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

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| In the matter of: | ) |
| | ) |
| Lowell Vos | ) Docket No. CWA-07-2007-0078 |
| d/b/a Lowell Vos Feedlot | ) |
| Woodbury County, Iowa | ) ANSWER TO APPLICATION FOR |
| | ) ATTORNEY FEES AND COSTS UNDER |
| | ) THE EQUAL ACCESS TO JUSTICE ACT |
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| | ) |
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| Respondent. | ) |
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Lowell Vos' application for reimbursement of fees and expenses must be dismissed because of his failure to bring the action under the appropriate statutory authority. In the alternative, the Environmental Protection Agency (EPA) provided sufficient evidence of a discharge of pollutants from Lowell Vos' feedlot to be substantially justified in bringing the underlying penalty action. In addition to being substantially justified, EPA also attempted to advance in good faith a credible extension and interpretation of the Clean Water Act that qualifies as a "special circumstance" under the Equal Access to Justice Act. For these reasons, Vos' claim for reimbursement of fees and expenses must be rejected.

## I. BACKGROUND

On August 14, 2007, U.S. EPA Region 7 issued a proposed Penalty Order under Section 309(g) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g), and a Complaint under Part 22, 40 C.F.R. Part 22, naming Lowell Vos (Vos) as Respondent. The Complaint alleged that Vos violated Sections 301, 308, and 402 of the Clean Water Act, 33 U.S.C. §§ 1311, 1318, 1402, by discharging feedlot-related pollutants into waters of the United States and failing to apply for a National Pollutant Discharge Elimination System (NPDES) permit. The Complaint alleged two violations. Count 1 alleged that pollutants from Vos' concentrated animal feeding operation (CAFO) discharged into waters of the United States, Elliot Creek and its unnamed tributary (UNT), without an NPDES permit. Count 2 alleged that Vos had failed to apply for an NPDES permit to authorize the discharges. The Complaint included a prayer for relief proposing up to $157,000 in penalties for the violations alleged therein.

Vos filed an Answer to the Complaint, denying, among other things, that unauthorized discharges from the feedlot had occurred. A hearing was held in this matter September 15-22, 2008. Following the hearing, EPA filed a motion to withdraw the unauthorized discharge count

(Count 1). In its motion, EPA recognized that errors identified in EPA's expert modeling report during the hearing undermined the report's credibility and would make it unlikely that EPA would be able to meets its burden of proof to demonstrate the specific days that discharges had occurred.[1] The Presiding Officer granted this motion on December 2, 2008.

The Presiding Officer issued an Initial Decision on June 8, 2009. The Initial Decision held that EPA had not met its burden of proof in demonstrating pollutants from Vos' CAFO had reached a water of the United States. Finding that EPA failed to demonstrate that unauthorized discharges had occurred, the Presiding Officer held that EPA had failed to establish a prima facie element of Vos' failure to apply for an NPDES permit and as a result Count 2 was dismissed.

EPA did not appeal the Initial Decision. Therefore, the decision became final on July 23, 2009. On August 21, 2009, Vos filed an Application for Attorney's Fees and Costs under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, (herein referred to as the "Application.") In the Application, Vos alleges that he is entitled under EAJA to reimbursement for expenses he incurred in litigating the CWA complaint brought by EPA Region 7.

On September 4, 2009, EPA filed motions to toll the time for EPA to answer and require Vos to provide additional information. On September 16, 2009, EPA's motions were granted. On October 22 Vos submitted additional information pursuant to the September 16, 2009, order. However, the October 22 response did not contain all the additional information required by the September 16 order. On October 23, 2009, EPA filed motions to continue to toll the time to file its answer, compel Vos to provide the additional information required by the September 16,

[1] Section 309(g) provides a statutory maximum penalty of $11,000 per day per violation of the CWA. In light of the 309(g) "per day" language, EPA believed that Count 1 would require EPA to establish the specific days that discharges occurred and that the damaged credibility of EPA's expert witness would likely make this impossible using the modeling presented at hearing. However, EPA did not concede the issue of whether discharges had occurred and in the post hearing briefs presented substantial evidence demonstrating not only that discharges had occurred but also the dates when they had occurred. *See* EPA's October 24, 2008, Motion to Withdraw Count 1 of Complaint and Posthearing Brief pg. 11-14.

2009, order, and, in the alternative, dismiss Vos' claim for his failure to timely file a complete application. On October 27, 2009, Vos provided the additional information sought by EPA and did not contest EPA's motion to continue to toll the time for EPA to file its answer. However, the response contested EPA's motion to dismiss. To date, the Presiding Officer has not issued a decision on EPA's motion to dismiss. EPA's answer to the EAJA Application is due November 23, 2009.[2] Herein, EPA submits its Answer to Vos' Application.

II. DISMISSAL FOR FAILURE TO STATE A CLAIM

Vos seeks to bring this action under 28 U.S.C. § 2412. The statute cited is inapplicable to an administrative action brought under 40 C.F.R. Part 22. Having failed to bring this action under the appropriate statutory authority, Vos has failed to provide a timely legal basis upon which reimbursement of fees and expenses may be granted. To the point, 28 U.S.C. § 2412 does not apply to the underlying action, therefore, the Presiding Officer does not have the authority to consider Vos' claim. Vos' EAJA claim must be dismissed as a result.

