UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF LOWELL VOS d/b/a LOWELL VOS FEEDLOT WOODBURY COUNTY, IOWA Respondent.	Docket No. CWA-07-2007-0078 **RESPONDENT'S POST HEARING BRIEF**

COMES NOW the Respondent, Lowell Vos d/b/a Lowell Vos Feedlot, by and through his attorney, Eldon L. McAfee, and submits his Post Hearing Brief.

STATEMENT OF THE CASE.

After the evidentiary hearing in this case, EPA withdrew Count 1, its claim for "Unpermitted Discharge of Pollutant to Waters of the United States." The remaining count is Count 2, EPA's claim for "Failure to Apply for a NPDES Permit." EPA's withdrawal of Count 1 dramatically changed this case, both from an evidentiary standpoint and as to the applicable legal precedent.

In continuing this case with only a claim for "Failure to Apply for a NPDES Permit", EPA has highlighted the questions of whether Lowell Vos can be subjected to liability and penalties under the Clean Water Act solely for failing to have an NPDES permit. While this is a controversial issue for CAFOs in light of the recently released final CAFO rule, the Clean Water Act itself and judicial interpretation confirm that there is no independent cause of action for failure to apply for an NPDES permit regardless of whether there has been a discharge to waters of the U.S. See Argument in section I,B of this brief citing *Environmental Protection Information Center v. Pacific Lumber Company*, 469 F.Supp. 2d 803, 826, 827 (U.S. Dist. Ct. No. Dist. Calif. 2007).

Beyond that, as will be extensively discussed in this brief, EPA's withdrawal of Count 1 puts this case in direct line with the holding of *Waterkeeper Alliance, Inc., et. al. v. U.S. EPA,* 399 F.3d 486 (2d Cir. 2005). *Waterkeeper*, in pertinent part, clearly states that Clean Water Act NPDES permit requirements do not apply unless there is "an actual addition of any pollutant to navigable waters." *Waterkeeper* at 505.

In *Waterkeeper*, the 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 case at bar is an individual enforcement action and *Waterkeeper* involved a proposed EPA rule, the legal standard is the same. And EPA is attempting to do the same thing in

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

EPA's evidence presented at hearing, when Count 1 was still in play, centered on the following principle: water runs downhill and Vos' feedlot is on top of a hill. Vos does not dispute those facts. What Vos disputes is that simply providing evidence that water runs down hill 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 down hill falls 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.

STATEMENT OF FACTS.

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. In 1991 he wanted to enlarge his feedlot and decided, to be safe, he would voluntarily apply for a construction and NPDES permit. Tr. 1398. However, he did not own the land and after his landlords decided they did not want to sell, he decided he did not want to build structures on rented land and therefore did not construct pursuant to the permits. Tr. 1398-1400. He continued to operate his feedlot in full compliance with applicable regulations and voluntarily built runoff control structures. Tr. 1400, 1404-1405.

At this time, 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 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. Under the Iowa Plan the DNR conducted both an in-house and on-site assessment and gave his ranked his feedlot as a medium priority with 132 points in the medium range of 125 to 149. Ex. C-14, C-16, Tr. 1410 – 1411. Vos felt good about the medium priority assessment, particularly because he was in the bottom half of medium. Tr. 1410.

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.

BACKGROUND OF APPLICABLE LAW

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).

Currently, 45 States, including Iowa, are authorized to administer their own permitting programs for the discharge of pollutants into navigable waters in lieu of the federally administered permitting program. *See* http://cfpub.epa.gov/npdes/statestats.cfm. *See also* 33 U.S.C. § 1342(b) (authorizing State discharge permitting programs to be approved by EPA). Where a state has been authorized under CWA Section 402 to administer its own program, the state becomes the NPDES permit-issuing agency in lieu of EPA, although EPA retains oversight and veto authority, as well as authority to enforce any violation of the CWA or of a state-issued discharge permit. *See* 33 U.S.C. § 1342(c), (d), and (i). The CWA explicitly preserves the right of states to adopt any restriction concerning the discharge of pollutants or the control of pollution, except that states may not adopt or enforce restrictions that are less stringent than any applicable federally mandated restriction. *Id.* § 1370.

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 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),[1] 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 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

[1] 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.

