. The 1991 NPDES And Construction Permits Are Material To The Culpability And The Extent Of Respondent's Violations Of The CWA.

Respondent argues that IDNR inaction on the 1991 permit supports Respondent's assertion that he did not have a duty to have the permits in the first place. *See* RPHB at 20-21. For the sake of clarity, EPA has not alleged that Respondent had a duty to apply for an NPDES prior to 2000. His violations began 180 days before exceeding 1,000 head. The record demonstrates Respondent exceeded 1,000 head of cattle prior to April 2001. The significance of the 1991 permits is that they demonstrate that Respondent knew the requirements that applied to him when he exceeded the regulatory threshold and met the definition of a large CAFO. Respondent's testimony demonstrates that he carefully considered the implications of expanding his feedlot. In 1991, he ultimately decided to put the plans to expand "on the shelf" because he did not want to build controls on land he did not own. RPHB at 19 and TR 1400.

EPA agrees that if Respondent had never exceed 1,000 head he probably would not need an NPDES permit or need to construct runoff controls to contain a 25-year, 24-hour

storm.[16] However, Respondent knew that controls were required should he meet the definition of a large CAFO. Respondent cannot have it both ways. On the one hand, he argues that the permits were not required and that IDNR had no basis for enforcing their requirements. On the other hand, he argues that because IDNR never enforced the permits this demonstrated that they were not required. The significance of the permits is that Respondent knew the requirements applicable to him if he increased the size of his herd. He knew that significant runoff controls were required and he knew that an NPDES permit was required. He acted on neither but, nevertheless, increased the sized of his herd and violated the CWA.

V. PARTICIPATION IN THE IOWA PLAN IS NOT COMPLIANCE WITH THE CLEAN WATER ACT.

A. An Agreement Between An Industry Group And A State Regulatory Agency Does Not Supersede A Federal Statute.

Respondent argues he was in compliance with the CWA because he participated in the Iowa Plan. RPHB at 22. Respondent's participation in the Iowa Plan is immaterial to Respondent's liability under the federal Clean Water Act. Respondent has not presented a legal basis for an agreement between an industry group and a state regulatory agency to supplant a federal statute. In essence, Respondent is asking this Court to supplant the strict liability scheme of the CWA with the "goals" and "real world limitations" espoused in Respondent's brief. *See* RPHB at 22. Respondent's strict liability under the CWA is discussed and supported extensively in EPA's post hearing

[16] However, 40 C.F.R. § 122.23(b)(6) defines a medium CAFO as, among other things, an animal feeding operation that confines 300 to 999 cattle. . .and pollutants are discharges into waters of the United States through a man-made ditch, flushing system, or other similar man-made device; or 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. If it was determined that Respondent's feedlot met the definition of a medium CAFO some level of control, possibly pursuant to an NPDES permit, would likely be required.

brief. *See* EPA PHB at 3. Approximately 100 similarly situated Iowa producers were able to meet the requirements of the Iowa Plan, obtain NPDES permits, and construct runoff controls during the same period that Respondent did nothing. *See* TR 817:2-4. Respondent received a significant competitive advantage over these producers through his noncompliance. *See* EPA PHB at 29-31. He should not be rewarded for his failure to comply where others did.

B. Respondent Failed To Meet The Requirements Of The Iowa Plan.

Respondent argues that he complied with the requirements of the Iowa Plan and therefore was in compliance with the CWA. See RPHB 22. Even assuming the Iowa Plan is relevant, Respondent cannot avail himself of it. The record is clear that he failed to take advantage of the opportunity the Iowa Plan had presented. Respondent did not comply with a single deadline established by the Iowa Plan and his participation was ultimately terminated by IDNR. *See* EPA PHB at 35-37. Respondent attempts to place his failure to comply with the CWA and the Iowa Plan on IDNR and NRCS. Respondent states that whenever a Notice of Violation was issued he would immediately contact NRCS and urge them to move forward. RPHB at 23. Significantly, the record and Respondent's brief are silent regarding Respondent's communication with IDNR and is replete with his failures to communicate with IDNR. Respondent failed to keep IDNR apprised of the status of his feedlot as required by the 1991 NPDES permit, letters issued to him by IDNR in 2000 went unanswered, notices of violation went unanswered, even a Notice of Imminent Termination from the Iowa Plan was not sufficient to evoke a response to IDNR. *See* TR 1433. His registration was his only act of timely compliance. There is no basis for Respondent to argue that he was in compliance with the Iowa Plan, much less the CWA.

