UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF LOWELL VOS d/b/a LOWELL VOS FEEDLOT WOODBURY COUNTY, IOWA Respondent.	Docket No. CWA-07-2007-0078 LOWELL VOS' RESPONSE TO EPA'S ANSWER TO APPLICATION FOR ATTORNEY FEES AND COSTS UNDER THE EQUAL ACCESS TO JUSTICE ACT

COMES NOW the Respondent, Lowell Vos d/b/a Lowell Vos Feedlot, by and through his attorneys and submits his Response to EPA's Answer to Application for Attorney Fees and Costs Under the Equal Access to Justice Act.

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I. EPA FAILED TO MEET ITS BURDEN OF PROVING SUBSTANTIAL JUSTIFICATION.

A. INTRODUCTION

From the day EPA initiated its investigation in this case continuing through the EPA's Answer to Application for Attorney Fees and Costs Under the Equal Access to Justice Act (Answer) there has been a general theme – that being the unreasonableness of EPA's legal position and its unreasonableness in pursuing that position against Vos. From the outset of this case the record as a whole shows that EPA refused to even consider that Vos' feedlot did not need an NPDES permit under the Clean Water Act. From failing to recognize when it conducted its first investigation on May 31, 2006 that Vos did not need an NPDES permit because he had the protection of the Iowa Plan[1], to continuing in its Answer to attempt to have this Court consider evidence that the Court has ruled must be excluded from the record, the EPA has pursued this action in spite of the facts and the law. As set out in Vos' post hearing briefs, it is not just that EPA did not have samples or any other form of proof of an actual discharge as required by to prove a violation of the NPDES permit requirements of the Clean Water Act, it is that EPA had ample opportunity to take those samples and consciously chose not to utilize that opportunity. See Respondent's Post Hearing Brief at pp. 16-17 and Initial Decision, pp. 12-14. That course of conduct meets the standard of lacking substantial justification in this Equal Access to Justice Act (EAJA) claim.

As in the consideration of the Initial Decision, the primary issue here in consideration of Vos' Application for Attorney Fees and Costs Under the Equal Access to the Justice Act must be EPA's unreasonable and unjustified reliance on computer modeling in bringing this action

[1] See the Initial Decision at pages 26 to 33 where the Court found that 'the Agency was seeking to have it both ways on the amnesty plan" (p. 31) and the Court's conclusion that the EPA's position on the Iowa Plan "lacks essential fairness."

against Mr. Vos. When its unjustified reliance upon computer modeling was exposed at trial, EPA withdrew its claim for "Unpermitted Discharge of Pollutant to Waters of the United States" and attempted to salvage something out of its original claim by continuing with its claim for "Failure to Apply for a NPDES Permit." The very fact that EPA felt compelled to withdraw its claim for unpermitted discharges solely because of deficiencies in its computer modeling evidence clearly shows that it did not have a substantial justification for bringing this action. As fully discussed in Vos' post hearing briefs and in the Initial Decision (which of course was not appealed by EPA and is now final) the claim of unauthorized discharges is also central to EPA's claim against Vos for failing to apply for an NPDES permit. In essence, EPA was not substantially justified in bringing this action if the only support for any claim of unauthorized discharge was computer modeling. EPA's withdrawal of its claim for unauthorized discharges when its computer modeling evidence failed at trial shows that computer modeling was the *only* evidence it could muster to support its action against Vos. Accordingly, Vos must be awarded attorney fees and costs under EAJA.

B. APPLICABLE LAW.

In its Answer EPA cites to numerous EAJA cases in support of its position that it was substantially justified in bringing the action against Vos. However, the Agency relies primarily on two cases that it believes are most applicable here.

