IN RE LOWELL VOS FEEDLOT

EAJA Appeal No. 10-01

FINAL DECISION

Decided May 9, 2011

Syllabus

Mr. Lowell Vos, doing business in Woodbury County, Iowa, as Lowell Vos Feedlot ("Vos" or "Vos Feedlot"), appeals from Administrative Law Judge ("ALJ") William Moran's April 2, 2010, denial of his application for attorneys' fees and costs under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504. The EAJA appeal arises out of an underlying Clean Water Act ("CWA") enforcement action initiated in August 2007 against Vos by Region 7 ("Region") of the United States Environmental Protection Agency. The ALJ ruled in that action that the Region had failed to establish, by a preponderance of the evidence, that Vos Feedlot had violated the CWA by discharging pollutants into waters of the United States without the requisite permit.

As the "prevailing party" in the underlying litigation, Vos Feedlot believes it is entitled to recover the reasonable fees and costs of defending itself against the government. The ALJ ruled, however, that the Region was "substantially justified" in pursuing the CWA charges and, therefore, no EAJA claim would lie. On appeal to the Environmental Appeals Board ("Board"), Vos Feedlot contends that the ALJ erred in so finding. It asks the Board to reverse the ALJ's EAJA recommendation and award it $80,548.99 in attorneys' fees and costs.

Held: The Board holds that the Region was "substantially justified" within the meaning of EAJA in pursuing the underlying CWA enforcement action against Vos Feedlot, and that the ALJ did not err in so finding. Accordingly, the Board affirms the ALJ's denial of the EAJA application.

In so doing, the Board rejects Vos Feedlot's interpretation of *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005). Vos argues that *Waterkeeper* established a new evidentiary standard for CWA cases: that the government must present direct evidence of actual discharges to prove a CWA violation and may not rely on indirect or circumstantial evidence of any kind for that purpose. Vos argues further that government reliance on inferential evidence to prove an actual discharge indicates, *ipso facto*, that the evidence is insufficiently weighty to substantially justify, under EAJA, a government decision to enforce the CWA. The Board holds to the contrary, ruling that, in the aftermath of *Waterkeeper*, the evidentiary standard in the CWA administrative enforcement context remains a preponderance of the evidence based on any admissible evidence, and the evidentiary standard for proving "substantial justification" under EAJA remains one of reasonableness in law and in fact. Accordingly, the government can continue to use any kind of evidence, direct or inferential, to attempt to establish that an unlawful discharge occurred.

The Board also rejects Vos Feedlot's claim that the Region's evidence against it did not constitute direct evidence of actual discharges and was flawed in many other respects, thus providing no substantial justification upon which a "reasonable person" could have initiated enforcement. Upon review of the administrative record and the sequence of events in this case, the Board finds no error in the ALJ's determination that EPA was substantially justified in proceeding against Vos Feedlot on August 14, 2007, the date it filed the complaint. At that time, the Region had compiled a large body of direct and circumstantial evidence regarding Vos's operations. The Board holds that, on the face of that body of direct and circumstantial evidence, the Region plainly had a reasonable basis in law and in fact to believe that Vos had discharged pollutants into the waters of the United States, in violation of the CWA. The fact that the record contains contradicting evidence that ultimately outweighed the government's evidence after a hearing does not by itself undermine a finding of substantial justification.

The Board therefore upholds the ALJ's ruling that the Region's decision to proceed with litigation was substantially justified for EAJA purposes and, accordingly, affirms the ALJ's denial of the EAJA application..

Before Environmental Appeals Judges Edward E. Reich, Kathie A. Stein, and Anna L. Wolgast.

Opinion of the Board by Judge Reich:

I. *INTRODUCTION*

Mr. Lowell Vos, doing business in Woodbury County, Iowa, as Lowell Vos Feedlot ("Vos" or "Vos Feedlot"), appeals from Administrative Law Judge ("ALJ") William Moran's April 2, 2010, denial of his application for attorneys' fees and costs under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504. The EAJA appeal arises out of an underlying Clean Water Act ("CWA") enforcement action initiated in August 2007 against Vos by Region 7 ("Region") of the United States Environmental Protection Agency. The ALJ ruled in that action that the Region had failed to establish, by a preponderance of the evidence, that Vos Feedlot had violated the CWA by discharging pollutants into waters of the United States without the requisite permit.

