BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the matter of:	)	
	)	CWA Appeal No. EAJA 10-01
Lowell Vos	)	
d/b/a Lowell Vos Feedlot	)	
Woodbury County, Iowa	)	EPA RESPONSE TO NOTICE OF APPEAL
	)	OF RECOMMENDED DECISION DENYING
	)	ATTORNEY FEES AND COSTS UNDER
Docket No. CWA-07-2007-0078	)	THE EQUAL ACCESS TO JUSTICE ACT
	)	
	)	
Respondent.	)	
	)	
_____	)	

Table of Contents

Table of Authorities

Cases

Statutes

Regulations

Other Authorities

I. INTRODUCTION

Pursuant to 40 C.F.R. § 22.30, Region 7 of the Environmental Protection Agency ("Region 7" or "the Region") submits the following Response Brief to the Environmental Appeals Board ("EAB") in response to the Notice of Appeal of Recommended Decision Denying Attorney Fees and Costs under the Equal Access to Justice Act ("EAJA") submitted by Lowell Vos ("Vos"). For the reasons set out below, Region 7 respectfully requests the Presiding Officer's Recommended Decision be upheld and finalized. [1]

II. ISSUE PRESENTED

Whether the Presiding Officer was correct in denying EAJA fees to Respondent by concluding that Region 7 was "substantially justified" in alleging that pollutants from Vos' concentrated animal feeding operation ("CAFO") discharged to a water of the United States, where the Presiding Officer had previously ruled that the Region's direct and circumstantial evidence supporting such a conclusion was of insufficient weight to satisfy the more burdensome preponderance of the evidence standard of proof in view of contradictory evidence introduced by Respondent.

III. STATEMENT OF THE CASE

This case is an appeal of the Presiding Officer's recommended decision denying Vos' attorney's fee claim submitted pursuant to the Equal Access to Justice Act ("EAJA"), 5 U.S.C. §

1 Throughout this Response Brief, EPA will refer to Administrative Law Judge William B. Moran as "Presiding Officer." Pursuant to 40 C.F.R. § 22.21 and 40 C.F.R. § 17.26, Judge Moran acted as the presiding officer for the underlying action and issued the Recommended Decision denying Vos' Application for fees and Costs under EAJA.

504. Vos contends he is entitled to reimbursement of the fees and costs he incurred in defending himself against a CWA administrative penalty action brought by EPA Region 7. The Presiding Officer denied Vos' fee claim and in so ruling, held the agency was substantially justified in bringing an enforcement action against Vos.

In the underlying CWA enforcement action, the Presiding Officer found the agency did not prove by a preponderance of the evidence that Vos' CAFO discharged pollutants to a water of the United States and thus dismissed Region 7's claim that Vos breached his duty to apply for a National Pollutant Discharge Elimination System (NPDES) permit. However, in his Recommended Decision he held Region7 had compiled sufficient evidence to be substantially justified in law and fact to believe pollutants from Vos' CAFO had discharged to a water of the United States.

Vos appeals the legitimacy of that decision arguing that the Region's evidence was so inadequate as to be the equivalent of no evidence at all, and thus the Presiding Officer's determination is incorrect as a matter of law. Vos supports this position with an inaccurate interpretation of the decision in *Waterkeeper Alliance, Inc., et. al. v. U.S. EPA*, 399 F.3d 486 (2d Cir. 2005). Applicable precedent and an accurate application of the *Waterkeeper* decision does not support Vos' interpretation.

As will be explained herein, the Presiding Officer correctly denied Vos' fee claim and Region 7 urges this court to uphold and finalize the Presiding Officer's Recommended Decision.

IV. BACKGROUND

A. Statutory and Regulatory Background

The Equal Access to Justice Act.

EAJA allows prevailing parties in both civil lawsuits and agency adjudications brought by or against the United States to recover legal fees and expenses, unless the United States' position was substantially justified or if specific circumstances make an award unjust. 5 U.S.C. § 504(a)(1), 28 U.S.C. § 2412(d)(2)(A)(ii).[2] "Concerned that the Government, with its vast resources, could force citizens into acquiescing to adverse Government action, simply by threatening them with costly litigation, Congress enacted the EAJA, waiving the United States' sovereign immunity to fee awards and creating a limited exception to the 'American Rule' against awarding attorneys fees to prevailing parties." *Pierce v. Underwood*, 487 U.S. 552, 575 (1988). The government is "substantially justified" if "its position 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 Construction Co.*, 200 F.3d 1076, 1080 (7th Cir. 2000) (citing *Phil Smidt & Son, Inc. v. NLRB*, 810 F.2d 638, 642 (7th Cir. 1987)). With respect to EPA administrative decisions, "[t]he Administrator delegates to the Environmental Appeals Board authority to take final action relating to the Equal Access to Justice Act." 40 C.F.R. § 17.8.

[2] EAJA's two statutory sections, 5 U.S.C. § 504 and 28 U.S.C. § 2412, govern administrative and judicial actions respectively. It should be noted that only 5 U.S.C. § 504 applies to the case at hand. Because the two statutes use similar language, *i.e.* "substantially justified," case law interpreting the standards in 28 U.S.C. § 2412 may be used to interpret the same language as used in 5 U.S.C. § 504.

The Clean Water Act.

In order for Region 7 to demonstrate that Vos was liable for violations of Sections 301, 308, and/or 402 of the Clean Water Act (CWA), 33 U.S.C. §§ 1311, 1318, and 1342, Region 7 had to establish he was (1) a "person" (2) that discharged (3) "pollutants" (4) from a "point source" (5) to a water of the United States (6) without an NPDES permit.