III. REIMBURSEMENT AMOUNT CLAIMED NOT JUSTIFIED

An award of fees is inappropriate because, among other things, EPA was substantially justified in bringing the underlying action. Moreover, EPA also contests the reimbursement amount Vos seeks pursuant to his EAJA Application. The Application claims that Vos incurred legal fees of $60,561.27[3], $1071.77 in additional costs, and $10,746.45 for expert witness fees for a total of $72,379.49. Application at 3-4. However, the additional information provided by Vos pursuant to the September 16, 2009, order contains cancelled checks that only sum to

[2] The Presiding Officer's September 16, 2009, Order requires EPA to submit its Answer three weeks following Vos submission of additional information. The additional information was mailed on October 28, 2009, as evidenced by its first-class mail postmark. 40 C.F.R. Part 22.7 controls when service is achieved by first class mail. Part 22.7(c) states 5 days shall be added to the time for filing a responsive document. Pursuant to the September 16 Order and Part 22.7(c) EPA's answer is due November 23, 2009.

[3] This amount was adjusted to $54,918.64 because of the EAJA standard rate for attorney fees however this does not reconcile the amount claimed and the documented amount paid by Vos.

$61,416.75. *See* October 20, 2009, Lowell Vos Response to Complainant's Request for additional information. The amount claimed and sought is not justified by the records provided by Vos.

IV. ISSUE OF SUBSTANTIAL JUSTIFICATION

In the alternative, EPA provides the following discussion as though Vos brought this reimbursement action under the appropriate statute to pursue an Equal Access to Justice Act action associated with an administrative adjudication, 5 U.S.C. § 504. Throughout the rest of this Answer, EPA will refer to 5 U.S.C. § 504 as though Vos had sought to proceed under the appropriate statute.

**UNCONTESTED ISSUES**

EPA does not contest that the administrative hearing held on the underlying matter was an adversarial adjudication. EPA does not contest that Vos is a prevailing party. EPA does not contest that Vos, as the owner of an unincorporated business with a net worth less than $7,000,000 and fewer than 500 employees is an eligible party as that term is used in 5 U.S.C. § 504.

Also uncontested are a number of prima facie elements for Clean Water Act liability. In order for EPA to demonstrate Vos was liable for violations of Sections 301, 308, and/or 402 of the Clean Water Act (CWA), 33 §§ 1311, 1318, and 1342, EPA had to establish he was (1) a "person" (2) that discharges (3) "pollutants" (4) from a "point source" (5) to a water of the United States (6) without an NPDES permit.

In his Answer to EPA's administrative complaint, Vos admitted that he is a "person" as that term is defined by Section 502(5), 33 U.S.C. § 1362(5). He also admitted that at all relevant times he operated a concentrated animal feeding operation and was therefore a "point source" as

that term is used in Section 502(14), 33 U.S.C. § 1362(14). Vos admitted that Elliot Creek, the perennial stream near his cattle operation, is a water of the United States as that term is used by the CWA. The Presiding Officer ruled that the unnamed tributary (UNT) that runs immediately adjacent to his feeding operation and flows to Elliot Creek is a water of the United States. Initial Decision at pg. 5. Vos did not contest that agricultural waste is a pollutant under 502(6), 33 U.S.C. § 1362(6). *Id.* Finally, it was uncontroverted that Vos did not have an NPDES permit at times relevant to the violations alleged by EPA.

The CWA, its implementing regulations, applicable precedent, and the Presiding Officer's decision in the underlying matter are in agreement that a point source that discharges to a water of the U.S. must apply for an NPDES permit. Vos argued post hearing that there is no duty to apply for an NPDES permit even if there has been a discharge from a point source. This issue is not contested because Vos' position was rejected by the Presiding Officer and was not raised as an issue in the Application. *See* Initial Decision pg. 24.

Also uncontested is CWA Section 301 liability for unauthorized discharges and Section 308/402 liability if EPA establishes that pollutants have discharged to a water of the United States and that Vos failed to apply for a NPDES permit. Nowhere in the Initial Decision, nor in Vos' application, is it indicated that EPA lacked statutory support and would thus be unjustified in seeking penalties if EPA it had been able to demonstrate that pollutants from Vos' feedlot reached the UNT.

**CONTESTED ISSUES**

The only issue raised in Vos' Application is an allegation that when EPA filed the Complaint it lacked sufficient evidence of a discharge of pollutants from Vos' feedlot to a water of the United States to be substantially justified. *See* Application pg. 2-3. His Application

alleges that EPA had no direct evidence of discharges at the time it filed the Complaint and EPA relied solely on "inferential evidence" and, as a result, EPA was not substantially justified in pursuing Vos for CWA violations. *Id.*

For the reasons discussed herein, EPA contests Vos' claim that he is entitled to reimbursement. Based on the evidence, both direct and circumstantial, EPA was substantially justified in bringing the underlying action, therefore, it would be inappropriate to award fees and expenses under EAJA.

**THE LAW ON THE QUESTION OF SUBSTANTIAL JUSTIFICATION**

EAJA, 5 U.S.C. § 504, states that the Agency shall award fees and other expenses to a prevailing party unless the adjudicative officer of the Agency finds that the position of the Agency was substantially justified or that special circumstances make an award unjust. *See* 5 U.S.C. § 504(a)(1). The Supreme Court in *Pierce v. Underwood*, has defined the term "substantial justification" as a standard of simple reasonableness, stating that:

> We are of the view, therefore, that as between the two commonly used connotations of the word "substantially," the one most naturally conveyed by the phrase before us here is not "justified to a high degree," but rather "justified in substance or in the main"–that is, justified to a degree that could satisfy a reasonable person. That is no different from the "reasonable basis both in law and fact" formulation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals that have addressed this issue. (citations omitted). *See Pierce v. Underwood*, 108 S.Ct. 2541 at 2550, 487 U.S. 552, 101 L.Ed.2d 490 at 504.