As the "prevailing party" in the underlying litigation, Vos Feedlot believes it is entitled to recover the reasonable fees and costs of defending itself against the government. The ALJ ruled, however, that the Region was "substantially justified" in pursuing the CWA charges and, therefore, no EAJA claim would lie. On appeal to the Environmental Appeals Board ("Board"), Vos Feedlot contends that the ALJ erred in so finding. It asks the Board to reverse the ALJ's EAJA recommendation and award it $80,548.99 in attorneys' fees and costs.

II. *ISSUE ON APPEAL*

The Board must decide whether the ALJ erred in determining the Region was "substantially justified" within the meaning of EAJA in pursuing the underlying CWA enforcement action against Vos Feedlot.

III. *SUMMARY OF DECISION*

The Board holds that the Region was substantially justified within the meaning of EAJA in pursuing the underlying CWA enforcement action against Vos Feedlot, and that the ALJ did not err in so finding. Accordingly, the Board affirms the ALJ's denial of the EAJA application.

IV. *FACTUAL AND PROCEDURAL HISTORY*

A. *The Underlying CWA Enforcement Action*

On August 14, 2007, the Region filed an administrative complaint against Vos Feedlot, charging Vos with violating the CWA by discharging "wastewater containing pollutants," more particularly "feedlot runoff," which carries "ammonia, fecal coliform, and other pollutants typically associated with feedlots" along with it as it leaves the feedlot site. *See* Complaint ¶¶ 28-30, 32, 35, at 4-5. The complaint alleged two counts: (1) unpermitted discharges of "wastewater containing pollutants" to waters of the United States, consisting of Elliott Creek and an unnamed tributary ("UNT") to Elliott Creek, on at least eight discrete occasions in the five years preceding the filing date of the complaint; and (2) failure to apply for a National Pollutant Discharge Elimination System ("NPDES") permit authorizing those discharges, an ongoing (daily) violation that began 180 days prior to Vos's first actual discharge.[1] *See id.* ¶¶ 31-37, at 5-6; *see also* 40 C.F.R. § 122.21(c)(1) (180-day requirement). The Region proposed penalties of "up to $157,500," the statutory maximum, for these alleged violations. Complaint ¶ 39, at 6. On September 19, 2007, Vos Feedlot filed an answer denying the central elements of the complaint and requesting a hearing. *See* Answer & Request for Hearing ¶¶ 31-37, at 2-3; *id.* at 9.

In September 2008, the ALJ presided over a six-day hearing on these charges, at which the parties introduced many exhibits and much expert witness

[1] The CWA prohibits the discharge of pollutants into the waters of the United States, except in cases where an NPDES or other permit authorizes such discharge. *See* CWA §§ 301(a), 402, 33 U.S.C. §§ 1311(a), 1342. The NPDES program is one of the principal permitting programs under the CWA. *See* CWA § 402, 33 U.S.C. § 1342.

testimony. *See* Hearing Transcript ("Tr."); Complainant's Exhibits ("CX"); Respondent's Exhibits. A month later, the Region filed a motion to withdraw the unlawful discharge count (i.e., Count 1). *See* EPA Motion to Withdraw Portion of Complaint at 2-3. The Region did not offer a reason for the withdrawal, but it stated it would no longer use evidence from two computer models that purported, based on feedlot topography, precipitation rates, flow path dynamics, and other variables, to identify specific days Vos Feedlot had discharged pollutants to waters of the United States.[2] *Id*. However, in this same motion, the Region indicated that even without these computer modeling data, other credible evidence in the record demonstrated that Vos Feedlot had discharged pollutants to waters of the United States "during significant precipitation events," thus creating an ongoing duty for Vos to apply for a permit.[3] *Id*. at 2. Accordingly, the Region continued to

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[2] After it filed the complaint, the Region retained Ms. Sandra Doty, an expert hydrologist from Scientific Applications International Corporation, to conduct detailed storm water runoff modeling of the feedlot site. Ms. Doty had previously performed runoff modeling and provided expert testimony in the *Service Oil* litigation before Chief ALJ Susan Biro. *See infra* note 4 and accompanying text (discussing *Service Oil* litigation). In this case, Ms. Doty used two separate computer models to evaluate the likely movement of contaminants from the feedlot to the UNT and from the UNT to Elliott Creek. *See* CX 29 (Manure Discharge Report); CX 43 (Revised Manure Discharge Report). The models indicated that Vos had discharged several thousand tons of pollutants over at least forty-five separate days within the five-year period preceding the filing of the complaint (i.e., August 14, 2002, to August 14, 2007). *See* Tr. at 346; CX 43 tbls. 2-3, at 10-12.