In his Answer to Region 7's administrative complaint, Vos admitted he is a "person" as that term is defined by Section 502(5), 33 U.S.C. § 1362(5). He also admitted that at all relevant times he operated a CAFO and was therefore a "point source" as that term is used in Section 502(14), 33 U.S.C. § 1362(14). Vos admitted Elliot Creek, the perennial stream near his cattle operation, is a water of the United States as that term is used by the CWA. The Presiding Officer ruled the unnamed tributary (UNT) that runs immediately adjacent to his feeding operation and flows to Elliot Creek is a water of the United States. Initial Decision at pg. 5. Vos did not contest that agricultural waste is a pollutant under 502(6), 33 U.S.C. § 1362(6). *Id*. Finally, it was uncontroverted that Vos did not have an NPDES permit at times relevant to the violations alleged by Region 7. Vos did not contest these findings in his EAJA application nor in his Appeal Brief.

The CWA, its implementing regulations, applicable precedent, and the Presiding Officer's Initial Decision in the underlying matter and Recommended Decision denying Vos' EAJA application are in agreement that a point source that discharges to a water of the U.S. must apply for an NPDES permit. Also uncontested is CWA Section 301 liability for unauthorized discharges and Section 402 liability if EPA establishes pollutants have discharged to a water of the United States and Vos failed to apply for a NPDES permit. Nowhere in the Initial Decision,

Vos' Application, the Recommended Decision nor the Notice of Appeal and brief, is it indicated Region 7 lacked statutory support and would thus be unjustified in seeking penalties if it had been able to demonstrate pollutants from Vos' feedlot reached the UNT.

Thus the Region established all but one of the elements necessary to prove the alleged violation beyond any doubt, and the sole factual issue addressed at the hearing before the Presiding Officer was whether or not some of the pollutants discharged from the Vos operation made it to the UNT adjacent to Vos' facility.

B. **Procedural Background**

On August 14, 2007, Region 7 issued a proposed Penalty Order under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and a Complaint under 40 C.F.R. Part 22, naming Vos as the Respondent. The Complaint alleged Vos violated Sections 301, 308, and 402 of the CWA, 33 U.S.C. §§ 1311, 1318, 1342, by discharging feedlot-related pollutants into waters of the United States and failing to apply for a National Pollutant Discharge Elimination System (NPDES) permit. The Complaint alleged two violations. Count 1 alleged pollutants from Vos' CAFO discharged into waters of the United States, Elliot Creek and its UNT, without an NPDES permit. Count 2 alleged Vos had failed to apply for an NPDES permit to authorize the discharges. The Complaint included a prayer for relief proposing up to $157,000 in penalties for the violations alleged therein.

Vos filed an Answer to the Complaint, denying, among other things, that unauthorized discharges from the feedlot had occurred. A hearing was held in this matter September 15-22, 2008. Following the hearing, Region 7 filed a motion to withdraw the unauthorized discharge count (Count 1). In its motion, Region 7 recognized that errors identified in its expert modeling

report during the hearing undermined the report's credibility and would make it unlikely Region 7 would be able to meets its burden of proof to demonstrate the specific days discharges had occurred.[3] However, Region 7 continued to argue that pollutant discharges from Vos' CAFO reached a water of the United States on at least some days, thus triggering a duty to apply for an NPDES permit (Count 2). The Presiding Officer granted this motion on December 2, 2008.

The Presiding Officer issued an Initial Decision on June 8, 2009. The Initial Decision held Region 7 had not proved by a preponderance of the evidence that pollutants from Vos' CAFO had reached a water of the United States. Finding Region 7 failed to demonstrate unauthorized discharges had occurred, the Presiding Officer held Region 7 had failed to establish a *prima facie* element of Vos' failure to apply for an NPDES permit and as a result Count 2 was dismissed. Region 7 did not appeal the Initial Decision. Therefore, the decision became final on July 23, 2009.

On August 21, 2009, Vos filed an Application for Attorney's Fees and Costs under EAJA, 28 U.S.C. § 2412, (herein referred to as the "Application"). Region 7 timely filed its Answer to the Application on November 20, 2009. Vos filed a response to Region 7's EAJA Answer on December 7, 2009 and a Supplemental Application under EAJA for additional attorney's fees on March 24, 2010. In the Application and its supplement, Vos alleges he is entitled under EAJA to reimbursement for expenses he incurred in litigating the CWA complaint

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

brought by Region 7.

On April 2, 2010, the Presiding officer issued a Recommended Decision denying Vos' application for attorney's fees and costs holding Region 7 was substantially justified in fact and law in bringing the underlying action. On or around May 7, 2010, Vos filed a Notice of Appeal and supporting brief ("Appeal Brief") seeking review of the Presiding Officer's decision to deny Vos' application for costs under EAJA. Region 7's response brief ("Response") is due June 1, 2010.[4] Herein, Region 7 submits its Response to Vos' Notice of Appeal.

V. Recommended Decision Denying Application for Fees and Costs Under EAJA

The Presiding Officer weighed the facts and applicable precedent and concluded EPA was substantially justified in pursuing the underlying enforcement action. He found EPA possessed a significant and substantial amount of direct and inferential evidence from which EPA could reasonably believe Vos had discharged pollutants from his CAFO to a water of the United States. Recommended Decision at 17. The Presiding Officer further determined that, although EPA did not meet the preponderance of the evidence standard, the reasonableness standard is what is applicable in this EAJA action. *Id*. He concluded EPA's position in the underlying action was reasonably based in fact and law, and therefore substantially justified. *See Id*.