First, it relies on *L & C Services,* 8 E.A.D. 110 (EAB 1999) for the proposition that for there to be an award in this EAJA claim EPA must not have had any evidence to establish a basic element of its case. However, EPA improperly extends the holding of *L &C* beyond its actual meaning based on the facts of this case. In that case, no penalty was assessed because the Region had no direct evidence on four counts to prove that the material observed by EPA inspectors actually contained asbestos. 8 E.A.D. 118 EAB noted that the presence of asbestos could not be confirmed visually and that no samples for laboratory analysis were taken to confirm the presence of asbestos. *Id.* Likewise, in this case EPA produced no evidence via samples that any runoff containing pollutants from Vos' feedlot had reached a water of the United States. As noted in the Initial Decision, Vos' expert witness testified that "sampling was the only reliable way to establish whether a discharge of pollutants actually occurred." *Initial Decision,* p. 19 and Tr. 1316. Thus, like in *L & C Services* and contrary to EPA's assertions in it Answer, in this case EPA did not have any evidence to establish a basic element of its case – that being a discharge of pollutants to a water of the United States. Although EPA believes it did present evidence, as will be discussed below, that evidence was found to be irrelevant, unreliable or otherwise without probative value. Such evidence is equivalent to no evidence.

Next, EPA relies on *In re Bricks Inc.* 11 E.A.D. 796 (2004) as being directly analogous to this case. EPA cites this case for the proposition that its inability to prove one element necessary for a finding of a violation does not mean that it was not substantially justified in bringing the action. At first blush, EPA's analysis of this case may seem to have merit. However, there are critical differences. First, an element missing under EAJA analysis is the EPA's own withdrawal of the critical and necessary element to prove both unauthorized discharges and the failure to have an NPDES permit. As discussed elsewhere in this Response, that withdrawal, on its own, supports a finding that EPA was not substantially justified in bringing this action. Second,

Bricks is a wetlands determination case that hinges on hydrological connections. Proving a hydrological connection is much different that proving a discharge of pollutants to a water of the United States under the standards set out in the Clean Water Act under *Waterkeepers.* In fact, this appears to be the approach taken by EPA in that much of its evidence involved showing there were defined drainage pathways from the feedlot to the unnamed tributary. However, this evidence fails under the *Waterkeepers* standard. This type of evidence may have met the EAJA substantial justification in *Bricks,* but it fails in this case.

C. LAW AND APPLICABLE FACTS AVAILABLE TO EPA.

EPA lays out the evidence it produced, or attempted to produce, at various stages of this case that it argues meets its burden of substantial justification.

First, EPA argues that Jeff Prier's visual observation and field test kit sample qualifies to meet its burden under EAJA. However, Prier's visual observations were discounted by the Court to the point of being the equivalent of non-existent. Specifically, the Court found it to be incredible that Mr. Prier could see a discharge from his car while driving at least three quarters of a football field away. *Initial Decision,* p. 9. Regarding the sampling done by Mr. Prier, this was a single field test kit sample taken for educational purposes and not for enforcement purposes. *Initial Decision,* p. 10. He testified Iowa DNR does not use field test kit samples in enforcement actions. Tr. 942. Further, Mr. Prier admitted that he did not follow proper protocol for taking the sample. Tr. 892. As noted by the Court in the Initial Decision, "not a single aspect of the appropriate protocol was followed." *Initial Decision,* p. 10. Accordingly, results of this sample are the equivalent of no evidence. Finally, EPA once again attempts to introduce for consideration by this Court photographs that this Court excluded from evidence prior to the hearing. See Answer, pp. 18-19 and Exhibits A and B. Vos objects to this attempt as in violation of the Court's previous ruling and requests that the Court not consider any of EPA's argument on this issue and disregard Exhibits A and B. The Court's previous ruling aside, it is interesting that EPA continues to pursue the introduction of these photographs when it did not know of their existence until one week before the hearing. How could EPA have relied on these photographs as a reasonable basis for bringing this action when it did not know they existed until "the eve of the hearing."

EPA also looks for support against Vos' EAJA claim in the following:

1. Vos received an NPDES permit in 1991 and increased his cattle numbers to more than 2,000 head. However, the Court found this argument to be irrelevant to the case. *Initial Decision,* p. 18. An irrelevant argument falls far short of the EAJA substantial justification standard
2. Vos employed an engineer to design runoff controls to obtain an NPDES permit. However, again this argument fails to meet the substantial justification standard when EPA failed to provide evidence of a discharge that would require Vos to obtain an NPDES permit.
3. Brian Hayes, an Iowa DNR fisheries biologist, testified as to the aquatic life in Elliot Creek and surmised that Vos' feedlot was impairing the aquatic life. However, EPA recognizes that this testimony was based on data and observations

occurring after Vos had reduced his feedlot capacity to less than 1,000 head and was therefore not subject to EPA enforcement jurisdiction. In fact, as noted by the Court in the Initial Decision, Mr. Hayes' fish sampling was done more than a year and a half after Vos reduced his feedlot capacity. *Initial Decision,* p. 17. Because of this lengthy gap in time, the Court found Mr. Hayes' sampling did not have probative value. *Id.* Evidence without probative value is the same as no evidence and does not meet the reasonableness standard for an EAJA claim.