During cross-examination of Ms. Doty at the hearing, Vos Feedlot identified errors in the supporting attachments of her expert Manure Discharge Report, which contained her runoff modeling results. Ms. Doty attempted to explain that the errors resulted from a misattachment of earlier modeling results to her final report, but this and other errors called into question her credibility and the credibility of her conclusions. *See*, *e.g.*, Tr. at 455-56, 459-68, 474-512, 605-08. After the hearing, the Region assessed its case and decided to abandon Count 1, for which it had relied heavily on the computer runoff modeling to establish specific dates of discharge. Accordingly, the Region filed the motion to withdraw Count 1. The Region's post-hearing briefs and later EAJA filings make it clearer than its withdrawal motion did that the Region withdrew Count 1 because it believed its runoff modeling effort had failed. *See* EPA Post-Hearing Br. at 7-8 & n.10; EPA Post-Hearing Resp. Br. at 7; EPA Answer to EAJA Application at 20; EPA Resp. Br. at 22.

[3] On June 25, 2003, Iowa Department of Natural Resources Inspector Jeffrey Prier observed a discharge of brown-colored water from a terraced area along the west side of the feedlot, which flowed downhill through a corn field and into the UNT, foaming upon entry. Tr. at 885-92; CX 15, 16, 20. Mr. Prier sampled downstream water in the UNT that day using a field test kit and determined it contained levels of ammonia and pH outside the normal background ranges for northwestern Iowa waters. Tr. at 891-93; CX 15. In addition, readings at the Sioux City Gateway Airport rainfall station indicated that the feedlot area had received approximately 1.82 inches of rain in the four days preceding, and including, June 25, 2003. *See* CX 46.

The Region inferred from these pieces of evidence that on any day or group of successive days in which Vos Feedlot received at least 1.82 inches of rainfall, it would very likely have discharged pollutants to the UNT (absent installation of runoff controls or changes in operations). Using the official rainfall records to identify such days or periods of days, the Region argued that Vos Feedlot discharged pollutants to the UNT more than twenty times in the years 2001 to 2007. *See* EPA Post-Hearing Br. at 11-12; EPA Post-Hearing Resp. Br. at 21-22 & app. A (summary of rainfall data).

pursue the count for failure to apply for an NPDES permit (i.e., Count 2).

On December 2, 2008, the ALJ granted the Region's motion and dismissed Count 1 with prejudice. Six months later, on June 8, 2009, the ALJ issued an Initial Decision dismissing Count 2 as well, on the ground that the Region had failed to prove, by a preponderance of the evidence, that Vos Feedlot had unlawfully discharged pollutants into waters of the United States, for which it would have had a duty to apply for an NPDES permit. *See generally* Init. Dec. & app. The Region did not appeal the ALJ's Initial Decision.

B. *The EAJA Appeal*

On August 21, 2009, Vos Feedlot filed a timely application for attorneys' fees and costs, pursuant to EAJA, 5 U.S.C. § 504. Vos Feedlot argued that it is entitled to an EAJA award because the Region's position in the underlying enforcement action – specifically, that Vos Feedlot had discharged pollutants into waters of the United States – was not "substantially justified." The Region filed an opposition to Vos's application on November 25, 2009. On April 2, 2010, the ALJ issued a Recommended Decision denying the application, holding that the Region was substantially justified in fact and in law in bringing the underlying CWA action. *See* Rec. Dec. at 11-16.

On May 7, 2010, Vos Feedlot filed with this Board an appeal of the ALJ's Recommended Decision. *See* Vos Feedlot Appeal Brief ("App. Br."). The Region filed a response to Vos's appeal on June 1, 2010. *See* EPA Response Brief. The Board's analysis follows.