VI. STANDARD OF REVIEW

EAJA directs appellate courts to uphold the agency decision on fees unless the agency

4 Vos's Notice of Appeal was served via first class mail and post-marked May 7, 2010. 40 C.F.R. Part 22.7 controls when service is achieved by first class mail. Part 22.7(c) states 5 days shall be added to the time for filing a responsive document. Pursuant to the 20-days allowed by 40 C.F.R. Part 22.30(a)(2) for a party to file a response brief and Part 22.7(c), EPA's response brief is due June 1, 2010.

decision was "unsupported by substantial evidence." 5 U.S.C. § 504(c)(2); *Phil Smidt* 810 F.2d at 641.[5] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 522-23 (1981). "The reviewing court must take into account contradictory evidence in the record ... but, 'the possibility of drawing two different conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'" *Id*. at 523 (citing *Consolo v. FMC*, 383 U.S. 607,620 (1966). The reviewing court must therefore give the agency the "benefit of the doubt" because the substantial evidence standard "requires not the degree of evidence which satisfies the court that the requisite fact exists, but merely the degree which could satisfy a reasonable factfinder." *Allentown Mack Sales & Service, Inc. v. NLRB.*, 522 U.S. 359, 377 (1998). Furthermore, although the substantial evidence test requires "more than a mere scintilla" of evidence supporting the agency's views, it is "extremely deferential to the factfinder." *Richardson v. Perales*, 402 US. 389, 401 (1971).

The reviewing court must determine whether the agency was substantially justified based "on the record." 5 U.S.C. § 504(c)(2). In his decision on the fee petition, the Presiding Officer ruled that Region 7 had presented significant evidence to justify its complaint. The Presiding Officer had to address the relative credibility of witnesses and the relative weight to be assigned to the various pieces of evidence. Even though the Presiding Officer ruled that Region 7 did not prove their complaint by a preponderance of evidence, he ruled that Region 7 was substantially justified to bring the claim. The Presiding Officer carefully weighed the evidence throughout the

[5] Congress amended EAJA in 1985, adding the "substantial evidence" language to 5 U.S.C. § 504(c)(2). Public Law 99-80, HR 2378 (Aug. 5, 1985). Before this amendment, most courts reviewed appeals from agency decisions under an "abuse of discretion" standard. *See e.g. Temp Tech Industries, Inc. v. NLRB*, 756 F.2d 586, 587 (7th Cir. 1985).

case, and the Presiding Officer's finding that Region 7 was "substantially justified" in its claims should be entitled to some deference in review by the EAB.

VII. THE LAW ON SUBSTANTIAL JUSTIFICATION

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

> We are of the view, therefore, that as between the two commonly used connotations of the word "substantially," the one most naturally conveyed by the phrase before us here is not "justified to a high degree," but rather "justified in substance or in the main"–that is, justified to a degree that could satisfy a reasonable person. That is no different from the "reasonable basis both in law and fact" formulation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals that have addressed this issue. (citations omitted). 487 U.S. at 555.

The Seventh Circuit also used the "simple reasonableness" standard, saying "the Supreme Court earlier endorsed the simple reasonableness standard in *Pierce* and we apply it here." *See Frey v. Commodity Futures Trading Commission*, 931 F.2d 1171, 1174 (7th Cir. 1991). In *Frey* the Seventh Circuit said that to avoid an award of fees the Agency position must have a reasonable basis in law and fact.[6] *Id.*

The EAB has addressed the question of whether the government's position was substantially justified in a number of cases.

---

6 Caselaw indicates that while the government must carry the burden of demonstrating that its position had a reasonable basis in fact and a reasonable basis in law, the government's failure to prevail in the final disposition of the underlying adversary adjudication does not raise a presumption that the government's position was not substantially justified. *See e.g., Kali v. Bowen*, 854 F.2d 321 (9th Cir. 1988) (Ninth Circuit affirmed district court decision denying attorneys fees, holding that while Agency did not prevail on the merits its position was substantially justified).

In re Bricks, Inc., 11 E.A.D 796 (2004), *aff'd sub nom*, *Bricks v. EPA*, 426 F.3d 918 (7th Cir. 2005), is directly analogous to the case Region 7 presented in the underlying matter. In *Bricks*, the EAB held that the agency was substantially justified to bring its claim even though the EAB determined EPA had not demonstrated the wetland at issue was a jurisdictional water, a *prima facie* element of its case, by preponderance of the evidence. As in this case, EPA demonstrated in *Bricks* that all the other elements for a violation were present. However, the EAB evaluated the evidence EPA presented to demonstrate the wetland had a direct connection to a water of the United States and concluded that, although there was some evidence of a connection, it was not sufficient by a preponderance of evidence. In its underlying decision, the EAB stated it did not rule out the possibility a hydrologic connection exists but concluded EPA had failed to meet its burden of proving such a connection. *Id*. at 800.[7]

Similarly, in the decision in the underlying matter, the Presiding Officer held Region 7 was substantially justified to bring their claim, but was unable to meet its burden of proof for a single element necessary to establish a CWA violation by a preponderance of the evidence. The Presiding Officer held the Region was unable to demonstrate pollutants from Vos' feedlot reached the UNT, but the Presiding Officer held "it is possible that feedlot pollutants reached the UNT," (emphasis added) (Initial Decision at 19), and ultimately concluded Region 7 had failed to establish discharges to a water of the United States by a preponderance of the evidence.[8]

---

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

8 In *In re L & C Services*, the EAB found a lack of substantial justification and awarded attorneys fees under EAJA because complainant "did not have any evidence to establish a basic element of its case" [emphasis added], 8 E.A.D. 110, 118 (EAB 1999) (emphasis added). This case is not dispositive here, where the Presiding Officer indicated EPA had a significant amount of evidence.

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

Despite Vos' urging to give greater weight to the Presiding Officer's decision on the CWA aspects of the underlying matter, EAJA requires an evaluation of more than just the final decision on the merits. Whether an agency's position was substantially justified is determined on the basis of the administrative record, *as a whole*, which is made in the adversary adjudication for which fees and other expenses are sought. *In re Bricks*, 11 E.A.D. at 803 citing 5 U.S.C. 504(a)(1) (emphasis in original). EAJA requires the Presiding Officer evaluate EPA's position *in its entirety* and a failure by the Region to establish an essential element of its case does not require a determination the Region was not substantially justified. *Id.* at 804. The fact EPA's position did not prevail does not create a presumption its position was not substantially justified. *See Id. citing Scarborough v. Principi*, 541 U.S. 401, 415 (2004).