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 Rule's "duty to apply." 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 first extended the February 13, 2006 deadline for NPDES permit applications to July 31, 2007. 71 Fed. Reg. at 6984. The EPA later extended the deadline again to Feb. 27, 2009. 72 Fed. Reg. at 40,250. Finally, EPA issued a revised final rule on November 20, 2008. Fed. Reg., Vol. 73, No. 225, Thursday Nov. 20, 2008, p. 70418. With respect to the "duty to apply" for an NPDES permit, EPA eliminated the already vacated "duty to apply" for permit coverage, as well as the now-unnecessary 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)..

ARGUMENT.

I. EPA'S COMPLAINT MUST BE DISMISSED AS A RESULT OF EPA'S WITHDRAWAL OF COUNT 1 WITH PREDUDICE.

Before getting to the issues addressed at the evidentiary hearing involving actual discharges as required for an NPDES permit under the Clean Water Act and the protections provided to Vos by previous federal regulations and the Iowa Plan, EPA's withdrawal of Count 1 highlights several legal issues that may well be dispositive of this case and therefore must be addressed.

A. COUNT 2 DEPENDS ON THE SAME FACTUAL BASIS AS COUNT 1 AND THEREFORE MUST BE DISMISSED.

EPA's Complaint sets out the following on page 5 for Findings of Violation:

"Count I

Unpermitted Discharge of Pollutants to Waters of the United States

31. The facts stated in paragraphs 17 through 30 above are herein incorporated.

32. Based on the size of the Facility, the lack of adequate runoff control structures, the distance from the Facility to Elliot Creek, and the slope and condition of the land across that distance, the Facility discharged wastewater containing pollutants into Elliot Creek as a result of significant precipitation events since Respondent began operations around 1975. Precipitation records demonstrate that there have been a minimum of 8 precipitation events within the last 5 years that have resulted in the discharge of pollutants from the Facility to Elliot Creek. None of these precipitation events qualified as 25-year/24-hour storms and many resulted in multi-day discharges.

33. The flow of wastewater from Respondent's Facility to Elliot Creek constituted unauthorized discharges of pollutants from a point source to waters of the United States. The discharges are violations of Sections 301 and 402 of the Clean Water Act, 33 U.S.C. § 1311 and 1342, and implementing regulations.

Count 2

Failure to Apply for a NPDES Permit

34. The facts stated in paragraphs 17 through 30 above are herein incorporated.

35. Based on the size of the Facility, the lack of adequate runoff control structures, the distance from the Facility to Elliot Creek, and the slope and condition of the land across that distance, the Facility discharged wastewater containing pollutants into Elliot Creek as a result of significant precipitation events since Respondent began operations around 1975. Precipitation records demonstrate that there have been a minimum of 8 precipitation events that have resulted in the discharge of pollutants from the Facility to Elliot Creek during the last 5 years. None of these precipitation events qualified as 25-year/24-hour storms and many resulted in multi-day discharges.

36. Large CAFOs that discharge have the duty to apply for a NPDES permit. 40 C.F.R. § 122.21(a). Respondent's Facility discharged pollutants without a NPDES permit in violation of Sections 301 and 402 of the Clean Water Act, 33 U.S.C. §§ 1311 and 1342, and implementing regulations on or before March 28, 2004. Respondent has a duty to apply for a NPDES permit 180 days prior to discharging any pollutants to waters of the United States but did not apply for a permit until on or about December 2, 2005.

37. Respondent's failure to apply for a permit is a daily violation of Section 301, 308, and/or 402 of the CWA, 33 U.S.C. §§ 1311, 1318, and/or 1342, and implementing regulations."

Count 1, which was withdrawn with prejudice by EPA, stated a claim for unpermitted discharges from the Vos feedlot. Complaint p. 5. Paragraph 35 serves as the basis for the Count 1 claim and is identical in substance and nearly word-for-word as ¶35 which serves as the basis for the claim in Count 2 that Vos failed to apply for an NPDES

permit as required by section 402 of the Clean Water Act, 33 U.S.C. §1342. While it can be argued that EPA may still pursue Count 2 after dropping Count 1, the two are inextricably linked and both hinge on proving discharge of pollutants to a water of the United States. As a matter of law, if EPA cannot pursue a claim for unpermitted discharges under section 301 of the Clean Water Act, 33 U.S.C. §1311, it cannot pursue a claim for Vos' failure to apply for an NPDES permit.