V. *ANALYSIS*

A. *Jurisdiction and Standard of Review*

The Board has jurisdiction under 40 C.F.R. §§ 17.8, 17.27, and 22.30. The Board's review of the ALJ's recommended decision is *de novo*. *E.g., In re L&C Servs., Inc.*, 8 E.A.D. 110, 115 (EAB 1999); *see* 40 C.F.R. § 17.27 (recommended decisions under EAJA are reviewed using procedures for initial decisions on merits); 40 C.F.R. § 22.1(a)(6) (Consolidated Rules of Practice at 40 C.F.R. part 22 govern administrative civil penalty proceedings brought under CWA § 309(g), 33 U.S.C. § 1319(g), such as the charges against Vos Feedlot); 40 C.F.R. § 22.30(f) (Board review of initial decisions is *de novo*). Such review involves evaluation of the issues raised on appeal to determine whether the ALJ's factual findings are supported by the record and his legal conclusions consistent with statutory, regulatory, and common law. *In re Hoosier Spline Broach Co.*, 7 E.A.D. 665, 682 & n.38 (EAB 1998), *aff'd*, 112 F. Supp. 2d 763 (S.D. Ind. 1999).

B. *The ALJ Did Not Err in Determining the Region Was Substantially Justified*

1. *The Operative Law*

The EAJA is a fee-shifting statute that, in certain situations, allows private parties who prevail in litigation brought by the federal government to recover from the government the costs of defending against the government's charges. Congress enacted this statute as "an instrument for curbing excessive regulation and the unreasonable exercise of government authority," with the intention of helping ensure, among other things, that governmental decisions to litigate "reflect informed deliberation." H.R. Rep. No. 96-1418, at 12 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4991. The Act provides, in relevant part:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, [attorneys'] fees and other expenses incurred by that party in connection with that proceeding, 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. Whether or not the position of the agency was substantially justified shall be 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.

5 U.S.C. § 504(a)(1).

The government is "substantially justified" if it can establish that its position in the underlying adjudication was grounded in "(1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced." *United States v. Hallmark Constr. Co.*, 200 F.3d 1076, 1080 (7th Cir. 2000) (quotations omitted); *accord Pierce v. Underwood*, 487 U.S. 552, 565-66 (1988) (holding that a government position is substantially justified when it is "justified to a degree that could satisfy a reasonable person," meaning it has a reasonable basis both in law and in fact); *In re Reabe Spraying Serv., Inc.*, 2 E.A.D. 54, 56 (CJO 1985). The government's position "'can be justified even though it is incorrect, and it can be substantially justified if a reasonable person could think it correct.'" *Manno v. United States*, 48 Fed. Cl. 587, 589 (2001) (quoting *Doe v. United States*, 16 Cl. Ct. 412, 419 (1989)).

The government bears the burden of proof on the question of substantial justification, for all stages of the underlying proceedings (prelitigation, litigation). *Hallmark*, 200 F.3d at 1079-81; *see Quality C.A.T.V., Inc. v. NLRB*, 969 F.2d 541,

545 (7th Cir. 1992) (holding that the government's position was substantially justified only up to the point in the proceedings at which it became apparent that its theory was "unsupportable"); *Hoosier Spline*, 7 E.A.D. at 683-94 (evaluating ALJ's partial award of EAJA fees based on his finding that the government's position was initially substantially justified but ceased to be so as the case proceeded). Notably, a government failure to prevail on the merits in the underlying adjudication does not create a presumption that its position in that action was not substantially justified. *Scarborough v. Principi*, 541 U.S. 401, 415 (2004); *In re Bricks, Inc.*, 11 E.A.D. 796, 804 (EAB 2004), *aff'd*, 426 F.3d 918 (7th Cir. 2005).

