BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF LOWELL VOS d/b/a LOWELL VOS FEEDLOT WOODBURY COUNTY, IOWA Respondent.	Docket No. CWA-07-2007-0078 LOWELL VOS NOTICE OF APPEAL OF INITIAL DECISION DENYING ATTORNEY FEES AND COSTS UNDER THE EQUAL ACCESS TO JUSTICE ACT

NOTICE OF APPEAL

Lowell Vos ("Appellant") seeks review of a decision of Administrative Law Judge Moran, issued April 2, 2010 denying an award of attorney fees and costs claimed by Vos under the Equal Access to Justice Act, 5. U.S.C. §504. An appeal brief is attached.

BEVING, SWANSON & FORREST

Elden McAfee AT0004987
Julia L. Vyskocil AT0009711
321 E. Walnut Street, Suite 200
Des Moines, Iowa 50309
Telephone: (515) 237-1188
Facsimile: (515) 288-9409
Email: emcafee@bevinglaw.com
ATTORNEYS FOR APPELLANT

Dated: May 7, 2010

Original Electronically Via EPA Central Data Exchange Site:

U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board (MC 1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF LOWELL VOS d/b/a LOWELL VOS FEEDLOT WOODBURY COUNTY, IOWA Respondent.	Docket No. CWA-07-2007-0078

LOWELL VOS APPEAL BRIEF FROM THE RECOMMENDED DECISION DENYING APPLICATION FOR ATTORNEYS FEES AND COSTS UNDER THE EQUAL ACCESS TO JUSTICE ACT

TABLE OF CONTENTS

Table of Authorities 1

Introduction 2

Issues Presented for Review 3

Factual and Procedural Background 3

Argument 4

Alternative Conclusions of Law 13

Conclusion 14

TABLE OF AUTHORITIES

Cases

In re Bricks Inc., 11 E.A.D. 796 (2004) 13

In re Service Oil, EPA Docket No. CWA-08-2005-0010, 2007 EPA ALJ LEXIS 21 (Aug. 3, 2007) 8

L & C Services, 8 E.A.D 110 (EAB 1999) 12

Natural Resources Defense Counsel v. EPA, 273 U.S. App. D.C. 180 (D.C. Cir. 1988) 8,9

Service Oil Inc. v. U.S. EPA, 590 F.3d 545 (8th Cir. 2009) 8,9

Waterkeeper Alliance, Inc. et. Al. v. U.S. EPA, 399 F.3d 486 (2d. Cir. 2005) ..... passim

Statutes

5 U.S.C. 504 2

33 U.S.C. 1311 4,7,9

33 U.S.C. 1342 5,7

33 U.S.C. 1362 5,7

Regulations

40 C.F.R. §122.23 5,6

40 C.F.R. §122.41 5

40 C.F.R. §122.42 5

40 C.F.R. Pt. 122, App. B (2000) 5

41 Fed. Reg. 11,458-61 (March 18, 1976) 5

66 Fed. Reg. 3008-3009 5

68 Fed. Reg. 7176 5,6

Fed. Reg. Vol. 73, No. 225, pp 70423-26 (November 20, 2008) 6

INTRODUCTION

Respondent Lowell Vos ("Vos") appeals from the Recommended Decision Denying Application for Attorney's Fees and Costs Under the Equal Access to Justice Act ("Recommended Decision") dated April 2, 2010, denying attorney fees and costs claimed by Vos under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. §504. In the Recommended Decision Judge William B. Moran found that EPA was substantially justified in bringing the underlying enforcement action against Vos. For the reasons stated below, the Administrative Law Judge

(the Court) erred in his conclusion that EPA had substantial justification for bringing the underlying enforcement action against Vos.

From the day EPA initiated its investigation in this case there has been an underlying theme –the unreasonableness of EPA's pursuit of this case in the face of the federal appeals court decision in *Waterkeeper Alliance, Inc., et. al. v. U.S. EPA*, 399 F.3d 486 (2d Cir. 2005). The Court in its Initial Decision in the underlying case and Recommended Decision in this EAJA matter also failed to recognize the fundamental importance of the *Waterkeeper* decision.