EPA also expends considerable effort in its Answer trying to justify its reliance on computer modeling as a reasonable basis for bringing this action. For example, EPA cites to the facts and circumstances surrounding its reliance on *In Re Service Oil.* However, there are several key distinguishing factors between that case and this case pertaining to computer modeling. First, based on the available record, it does not appear that modeling was central issue as in this case. Second, like the *Leeds* case cited by EPA in the underlying action, *In Re Service Oil* did not involve a feedlot and discharges to a corn field. As the Court noted in the Initial Decision, a corn field is not analogous to a storm sewer. *Initial Decision,* p. 7. Placing sole reliance for using computer modeling as proof of a Clean Water Act discharge in this case based entirely on one administrative decision does not meet the EAJA standard for substantial justification.

EPA's extensive argument on computer modeling only serves to further underscore Vos' position that computer modeling by itself fails to meet the standard of *Waterkeepers.* As noted in Vos' Post Hearing Brief, the court in *Waterkeepers* ruled that "in the absence of an actual addition of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, no statutory obligation of point sources to comply with EPA regulations for point source discharges, and no statutory obligation of point sources to seek or obtain an NPDES permit in the first instance." *Waterkeeper* at 504-505. (emphasis added).

The Court stated in the Initial Decision that the parties do not claim that the *Waterkeeper* decision is instructive on the question of the evidence EPA must present to show actual discharges. *Initial Decision,* p. 22. For the reasons discussed below, the *Waterkeeper* decision is not the central part of this EAJA claim. However, it must be noted that, as Vos has argued throughout this case, *Waterkeeper* requires an actual addition of a pollutant to a water of the U.S. before an NPDES permit is required and that, in Vos' view, only water sampling or definitive visual observation of a pollutant would meet this standard.[2] How can there be proof of an *actual* addition of a pollutant with anything other than *actual* evidence of discharge? While the Court declined to rule on *Waterkeepers* to the extent argued by Vos, in its Initial Decision the Court required sampling whenever faced with inferential evidence of a discharge and when sampling was possible. Finally, Vos reiterates his position that EPA's position in this case is akin

[2] In its Answer (p.11, f.n. 6) EPA reserves the right to respond to any argument on the *Waterkeeper* decision presented by Vos in this Response. To the extent EPA believes that it did not have the opportunity in its Answer to adequately address this issue or any other issue as discussed in this Response and needs additional opportunity to respond, Vos does not object.

to requiring a "no potential to discharge" by Vos and that standard was rejected by *Waterkeeper*. When all of these factors in the record are taken as a whole, EPA's position is not substantially justified.

While Vos would relish the opportunity to more fully explore whether circumstantial evidence such as computer modeling meets the standard in *Waterkeeper,* the Court could and did leave that question for another day because EPA dropped Count 1 (claim for unauthorized discharges) when its introduction of computer modeling evidence completely failed at trial. While EPA argues strenuously that it had a reasonable basis for relying on computer modeling, EPA fails to address the issue that sole and absolute reliance on this type of evidence for its claim of unauthorized discharges was not reasonable. And, if computer modeling was not the sole basis for EPA's proof of the most critical element of its case, why did it drop that claim when that evidence fell flat on its face at trial? As the Court noted, if dropping the unpermitted discharge claim has no bearing on the reliability and credibility of its field observations, then "EPA's decision to drop Count 1 made no sense." *Initial Decision,* page 23.