The "substantial justification" standard is not heightened beyond the requirement that the government shows its case had a reasonable basis in law and fact. *See S&H Riggers & Erectors, Inc., v. Occupational Safety & Health Review Com'n*, CA 5, 672 F.2d 426, 1982. The standard should not be read to raise a presumption the government position was not substantially justified simply because it lost the case. *See Id.* Nor does the standard require the government to establish its decision to litigate was based on a substantial probability it would prevail. *See Id.*

The test is essentially one of reasonableness and EPA must show it possessed facts from which it could reasonably believe the law had been violated. *See In the Matter of Reabe Spraying Service, Inc.*, 2 E.A.D. 54, (EAB 1985).

Region 7 presented a significant amount of evidence pointing to the possibility pollutants from Vos' feedlot discharged into the UNT. This included, among other things, the testimony of Mr. Prier that he had seen feedlot runoff leaving Vos'feedlot and entering the UNT and he had sampled the waters with a field-test kit. This is not a situation where the Region entirely omitted a crucial element of proof from its case as in *L&C Services. See n.8.* Rather, this is a situation where significant proof was presented but fell short, in the Presiding Officer's view, of meeting the Region's burden of persuasion in particular when weighed against countervailing evidence presented by the Respondent. Even under these circumstances, the Presiding Officer did not conclude the Region lacked a reasonable basis to proceed, as in *Bricks*. *See In re Bricks,* 11 *E.A.D.* at 804. The case Region 7 presented in Vos is in stark contrast to the situation the EAB confronted in *In re L & C Services* when the EAB concluded the underlying action lacked substantial justification because the Complainant put on its case "without a shred of direct evidence establishing the key elements of the offenses." *See In re Bricks,*11 E.A.D at 804 citing *In re L & C Services,* 8 E.A.D at 119.

The mere fact the record contains contradictory evidence, which may in the ultimate judgment of the trier of fact, outweigh the evidence upon which the government's position is based by a preponderance of the evidence, provides no basis for an award of EAJA fees. *See Id* at 805 citing *Hoosier,* 7 E.A.D. 665, 691 (EAB 1998).

VII. ARGUMENT

A. *The administrative record contains substantial evidence to support the Presiding Officer determination that Region 7 was substantially justified in law and fact in commencing the underlying action.*

Vos argues that the Region should be liable for fees because it presented the equivalent of no evidence whatsoever on a required element of the alleged violation. However, as recognized by the Presiding Officer, it is simply untrue to conclude that the Region did not present evidence on the discharge element of the case.

During the six-day hearing in which the primary issue was whether the feedlot had discharged to a water of the United States, Region 7 presented six witnesses and approximately 30 exhibits dealing with the discharge element of its case. Furthermore, in his opening statement, when discussing the discharge evidence Region 7 would present, Vos stated "they [EPA] have evidence that gets very close, but it doesn't get there." (emphasis added) TR 29:3-49. Thus Vos concedes EPA has evidence of discharges but questions whether the evidence is sufficient to meet its burden to prove a violation. Vos' opening statement contradicts arguments made in his Application and refined in his Appeal brief and recognizes EPA was substantially justified in bringing the underlying action.

Vos, however, attempts to argue that the evidence presented by Region 7 on the discharge issue should not be considered by the Board in determining whether the Region was "substantially justified" under EAJA. Vos bases his primary argument on a misinterpretation of *Waterkeeper,* 399 F.3d 486. Vos argues that any evidence which does not meet his incorrect "Waterkeeper standard" is "inferential," and cannot be considered in a determination that Region

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

7 was substantially justified. As will be more fully discussed below, "inferential evidence" such as runoff modeling is an accepted method of demonstrating the discharge of pollutants to a water of the United States. Vos' argument ignores or attempts to downplay that Region 7 provided eyewitness testimony of a discharge of feedlot effluent to the UNT and field sampling of the stream indicated elevated ammonia and pH within the receiving stream. In other words, Region 7 provided direct evidence that pollutants from the feedlot reached the UNT. In his Appeal Brief, Vos incorrectly downplays all the evidence Region 7 presented as inferential and then asserts Region 7's reliance on this "inferential evidence" to bring the underlying action was not substantially justified.

Region 7's position had a reasonable basis in law and fact at all times during the proceedings. The information below is not provided as an attempt to reargue the underlying case. Instead, the information is provided to demonstrate the facts and law Region 7 relied upon in its belief Vos had violated the law and was therefore substantially justified. *See In the Matter of Reabe Spraying Service, Inc,* 2 E.A.D. 54, (EAB 1985).

Law and Facts Available to EPA Prior to Filing Complaint

In initiating the proceeding, Region 7 relied on EPA and Iowa Department of Natural Resources (IDNR) inspector observations that the feedlot lacked adequate controls to prevent pollutants from reaching the UNT. EPA's inspector, Lorenzo Sena, observed unabated erosional features leading from the feedlot to the UNT. CX 23 and TR 70-101. In 2003, a time that fell within the period of violation alleged by EPA, IDNR's inspector, Jeff Prier, observed a discharge emanating from a settling basin and discharging into the UNT. CX 15 and TR 880-888. The discharge came from a structure designed to capture runoff and slow the water down enough to

allow solids to settle before the runoff water moves on. TR 1358:3-22. Impounded feedlot runoff that discharges from this structure contains dissolved and suspended pollutants. Mr. Prier observed the discharge was brown in color and created foam when it entered the UNT. TR 888. Region 7 knew Mr. Prier had drawn a downstream sample and, based on the hundreds of samples he has taken, it was his opinion the ammonia concentrations and the pH were elevated as a result of the discharge. TR 882-893. The sampling results also were direct evidence of a discharge, especially in light of the fact he had witnessed an upstream discharge from the feedlot.