C. The Iowa Plan Did Not Create Open Ended Amnesty.

Respondent argues that the amnesty provided by the Iowa Plan extended beyond the 5-year term of the Plan. RPHB 22. He asks this Court to give unwarranted credence to the words "goals" and "real world limitations" in the policy statement associated with the Iowa Plan. *See* RX 3. He, in effect, asks this Court to read these paragraphs as creating an open ended agreement that allows the Respondent immunity from the CWA in spite of his extensive failures to meet its requirements. Respondent's slanted reading conflicts with the testimony provided by Mr. Gene Tinker, IDNR's Animal Feeding Operations Coordinator. Mr. Tinker testified that it was expected that participants would have permits in hand and controls in place at the conclusion of the Iowa Plan. He further testified that amnesty required meeting the deadlines established pursuant to the Plan. TR 816:13-24.

Respondent's interpretation also conflicts with actual language of the correspondence jointly issued by IDNR and the Iowa Cattlemen on March 22, 2001, notifying EPA of the agreement. RX 2. The letter contains a bulleted and underlined item stating that there was a compliance period of two to five years. *Id.* Although the letter referenced by Respondent discusses the "goals" of the plan, the timeline for compliance was concrete.

Respondent's interpretation also conflicts with the amnesty provisions of the agreement. In particular, the Iowa Plan states that a producer will not be subject to penalties[17] provided that the producer maintains reasonable progress towards compliance. RX 3, p. 3, paragraph 2. The Iowa Plan also states that the penalty protections will apply so long as the facility operator is cooperating with the department to achieve compliance

[17] The Iowa Plan was between IDNR and industry representatives, see RX 3 at 2, and as discussed above, the agreement did not create any amnesty from liability under the CWA.

within a reasonable time. RX 3, p. 4, paragraph 6. Despite failing to timely submit a single deliverable, submitting the permit application more than a year late, and an utter failure to keep IDNR apprised of his progress, Respondent speciously asserts that amnesty not only applied within the duration of the Iowa Plan but continued beyond the Iowa Plan until he received permit coverage. RPHB at 22.

D. Respondent Failed To Construct Runoff Controls After His NPDES Permit Was Issued.

Respondent argues that he could have constructed runoff controls if IDNR had issued the construction permit timelier. RPHB 23. Respondent notes that Iowa statutes required IDNR to approve or disapprove a construction permit within 90 days of the date the application was submitted, December 5, 2005. RPHB at 23. He asserts that he could have met the April 1, 2006 Iowa Plan deadline if IDNR had approved the application within 90 days. Respondent's assertion is contradicted by the facts. Respondent is stating that he could have constructed the controls in less than 30 days in March when the temperatures often drop below freezing. *See* CX 46. However, he was unable to initiate construction in August 2006 because of the imminent onset of winter. *See* RPHB at 23. Even in northern Iowa, winter does not commence in September. This assertion demonstrates that Respondent's noncompliance was not the fault of IDNR, not the fault of NRCS, and not the fault of the weather, but instead, resulted from his consistent failures to take the steps necessary to comply with the CWA. Although Respondent asserts that he was not allowed to begin construction until the permit was issued, his failure to act when it

was issued further demonstrates Respondent's culpability.[18] Respondent has not constructed the controls he claims were delayed by bureaucrats more than three years ago.