The Seventh Circuit, in *Frey v. Commodity Futures Trading Commission*, also used the "simple reasonableness" standard, saying "the Supreme Court earlier endorsed the simple reasonableness standard in *Pierce* and we apply it here." *See Frey v. Commodity Futures Trading Commission*, 931 F.2d 1171, 1174 (7th Cir. 1991). In *Frey* the Seventh Circuit said that

to avoid an award of fees the Agency position must have a reasonable basis in law and fact.[4] *Ibid* at 1174.

The Environmental Appeals Board (EAB) has addressed the question of whether the government's position was substantially justified in a number of cases. The EAB's rulings in *L & C Services* and *Hoosier Spline Broach* illustrate both ends of the "substantial justification" spectrum. In *L & C Services*, the EAB found a lack of substantial justification and awarded attorneys fees under EAJA because complainant "did not have any evidence to establish a basic element of its case" [emphasis added], 8 E.A.D. 110, 118 (EAB 1999).

In the *Hoosier Spline Broach* case, the EAB found substantial justification and denied attorneys fees because in that case EPA had evidence to support its position. Resolution of the disputed facts in *Hoosier Spline Broach* involved a "battle of the experts" and "the Region cannot properly be penalized for pressing forward with its case," and "the Region was entitled to choose between "permissible, though conflicting, views of the available evidence." 7 E.A.D. 665, 691-692 (EAB 1998).

A third case, *In re Bricks, Inc.*, 11 E.A.D 796 (2004), *aff'd sub nom, Bricks v. EPA*, 426 F.3d 918 (7th Cir. 2005), is directly analogous to the case EPA presented in the underlying matter. In the underlying action in *Bricks*, the EAB determined that EPA had not met its burden of proof to demonstrate that the wetland at issue was a jurisdictional water, a *prima facie* element

[4] A long line of cases emphasize that while the government must carry the burden of demonstrating that its position had a reasonable basis in fact and a reasonable basis in law, the government's failure to prevail in the final disposition of the underlying adversary adjudication does not raise a presumption that the government's position was not substantially justified. *See e.g., U.S. v. Marolf,* 277 F.3d 1156 (9th Cir. January 17, 2002) (case where Ninth Circuit awarded attorney fees in drug forfeiture proceeding); *U.S v. Real Property Known as 22249 Dolorosa Street, Woodland Hills, Cal.,* 190 F.3d 977 (9th Cir. 1999) (another case where Ninth Circuit awarded attorney fees in drug forfeiture proceeding); *Massie v. U.S.,* 226 F.3d 1318 (Fed Cir. 2000) (case remanded to District Court for award of fees and costs to plaintiff in matter of child injured during her birth at Naval hospital); *Kali v. Bowen,* 854 F.2d 321 (9th Cir. 1988) (Ninth Circuit affirmed district court decision denying attorneys fees, holding that while Agency did not prevail on the merits its position was substantially justified).

of its case. As in this case, EPA demonstrated in *Bricks* that all the other elements for a violation were present. However, the EAB evaluated the evidence EPA presented to demonstrate that the wetland had a direct connection to a water of the United States and concluded that, although there was some evidence of a connection, it was not sufficient. In its underlying decision, the EAB stated that it did not rule out the possibility that a hydrologic connection exists but concluded that EPA had failed to meet its burden of proving such a connection. *Id.* at 800.

Similarly, the Presiding Officer held that Region 7 was unable to meet its burden of proof for a single element necessary to establish a CWA violation. The Presiding Officer held that the Region was unable to demonstrate that pollutants from Vos' feedlot reached the UNT. The Presiding Officer held that "it is possible that feedlot pollutants reached the UNT, but the issue is whether EPA proved that by a preponderance of the evidence," (emphasis added) (Initial Decision at 19), and ultimately concluded that EPA had failed to establish discharges to a water of the United States by a preponderance of the evidence.

The 7th Circuit Court of Appeals upheld the EAB's determination that EPA was reasonably justified in bringing the action in *Bricks*. *Bricks v. EPA*, 426 F.3d 918 (7th Cir. 2005). The underlying facts and decisions in *Bricks* and *Vos* are comparable. As in *Bricks*, EPA was substantially justified in bringing the action against Vos and it would be inappropriate to award fees and expenses to Vos under EAJA.

EAJA requires an evaluation of more than just the Final Decision in the underlying matter. Whether an agency's position was substantially justified is determined on the basis of the administrative record, *as a whole*, which is made in the adversary adjudication for which fees and other expenses are sought (emphasis in original). *In re Bricks*, 11 E.A.D. at 803 citing 5 U.S.C. 504(a)(1) EAJA requires that the Presiding Officer evaluate EPA's position *in its entirety*

and a failure by the Region to establish an essential element of its case does not require a determination that the Region was not substantially justified. *Id.* at 804. The fact that EPA's position did not prevail does not create a presumption that its position was not substantially justified. *See Id. citing Scarborough v. Principi*, 124 S. Ct. 1856, 1866 (2004).

The "substantial justification" standard is not heightened beyond the requirement that the government shows that its case had a reasonable basis in law and fact. *See S&H Riggers & Erectors, Inc., v. Occupational Safety & Health Review Com'n*, CA 5, 672 F.2d 426, 1982. The standard should not be read to raise a presumption that the government position was not substantially justified simply because it lost the case. *See Id.* Nor does the standard require the government to establish that its decision to litigate was based on a substantial probability that it would prevail. *See Id.* The test is essentially one of reasonableness and EPA must show that it possessed facts from which it could reasonably believe that the law had been violated. *See In the Matter of Reabe Spraying Service, Inc.*, 2 E.A.D. 54, EAB (1985).