> The Court in the Initial Decision aptly noted:
> ". . . EPA's self-initiated action to withdraw Count I cannot be completely ignored in the analysis of whether it was able to establish Count 2. Obviously, EPA felt that the evidence it presented for Count 1would not support a finding that the preponderance of the evidence established a violation. The next logical question is which element, or elements, among those in Count 1 did the Agency conclude was wanting? The answer is obvious. EPA was acknowledging that it could not establish the addition of pollutants to waters of the United States. That is the very same element, equally required to establish a violation of Count 2. In short, it makes no sense that EPA has conceded that it cannot establish the discharge of a pollutant element for Count 1 while claiming that it can show the same element for Count 2. The Court cannot simply ignore the significance of EPA's admission of the weakness of its evidence for Count 1 when the same evidentiary issue is presented in Count 2." *Initial Decision,* pp. 24-25.

Just as the Court could not ignore the significance of EPA's dropping Count 1 in the underlying case, it cannot be ignored in this EAJA claim. Nothing proves Vos' point that EPA was not substantially justified in pursuing this case against Vos better than EPA's own voluntary action in dropping Count 1 when the most critical element for establishing Count 2 was identical to Count 1.

In all of the research of applicable cases under EAJA, no case has been cited like this case where EPA voluntarily withdrew the most critical element of its entire case. That in itself shows lack of substantial justification for bringing the action and forcing Lowell Vos to spend thousand of dollars in defending himself.

In conclusion on this issue, the record shows EPA lacked substantial justification in bringing this action. This lack of substantial justification is succinctly noted by the Court in the Initial Decision as follows:

> "Again, it is the Court's conclusion that EPA failed, both through direct evidence and by inference to show that pollutants from Respondent's feedlot made their way to U.S. waters. Showing that an area receives 'a lot of rain' does not show that pollutants were present in any discharges from the feedlot, nor that any assumed pollutants would migrate sufficiently to reach the UNT. *EPA knew there was a deficiency in its evidence on this subject and plainly that is why it attempted to develop the models to show that pollutants would reach that destination.* In the end EPA itself knew that its own models were fatally flawed and upon consideration of all of the evidence it presented at the hearing, the Agency concluded that it could not establish Count 1." *Initial Decision,* p. 16 (emphasis added).

II. THE SPECIAL CIRCUMSTANCES EXEMPTION IS NOT AVAILABLE TO EPA

EPA also argues that its actions were justified under the "special circumstances" exemption in 5 U.S.C. §504(a)(1) and as set out in *In the Matter of Reabe Spraying Service, Inc.,* 2 E.A.D. 54 (1985). That decision, as noted by EPA in its Answer, provides that the special circumstances 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." *Id.*

EPA first alleges that Vos has not brought forward any precedent that forecloses EPA from using circumstantial or inferential evidence for proof of a discharge under the Clean Water Act. However, as noted previously, Vos has repeatedly argued that *Waterkeepers* is that precedent and EPA was fully aware of that case before it initiated this action.

EPA then alleges that "there were many factors that pointed to the inevitability that this feedlot discharged pollutants to a water of the United States." There is no better argument for applying the holding of *Waterkeeper* to this EAJA case than EPA's own statement. To argue that it was inevitable that Vos' feedlot discharged in the face of the lack of evidence presented by EPA in this case illustrates the unreasonableness of EPA's position. That coupled with EPA's withdrawal of its unauthorized discharge claim as previously discussed makes the special circumstances exemption inapplicable to this case.

III. STATUTORY AUTHORITY FOR EQUAL ACCESS TO JUSTICE ACTION

EPA argues that this case should be dismissed because Vos filed his application for attorney fees and costs under 28 U.S.C. §2412 instead of 5 U.S.C. §504. While technically correct, this inadvertent error cannot be the basis for dismissing the entire action for attorney fees and costs. The filing and eligibility requirements for an application for attorney fees and costs are identical under both 28 U.S.C. §2412 and 5 U.S.C. §504 as is the burden of proof for EPA. Because the provisions of 28 U.S.C. 2412 and 5 U.S.C. §504 are identical, Vos has satisfied all eligibility and filing requirements for an EAJA application. Further, the harmless error did not prejudice EPA as they must show that they were substantially justified in bringing an action

against Vos, regardless of the statutory provision, as evidenced by EPA's significant emphasis on justification in their answer to Vos' application. Additionally, the Supreme Court in *Scarborough v. Principi*, found that an EAJA application can be amended to cure a default if the amendment to the application does not prejudice the Government. 541 U.S. 401, 422 (2004). Under *Scarborough*, Vos would be permitted to amend his EAJA application to correct the statutory citation because the amendment would cure a default and would not be prejudicial to the Government. Accordingly, Vos requests that his EAJA claim be amended to reflect the correct statutory citations as set forth in this section of this Response.