The record in this case shows that EPA refused to even consider that Vos' feedlot did not need an NPDES permit under the Clean Water Act even though there was no proof of an actual addition of pollutants to waters of the U.S. as required by *Waterkeeper. Waterkeeper Alliance, Inc., et. al. v. U.S. EPA*, 399 F.3d at 504-505. From failing to recognize that Vos had the protection of the Iowa Plan[1] to continuing with this case in spite of blatant failures in its computer modeling evidence, the EPA has pursued this action in spite of the facts and the law. It is not just that EPA did not have samples or any other form of proof of an actual discharge as required by *Waterkeeper* 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 *Initial Decision*, pp. 12-14.

ISSUES PRESENTED FOR REVIEW

Vos appeals the Court's ruling that EPA was substantially justified in bring the underlying enforcement action against Vos and further that EPA's underlying enforcement action had a reasonable basis in law and fact.

There are two central issues in consideration of Vos' Application for Attorney Fees and Costs Under EAJA and whether EPA was substantially justified. First and foremost, EPA pursued this action in the face of the 2005 *Waterkeeper* decision. Then, 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" (Count 1 of the Complaint) and attempted to salvage something out of its original claim by continuing with its claim for "Failure to Apply for a NPDES Permit" (Count 2).

FACTUAL AND PROCEDURAL BACKGROUND

Lowell Vos has fed cattle at the current location of his feedlot, which was started by his father, in Woodbury County Iowa for more than 30 years. Tr. 1395. He continued to operate his feedlot in full compliance with applicable regulations and voluntarily built runoff control structures. Tr. 1400, 1404-1405. In 2000 and into 2001, he had heard about what would be come to be known as the Iowa Plan. Tr. 1402, 1403. When the Iowa Plan was finalized, he registered on April 4, 2001. Ex. C-12, Tr. 1406, 1408. Under the Iowa Plan, he was to receive immunity from any penalties for the failure to have an NPDES permit. Ex. R-3, p. 2. Even

[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."

though he knew he was in compliance with the rules and did not need an NPDES permit, different rules were coming and he wanted enlarge his feedlot. Tr. 1407. Vos worked with the USDA Natural Resources Conservation Service to engineer runoff controls for his feedlot and obtain an NPDES permit. However, when NRCS was unable to meet the engineering deadlines under the Iowa Plan, they referred him to a private engineering firm, Eisenbraun and Associates, Inc., to complete the engineering work. Tr. 1046. That work was completed and a construction permit application was submitted on December 5, 2005. Tr. 1436. He was ready to begin construction in the spring of 2006 to meet the requirements of the Iowa Plan but did not receive his construction permit until the first week of September in 2006. Tr. 1439. He was advised it was too late to begin construction that fall. Tr. 1439-1440. Vos applied for an NPDES permit on December 2, 2005, and received his final NPDES permit from Iowa DNR on December 6, 2006. Complaint and Answer ¶25.

EPA inspected his feedlot on May 31, 2006. Tr. 45, 1438. He had no contact from EPA until he received the Finding of Violation and Order for Compliance from EPA dated January 7, 2007. Ex. R-19, Tr. 1441. The letter that accompanied Ex. R-19 stated that although he participated in the Iowa Plan, he failed to obtain an NPDES permit and install controls by the end of the Plan, April 1, 2006. Ex. R-20, Tr. 1447. He then reduced his feedlot capacity to less than 1,000 head on February 19, 2007. Tr. 1456. Subsequently, EPA visited his feedlot on March 11, 2008, and July 1, 2008. Since he had reduced his capacity to less than 1,000 head, these visits were not for compliance purposes but rather were to gather information for computer modeling. Tr. 221-222, 285-285.

EPA initiated an action against Vos and a six-day hearing was held beginning September 15, 2008, and the Court issued its Initial Decision on June 8, 2009. The Court ruled that EPA had failed to prove that Vos had discharged pollutants from his feedlot into a water of the United States. Accordingly, the Court dismissed Count II of EPA's Complaint which alleged that Vos had failed to apply for an NPDES permit. Count I, alleging that Vos had unauthorized discharges to a water of the United States, was withdrawn by EPA post hearing.

Subsequent to the Initial Decision becoming final on July 23, 2009, Vos filed an Application for Attorney Fees and Costs under EAJA. On April 2, 2010, the Court issued the Recommended Decision denying Vos' application.