2. *Analysis of Vos Feedlot's Arguments*

Much of Vos Feedlot's EAJA appeal is given over to a discussion of the United States Court of Appeals for the Second Circuit's decision in *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005). Vos argues that *Waterkeeper* established a new evidentiary standard for CWA cases: that the government must present direct evidence of actual discharges to prove a CWA violation and may not rely on indirect or circumstantial evidence of any kind for that purpose. Vos also criticizes the Region's evidence against it, claiming the evidence does not constitute direct evidence of actual discharges and is flawed in many other respects, thus providing no substantial justification upon which a "reasonable person" could have initiated this CWA enforcement action. The analysis below addresses each of these issues in turn.

a. *The* Waterkeeper *Decision Did Not Establish a Specific Evidentiary Standard for Proving Unlawful Discharges of Pollutants to Waters of the United States*

As just noted, Vos Feedlot's EAJA appeal leans hard on its interpretation of the Second Circuit's *Waterkeeper* decision. That case involved a complex suite of challenges by environmental and farm groups to a new rule EPA had issued in 2003 (known colloquially as "the CAFO Rule"), which purported to regulate discharges of pollutants from concentrated animal feeding operations ("CAFOs"). Among other things, the farm groups appealed the rule's "duty-to-apply" provision, which directed all CAFOs to apply for NPDES permits or otherwise demonstrate that they had no potential to discharge pollutants to waters of the United States.

The Second Circuit vacated the duty-to-apply provision, holding that the Agency's creation of such a sweeping duty violated the statutory scheme devised by Congress. Under the CWA, the court ruled, Congress gave EPA jurisdiction "to regulate and control only *actual* discharges – not potential discharges, and certainly not point sources themselves." *Id.* at 505. EPA's duty-to-apply provision improperly transgressed this statutory boundary by extending the reach of NPDES permitting requirements even to those CAFOs that did not actually discharge any

pollutants to protected waters. *Id*. at 504-06; *see* CWA § 502(12), 33 U.S.C. § 1362(12) ("discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source").

Vos Feedlot reads this ruling as establishing a new, more stringent evidentiary standard for all prospective CWA enforcement cases: namely, that after *Waterkeeper*, the government must have "direct evidence of actual discharges" (i.e., direct evidence of actual additions of pollutants) to prove a CWA violation. App. Br. at 8 (arguing that "there cannot be proof of an *actual* addition of a pollutant with anything other than *actual* evidence of discharge"). According to Vos Feedlot, direct evidence can consist only of "legitimate water sampling" or "definitive visual observation." *See id*. at 8, 12. Any other types of evidence are inferential (i.e., indirect, circumstantial) forms of evidence that can, at best, establish only a *potential* discharge, not an *actual* discharge. Inferential evidence, in Vos's view, has no value under *Waterkeeper*; it is equivalent to no evidence. *See id*. at 9-13.

Vos concludes that government reliance on inferential evidence to prove an actual discharge indicates, *ipso facto*, that the evidence is insufficiently weighty to substantially justify, under EAJA, a government decision to enforce the CWA. *Id*. Vos Feedlot then attempts to characterize all of the Region's evidence against it as inferential and claims that the ALJ erred in identifying some of that evidence as direct evidence. *See* App. Br. at 10-13.

The Board rejects Vos Feedlot's interpretation of *Waterkeeper*, which reads far too much into the Second Circuit's decision. In the duty-to-apply context, the Second Circuit dealt only with a facial challenge to the language of the 2003 CAFO Rule. The court held only that EPA lacked statutory authority to impose NPDES permitting requirements on an entire class of dischargers, based only on the class members' potential to discharge. *Waterkeeper*, 399 F.3d at 504-06. In so doing, the court did not purport to create, nor did it incidentally create, a new evidentiary threshold EPA must satisfy to demonstrate that unlawful discharges have occurred. *Waterkeeper* has no discussion of evidentiary standards whatsoever, and never references the rules that govern administrative adjudications, which explicitly direct ALJs to: (1) admit "all evidence [that] is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value"; and (2) decide each matter of controversy "upon a preponderance of the evidence." 40 C.F.R. §§ 22.22(a), .24(b). Similarly, the court in *Waterkeeper* did not purport to create, nor did it incidentally create, a more stringent evidentiary standard EPA must satisfy to qualify as "substantially justified" under the EAJA. *See* 399 F.3d at 504-06 (no discussion of EAJA, the "reasonable basis" standard for proving "substantial justification" under EAJA, or the evidentiary standards set forth in 40 C.F.R. § 17.27 for review of EAJA decisions).