Region 7 presented a significant amount of evidence pointing to the possibility that pollutants from Vos' feedlot discharged into the UNT. This included, among other things, the testimony of Mr. Prier that he had seen feedlot runoff leaving Vos' feedlot and entering the UNT and that he had sampled the waters with a field-test kit. In other words, this is not a situation where the Region entirely omitted a crucial element of proof from its case as in *L&C Services*. Rather, this is a situation where proof was in fact presented, but it fell short in the Presiding Officer's view, of meeting the Region's burden of persuasion. Under these circumstances, the Presiding Officer is hard pressed to conclude that the Region lacked a reasonable basis to proceed. *See Bricks* at 804. The case that Region 7 presented in Vos is in stark contrast to the situation the EAB confronted in re *L & C Services* when the EAB concluded that the underlying

action lacked substantial justification because the Complainant put on its case "without a shred of direct evidence establishing the key elements of the offenses." *See In re Bricks* at 804 citing *L & C Services* at 119.

The mere fact that the record contains contradictory evidence, which may in the ultimate judgment of the trier of fact, outweigh the evidence upon which the government's position is based, provides no basis for an award of EAJA fees. *See In re Bricks* at 805 citing *Hoosier, 7 E.A.D.* at 691.

**EPA'S POSITION WAS SUBSTANTIALLY JUSTIFIED**

ARGUMENT

Far from not presenting any evidence, during the six-day hearing in which the primary issues was whether the feedlot had discharged to a water of the United States, EPA presented six witnesses and approximately 30 exhibits dealing with the discharge element of its case. Furthermore, in his opening statement, when discussing the discharge evidence EPA would present, Vos stated "they [EPA] have evidence that gets very close, but it doesn't get there." (emphasis added) TR 29:3-4[5]. Thus Vos concedes that EPA has evidence of discharges but questions whether the evidence is sufficient to meet its burden to prove a violation. Vos' opening statement contradicts his arguments in his Application and recognizes that EPA was substantially justified in bringing the underlying action.

The sole support for Vos' allegation that Region 7 was not substantially justified in bringing the underlying action is a partial quote from the Initial Decision in which the Presiding Officer concludes that EPA "failed through direct evidence and by inference to show that

[5] Hearing transcript references will be referred to as TR __:__. The first blank representing the page of the transcript and the second blank, if applicable, representing the line(s) within a page that are referenced. EPA's exhibits will be references to as CX___.

pollutants from Respondent's feedlot made their way to U.S. waters." (Emphasis added). Initial Decision pg. 16 and Application pg. 2-3. In his Application, Vos incorrectly interprets this statement and argues that EPA filed a Complaint against Vos knowing that it had no direct evidence and instead relied entirely on inferential evidence. Vos' Application ignores the fact that EPA presented and the Presiding Officer, as stated in the Application quote cited above, considered direct evidence in his decision. Instead his argument ignores this fact and incorrectly alleges that EPA relied solely on inferential evidence. Moreover, Vos provides no discussion and no case law in support of his contention that inferential evidence such as modeling is insufficient to demonstrate that pollutants were discharged to a water of the United States.[6]

As will be more fully discussed below, "inferential evidence" such as runoff modeling is an accepted method of demonstrating the discharge of pollutants to a water of the United States. Vos' argument ignores that EPA provided eyewitness testimony of a discharge of feedlot effluent to the UNT and that field sampling of the stream indicated elevated ammonia and pH within the receiving stream. In other words, EPA provided direct evidence that pollutants from the feedlot reached the UNT. In his Application, Vos incorrectly characterizes all the evidence EPA presented as inferential and then asserts that EPA's reliance on this "inferential evidence" to bring the underlying action was not substantially justified. Application pg. 3

[6] In a footnote on page 2 of his Application, Vos states that he will more fully brief any argument that EPA presents on the issue of substantial justification. EPA recognizes that it carries the burden of proving that it was substantially justified. However, this burden does not justify the filing of an incomplete application by Vos. EPA suspects that Vos will continue to attempt to argue, as he did in both his post-hearing briefs, that the "actual discharge" language used by the Court in *Waterkeeper Alliance et. al. v. EPA*, 399 F.3d 486 (2d. Cir. 2005) prohibits the use of any evidence except sampling and eyewitness accounts, in other words, that circumstantial evidence is never sufficient to demonstrate discharges. Since EPA briefed this issue extensively in its post-hearing briefs and EPA presented "direct evidence" (e.g., an eyewitness account and field sampling of discharge) at the hearing, it will not re-argue its position on the impact of the *Waterkeeper* decision in this Answer. However, EPA reserves its right to respond should Vos continue this errant line of argument in any sort of response brief to this Answer.

## DISCUSSION

EPA's position had a reasonable basis in law and fact at all times during the proceedings. It may help to view the enforcement case in light of what EPA knew when it chose to bring the action. This information is not provided as an attempt to reargue the underlying case. Instead, the information is provided to demonstrate the facts and law EPA relied upon in its belief that Vos had violated the law and was therefore substantially justified. *See In the Matter of Reabe Spraying Service, Inc.*

Law and Facts Available to EPA Prior to Filing Complaint

In initiating the proceeding, EPA relied on EPA and IDNR inspector observations that the feedlot lacked adequate controls to prevent pollutants from reaching the UNT. EPA's inspector, Lorenzo Sena, observed unabated erosional features leading from the feedlot to the UNT. CX 23 and TR 70-101. In 2003, a time that fell within the period of violation alleged by EPA, the Iowa Department of Natural Resources' (IDNR) inspector, Jeff Prier, observed a discharge emanating from a settling basin and discharging into the UNT. CX 15 and TR 880-888. The discharge came from a structure designed to capture runoff and slow the water down enough to allow solids to settle before the runoff water moves on. Impounded feedlot runoff that discharges from this structure contains dissolved and suspended pollutants. Mr. Prier observed that the discharge was brown in color and created foam when it entered the UNT. TR 888 EPA knew that Mr. Prier had drawn a downstream sample and, based on the hundreds of samples he has taken, it was his opinion that the ammonia concentrations and the pH were elevated as a result of the discharge. TR 882-893. The sampling results also were direct evidence of a discharge, especially in light of the fact that he had witnessed an upstream discharge from the feedlot.