ARGUMENT

I. THE CLEAN WATER ACT AND IMPLEMENTING REGULATIONS FOR CONCENTRATED ANIMAL FEEDING OPERATIONS SUCH AS VOS' REQUIRE AN NPDES PERMIT ONLY IF THERE IS AN ACTUAL DISCHARGE OF POLLUTANTS TO A WATER OF THE UNITED STATES.

The Clean Water Act (CWA) prohibits certain point source discharges of pollutants to navigable waters unless authorized by an NPDES permit that regulates the quantities and concentrations of pollutants in any such discharges. CWA Section 301 provides that "[e]xcept as in compliance with this section and [other] sections . . . of this title, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). "Discharge of a pollutant" is

defined as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12)(A), (16)). "Point source" in turn is defined as a "discernible, confined and discrete conveyance, including . . . [a CAFO] . . . from which pollutants are or may be discharged." *Id.* § 1362(14).

CWA Section 402 establishes the NPDES program, under which EPA or authorized States may issue permits allowing the discharge of pollutants to navigable waters pursuant to specified conditions. *Id.* § 1342. NPDES permits must include "effluent limitations," which restrict the "quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters." *Id.* § 1362(11). Permits also include reporting and recordkeeping requirements to help ensure compliance with effluent limitations. *See* 40 C.F.R. §§ 122.41 (general conditions), 122.42(e)(2) and (4) (CAFO-specific conditions).

In 1976, EPA issued the first set of comprehensive regulations applying NPDES permitting requirements to CAFOs. 41 Fed. Reg. 11,458-61 (Mar. 18, 1976). These regulations defined an "animal feeding operation" ("AFO") as "a lot or facility" on which "[a]nimals (other than aquatic animals)" are "stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period" and "[c]rops, vegetation forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility." 40 C.F.R. § 122.23(b)(1). AFOs with a sufficiently large number of "animal units" (*e.g.*, 1000 slaughter and feeder cattle) were defined as CAFOs *unless* they discharged only in the event of a 25-year, 24-hour storm event. 40 C.F.R. Pt. 122, App. B (2000), Ex. R-1 interpreting 40 CFR §122.23 as it was in effect until April 13, 2003. Under the 1976 scheme, if a CAFO managed its operations to avoid discharges to navigable waters under normal conditions – *i.e.*, if it discharged only in the event of a 25-year, 24-hour storm event, or not at all – the operation was excluded from the regulatory definition of CAFO and therefore excluded from "point source" status and the NPDES permitting scheme. *See* 40 C.F.R. Pt. 122 App. B (2000), Ex. R-1 interpreting 40 CFR §122.23 as it was in effect until April 13, 2003.

On February 13, 2003, EPA adopted significant changes to the CAFO rule. The 2003 CAFO Rule promulgated a revised, substantially expanded definition of CAFO. 68 Fed. Reg. 7176, 7265-66 (Feb. 12, 2003). It defined the largest operations as CAFOs ("Large CAFOs") based solely on the number of animals housed (*e.g.*, 1,000 or more head of cattle),[2] eliminating the exclusion for operations that discharge only in the event of a 25-year, 24-hour storm (or not at all). *Id.* "Large CAFOs" thus are defined as CAFOs *solely* based on size, regardless of the presence or absence of any discharge to navigable waters.

The 2003 Rule imposed on all CAFOs a new "duty to apply" for an NPDES permit, unless the CAFO was specifically found by the permitting authority to have "no potential to discharge." 68 Fed. Reg. at 7265-67. With respect to Large CAFOs – defined solely on the basis of size – the permit requirement was based on a regulatory presumption that such CAFOs have the *potential* to discharge. 68 Fed. Reg. at 7201-02. *See also* 66 Fed. Reg. at 3009 ("EPA is [presuming] . . . that all CAFOs have a potential to discharge to the waters such that they

[2] The 2003 CAFO Rule retained the definition of AFO but abandoned the concept of "animal units" in favor establishing a specific threshold number for various types of animals.

should be required to apply for a permit"). EPA admitted that requiring an entire category of point sources (Large CAFOs) to seek NPDES permits, regardless of the presence or absence of actual discharges, was unprecedented. 68 Fed. Reg. at 7201; *see* 66 Fed. Reg. at 3008 ("EPA has not previously sought to categorically adopt a duty to apply for an NPDES permit for all facilities within a particular industrial sector"). Operations defined as CAFOs as a result of the 2003 Rule, "newly defined CAFOs" – *e.g.*, operations such as Vos' that previously qualified for the 25-year, 24-hour storm exclusion, – were required to apply by February 13, 2006. *See* 68 Fed. Reg. at 7203-05, 7267-68.