In the aftermath of the *Waterkeeper* decision, the evidentiary standard in the CWA administrative enforcement context remains a preponderance of the evidence based on any admissible evidence, and the evidentiary standard for proving "substantial justification" under EAJA remains one of reasonableness in law and in fact. Nothing the Second Circuit held or implied in that case changed anything regarding these specific issues. Accordingly, any kind of evidence, direct or inferential, can continue to be used to attempt to establish that an unlawful discharge occurred and that the government was substantially justified in pursuing a CWA enforcement action for that discharge. *See*, *e.g.*, *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 163 (4th Cir. 2000) ("[l]itigants routinely rely on circumstantial evidence to prove any number of contested issues"; "[t]o require [only direct evidence of CWA violations] would impose on [CWA] suits a set of singularly difficult evidentiary standards"); *In re BWX Techs., Inc.*, 9 E.A.D. 61, 78 (EAB 2000) (exclusive reliance on circumstantial evidence does not necessarily render a case infirm, because "circumstantial evidence can be effectively used to state a proposition of material fact in the absence of direct evidence"); *Hoosier Spline*, 7 E.A.D. at 685 (factual inferences "may properly be drawn so long as they are based on evidence contained in the record").

The United States Court of Appeals for the Eighth Circuit's recent decision in *Service Oil, Inc. v. EPA*, 590 F.3d 545 (8th Cir. 2009), is not to the contrary. Vos Feedlot cites that case generally to illustrate alleged ALJ error in finding the government's litigation position in the present matter to be substantially justified. *See* App. Br. at 8-9. Such a claim is misplaced, however. In holding that EPA lacks statutory authority to assess administrative penalties for failure to submit a timely NPDES permit application, the Eighth Circuit did not address, in any aspect, the question whether circumstantial evidence can be legally sufficient to demonstrate that actual discharges of pollutants occurred. *See Service Oil*, 590 F.3d at 549-51. Moreover, even if it had addressed that point, the Eighth Circuit decided *Service Oil* in December 2009, five months *after* the ALJ issued his Initial Decision in the Vos Feedlot case. The Eighth Circuit's opinion was not available when the Region commenced the CWA action against Vos in August 2007, or when it chose to press forward with Count 2 after the September 2008 hearing before the ALJ. Instead, at those times, governing precedent consisted of a Board decision affirming that computer modeling as used in the *Service Oil* case can provide relevant and sufficient evidence of CWA discharges.[4]

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[4] Shortly before it filed the complaint, the Region learned that Chief ALJ Susan Biro had issued a decision on August 3, 2007, in which she accepted computer modeling of storm water runoff as suitable evidence that sediment from a construction site had traveled approximately five miles and ultimately discharged into waters of the United States. *See In re Service Oil, Inc.*, Docket No. CWA-08-2005-0010, at 24-51 (ALJ Aug. 3, 2007), *aff'd*, 14 E.A.D. 133 (EAB 2008), *rev'd on other grounds*, 590 F.3d 545 (8th Cir. 2009). The Region evaluated Judge Biro's decision and determined that the flow paths from Vos Feedlot to the UNT and Elliott Creek were more direct than those
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For the foregoing reasons, the Board need not consider Vos Feedlot's various arguments charging the ALJ with error for purportedly mischaracterizing certain evidence as "direct" when Vos believes it was "inferential." *See* App. Br. at 9-13. Resolution of these specific questions is not necessary because both kinds of evidence can, in an administrative proceeding, be advanced by the parties and weighed by an ALJ. *See* 40 C.F.R. § 22.22(a)(1) (ALJs "shall admit all evidence [that] is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value"); *see also*, *e.g.*, *In re Titan Wheel Corp.*, 10 E.A.D. 526, 536-37 (EAB 2002) (under 40 C.F.R. § 22.4(c)(6), ALJs have broad discretion to admit or exclude evidence), *aff'd*, 291 F. Supp. 2d 899 (S.D. Iowa 2003), *aff'd per curiam*, 113 Fed. Appx. 734 (8th Cir. 2004). The Board concludes that neither *Waterkeeper* nor *Service Oil* altered the operative evidentiary standards for administrative adjudications or EAJA actions.

b. *A "Reasonable Person" Could Have Proceeded with This CWA Enforcement Action on the Body of Evidence in the Record*