It warrants repeating that approximately 100 similarly situated Iowa producers were able to meet the requirements of the Iowa Plan, obtain NPDES permits, and construct runoff controls during the same period that Respondent did nothing. *See* TR 817:2-4. Respondent received a significant competitive advantage over these producers through his noncompliance. *See* EPA PHB at 29-31. He should not be rewarded for his failure to comply where others did.

E. Respondent Was Kicked Out Of The Iowa Plan

Employing a very strained interpretation of the documents in the case, Respondent attempts to argue that his participation in the Iowa Plan was never terminated. RPHB at 23. The correspondence from IDNR does not support this assertion. As noted in more detail in EPA's PHB, IDNR issued a certified letter to Respondent on April 28, 2005, that clearly stated (in bold) that his final plans had to be submitted within 30 days or his participation in the Iowa Plan would be terminated and would no longer be covered by the amnesty provisions of the agreement. CX-22. Despite Respondent's admitted failure to submit the plans until December 5, 2005, his failure to contact IDNR regarding the letter, and IDNR testimony that he was removed from the Plan, Respondent asserts that he, nevertheless, was still in the Plan.

[18] Respondent also asserts that under Iowa law he could not commence any construction until a construction permit was issued. RPHB 23. However, Respondent was informed in 2003 that he was allowed to construct temporary measures. *See* CX 16. Nothing in the record indicates that Respondent ever considered the construction of temporary measures to address runoff to the south and north of his feedlot.

VI. RESPONDENT GAINED AN ECONOMIC BENEFIT FROM OPERATING AS A LARGE CAFO WITHOUT RUNOFF CONTROLS ASSOCIATED WITH OBTAINING AN NPDES PERMIT

Respondent did not introduce any testimony or exhibits regarding the costs of the runoff controls structures designed by his engineer, Brad Woerner. Respondent's post hearing brief is silent regarding EPA's estimates. Respondent does not contest the costs presented by EPA. Therefore, this Court may conclude that the costs are a reasonable estimation.[19]

Respondent's brief instead focuses on the period of violation for which Respondent should be liable. In the process Respondent ignores the distinction between avoided versus delayed costs. Mr. Schefftz provided extensive testimony regarding the distinction between the two types of benefit and how the estimates were calculated. *See* TR 671-683. Mr. Shefftz concluded that Respondent had received approximately $196,000 in economic benefit because the Respondent has never constructed runoff controls versus an economic benefit of 65,000 if the controls were put in place in 2008. *See* TR 681:19-25. The discussion of economic benefit in Respondent's brief ignores this distinction and ignores the fact that Respondent has never constructed controls. *See* RPHB at 24-25. There is no evidence in the record that he will ever construct those controls. Respondent instead relies on an inapplicable hypothetical presented to Mr. Schefftz during cross exam wherein Mr. Schefftz was asked to provide a "ballpark" estimation of the economic benefit if the period of noncompliance was only 10 months. *See* RPHB 25 and TR 690-91. First, Respondent's

[19] *See United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 49 ERC 1193, 30 ELR 20,076 (4th Cir. 1999), cert. denied, 531 U.S. 813, 121 S. Ct. 46, 148 L. Ed. 2d 16 (2000) ("the precise economic benefit a polluter has gained by violating its effluent limits may be difficult to prove, so '[r]easonable approximations of economic benefit will suffice.'" 191 F.3d at 529; "The cost-avoided method is not in conflict with the CWA or basic economic principles. On the contrary, it represents a logical method by which a violator in Smithfield's position can be disgorged of any profits it attained through its non-compliance.

noncompliance began prior to exceeding 1,000 head in 2001 until he applied for an NPDES permit in December 2005, not the 10-months proposed by Respondent. Second, runoff controls have never been constructed and Respondent did not present any testimony that he had built or intended to build controls. Therefore, any discussion of delayed costs is irrelevant. The costs avoided by the Respondent are the appropriate measure of his ill-gotten gains.