Large CAFOs could avoid the 2003 duty to apply for a permit only by securing the permitting agency's agreement that the operation had "no potential to discharge." 68 Fed. Reg. at 7267. The extraordinary nature of the required showing – that there is "no potential" to discharge "under any circumstance or climatic condition" – created a functionally irrebuttable presumption that Large CAFOs had the "potential" to discharge into navigable waters, even if they had never previously discharged, had discharged but fully corrected the cause of the discharge, or had discharged only in the event of an extraordinary storm. *Id.*

Several sections of the 2003 CAFO rule were challenged in the *Waterkeeper* case. The most relevant aspect of the *Waterkeeper* decision to this case which was challenged was the 2003 "duty to apply" rule. The Second Circuit vacated the "duty to apply" in its entirety, holding that EPA cannot regulate CAFOs based on a "potential to discharge." 399 F.3d at 504-06. The court explained that the CWA "gives the EPA jurisdiction to regulate and control only *actual* discharges – not potential discharges, and certainly not point sources themselves." *Id.* at 505. Thus, the court held that the CWA "on its face, prevents the EPA from imposing, upon CAFOs, the obligation to seek an NPDES permit or otherwise demonstrate that they have no potential to discharge." *Id.* at 506.

In response to the *Waterkeeper* decision, EPA eliminated the "duty to apply" for permit coverage, as well as the process for seeking a "no potential to discharge" determination. Fed. Reg., Vol. 73, No. 225, Thursday Nov. 20, 2008, pp. 70423-70426. EPA established in place of those provisions a new rule, pursuant to which all CAFOs that "discharge or propose to discharge" must apply for an NPDES permit. Fed. Reg., Vol. 73, No. 225, Thursday Nov. 20, 2008, pp. 70423-70425. Also see 40 CFR §122.23(d)(1) and (f).

II. EPA DOES NOT HAVE EVIDENCE OF AN ACTUAL DISCHARGE OF POLLUTANTS TO A WATER OF THE U.S. FROM VOS' FEEDLOT AND THEREFORE FAILS TO MEET THE MINIMUM STANDARD IN WATERKEEPER ALLIANCE, INC. v. U. S. EPA THAT THERE BE AN ACTUAL ADDITION OF POLLUTANTS TO A WATER OF THE U.S. FOR AN NPDES PERMIT TO BE REQUIRED OF VOS.

In *Waterkeeper*, the federal appeals court rejected EPA's attempt to impose a duty for CAFOs to apply for an NPDES permit "regardless of whether or not they have, in fact, added any pollutants to the navigable waters, i.e., discharged any pollutants." *Id.* Although the underlying case in this EAJA claim was an individual enforcement action and *Waterkeeper* involved a proposed EPA rule, the legal standard is the same. EPA attempted to do the same

thing in this case it was attempting to do in the rule rejected in *Waterkeeper* – make the CAFO prove that it has "no potential to discharge."

EPA's evidence presented at hearing centered on the following principle: water runs downhill and Vos' feedlot is on top of a hill. Vos did not dispute those facts. What Vos disputed is that simply providing evidence that water runs downhill does not meet the standard of the Clean Water Act as enunciated in *Waterkeeper* of proving an actual addition of a pollutant to navigable waters. Proving that water runs downhill fell far short of meeting EPA's burden of proof to show Vos failed to apply for an NPDES permit in violation of the Clean Water Act.

If EPA had any basis in this case to require Vos to apply for an NPDES permit, EPA had to have proof that Vos actually discharged pollutants from his feedlot to waters of the United States. Without such proof, EPA's case failed as a matter of law. The standard for the requirement for a CAFO to apply for an NPDES permit as clarified in the *Waterkeeper* decision is:

> "The Clean Water Act authorizes the EPA to regulate, through the NPDES permitting system, only the discharge of pollutants. The Act generally provides, for example, that "Except as in compliance [with all applicable effluent limitations and permit restrictions,] the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a) (emphasis added). Consistent with this prohibition, the Act authorizes the EPA to promulgate effluent limitations for - and issue permits incorporating those effluent limitations for - the discharge of pollutants. Section 1311 of Title 33 provides that "effluent limitations ... shall be applied to all point sources of discharge of pollutants." See 33 U.S.C. § 1311(e). Section 1342 of the same Title then gives NPDES authorities the power to issue permits authorizing the discharge of any pollutant or combination of pollutants. See 33 U.S.C. § 1342 (a)(1) ("the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants") (emphasis added); see also 33 U.S.C. § 1342(b) (authorizing states to administer permit programs for "discharges into navigable waters"). In other words, unless there is a "discharge of any pollutant," there is no violation of the Act, and point sources are, accordingly, neither statutorily obligated to comply with EPA regulations for point source discharges, nor are they statutorily obligated to seek or obtain an NPDES permit.
>
> Congress left little room for doubt about the meaning of the term "discharge of any pollutant." The Act expressly defines the term to mean "(A) any addition of any pollutant to navigable waters from any point source, [or] (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." 33 U.S.C. § 1362(12). Thus, in the absence of an **actual** addition of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, no statutory obligation of point sources to comply with EPA regulations for point source discharges, and no statutory obligation of point sources to seek or obtain an NPDES permit in the first instance." Waterkeeper at 504-505 (emphasis added).
>
> While this language is clear enough, the court went on:

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

As will be discussed in more detail later in this Appeal Brief, only water sampling or definitive visual observation of a pollutant meets the *Waterkeeper* "actual addition of a pollutant" standard. To sum it up, there cannot be proof of an *actual* addition of a pollutant with anything other than *actual* evidence of discharge. It is that simple. While the Court in its Initial Decision and Recommended Decision declined to follow *Waterkeeper* to the extent urged by Vos, the Court nonetheless required sampling whenever faced with EPA's circumstantial evidence of a discharge. And, as previously noted in this Appeal Brief, for purposes of substantial justification analysis it is not just that EPA did not have samples or any other form of proof of an actual discharge as required by *Waterkeeper*, it is that EPA had ample opportunity to take those samples and consciously chose not to utilize that opportunity. See *Initial Decision*, pp. 12-14.

Vos also reiterates his position that EPA's position in this case is akin 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 from the very beginning and throughout every stage of the case was not substantially justified.

When the Court addressed the issue of whether EPA's position had a reasonable basis in law, it noted that Vos argued that "circumstantial evidence such as modeling is legally insufficient to demonstrate that a discharge of pollutants occurred." *Recommended Decision*, p. 16. Interestingly, the Court then noted that EPA cited *In Re Service Oil, Inc.* EPA Docket No. CWA-08-2005-0010, 2007 EPA ALJ LEXIS 21(ALJ, Aug. 3, 2007) "as support for its position that circumstantial evidence is an appropriate method of establishing that a discharge occurred." *Recommended Decision*, p. 16. This is interesting because on December 28, 2009, the Eighth Circuit Court of Appeals ruled that EPA lacked statutory authority to assess administrative penalties against Service Oil, Inc. for failure to submit a timely permit application. *Service Oil, Inc. v. U.S. EPA*, 590 F.3d 545 (8th Cir. 2009). In reaching that decision, the Eighth Circuit Court cited *Waterkeeper* for the authority that EPA's authority to assess monetary penalties by administrative proceeding is limited to unlawful discharges of pollutants. Specifically, the Eighth Circuit Court ruled:

"As the Second Circuit held in invalidating a portion of EPA's regulations governing concentrated animal feeding operations, "unless there is a 'discharge of any pollutant,' there is no violation of the Act, and point sources are, accordingly, neither statutorily obligated to comply with EPA regulations for point source discharges, nor are they statutorily obligated to seek or obtain an NPDES permit." *Waterkeeper Alliance, Inc. v. E.P.A.*, 399 F.3d 486, 504 (2d Cir.2005). While acknowledging "the policy considerations underlying the EPA's approach," the

court concluded that "it contravenes the regulatory scheme enacted by Congress; the Clean Water Act gives the EPA jurisdiction to regulate and control only *actual* discharges — not potential discharges, and certainly not point sources themselves." Id. at 505 (emphasis in original). Accord *NRDC*, 822 F.2d at 128 n. 24 ("The Act does not prohibit construction of a new source without a permit. ... The Act only prohibits new sources from discharging pollutants without a permit, 33 U.S.C. § 1311(a), or in violation of existing NSPS standards, id. § 1316(e).") The same limitations apply in this case." *Service Oil, Inc. v. U.S. EPA,* 590 F.3d at 551.