Vos Feedlot argues that, regardless of whether the evidence in the record is considered direct or inferential, the ALJ erred in finding it substantial enough to justify the government's litigation position that discharges had occurred. App. Br. at 9; *see* Rec. Dec. at 12, 16. Vos specifically highlights deficiencies identified at the hearing in the computer modeling of feedlot discharges, and the Region's decision to withdraw Count 1 because of those deficiencies. App. Br. at 11-13; *see supra* note 2 and accompanying text. In Vos Feedlot's view, the Region's voluntary withdrawal of the "most critical element of its entire case" – i.e., the proof of discharges – reveals a lack of substantial justification to bring the case in the first instance. App. Br. at 12. Vos Feedlot also criticizes other evidence and witness testimony the Region presented at the administrative hearing, noting that the ALJ found much of it lacking in credibility and probative value. *See id.* at 9-13. On the basis of the ALJ's evidentiary rulings during and after the hearing, Vos argues that the Region's evidence against it was so flawed as to be nonexistent and thus to provide no substantial justification for the enforcement action. Furthermore, Vos asserts that the Region knew or should have known its evidence was inadequate, and that "EPA must be held accountable for its failure to conduct a proper investigation." *Id.* at 12.

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in *Service Oil*. The Region also decided that the types of pollutants associated with feedlot runoff – i.e., dissolved and suspended phosphorus, nitrogen, ammonia, bacteria, and other contaminants – were even more likely than the sediment in *Service Oil* to flow significant distances. *See*, *e.g.*, CX 33, 34. The Region conducted some simple runoff modeling and concluded that Vos Feedlot had discharged many times during the applicable five-year statute of limitations. In light of this and other evidence, the Region decided to go forward with filing the complaint against Vos Feedlot.

Upon review of the administrative record and the sequence of events in this case, the Board is not persuaded that the ALJ erred in finding EPA substantially justified to proceed against Vos Feedlot on August 14, 2007, the date it filed the complaint. At that time, the Region had compiled a large body of direct and circumstantial evidence regarding Vos's operations, as summarized in the Initial and Recommended Decisions. On the face of that body of direct and circumstantial evidence, the Region plainly had a reasonable basis in law and in fact to believe that Vos had discharged pollutants into the waters of the United States, in violation of the CWA.

Among many other things, the Region had one eyewitness account of a discharge on June 25, 2003, along with one water sample of the UNT taken that day with a field test kit, showing ammonia and pH levels outside their normal ranges. Tr. at 885-92; CX 15, 16, 20. The Region had a great deal of circumstantial evidence that feedlot runoff flowed off Vos's site with enough force to carve its way through corn fields placed at right angles to the flow paths, forming and reforming every year despite plowing that recontoured the land and smoothed over past discharge channels, and stretching all the way from the feedlot to the UNT. *See*, *e.g.*, Complaint ¶¶ 26, 30, at 4-5; Tr. at 69-101, 128-29, 135-36, 146-58; CX 9, 23, 46; CX 1-4 (Pollard); CX 6 (Pollard). In response to allegations that the Region should have collected more direct sampling evidence prior to filing the complaint, the Region reasonably explains that feedlots "discharge sporadically" and EPA's location in Kansas City, six hours distant from Vos Feedlot, makes very difficult the collection of samples during actual discharge events. EPA Answer to EAJA Application at 24; *see* Tr. at 315-16 (EPA collects feedlot runoff samples only when discharges are actually occurring, to ensure accurate assessment of impacts on receiving waters).

The ALJ found the Region had "a substantial amount of both direct and inferential evidence" to support its position that Vos Feedlot discharged pollutants into waters of the United States during heavy precipitation events (i.e., 1.82 inches of rainfall or more). Rec. Dec. at 12; *see supra* note 3 and accompanying text. He also found that EPA could not have anticipated that Vos's cross examination would so effectively reveal defects in the government's case. Rec. Dec. at 14. Upon *de novo* review of the record, the Board agrees. A reasonable person could, on this record, have brought this enforcement matter and continued pressing forward with Count 2 even after the administrative hearing.[5]