A review of IDNR's file on Vos' feedlot disclosed that Vos had applied for and received NPDES and construction permits for his feedlot in 1991. CX 9. The NPDES permit expired in 1996 and Vos never sought its renewal. *Id.* The NPDES permit specified that he was only authorized to discharge storm-water runoff from his facility if the discharge resulted from a precipitation event greater than a 25-year, 24-hour magnitude. According to the NPDES permit, that would be a rain event of greater than 5 inches in a 24-hour period. *Id.* The construction permit required the construction of runoff controls. *Id.* These runoff controls were never built. However, sometime prior to 2001, Vos increased the number of cattle at his facility to greater than 2,000 head, at least double the number of cattle necessary to meet the definition of a large CAFO. CX 12. Based on the fact that he had previously received an NPDES permit for the facility that spelled out the discharge limitations applicable to his facility, it was reasonable to presume that Vos was aware of the CWA's requirements. In other words, Vos knew that he was obligated to control the runoff from his facility if he confined more than 1,000 head but increased the number of animals anyway.

The review of IDNR's file also disclosed that on May 24, 2004, Vos' engineer had proposed the construction of additional runoff controls at the feedlot. *See* CX 20 and CX 50. Vos' engineer proposed that these were the minimum controls necessary to ensure the feedlot only discharged as a result of storms greater than a 25-year, 24-hour event. *Id.* and TR1087-88. Ultimately, the proposed design included the construction of extensive berming, several sedimentation basins, and three large storage lagoons with a combined storage capacity of approximately 830,000 gallons. *See* CX 20 and CX 50. Each of these storage basins was proposed at a location that would intercept runoff from one of the three major discharge paths

from the feedlot to the UNT. *Id.* Their locations corroborated EPA's conclusion that pollutants from the feedlot were reaching the UNT in violation of the CWA via these erosional pathways.

In December 2006, prior to initiating any enforcement action, Steve Pollard, EPA's compliance officer on this case, drove up to Vos' feedlot to observe the UNT and Elliot Creek to help determine their jurisdictional status. CX 24 and TR 158-167. The Supreme Court decision in *United States v. Rapanos*, 547 U.S. 715 (2006), created some question as to whether these streams were waters of the United States and thus subject to CWA jusridiction. To ensure that EPA was justified in bringing the action, Mr. Pollard observed the streams to ensure that they had defined beds and banks, had water flowing within them, and to evaluate any other characteristics necessary to demonstrate that they were relatively permanent waterways and thus waters of the United States.

Prior to filing the Complaint, EPA performed some rudimentary runoff modeling and determined that the feedlot had discharged many times during the applicable 5-year statute of limitation period. On August 3, 2007, Administrative Law Judge Biro handed down a decision in which runoff modeling was accepted as suitable evidence that sediment from a construction site had discharged to a water of the United States. *See In re Service Oil Co.*, Docket No. CWA-08-2005-0010 (ALJ Biro August 3, 2007), *aff'd*, 2008 WL 2901869 (EAB 2008). In *Service Oil*, runoff modeling successfully demonstrated the respondent had discharged pollutants in violation of Section 301 and had failed to apply for an NPDES permit pursuant to Section 308 of the CWA. The runoff modeling in *Service Oil* demonstrated that sediment suspended in storm water runoff from a construction site had traveled a comparatively convoluted path through two lift stations and approximately 5 miles of conveyance, including grassed waterways, before discharging into the Red River, a water of the United States. *See Id.* at 24-51. EPA evaluated

the decision and determined that the flow path from Vos' feedlot to a water of the United States was much more direct than the path evaluated in *Service Oil.* EPA also evaluated the types of pollutants typically associated with feedlot runoff and determined the dissolved and suspended nature of nutrients and bacteria were even more likely than sediment to flow significant distances. CX 33 and CX 34. At this time EPA felt that the facts and applicable precedent supported its belief that Vos had violated the CWA so it filed the Complaint on August 14, 2007.

Unequivocally, based on direct and circumstantial evidence, EPA was substantially justified in filing the Complaint.

Law and Facts Available to EPA after Filing Complaint but Prior to Hearing

Although EPA had conducted preliminary modeling during case development, it was apparent that the distance from the facility to Elliot Creek[7] would require modeling that was beyond the expertise of EPA staff. In 2008, following ADR, as it became more and more apparent that this case would move to litigation, EPA contracted Sandy Doty of Scientific Applications International Corporation as an expert hydrologist to perform the modeling. Ms. Doty conducted runoff modeling and testified as an expert witness for EPA during the *Service Oil* litigation. Based on her successful runoff modeling during the *Service Oil* litigation, EPA felt confident that modeling would establish that Vos' feedlot discharged pollutants to the UNT and Elliot Creek.