When EPA did not have proof of an actual addition of a pollutant to a water of the U.S., it attempted to meet its burden by in essence proving that "water runs down hill." Vos obviously did not dispute that proposition. However, such testimony and evidence did not come close to meeting the standard for a discharge under the Clean Water Act for numerous and obvious reasons found to be significant by the Court in the Initial Decision.

III. EPA'S LACK OF EVIDENCE OF AN ACTUAL DISCHARGE AND THE FAILURE OF ITS COMPUTER MODELING EVIDENCE AND SUBSEQUENT WITHDRAWAL OF COUNT 1 OF ITS COMPLAINT EXPOSED ITS LACK OF SUBSTANTIAL JUSTIFICATION TO BRING THIS ACTION AGAINST VOS.

After reviewing the arguments of Vos and the EPA, the Court stated:

"A review of the record supports a finding that EPA possessed a substantial amount of both direct and inferential evidence to support its position that Respondent discharged pollutants from his feedlot into waters of the United States, which EPA presented or attempted to present a the hearing." *Recommended Decision*, p. 12.

The Court erred in finding EPA had a substantial amount of evidence, whether it was direct or inferential. But more importantly, the Court erred in finding EPA had any direct evidence of an "actual addition" of a pollutant from Vos' feedlot to a water of the U.S. See *Waterkeeper Alliance, Inc., et. al. v. U.S. EPA,* 399 F.3d 505.

The Court first found that Iowa DNR witness Jeff Prier's visual observation and field test kit sample qualified to meet EPA's burden under EAJA. *Recommended Decision*, p. 12. However, in the Initial Decision, the Court found that it was not credible 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, the Court erred in finding that this evidence met EPA's burden of substantial justification. The Court's ruling essentially allows EPA to bootstrap otherwise deficient evidence into a claim and take its chances in trial thereby forcing respondents such as Vos to defend themselves against claims that EPA were deficient yet EPA was willing to

take the chance at trial. That approach does not meet the substantial justification standard to defeat an EAJA claim.

The Court also found that photographs that it excluded from evidence prior to the hearing were admissible in this EAJA proceeding for the limited purpose of demonstrating that EPA was substantially justified. *Recommended Decision*, p. 12, f.n. 13. Vos once again objects to consideration of this evidence as in violation of the Court's previous ruling and requests that this Court disregard Exhibits A and B. If these photograph Exhibits are to be considered by this Court, Vos requests that this Court consider the fact that EPA did not know of their existence until one week before the hearing. EPA could not have relied on these photographs as a reasonable basis for initiating and pursuing this action when it did not know they existed until the eve of the hearing.

The Court also noted that EPA witnesses Lorenzo Sena and Stephen Pollard testified they "observed and documented distinct flow paths from Respondent's feedlot to the tributary." *Recommended Decision*, p. 12. However, as will be discussed below, these flowpaths do not establish that there was an actual addition of a pollutant to a water of the U.S. as required by *Waterkeeper*.

While the Court characterized this as direct evidence, this evidence can only be properly characterized as inferential at best and non-existent at worst under the standard set in *Waterkeeper*. As was fully discussed above, the federal Court of Appeals in *Waterkeeper* ruled that there must be an *actual* addition of a pollutant to waters of the U.S. for the there to be any obligation to obtain an NPDES permit. *Waterkeeper* at 505.

The *Waterkeeper* court's use of the term "actual" when establishing the requirement for the addition of a pollutant is key. The Merriam-Webster dictionary defines the term actual as "existing in fact and not merely potentially," "existing in fact or reality," and "not false or apparent." *Merriam-Webster Online, http://www.merriam-webster.com/dictionary/actual.*

Flowpaths to a water of the U.S., without direct evidence such as water samples, do not qualify as evidence of an actual addition of a pollutant to a water of the U.S. Flowpaths may be evidence of potential additions of a pollutant to a water of the U.S., but not evidence of an actual addition.