Even assuming this was a delayed, and not an avoided cost, the economic benefit would still be substantial. *See* TR 691:18-21. Mr. Schefftz testified that a 10-month noncompliance period would significantly reduce the avoided economic benefit but the economic benefit would still be approximately $180,000. For example, the 10-month noncompliance period proposed by Respondent would eliminate 4 years and 2 months of the annual avoided costs associated with maintenance of the runoff controls. Respondent would, however, still be liable for the avoided economic benefit associated with the construction of the runoff controls and irrigation system. Mr. Schefftz estimated that the annual avoided cost associated with the maintenance was $3,750. TR 672. Using a 10-month noncompliance period would decrease the avoided economic benefit by approximately $16,000 from $196,000 to $180,000.

Even considering economic benefit in a manner most favorable to Respondent as proposed, he would be liable for approximately $180,000 in avoided compliance costs associated with his failure to build controls.[20] This amount is still $22,500 more than the $157,500 penalty proposed by EPA.[21]

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[20] This $180,000 amount does not take into account Mr. Schefftz testimony that Respondent avoided economic benefit continues to accrue until disgorgement at a rate of approximately $1,200 per month. See TR 679 and 682-83. Nor does the amount take into account that the $196,000 figure was based on a

CONCLUSION

Respondent's Brief has failed to raise any arguments that undermine either the liability or penalty portions of EPA's case. He has failed to rebut the inescapable conclusion to be drawn from this record: Respondent's feedlot has discharged and continues discharge pollutants to the creek below his feedlot, Elliott Creek and waters downstream. Until February 19 2007, Respondent operated a large CAFO, which required him to apply for an NPDES permit and construct runoff controls. He was aware of this duty but refused to comply with the requirements. His refusal to comply with the CWA has lead to this enforcement action. For the reasons set out above and in EPA's PHB, the proposed penalty of $157,500 should be assessed.

September 1, 2008, calculation date. TR 679. During the intervening period the Respondent has accumulated an additional $7,200 in avoided economic benefit and this amount continues to accrue.

[21] See *Public Interest Research Group of N.J., Inc. v. Magnesium Elektron, Inc.*, 40 ERC 1917, 1929 (D.N.J. 1995) ("The penalty must at least reflect the proven economic benefit . . . That is the starting point. Then the other § 309(g) factors are used to increase the amount which reflects the economic benefit, except that economic impact of the penalty in extraordinary circumstances may serve to reduce the amount found to reflect the economic benefit to the violator of non-compliance. If the penalty arrived at by calculation of the economic benefit exceeds the statutory maximum penalty, the penalty will be reduced to the statutory maximum.")

APPENDIX A

EPA Post-Hearing Response Brief
Significant Rain Events
Sioux City Gateway Airport Weather Station (CX 46)

Dates	**Precipitation Amount (inches)**
April 10-13, 2001	1.93
April 30-May 6, 2001	4.45
August 14-15, 2001	1.93
September 13-16, 2001	2.61
November 23-26, 2001	3.05
July 24-26, 2002	1.98
May 4, 2003	1.85
June 1-9, 2003	2.09
June 21-25, 2005	1.82
July 3-6, 2003	3.29
September 9-11, 2003	5.73
May 21-24, 2004	2.12
July 2-5, 2004	2.41
April 10-12, 2005	1.81
April 17-22, 2005	1.99
May 11-12, 2005	2.02
May 25-June 6, 2005	1.86
September 24-24, 2005	2.42
April 27-30, 2006	2.18
June 15-17, 2006	2.90
August 10-11, 2006	1.95
September 19-23, 2006	2.19

CERTIFICATE OF SERVICE

I certify that the foregoing "Post-Hearing Response Brief" was sent to the
U.S. Environmental Protection Agency, Region VII
901 North 5th Street
Kansas City, Kansas 66101

Copy, by pouch mail (including CD with electronic file):

Honorable William B. Moran
Administrative Law Judge
EPA Office of Administrative Law Judges
Mail Code 1900L
Aerial Rios Building
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Dated: 3/2/2009

U.S. EPA Region VII