The parties' prehearing exchanges were due in April 2008. In the meantime, because it had been almost two years since Mr. Sena's inspection of Vos' feedlot in the spring of 2006, in March of 2008, EPA determined that it would be appropriate for Mr. Pollard to examine

[7] In his answer Vos had admitted that Elliot Creek was a water of the U.S. but there had not been a determination of the jurisdictional status of the UNT. Two different models were implemented to ensure that EPA could present convincing evidence that pollutants from the feedlot reached Elliot Creek. The APEX model was used to model the movement of pollutants from the feedlot to the UNT and then the SWAT model was then used to model the movement of those same pollutants through the UNT into Elliot Creek.

firsthand the flow paths from the feedlot to the UNT. One purpose was to confirm the validity of his conclusions, drawn from aerial photography, that there were several unobstructed flowpaths that form and reform from the feedlot to the UNT. *See* CX 28 and TR 167-175. During the site visit, Mr. Pollard observed that there continued to be at least three well-defined and unobstructed erosional flowpaths from the feedlot to the UNT. *Id.* Mr. Pollard also observed and photographed manure, feed, and other materials from the feedlot within the eroded pathways. CX 28 photos 14-22 and 26-28 and TR 180-81. Another purpose of his site visit was to ground-truth some of the assumptions Ms. Doty was using to model feedlot runoff. *See* TR 187. In summary, the main objective of the visit was to get a firsthand look at the facility to ensure that EPA had accurate and defensible facts. Mr. Pollard did not observe anything that contradicted EPA's conclusion that the facility lacked adequate runoff controls to contain a 25-year, 24-hour precipitation event and that significant rain events would carry pollutants to the UNT which in turn would flow to Elliot Creek. In other words, EPA continued to have a reasonable basis to believe that Vos had violated the CWA.

In April 2008, EPA filed a pre-hearing exchange containing approximately 50 exhibits including Ms. Doty's expert Manure Discharge Report that contained the results of her runoff modeling. CX 29. Based on her modeling efforts, she concluded that pollutants from Vos's feedlot had discharged approximately 103 times during the period of interest. To be certain that the assumptions she had used to calculate when the feedlot had discharged were accurate, Ms. Doty performed a site visit in July 2008. TR 349. Based on her observations, she further refined the modeling effort and EPA submitted her revised expert Manure Discharge Report in its supplemental pre-hearing exchange. *See* TR 347. The revised modeling effort concluded that Vos' feedlot discharged at least 45 times in violation of Section 301 of the CWA and

approximately 2410 tons of pollutants from the feedlot discharged into the UNT. *See* CX 43 and TR 346.

On July 23, 2008, the EAB issued its Final Decision and Order in the Matter of *Service Oil*. 2008 WL 2901869 (EAB 2008). The EAB's decision affirmed the ALJ's Initial Order and became precedent for EPA's ability to use runoff modeling and other circumstantial evidence to demonstrate illegal pollutant discharges. The decision in *Service Oil* is controlling on whether circumstantial evidence may be sufficient to demonstrate that discharges of pollutants have occurred. *See In re Service Oil Co.*, Docket No. CWA-08-2005-0010 (ALJ Biro August 3, 2007), *aff'd*, 2008 WL 2901869 (EAB 2008). This EAB decision contradicts Vos' unsupported assertion that sampling or other "direct" evidence is required for EPA to be substantially justified in bringing an action to establish CWA liability. *See* Application pg. 2-3. Even if EPA did not have any direct evidence, it had a reasonable basis in law and fact that the available circumstantial evidence would meet the burden of persuasion established by *Service Oil*.

In early August 2008, Brian Hayes, an IDNR fisheries biologist with approximately 20 years of experience investigating Iowa streams, performed an assessment of the aquatic life in Elliot Creek and the UNT. In his 20 years of assessing Iowa streams, he had never seen a stream as impacted as Elliot Creek and the UNT. In his opinion pollutants from Vos' feedlot had chronically impaired the diversity and number of fish that should have been in the streams. TR 725-732. In other words, even though Vos had decreased the number of cattle he confined at his feedlot below the 1,000 head regulatory threshold, the pollutants from the site continued to harm the aquatic life in the streams. It was reasonable to conclude that the impact on the UNT was even greater when he confined more than twice the number of cattle.

On September 8, 2008, Mr. Prier recalled he had photographed the discharge he had witnessed back in 2003. The first photo was of feedlot effluent running over the top of Vos' sedimentation basin and downcutting the downgradient side of the berm. *See* attached Exhibit A. The second photograph showed the same effluent exiting the cornfield through an eroded channel, down the bank, over a tile line, and into the UNT. *See* attached Exhibit B. This photo demonstrated the classic indications of contaminated feedlot effluent in that it was brown and foamed when agitated. These photos had never been printed and therefore never placed in the IDNR files but instead resided on an IDNR hard drive which was totally inaccessible to EPA. *See* EPA's September 5, 2008 Motion to Supplement Prehearing Exchange. Forty C.F.R. Part 22.22(a) allows the late entry of evidence provided the party had good cause for failing to exchange the required information and provided the information as soon as it had control of the information. A series of motions and responses were filed but the decision on the entry of this evidence was not made until the administrative hearing. Prior to the hearing, EPA had a reasonable expectation that this evidence would be allowed because Vos had recognized that EPA had no way of knowing that the photos existed and EPA provided the photos within hours of receiving them. *See* Respondent's September 9, 2008, Resistance to Motion Supplement.