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

The review of IDNR's file also disclosed that on May 24, 2004, Vos' engineer had

proposed the construction of additional runoff controls at the feedlot. *See* CX 20 and CX 50. Vos' engineer proposed that these were the minimum controls necessary to ensure the feedlot only discharged as a result of storms greater than a 25-year, 24-hour event. *Id*. and TR1087-88. Ultimately, the proposed design included the construction of extensive berming, several sedimentation basins, and three large storage lagoons with a combined storage capacity of approximately 830,000 gallons. *See* CX 20 and CX 50. Each of these storage basins was proposed at a location that would intercept runoff from one of the three major discharge paths from the feedlot to the UNT. *Id*. Their locations corroborated Region 7's conclusion that pollutants from the feedlot were reaching the UNT in violation of the CWA via these erosional pathways.

In December 2006, prior to initiating any enforcement action, Steve Pollard, EPA's compliance officer on this case, drove up to Vos' feedlot to observe the UNT and Elliot Creek to help determine their jurisdictional status. CX 24 and TR 158-167. The Supreme Court decision in *United States v. Rapanos*, 547 U.S. 715 (2006), created some question as to whether these streams were waters of the United States and thus subject to CWA jusridiction. To ensure Region 7 was justified in bringing the action, Mr. Pollard observed the streams to ensure they had defined beds and banks, had water flowing within them, and to evaluate any other characteristics necessary to demonstrate they were relatively permanent waterways and thus waters of the United States.

Prior to filing the Complaint, Region 7 performed some rudimentary runoff modeling and determined the feedlot had discharged many times during the applicable 5-year statute of limitation period. On August 3, 2007, Administrative Law Judge Biro handed down a decision

in which runoff modeling was accepted as suitable evidence that sediment from a construction site had discharged to a water of the United States. *See In re Service Oil Co.*, Docket No. CWA-08-2005-0010 (ALJ Biro August 3, 2007), *aff'd*, 2008 WL 2901869 (EAB 2008).[10] In *Service Oil*, runoff modeling successfully demonstrated the respondent had discharged pollutants in violation of Section 301. The runoff modeling in *Service Oil* demonstrated that sediment suspended in storm water runoff from a construction site had traveled a comparatively convoluted path through two lift stations and approximately 5 miles of conveyance, including grassed waterways, before discharging into the Red River, a water of the United States. *See Id.* at 24-51. Region 7 evaluated the decision and determined the flow path from Vos' feedlot to a water of the United States was much more direct than the path evaluated in *Service Oil.* Region 7 also evaluated the types of pollutants typically associated with feedlot runoff and determined the dissolved and suspended nature of nutrients and bacteria were even more likely than sediment to flow significant distances. CX 33 and CX 34. At this time Region 7 felt the facts and applicable precedent supported its belief Vos had violated the CWA so it filed the Complaint on August 14, 2007.

Unequivocally, based on direct and circumstantial evidence and applicable precedent, Region 7 was substantially justified in filing the Complaint.

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

Although Region 7 had conducted preliminary modeling during case development, it was

10 As Vos noted in his Appeal Brief, the 8th Circuit reversed and remanded this case in December 2009. *See Service Oil*, 590 at 551. As discussed earlier, this decision was issued after the decision in underlying action was final and was unavailable for EPA to consider and therefore cannot be used to determine whether EPA's claim at the time of the violation was substantially justified. Moreover, the Court did not vacate EPA's use of modeling to prove "actual discharges."

apparent the distance from the facility to Elliot Creek[11] would require additional modeling. In 2008, following alternative dispute resolution, and in part due to the likelihood of litigation, EPA contracted Sandy Doty of Scientific Applications International Corporation as an expert hydrologist to perform the modeling. Ms. Doty conducted runoff modeling and testified as an expert witness for EPA during the *Service Oil* litigation. Based on her successful runoff modeling during the *Service Oil* litigation, Region 7 felt confident modeling would establish that Vos' feedlot discharged pollutants to the UNT and Elliot Creek.

The parties' prehearing exchanges were due in April 2008. In the meantime, because it had been almost two years since Mr. Sena's inspection of Vos' feedlot in the spring of 2006, in March of 2008, Region 7 determined it would be appropriate for Mr. Pollard to examine firsthand the flow paths from the feedlot to the UNT. One purpose was to confirm the validity of his conclusions, drawn from aerial photography, that there were several unobstructed flowpaths that form and reform from the feedlot to the UNT. *See* CX 28 and TR 167-175. During the site visit, Mr. Pollard observed that there continued to be at least three well-defined and unobstructed erosional flowpaths from the feedlot to the UNT. *Id*. Mr. Pollard also observed and photographed manure, feed, and other materials from the feedlot within the eroded pathways. CX 28 photos 14-22 and 26-28 and TR 180-81. Another purpose of his site visit was to ground-truth some of the assumptions Ms. Doty was using to model feedlot runoff. *See* TR 187. In summary, the main objective of the visit was to get a firsthand look at the facility to ensure Region 7 had accurate and defensible facts. Mr. Pollard did not observe anything that

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

contradicted Region 7's conclusion the facility lacked adequate runoff controls to contain a 25-year, 24-hour precipitation event and significant rain events would carry pollutants to the UNT which in turn would flow to Elliot Creek. In other words, Region 7 continued to have a reasonable basis to believe Vos had violated the CWA.

In April 2008, Region 7 filed a pre-hearing exchange containing approximately 50 exhibits including Ms. Doty's expert Manure Discharge Report that contained the results of her runoff modeling. CX 29. Based on her modeling efforts, she concluded pollutants from Vos's feedlot had discharged approximately 103 times during the period of interest. To be certain the assumptions she had used to calculate when the feedlot had discharged were accurate, Ms. Doty performed a site visit in July 2008. TR 349. Based on her observations, she further refined the modeling effort and Region 7 submitted her revised expert Manure Discharge Report in its supplemental pre-hearing exchange. *See* TR 347. The revised modeling effort concluded Vos' feedlot discharged at least 45 times in violation of Section 301 of the CWA and approximately 2410 tons of pollutants from the feedlot discharged into the UNT. *See* CX 43 and TR 346.