B. THERE IS NO INDEPENDENT CAUSE OF ACTION UNDER THE CLEAN WATER ACT FOR FAILURE TO APPLY FOR AN NPDES PERMIT, REGARDLESS OF WHETHER VOS DISCHARGED.

The remaining count in this action, Count 2, is in essence:

(1) Vos discharged wastewater containing pollutants into Elliot Creek as a result of significant precipitation events since he began operations around 1975. Complaint, ¶35.
(2) Large CAFOs that discharge have the duty to apply for an NPDES permit and when Vos' feedlot qualified is a large CAFO it discharged without an NPDES permit in violation of §§301 and 402 of the Clean Water Act. Vos had a duty to apply for an NPDES permit180 days before discharging pollutants but did not apply for a permit until on or about December 2, 2005. Complaint, ¶36.
(3) Vos' failure to apply for a permit is a daily violation of §§301, 308, and/or 402 of the Clean Water Act.

Vos denied EPA's claims in ¶'s 35, 36, and 37. Answer, ¶'s 35, 36, and 37.

Title III of the Clean Water Act is based on the following discharge prohibition, which is found in section 301: "Except 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) (emphasis added). The only part of the Clean Water Act that directly governs NPDES permits is §402. By withdrawing Count 1 and dismissing its claims for unpermitted discharge of pollutants to waters of the U.S., EPA's claims under Count 2 for violations of §§301 and 308 (33 U.S.C. 1318) are not applicable.

EPA's only remaining support in the Clean Water Act for Count 2 then is §402. Section 402 provides for NPDES permits, which allow exceptions to the section 301 discharge prohibition: "[T]he Administrator *may*, after opportunity for public hearing, issue a permit *for the discharge* of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title . . . ." 33 U.S.C. §1342(a)(1) (emphasis added). Thus, §402 provides no basis for a EPA's claim for failure to apply for an NPDES permit. See *Environmental Protection Information Center v. Pacific Lumber Company*, 469 F.Supp. 2d 803, 826, 827 (U.S. Dist. Ct. No. Dist. Calif. 2007). (Section 402 "does not employ the language of duty, rather it proscribes a timeline for the filing of applications where appropriate." *Id.* at 826.) The court goes on to state:

"The Second Circuit addressed a similar argument in Waterkeeper Alliance, Inc. v. United States EPA, 399 F.3d 486, 505 (2d Cir. 2005). That case involved a challenge to an EPA rule requiring all Concentrated Animal Feeding Operations (CAFOs) to apply for an NPDES permit regardless of whether they had in fact discharged any pollutants under the CWA. The court in strong language disavowed this interpretation as inconsistent with the text and purpose of the CWA. Id. at 506. "[I]n 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." Id. at 505. The court declines to adopt such a duty as an element of section 402 liability." *Id.* at 826-827.

Finally, and maybe most telling for EPA's remaining claims in this case, the court ruled:

"In order to establish a violation of section 402, EPIC would need to establish that PALCO had failed to comply with the terms of an NPDES permit. Section 402 sets out the permitting requirements for NPES permits. Section 402(h) affords a cause of action for noncompliance with a permit. See Laidlaw, 528 U.S. at 174. As noted above, it confers no independent cause of action other than that for noncompliance. The court has found no cases in which a plaintiff has maintained a separate cause of action under section 402 for discharges. Liability under the CWA for discharges is appropriately brought under section 301." *Id.* (emphasis added)

Nowhere in the Clean Water Act is there a requirement for Vos or *anyone* to apply for or obtain an NPDES permit. Rather, the Clean Water Act authorizes EPA to issue NPDES permits to *allow* discharges of pollutants under conditions imposed by the permit. In other words, the Clean Water Act establishes the NPDES permit system and an NPDES permit allows those CAFOs to discharge in storm events greater than the 25-year, 24-hour storm. Without an NPDES permit, a CAFO cannot discharge in any storm event and the Clean Water Act imposes severe sanctions for discharging without an NPDES permit. But the EPA has dropped that claim in this case. Nothing in the Act establishes or authorizes an affirmative duty to obtain permit coverage – even where there *is* a discharge, let alone where there is not. So, even if EPA were successful in proving that Vos discharged pollutants to waters of the U.S., EPA has dismissed its claim for penalties for any such discharges and there are no provisions under Count 2 for liability or penalties for failure to apply for a permit.