In summary, on the eve of the hearing, EPA had evidence that Vos had an NPDES permit in 1991 but never built the runoff controls to comply with it. Sometime prior to 2000, he at least doubled or possibly tripled the number of cattle confined at the feedlot with the knowledge that he needed additional runoff controls if he met the definition of a large CAFO. Vos' engineer indicated that massive storage lagoons were necessary for the feedlot to comply with the CWA. *See* CX 20 and CX 50. However, the controls were never constructed. In 2003, IDNR inspectors witnessed pollutants entering the UNT and had samples indicating the presence of

pollutants in the UNT. EPA had photos of the discharge and a realistic expectation that these photos would be allowed into evidence. EPA had been to the feedlot three times to make certain that there was nothing at the facility that would counter its conclusion that the feedlot lacked adequate controls and that pollutants would inevitably reach waters of the U.S. Runoff modeling demonstrated that thousands of tons of pollutants from the feedlot reached Elliot Creek and the *Service Oil* decisions supported EPA's use of this modeling. All of this evidence of discharges was corroborated by Mr. Hayes stream assessment and his opinion that Vos' feedlot had decimated the aquatic life in Elliot Creek and the UNT.

Unequivocally, EPA was substantially justified in taking this action to hearing.

The Hearing

It would be an understatement to say that things did not go as hoped at hearing. First, Mr. Prier's photos were not allowed into evidence.[8] During the cross examination of Ms. Doty, Vos identified errors in the supporting attachments of her expert report. Ms. Doty attempted to explain that the error resulted when the attachments from an early run of the modeling had inadvertently been attached to the final expert report. *See* TR 605-608. However, this and other errors significantly undercut her credibility and the credibility of her conclusions. Mr. Prier was ordered not to testify regarding the use of a telephoto lens to allow him to better view the discharge he observed in 2003 (*See* TR 928-29) and ordered not to testify regarding discharges

[8] EPA continues to contend that these photographs were improperly excluded and should have been admitted into evidence. Footnote 9 in the Initial Decision excoriates EPA for what it called "sloppy practice" in reviewing IDNR files. A more thorough review of the post-hearing briefs and the motions associated with EPA's attempt to enter these photos into evidence would reveal that the photographs were on a computer hard drive and had never been printed and had never been placed in files associated with Vos' feedlot. Although EPA had unfettered access to IDNR facility files, it had no access to IDNR computers and their hard-drive contents. As Vos admitted in Paragraph 3 of his September 9, 2008, response to EPA's motion to supplement its prehearing exchange with these photos, EPA had no reason to know of the existence of the photos. EPA continues to contend that these photos should have been entered into evidence and their contents considered.

he had observed at Vos' feedlot only days before the hearing (*See* TR 914-21). Offers of proof were made in each instance.

Post-hearing Briefs

Following the hearing, EPA assessed the disappointing testimony associated with the expert modeling report and its conclusions. EPA recognized that it had relied heavily on the modeling to demonstrate the specific days that pollutants reached the UNT and Elliot Creek. EPA further recognized that these days of discharge were the basis for the penalty it had proposed for Count 1 (the discharge count). The failure of the modeling effort led EPA to conclude that it would be appropriate to withdraw the discharge count of the Complaint.[9] Based on precedent discussed thoroughly in its post hearing briefs, EPA determined it was only necessary to establish that discharges had occurred, not the specific dates they had occurred, to establish a duty to apply for an NPDES permit. EPA continued to believe there was ample evidence to demonstrate discharges had occurred and therefore determined it was reasonable to proceed to argue Count 2. Instead of relying on the discharge modeling in its post hearing briefs, EPA instead focused on the 2003 discharge that Mr. Prier observed.

In its post-hearing briefs EPA presented a reasonable argument that the Vos' feedlot discharged at least 21 times between January 1 and December 31, 2007. This argument was based on an actual observed discharge from the feedlot to the UNT, actual rainfall records, and actual observations that there were inadequate runoff controls, and actual observations of unimpeded eroded flowpaths from the feedlot all the way to the UNT. See EPA Post-Hearing Brief at 11-12 and Post-Hearing Response Brief at 21-22. The argument was not merely based

[9] A more thorough reading of the motion associated with the withdrawal of Count 1 would have revealed that EPA did not relinquish its claim that discharges had occurred. Instead the withdrawal recognized the modeling allowed EPA to identify the specific days the feedlot discharged and thus allow the calculation of a per violation per day penalty for discharges. This was a subtle distinction that was not incorporated into the Initial Decision.

on an assertion "that an area receives a lot of rain." *See* Vos' Application at p.2. The argument that pollutants from the feedlot had reached the UNT was substantially justified.

The Initial Decision

The Initial Decision states that "EPA presented some evidence which one could infer that that Respondent's feedlot discharges pollutants, such inferences at least in the light of the evidence, presented are not the equivalent of proof of an actual discharge." Initial Decision pg. 25. The Presiding Officer recognized that "some evidence" was presented by EPA, which clearly exceeds the "not a shred of evidence" EAB holding in *L & C Service*s. In that case, as discussed earlier, the EAB found a lack of substantial justification when the complainant "did not have any evidence to establish a basic element of the case."

In the Initial Decision, the Presiding Officer concluded that Mr. Prier and many of EPA's other witnesses lacked sufficient credibility for EPA to prevail. The Presiding Officer evaluated each of EPA's witness individually and found fault in their testimony or credibility. He systematically discounted each witness's testimony as being unable to meet the preponderance of the evidence burden born by EPA to sufficiently demonstrate that pollutants from Vos' feedlot had reached the UNT. However, there is applicable precedent that precludes the awarding of fees when an adverse determination is based on the credibility, or lack thereof, of the witnesses.

As discussed above, in evaluating whether EPA was substantially justified, EAJA requires an evaluation of more than just the Final Decision in the underlying matter. EAJA requires that the Presiding Officer evaluate EPA's position *in its entirety* and a failure by the Region to establish an essential element of its case does not require a determination that the Region was not substantially justified. *See In re Bricks* at 804. The fact that EPA's position did

not prevail does not create a presumption that its position was not substantially justified. *See Id. citing Scarborough v. Principi*, 124 S. Ct. 1856, 1866 (2004).