On July 23, 2008, the EAB issued its Final Decision and Order in the Matter of *Service Oil*. 2008 WL 2901869 (EAB 2008). The EAB's decision affirmed the ALJ's Initial Order in its entirety. Because Service Oil did not contest Section 301 liability, including the finding that allowed Region 7 to use runoff modeling and other circumstantial evidence to demonstrate illegal pollutant discharges, the Region had a reasonable basis in law and fact that the available circumstantial evidence would meet the burden of persuasion accepted in *Service Oil*.

In early August 2008, Brian Hayes, an IDNR fisheries biologist with approximately 20 years of experience investigating Iowa streams, performed an assessment of the aquatic life in

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

On September 8, 2008, Mr. Prier recalled he had photographed the discharge he had witnessed back in 2003. The first photo was of feedlot effluent running over the top of Vos' sedimentation basin and downcutting the downgradient side of the berm. *See* Answer, Exhibit A. The second photograph showed the same effluent exiting the cornfield through an eroded channel, down the bank, over a tile line, and into the UNT. *See* Answer, Exhibit B. This photo demonstrated the classic indications of contaminated feedlot effluent in that it was brown and foamed when agitated. These photos had never been printed and therefore never placed in the IDNR files but instead resided on an IDNR hard drive which was totally inaccessible to EPA. *See* EPA's September 5, 2008 Motion to Supplement Prehearing Exchange. Late entry of evidence is allowed by 40 C.F.R. Part 22.22(a), provided the party had good cause for failing to exchange the required information and provided the information as soon as it had control of the information. A series of motions and responses were filed but the decision on the entry of this evidence was not made until the administrative hearing. Prior to the hearing, Region 7 had a reasonable expectation this evidence would be allowed because Vos had recognized EPA had no way of knowing the photos existed and Region 7 provided the photos within hours of receiving

them. *See* Respondent's September 9, 2008, Resistance to Motion Supplement.

In summary, on the eve of the hearing, Region 7 had evidence Vos had an NPDES permit in 1991 but never built the runoff controls to comply with it. Sometime prior to 2000, he at least doubled or possibly tripled the number of cattle confined at the feedlot with the knowledge he needed additional runoff controls if he met the definition of a large CAFO. Vos' engineer indicated massive storage lagoons were necessary for the feedlot to comply with the CWA. *See* CX 20 and CX 50. However, the controls were never constructed. In 2003, IDNR inspectors witnessed pollutants entering the UNT and had samples indicating the presence of pollutants in the UNT. Region 7 had photos of the discharge and a realistic expectation these photos would be allowed into evidence. Region 7 had been to the feedlot three times to make certain there was nothing at the facility that would counter its conclusion the feedlot lacked adequate controls and that pollutants would inevitably reach waters of the U.S. Runoff modeling demonstrated thousands of tons of pollutants from the feedlot reached Elliot Creek and the *Service Oil* decisions supported EPA's use of this modeling. All of this evidence of discharges was corroborated by Mr. Hayes stream assessment and his opinion Vos' feedlot had decimated the aquatic life in Elliot Creek and the UNT.

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

The Hearing

Region 7 suffered some setbacks at the hearing. First, Mr. Prier's photos were not allowed into evidence.[12] During the cross examination of Ms. Doty, Vos identified errors in the

12 The Presiding Officer, in his Recommended Decision, found "that EPA permissibly identifies the evidence upon which it relied at different states of the underlying proceeding, including the aforementioned photographs, as EPA offers this evidence only for the limited purpose of demonstrating that it was substantially justified. Moreover, as this Discussion reveals, EPA presented much other evidence at the hearing which establishes "substantial

supporting attachments of her expert report. Ms. Doty attempted to explain the error resulted when the attachments from an early run of the modeling had inadvertently been attached to the final expert report. *See* TR 605-608. However, this and other errors significantly undercut her credibility and the credibility of her conclusions. Moreover, the Presiding Officer did not allow Mr. Prier to testify regarding the use of a telephoto lens to allow him to better view the discharge he observed in 2003 (*See* TR 928-29) and did not allow him to testify regarding discharges he had observed at Vos' feedlot only days before the hearing (*See* TR 914-21). Offers of proof were made in each instance.

Post-hearing Briefs

Following the hearing, Region 7 assessed the disappointing testimony associated with the expert modeling report and its conclusions. Region 7 recognized it had relied heavily on the modeling to demonstrate the specific days pollutants reached the UNT and Elliot Creek. Region 7 further recognized these days of discharge were the basis for the penalty it had proposed for Count 1 (the discharge count). The failure of the modeling effort led Region 7 to conclude it would be appropriate to withdraw the discharge count of the Complaint.[13] Based on precedent

---

justification" for pursuing this action." Recommended Decision p.12 footnote 13. EPA continues to contend that these photographs were improperly excluded and should have been admitted into evidence. Footnote 9 in the Initial Decision excoriates EPA for what it called "sloppy practice" in reviewing IDNR files. A more thorough review of the post-hearing briefs and the motions associated with EPA's attempt to enter these photos into evidence would reveal that the photographs were on a computer hard drive and had never been printed and had never been placed in files associated with Vos' feedlot. Although EPA had unfettered access to IDNR facility files, it had no access to IDNR computers and their hard-drive contents. As Vos admitted in Paragraph 3 of his September 9, 2008, response to EPA's motion to supplement its prehearing exchange with these photos, EPA had no reason to know of the existence of the photos. EPA continues to contend that these photos should have been entered into evidence and their contents considered.

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

discussed thoroughly in its post hearing briefs, Region 7 determined it was only necessary to establish discharges had occurred, not the specific dates they had occurred, to establish Vos' duty to apply for an NPDES permit. Region 7 continued to believe there was ample evidence to demonstrate discharges had occurred and therefore determined it was reasonable to proceed to argue Count 2. Instead of relying on the discharge modeling in its post hearing briefs, Region 7 instead focused on the 2003 discharge Mr. Prier observed.