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[5] For consistency's sake, a reasonable person could also have continued pressing forward with Count 1, though after scaling it back to correspond to the June 25, 2003 discharge date and other dates within Count 1's period of violation that the Region identified as discharge dates using the 1.82-inch rainfall benchmark, since this analysis was unaffected by the withdrawal of the computer modeling analyses. The Region provides no explanation as to why it did not continue to pursue Count 1 in this

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Vos Feedlot's arguments on appeal overlook the fact that the Region did not rely on Ms. Doty's computer modeling analyses at the time it filed the CWA complaint. Those analyses came later, in the time between the filing of the complaint and the holding of the administrative hearing. Thus, the later problems experienced with the probative value of the computer modeling have no bearing on whether the Region made a reasonable decision to proceed with the enforcement case in August 2007. Instead, the Region relied on much other direct and circumstantial evidence at the time of filing of the complaint to provide its substantial justification for proceeding against Vos.

Vos's arguments also fail to credit the fact that the Region did not expect its witnesses would be found deficient in credibility and reliability. The ALJ himself noted that he had only found a lack of credibility in the Region's witnesses when he evaluated their testimony in light of Vos Feedlot's contradicting evidence. Rec. Dec. at 13. Board precedent, following established federal case law, holds the following in such a circumstance:

> When the government's position in an action is reasonably supported by evidence in the record, the mere fact that the record contains some 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.

In re Hoosier Spline Broach Co., 7 E.A.D. 665, 691 (EAB 1998) (citing cases), *aff'd*, 112 F. Supp. 2d 763 (S.D. Ind. 1999).

The *de novo* review standard does not override another general principle that guides Board review; namely, that where factual determinations turn on the credibility of a witness, the Board will generally defer to the ALJ's assessment thereof. *E.g.*, *In re Cutler*, 11 E.A.D. 622, 640-41 (EAB 2004); *In re City of Salisbury*, 10 E.A.D. 263, 276, 293-96 (EAB 2002). To overcome such Board deference, the appellant would have to demonstrate that the ALJ's factual conclusions constitute clear error or otherwise exceed his discretion. *In re Vico Constr. Corp.*, 12 E.A.D. 298, 327-28 (EAB 2005). The ALJ's evaluation of the witnesses was a central element in both his decision in the enforcement action and in his evaluation of the EAJA petition. Vos Feedlot argues that the Region should have recognized the weaknesses of its case even before Vos presented its evidence at the hearing. Thus, the Region should be held to account for not discerning all such weaknesses prior to the hearing. This argument lacks merit. A hearing, by its very

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(continued)
fashion. In his merits decision, the ALJ faulted the Region for this divergent approach. *See* Init. Dec. at 23-25.

nature, serves as a vehicle to test the parties' respective evidence, and the fact that some of the Region's evidence was undermined does not necessarily mean its reliance on it prior to the hearing was not justified.

Contrary to Vos Feedlot's arguments, this is not a case, as in *In re L&C Services, Inc.*, where the Region wholly omitted a crucial element of proof from its case and thus failed to establish substantial justification. *See In re L&C Servs., Inc.*, 8 E.A.D. 110, 118 (EAB 1999) (where Agency failed to adduce any evidence that material in question is "friable asbestos," Agency position that material is friable asbestos is not reasonably based in fact). Rather, this is a case where the Region presented significant proof that Vos discharged pollutants to protected waters, but the ALJ held that its proof fell short of meeting the burden of persuasion. As such, it is more similar to the situations in *In re Bricks, Inc.* and *In re Hoosier Spline Broach Co.*, where contradictory evidence persuaded the ALJs that the government's cases, though reasonable and substantially justified, failed to prove their arguments on the merits by a preponderance of the evidence. *See In re Bricks, Inc.*, 11 E.A.D. 796, 804-05 (EAB 2004), *aff'd*, 426 F.3d 918 (7th Cir. 2005); *Hoosier Spline*, 7 E.A.D. at 683-94.

The Board therefore upholds the ALJ's ruling that the Region's decision to proceed with litigation was substantially justified for EAJA purposes.

VI. *CONCLUSION AND ORDER*

In conclusion, the Board holds that the Region was substantially justified in pursuing the CWA enforcement action against Vos Feedlot. Accordingly, the Board affirms the ALJ's denial of Vos Feedlot's EAJA application.

So ordered.