In examining the administrative record as a whole, the Presiding Officer must find that Region 7 presented a significant amount of evidence pointing to the possibility that pollutants from Vos' feedlot reached the UNT. *See Bricks v. EPA* 426 F.3d 918(7th Cir. 2005) at 923 discussing and upholding the EAB's decision that EPA was substantially justified. Furthermore, the Presiding Officer must hold that this is not a situation where EPA omitted a crucial element of proof from its case; rather this is a situation where proof was in fact presented but it fell short of meeting EPA's Burden of Persuasion in the opinion of the Presiding Officer. *See Id.* EPA could not be expected to predict the outcome of the Presiding Officer's determinations because his determinations in the underlying enforcement action turned, in part, on his findings and conclusions relating to the probative value of the witnesses' testimony. *See Id.*

Region 7 points to *United States v. Hallmark Construction Co.,* 200 F.3d 1076 (7th Cir. 2000), to contrast the facts and law presented in *Vos* with a case where an EAJA award was granted. Hallmark also makes it clear that the outcome of a case is not conclusive evidence of the justification for the government's position. *Id.* at 1079. Instead, the analysis should contain an evaluation of the factual and legal support for the government's position throughout the entire proceeding. *Id.* at 1080. In *Hallmark*, during the underlying proceeding, the district court found that the U.S. Army Corps of Engineers acted in an arbitrary and capricious manner in classifying the defendant's property as a wetland. *United States v. Hallmark Construction Co.,* F. Supp 2d 1033,1041 (N.D. Ill. 1998). The district court also found that the Corps's determination was "not based on a consideration of the relevant factors and evidence and that much of the government's evidence rested on speculation and conjecture. *See Id.*

Unlike *Hallmark*, there has been no holding that Region 7 acted in an arbitrary or capricious manner in bringing the underlying proceeding. Instead, the Presiding Officer held that Region 7 failed to meet its burden of proof and therefore failed to establish an element of its case. There has been no accusation that EPA did not present a shred of evidence as to the basic elements of its case as reasoned in *L&C Services* when that court determined that it was appropriate to awarded expenses under EAJA.

The fairest comparison for analysis of whether Region 7 was substantially justified in bringing the underlying action is with the facts and analyses by the EAB and the 7th Circuit in *Bricks*. Under this test it is clear that Region 7 was reasonably justified and an EAJA award is inappropriate.

## V. SPECIAL CIRCUMSTANCES

In any event, even if the Presiding Officer should determine that the facts and law interpreted, presented, and argued by Region 7 did not substantially justify bringing the underlying action, the action was justified under the "special circumstances" exemption contained in 5 U,S.C. § 504(a)(1). The exemption allows an agency latitude to advance in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts, without being deterred by the prospect of attorney's fees and expenses under EAJA, should it fail to prevail. *See In the Matter of Reabe Spraying Service* (citing H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10-11 (1980), reprinted in 1980 U.S. Code Cong. & Ad. News, 4984-90; see also H.R. Conf. Rep. No. 96-1434, 96th Cong., 2d Sess. 21-22 (1980), reprinted in 1980 U.S. Code Cong. & Ad News, 5010-11).

Region 7 is unaware of, and Vos to date has not brought forward, any case law or other precedent in its Application or post-hearing briefs that forecloses EPA from using circumstantial or inferential evidence as proof that Vos's feedlot discharged pollutants. The simple reality is feedlots like Vos' discharge sporadically and it is very difficult for EPA, which is based in Kansas City six hours away from Vos' feedlot, to be present while discharges are occurring. On four occasions, EPA staff visited or inspected Vos' feedlot in its effort to document CWA compliance. It was not raining on any of those dates. However, there were many factors that pointed to the inevitability that this feedlot discharged pollutants to a water of the United States.

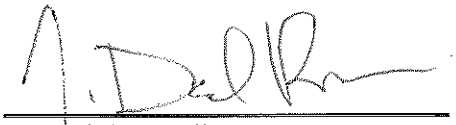
As discussed throughout this Answer, EPA had substantial information that Vos' feedlot discharged to waters of the United States and thus violated the law. The use of runoff modeling and other circumstantial evidence of discharges was a good faith interpretation of the law and a reasonable effort to demonstrate that Vos violated the CWA. Assuming, *arguendo*, the Presiding Officer determines that the established precedent did not support EPA's attempt to use modeling and other circumstantial evidence to demonstrate the discharge of pollutants. EAJA provides an exemption when "Special Circumstances" make an award of fees unjust. Under the reasoning in *Reabe*, it would be unjust to award fees and expenses when EPA was involved in vigorous enforcement efforts based on established precedent or was a good faith, novel but credible extension and interpretation of the law. Awarding fees and expenses under these circumstances would be unjust.

## VI. CONCLUSION

Vos' EAJA claim must be dismissed because of his failure to provide a timely legal basis to make a claim for reimbursement of fees and expenses. In the alternative and for the reasons stated and discussed above, EPA has demonstrated that it was substantially justified in bringing

the underlying penalty action. Failing that, EPA has demonstrated that the underlying action is exempted from Vos' claim under EAJA "special circumstances" exemption. EPA requests that the Presiding Officer reject and deny Vos' claim for attorney's fees and expenses under 5 U.S.C. § 504.

RESPECTFULLY SUBMITTED this 20th day of November, 2009.



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## CERTIFICATE OF SERVICE

I certify that the foregoing "Answer to Application for Attorney Fees and Expenses under the Equal Access to Justice Act" was sent to the following persons, in the manner specified, on the date below:

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U.S. EPA Region VII


Exhibit A

JUN 25 2003

Exhibit B