Admittedly, taking the position that EPA cannot maintain a separate cause of action for Vos' failure to apply for an NPDES permit even if there has been a discharge faces contrary analysis. First, the *Waterkeeper* decision can be interpreted to say that if there is a discharge of pollutants, there is a statutory obligation to obtain an NPDES permit. For example, see *Waterkeeper* at 505 ("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."). However, the *Waterkeeper* court was not asked to answer the question of whether the Clean Water Act authorized requiring an NPDES permit if a CAFO had discharged. Rather, the only question addressed in the court's decision was whether "the EPA has exceeded its statutory jurisdiction by requiring all CAFOs to either apply for NPDES permits or otherwise demonstrate they have no potential to discharge." *Id.* at 504. Second, in addition to the position taken in this case, in adopting the final CAFO rule the EPA clearly believes that CAFOs that discharge or propose to discharge must seek coverage under an NPDES permit and that there may be an independent cause of action for failure to apply for an NPDES permit against a CAFO that has discharged without a permit. See generally Fed. Reg., Vol. 73, No. 225, Thursday Nov. 20, 2008, pp. 70418-70434. Also see 40 CFR §122.23(d)(1) and (f). However, it goes without saying that these and previous regulatory provisions requiring a CAFO to apply for an NPDES permit are superseded by the provisions of the Clean Water Act itself. *Waterkeeper* at 506 ("Principles of statutory construction forbid us from sanctioning EPA conduct that is plainly inconsistent with a statute's specific text. See Caminetti v. United States, 242 U.S. 470, 485, 37 S.Ct. 192, 61 L.Ed. 442 (1917) ('It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain ... the sole function of the courts is to enforce it according to its terms.'))"

In sum, the court in *Environmental Protection Information Center v. Pacific Lumber Company,* clearly held that there is no independent cause of action for failure to apply for an NPDES permit, only a cause of action for failure comply with the terms of an NDPES permit. In this case, EPA is not alleging that Vos failed to comply with the terms of an NPDES permit and is not making a claim for unpermitted discharges. The only claim is for failure to apply for an NPDES permit. Following EPA's withdrawal with prejudice of Count 1, Count 2 must be dismissed meaning EPA's entire remaining claim against Vos must be dismissed.

II. CLEAN WATER ACT NPDES PERMIT REQUIREMENTS DO NOT APPLY UNLESS VOS HAS DISCHARGED TO A WATER OF THE UNITED STATES.

If the Court determines that Vos had a duty to apply for an NPDES permit if he discharged pollutants to a water of the United States, then the question of whether EPA has presented proof a discharge must be examined.

A. EPA HAS NO PROOF OF AN ACTUAL DISCHARGE.

If EPA has any basis in this case to require Vos to apply for an NPDES permit, EPA must prove that Vos actually discharged pollutants from his feedlot to waters of the United States.[2] Without such proof, EPA's case fails as a matter of law. The standard for

[2] As stated at the hearing, Vos admits that Elliot Creek is a water of the United States. Complaint and Answer, ¶27, Tr. 26. Regarding the unnamed tributary, EPA counsel in his opening stated he did not

the requirement for a CAFO to apply for an NPDES permit was clarified in the *Waterkeeper* decision. In that case, the court ruled in pertinent part:

> *"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:

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believe there was any dispute that it connects to Elliot Creek. Tr. 26-27. EPA presented evidence and testimony that it connects. Vos did not present evidence to the contrary nor allege that the unnamed tributary does not connect to Elliot Creek. The only question comes as a result of testimony by EPA's expert, Ms. Doty. Ms. Doty initially testified that SWAT modeling indicated there was flow in the unnamed tributary on a daily basis. Tr. 441-442. Then, upon cross examination regarding the graphs of flow rates in her report, she testified that when the graphs show "zeros", that would mean no flow in the unnamed tributary on those days. Ex. C-43, Appendix B-2, pp. 8-9, Tr. 484-486. The graph on page 8 of Appendix B-2 also shows a flow rate of 20to 30 billion gallons. Ex. C-43, Appendix B-2, p. 8, Tr. 487, 650-652. Ms. Doty testified that that graphed flow rate was an error but that when the graphs in B-2 show zeros, the zeros are correct but the graphs reflect sublateral flow to each segment of the unnamed tributary. Tr. 648-653. So, as a result, it appears Ms. Doty 's testimony supports the EPA's position that the unnamed tributary has connectivity to Elliot Creek. Vos has not evidence to rebut this position but is concerned about any reliance on Ms. Doty's testimony or report on the issue of connectivity given the numerous errors and contradictions in her testimony and report.