The *Waterkeeper* standard for discharges is also significant in analyzing EPA's and the Court's reliance on Mr. Prier's observations and field sample results. As previously noted, Mr. Prier's field water sample results on June 25, 2003, were not taken for enforcement purposes and "not a single aspect of the appropriate protocol was followed." *Initial Decision*, p. 10. His visual observation of runoff (from 75 yards away) was during the same visit which was not for enforcement purposes. In fact, no enforcement action was taken by DNR - or EPA until this action more than four years later - as result of Mr. Prier's site visit. In the Recommended Decision, the Court also noted that Mr. Prier photographed the discharge using a telephoto lens. *Recommended Decision*, p. 12. However, again, Mr. Prier did not take steps to confirm his observation of brown colored liquid, even though this liquid was flowing from a cornfield. To meet the standard of proving an actual addition of pollutants to the unnamed tributary, and

therefore the standard of substantial justification in this EAJA action, Mr. Prier would have had to actually go to the site where he believed the discharge was occurring and observe the liquid closer and take a proper sample. He did neither. To allow this evidence to qualify as substantial justification for EPA's claim is not only improper in this specific case, but it would also serve to condone unjustified investigative conduct that will be detrimental to other respondents in the future.

In the Recommended Decision the Court also notes that EPA presented computer modeling as evidence of a discharge. *Recommended Decision*, p. 13. In making a substantial understatement, the Court noted there were defects in the computer modeling. *Recommended Decision* at p. 13. In fact, in the Initial Decision the Court characterized EPA's computer modeling expert's testimony as "a disaster for the government." *Initial Decision*, p. 16. The computer modeling testimony and evidence was so deficient that EPA withdrew Count 1 of the Complaint post-hearing. *Recommended Decision*, p. 13. The Court, however, ruled that because those defects became apparent upon cross examination, EPA's withdrawal of Count 1 does not mean EPA's position was not substantially justified. *Recommended Decision*, p. 14.

Before critiquing the Court's finding that failure of the computer modeling and EPA's subsequent withdrawal of Count 1 do not rise to the level of lack of substantial justification, the Court's analysis of this issue in its Initial Decision must first be reviewed. In that decision, the Court stated:

> ". . . EPA's self-initiated action to withdraw Count 1 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 1 would 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 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.

The Court further found:

> "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).

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. 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 thousands of dollars in defending himself.

However, the Court found that " . . . EPA could not have anticipated the Respondent would identify defects in the computer modeling, as those defects became apparent only upon cross examination" and that "the fact that cross examination was so effective in this matter does not necessarily mean that EPA's position was not reasonably based in fact." *Recommended Decision*, p. 14. Although the Court has a point, the error in the Court's analysis is that this was not a case where the evidence was a close call. See Ex. C-29 and Ex. C-43 for the EPA's expert's reports and Tr. 341-657 for the expert's testimony. The deficiencies in EPA's computer modeling evidence could have and should have been discovered before trial if a proper review of the computer modeling evidence had been conducted by the EPA expert. To hold Vos accountable for discovering such blatant deficiencies in evidence unfairly shifts that burden. EPA must be held accountable for its failure to conduct a proper investigation. And because it did not, its pursuit of this action was not substantially justified.

In reaching the conclusion that EPA had substantial justification, the Court cited two cases for authority. First, it cited *L & C Services,* 8 E.A.D. 110 (EAB 1999) and noted in that case there were serious shortcomings in EPA's evidence. *Recommended Decision*, pp. 14-15. Specifically the Court cited the lack of "compelling circumstantial evidence to fill the gap left by the complete absence of direct evidence." *Recommended Decision*, p. 14, f.n. 14. The Court found that the "shortcomings identified in *L&C Services* were not present in the Lowell Vos matter." *Recommended Decision*, p. 14, f.n. 14.

The Court is letting EPA off the hook in its analysis of the evidentiary standards set by *L & C Services*. As previously noted, the Court improperly characterized Iowa DNR's evidence of a discharge as well as EPA's evidence of flowpaths as direct evidence. Because DNR and EPA did not obtain legitimate sampling or other direct evidence of a discharge, the evidence is circumstantial in nature. This evidence, along with the computer modeling, is clearly circumstantial and cannot begin to qualify under *Waterkeeper* as evidence of an actual addition of a pollutant to a water of the U.S. Vos' expert witness testified that "sampling was the only reliable way to establish whether a discharge of pollutants actually occurred." *Recommended Decision*, p. 15 and *Initial Decision*, p. 19. Thus, like in *L & C Services,* in this case EPA did not have evidence to establish a basic element of its case – that being a discharge of pollutants to a water of the United States.