In its post-hearing briefs Region 7 presented a reasonable argument the Vos' feedlot discharged at least 21 times between January 1, 2003 and December 31, 2007. This argument was based on an actual observed discharge from the feedlot to the UNT, actual rainfall records, and actual observations there were inadequate runoff controls, and actual observations of unimpeded eroded flowpaths from the feedlot all the way to the UNT. *See* EPA Post-Hearing Brief at 11-12 and Post-Hearing Response Brief at 21-22. The argument was not merely based on an assertion "that an area receives a lot of rain." *See* Appeal Brief p.9. The argument that pollutants from the feedlot had reached the UNT was substantially justified.

The Initial Decision

The Initial Decision states "EPA presented some evidence which one could infer that Respondent's feedlot discharges pollutants, such inferences *at least in the light of the evidence, presented* are not the equivalent of proof of an actual discharge." Initial Decision pg. 25 (emphasis added). The Presiding Officer recognized that "some evidence" was presented by Region 7, which clearly exceeds the "not a shred of evidence" EAB holding in *L & C Service*s. *See* 8 E.A.D. 110, where the complainant "did not have any evidence to establish a basic element of the case."

In the Initial Decision, the Presiding Officer concluded Mr. Prier and many of Region 7's other witnesses lacked *sufficient* credibility for EPA to prevail by a preponderance of the evidence. The Presiding Officer evaluated each of Region 7's witness individually and found fault in their testimony or credibility. He systematically discounted each witness's testimony as being unable to meet the preponderance of the evidence burden born by Region 7 to sufficiently demonstrate pollutants from Vos' feedlot had reached the UNT. The Presiding Officer also ruled that the Region's witnesses were not credible only when evaluated in light of the contradictory evidence offered by Respondent. *See* Recommended Decision p. 13.

However, in evaluating whether Region 7 was substantially justified, EAJA requires an evaluation of more than just the Final Decision in the underlying matter. EAJA requires the Presiding Officer to evaluate Region 7's position *in its entirety* and a failure by the Region to establish an essential element of its case does not require a determination the Region was not substantially justified. *See In re Bricks,* 11 E.A.D. at 804. The fact Region 7's position did not prevail does not create a presumption its position was not substantially justified. *See Id. (citing Scarborough,* 541 U.S. at 415.

In examining the administrative record as a whole, the Presiding Officer agreed that Region 7 presented a significant amount of evidence pointing to the possibility pollutants from Vos' feedlot reached the UNT and that Region 7 was substantially justified. *See* Recommended Decision p. 13 citing *In re Bricks,* 11 E.A.D. at 797 (discussing and upholding the EAB's decision EPA was substantially justified). Furthermore, the Presiding Officer agreed this is not a situation where Region 7 omitted a crucial element of proof from its case; rather this is a situation where significant proof was in fact presented but it fell short of meeting Region 7's

Burden of Persuasion in the opinion of the Presiding Officer. *See Id.* p. 14 footnote 14. Region 7 could not be expected to predict the outcome of the Presiding Officer's determinations in the underlying enforcement action, because those determinations turned, in part, on his findings and conclusions with regard to the relative value of the witnesses' testimony. *See Id.*

B. ***The decision in Waterkeeper did not establish an evidentiary standard to demonstrate "actual discharges" of pollutants from a CAFO or other point source to a water of the United States.***

EPA began regulating discharges of wastewater and manure from CAFOs in the 1970s. EPA initially issued national effluent guidelines and standards for feedlots on February 14, 1974 (39 FR 5704), and NPDES CAFO regulations on March 18, 1976 (41 FR 11,458). In 2003, EPA issued a revision to these regulations for the 5% of the nation's animal feeding operation (AFOs) that presented the highest risk of impairing water quality and public health (68 FR 7176-7274; February 12, 2003) ("the 2003 CAFO Rule"). The 2003 CAFO Rule required the owners and operators of all CAFOs to seek coverage under an NPDES permit, unless they demonstrated no potential to discharge. A number of CAFO industry organizations and environmental groups filed petitions for judicial review of certain aspects of the 2003 CAFO Rule. This case was brought before the U.S. Cicuit Court of Appeals for the Second Circuit. The court ruled on these petitions and upheld most of the provisions of the 2003 rule but vacated and remanded others. *Waterkeeper* 399 F.3d 486.

The CAFO industry organizations argued that EPA exceeded its statutory authority by requiring all CAFOs to either apply for NPDES permits or demonstrate that they have no potential to discharge. The court agreed with the CAFO industry petitioners on this issue and therefore vacated the "duty to apply provision" of the 2003 CAFO Rule. The court found that

the duty to apply, based on the potential to discharge, was invalid because the CWA subjects only actual discharges to permitting requirements rather than potential discharges. The court acknowledged EPA's policy considerations on seeking to impose duty to apply based on the potential to discharge but found that the Agency lacked statutory authority to do so. *Id* at 505.

Vos recognized in his Post Hearing Brief that "the only question addressed in the [Second Circuit's] decision was whether 'the EPA exceeded its statutory jurisdiction by requiring all CAFOs to either apply for NPDES permits or otherwise demonstrate they have no potential to discharge'." Respondent's Post Hearing Brief at 8. Moreover, the Presiding Officer stated the *Waterkeeper* decision was not instructive on the question of evidence EPA must present to show actual discharges. Initial Decision p. 22. Despite the recognized limited scope of the *Waterkeeper* decision, Vos now attempts to expand the scope of the decision. He argues that there is a "higher evidentiary standard" established by *Waterkeeper* and that the Region's evidence under this "standard" was so inadequate as to be the equivalent of no evidence at all, and thus the Presiding Officer's determination is incorrect as a matter of law under EAJA.