IV. REIMBURSEMENT AMOUNT CLAIMED BY VOS IS JUSTIFIED

In its answer EPA contends that the reimbursement amount claimed by Vos is not justified, claiming that Vos submitted cancelled checks totaling $61,416.75, when the total fees and costs claimed in Vos' original application totaled $72,379.49. In prior submission of cancelled checks, a copy of the check to Terracon for $6282.39 for expert witness fees was inadvertently omitted and has been included as an attachment to this response. EPA's computation of the cancelled checks submitted by Vos is erroneous in that the figure, as evidenced by information submitted by Vos, totals $76,669.64. Details of all cancelled checks submitted by Vos are included in the table below. The total amount paid by Vos, as evidenced by his cancelled checks is more than the $72,379.49 originally claimed in Vos' EAJA application, however Vos does not wish to amend his application but instead claims $72,379.49 in attorney and expert witness fees as originally claimed.

Cancelled Checks Submitted by Vos

Payee	Amount
Beving, Swanson & Forrest, P.C.	$5249.00
Beving, Swanson & Forrest, P.C.	$1073.00
Beving, Swanson & Forrest, P.C.	$1831.50
Beving, Swanson & Forrest, P.C.	$1036.00
Beving, Swanson & Forrest, P.C.	$751.50
Beving, Swanson & Forrest, P.C.	$133.00
Beving, Swanson & Forrest, P.C.	$3089.09
Beving, Swanson & Forrest, P.C.	$608.00
Beving, Swanson & Forrest, P.C.	$380.00
Beving, Swanson & Forrest, P.C.	$1869.50
Beving, Swanson & Forrest, P.C.	$35,253.25
Beving, Swanson & Forrest, P.C.	$1001.00
Beving, Swanson & Forrest, P.C.	$721.50
Beving, Swanson & Forrest, P.C.	$988.00
Beving, Swanson & Forrest, P.C.	$10,000.00
Eisenbraun & Associates	$3376.02
Eisenbraun & Associates	$1931.96
Terracon	$1125.00
Terracon	$6282.39
Total	**$76,699.64**

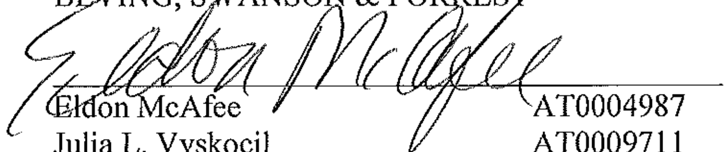
VI. ATTORNEY FEES EXPENSED IN PREPARING EAJA APPLICATION AND RESPONSE

As shown by the cancelled checks submitted by Vos, he paid $72,379.49 in attorney and expert witness fees defending himself in the EPA enforcement action. In addition to those expenses, Vos has also paid attorney fees in connection with preparing his EAJA application, responding to EPA's requests for information and this Response to EPA's answer. Documentation of these additional attorney fees paid by Vos shall be submitted when they are complete so that the documentation will include all attorney fees associated with Vos' EAJA application.

V. CONCLUSION.

Vos respectfully requests that the Court find that he meets the statutory requirements for an award of attorney fees and costs under the EAJA and that the Administrator's position was not substantially justified and did not qualify under the EAJA special circumstances exemption. Respondent further requests this court to award $61,633.04 in attorney fees and costs under 5 U.S.C. §504 and $10,746.45 in expert witness fees under 5 U.S.C. §504(b) for a total of $72,379.49.

BEVING, SWANSON & FORREST



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CERTIFICATE OF SERVICE
The undersigned certifies that the foregoing instrument was served upon each of the attorneys of record of all parties to the above-entitled cause herein at their respective addresses disclosed on the pleadings of record on the 7th day of December, 2009.

By: ☑ U.S. Mail ☐ FAX
☐ Hand Delivered ☐ Overnight Courier
☐ Federal Express ☐ Other:________

Signature:

Original and one copy by first class U.S. Mail and one copy by Facsimile to:
Sybil Anderson
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A copy by first class U.S. Mail and Facsimile to:
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