The Court also ruled that EPA conceded that sampling was necessary in *L & C Services* but did not make any such concession in the Vos case. *Recommended Decision*, p. 15. While EPA did concede that issue in *L & C Services*, to make an outright concession of an issue the

requirement for the substantial justification standard in an EAJA claim raises the bar much too high. In this case the bar is set by *Waterkeeper* and that bar is an actual addition of a pollutant to a water of the U.S. While EPA may challenge the statement that sampling is the only reliable way to determine whether a discharge of pollutants actually occurred from Vos' feedlot, that challenge fails under the burden of proving an actual addition of pollutants. Thus, it is not necessary that EPA concede on this issue in this EAJA claim.

The Court also cited *In re Bricks Inc.* 11 E.A.D. 796 (2004), for the propositions that if proof of an issue is presented by EPA but found to be deficient at trial, EPA has nonetheless met its substantial justification requirement. *Recommended Decision*, p. 14. Again, the Court has set the bar too high for Vos in this case. 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 previously discussed, that withdrawal was such an extreme action by EPA that the 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 proving a physical, topographical condition and much different than proving a discharge of pollutants to a water of the U.S. under the standards under *Waterkeeper*. Proving the actual addition of pollutants to waters of the U.S. is not a physical determination and ultimately depends upon water sampling. However, EPA took the approach throughout this case similar to proving a hydrological connection in that much of its evidence was defined drainage pathways from the feedlot to the unnamed tributary. This type of evidence may have met the EAJA substantial justification standard in *Bricks*, but it fails in this case.

The Court, also under the *Bricks* analysis, stated that EPA "could not have anticipated that the Court would find that its evidence lacked credibility and probative value." *Recommended Decision*, p. 14. To the contrary, EPA could well have predicted this would occur. EPA knew, or at the least should have known, the substance to which each of its witnesses would testify to at trial. If they lacked credibility, EPA must be held accountable for that. To do otherwise, as discussed previously, subjects Vos and other respondents to an undue burden of paying to defend an action brought by EPA that is based on faulty evidence.

In summary, in the Initial Decision the Court was properly critical of the evidence EPA produced and its withdrawal of Count 1 when a crucial part of that evidence failed. However, the Court erred in the Recommend Decision by retreating from its previous analysis and finding that EPA's failure to produce proof of an actual discharge did not rise to the level of lack of substantial justification under Vos' EAJA claim.

ALTERNATIVE CONCLUSIONS OF LAW

The Court ruled that there was no dispute that an NPDES permit would have been required of Vos if Vos had discharged pollutants to a water of the U.S. *Recommended Decision*, p. 16 *("In point of fact, Respondent does not dispute in his Application that he would have been required to apply for an NPDES permit if an actual discharge had occurred").* Vos agrees with that Court's ruling to the extent that a discharge is determined under the "actual addition of a pollutant" standard set in *Waterkeeper*.

CONCLUSION

Vos respectfully requests that this Court find that he meets the statutory requirements for an award of attorney fees and costs under the EAJA and that the Administrative Law Judge's Recommended Decision Denying Application for Attorney's Fees and Costs Under the Equal Access to Justice Act was in error and that EPA was not substantially justified in bringing the action against Vos. Respondent further requests this court to award $69,802.54 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 $80,548.99.

BEVING, SWANSON & FORREST, P.C.

Eldon McAfee AT0004987
Julia L. Vyskocil AT0009711
321 E. Walnut Street, Suite 200
Des Moines, Iowa 50309
Telephone: (515) 237-1188
Facsimile: (515) 288-9409
Email: emcafee@bevinglaw.com

ATTORNEY FOR APPELLANT

Dated: May 7, 2010

Original Electronically Via EPA Central Data Exchange Site:

U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board (MC 1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Copy by Facsimile and U.S. Mail to:

J. Daniel Breedlove, Esq.
Assistant Regional Counsel
U.S. EPA
901 North 5th Street
Kansas City, KS 66101

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon each of the attorneys of record of all parties to the above-entitled cause by enclosing the same in an envelope addressed to each such attorney at such attorney's address as disclosed by the pleadings of record herein on the 7th day of May, 2010.

By:
- ☒ U.S. Mail
- ☐ Hand Delivered
- ☐ Federal Express
- ☐ Facsimile
- ☐ Overnight Courier
- ☐ Other

Signature _____