Vos argues that the *Waterkeeper* decision created an evidentiary requirement that "sampling or definitive visual observation" is the only evidence acceptable evidence to demonstrate actual discharges, rather than potential discharges.[14] Vos erroneously asserts that any evidence which does not meet his incorrect "*Waterkeeper* standard" is "inferential," and

14This is an interesting modification of the argument Vos presented in his EAJA Application. Vos argued throughout his Application that "direct evidence" of discharges was required to meet the "*Waterkeeper* standard." However, as explained in its Answer, EPA presented witness testimony describing an observed discharge and attempted to introduce photos of a discharge of pollutants from the CAFO into the UNT. That is, EPA presented direct evidence of the discharge. In his Recommended Decision denying Vos' application, the Presiding Officer held that the observations and photos supported EPA's contention that it was substantially justified in the underlying action. Vos now refines his argument and claims that "water sampling or definitive visual observation" is required to demonstrate pollutant discharges. Emphasis added. *See* Appeal Brief p. 8. To the point, Vos now attempts to move the evidentiary bar to better suit his needs on appeal.

cannot be considered in a determination Region 7 was substantially justified.

Region 7 urges the Board to take particular notice of the phrases that are conspicuously absent from the Second Circuit's decision. For instance, nowhere within the *Waterkeeper* decision are the terms: burden of proof, evidence, evidentiary standard, direct evidence, observed discharge, circumstantial evidence, or sampling. The *Waterkeeper* decision did not contemplate nor attempt to establish an evidentiary threshold EPA must satisfy in order to demonstrate that discharges have occurred, much less a create a more stringent evidentiary standard Region 7 must satisfy to be substantially justified under EAJA. In other words, Vos urges that without any discussion of evidentiary issues, the Second Circuit intended to upend the well established principal that a party must meet the preponderance of the evidence in order to prevail in civil litigation[15] and the requirement of 40 C.F.R Part 22.24(b) that each matter or controversy shall be decided by the Presiding Officer upon a preponderance of the evidence. Moreover, Vos also argues that his interpretation of *Waterkeeper* supersedes the "substantially justified" requirement of EAJA, 5 U.S.C. § 504(a)(1), and the extensive line of cases discussed above interpreting this language.

As detailed above, Region 7 presented sufficient direct and circumstantial evidence of "actual discharges" from Vos' CAFO to a water of the United States to be substantially justified in bringing the underlying action and for this Board to uphold the Presiding Officer's Recommended Decision.

Vos attempts to introduce the 8th Circuit's holding in *Service Oil Inc. v. U.S. EPA*, 590 F.3d 545 (8th Cir. 2009) to support his argument "only water sampling or definitive visual

15 The burden of showing something by a preponderance of the evidence is the most common standard in the civil law. *Concrete Pipe & Prods. V. Constr. Laborers Pension Trust*, 508 U.S. 602, 621 (1993).

observation of a pollutant meets the *Waterkeeper* 'actual addition of a pollutant' standard." *See* Notice of Appeal p. 8. First, the 8th Circuit's decision is irrelevant to the question of whether Region 7 was substantially justified in bringing the underlying action because the decision was issued months after the Final Decision was issued. The decision was unavailable for the Region to consider when it commenced the underlying matter.

Second, significant to the question of suitable evidence to demonstrate discharges, EPA demonstrated in *Service Oil* that actual discharges had occurred using computer modeling without water quality sampling. *See In re Service Oil Co*., Docket No. CWA-08-2005-0010 (ALJ Biro August 3, 2007), *aff'd*, 2008 WL 2901869 (EAB 2008). The Eighth Circuit's decision was on a specific issue (concerning the duty to apply for a permit) and did not address the validity of any aspects of the case, in particular, those involving Service Oil's liability for unpermitted discharges. Thus the *Service Oil* decision provides no basis whatsoever for the argument that the EAB's acceptance of computer modeling should not be considered the state of the law for EPA administrative adjudications. *See Id.* at 551.

Finally, like the *Waterkeeper* decision, the 8th Circuit decision was limited and only addressed the jurisdictional issue of when the CWA applies. The *Service Oil* decision, also like the *Waterkeeper* decision, did not attempt to establish or address any evidentiary threshold EPA must meet to demonstrate discharges have occurred.

In summary, the *Waterkeeper* and *Service Oil* courts did not address any evidentiary standard for demonstrating an "actual discharge." It is inappropriate to attempt to glean from these decisions that water sampling is the sole method for EPA to demonstrate pollutant discharges. Moreover, it is impossible to glean that "water quality sampling or definitive

observation of pollutants" are necessary to meet the substantially justified burden under EAJA if other suitable evidence is introduced to support the allegation. As such, Vos' misinterpretation of the decisions do not provide a basis for the EAB to disrupt the Recommended Decision denying Vos' application for attorney fees and costs under EAJA.

VIII. CONCLUSION

Region 7 was substantially justified in fact and law to bring the underlying enforcement action against Vos. The facts and applicable precedent discussed herein are sufficient for the EAB to determine the Presiding Officer's Recommended Decision Denying Application for Attorney's Fees and Costs under EAJA was supported by the record. As such, Region 7 requests that the EAB finalize the Recommended Decision and deny Vos' EAJA claim.

CERTIFICATE OF SERVICE

I certify that the foregoing "EPA Response to Notice of Appeal of Recommended Decision Denying Attorney Fees and Costs Under the Equal Access to Justice Act" was sent to the following, in the manner specified, on the date below:

Electronic version filed in Portable Document Format (PDF) via Central Data Exchange (CDX):

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board

Copy, by mail and electronic mail:

Eldon McAfee, Esq.
Julia L. Vyskocil, Esq.
Beving, Swanson, & Forrest, PC
321 Walnut, Suite 200
Des Moines, Iowa 50309

Dated: June 1, 2010 /s/ J. Daniel Breedlove
U.S. EPA Region 7