> *". . . 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 (emphasis added).

In an attempt to meet this standard, EPA provided testimony that "water runs down hill" and introduced evidence of alleged discharges. At the time of the hearing, EPA was still pursing Count 1 for unpermitted discharges. While that evidence takes on a somewhat different meaning following the dismissal of Count 1 with prejudice, EPA must still meet the standard set out in *Waterkeeper*.

As noted previously, Vos obviously does not dispute that water runs down hill. However, such testimony and evidence does not come close to meeting the standard for a discharge under the Clean Water Act for numerous and obvious reasons. In particular, EPA's approach under this theory fails to recognize the management practices used by Vos. First, he scrapes his feedlot pens regularly to minimize manure runoff from his lots. Mike Vos testified that after scraping the lots are pretty much bare ground. Tr. 996. Mike also testified that they use cornstalk bedding in the winter and that this results in the cattle depositing much of the manure in the bedding and away from areas of the pens where runoff would occur. Tr. 1005-1007. Brad Woerner testified that Vos' lots were clean and well maintained. Ex. R-9 through R-12, Tr. 1059-1063. EPA observed this when they were present for inspections. Tr. 114, 324-325. These and other real world practices employed by Vos to minimize manure runoff from his pens illustrate the problem with EPA's overly simplistic approach to proving a discharge that would require an NPDES permit.

EPA's evidence of alleged discharges was limited to five specific dates. This brief will analyze each allegation separately and set out why none of these allegations meet any applicable legal standards under the Clean Water Act necessary to subject Vos to a violation for failure to apply for an NPDES permit.

Before analyzing the alleged discharges, the context that this evidence was presented at the hearing must be considered. In the prehearing exchanges, exhibits, and at the hearing, EPA devoted considerable time and effort to computer modeling of the Vos feedlot and using it to prove the number of discharges. Ex. C-29 and Ex. C-43 and Sandra Doty's testimony at Tr. 341-657. Vos devoted considerable time and effort to rebutting that evidence via his expert witness, Mr. Gerald Hentges. Tr. 1124-1319. While both witnesses testified to personal observations and reviewed photo exhibits, the bulk of their testimony concerned modeling. During cross examination of Ms. Doty and during direct examination of Mr. Hentges, crucial errors in Ms. Doty's computer modeling were discovered. In addition, in Vos' opinion, significant shortcomings in the modeling procedures, namely the failure to correctly validate and calibrate the models, employed by Ms. Doty were exposed. In addition, Ms. Doty could not produce any

reference in the published literature that supported using modeling for enforcement purposes under the Clean Water Act. Subsequent to the hearing EPA moved to withdraw Count 1 of the Complaint. In continuing with Count 2, EPA stated that it "will not use evidence from the APEX or SWAT models to argue that Respondent had an ongoing duty to apply for an NPDES permit because his feedlot discharged to waters of the United States." Vos replied to this motion by not opposing the motion subject to reservation of all his rights and defenses for argument in post-hearing briefs, including the right to use all evidence before the Court, including but not limited to evidence from the APEX or SWAT models. The Court issued an Order granting EPA's motion and accepting Respondent's reservation of right to use the entire record in its defense of Count 2. In the discussion of the alleged discharges on the following pages of this brief, Vos notes and asks this Court to consider that these allegations, particularly allegations of the May 31, 2006, March 11, 2008, and July 1, 2008 EPA site visits, were originally intended and presented to this Court primarily as support for computer modeling and the claims of unpermitted discharges. Given the problems encountered with, and subsequent abandonment of, computer modeling and the withdrawal of the claim of unpermitted discharges, Vos seriously questions the reliability and credibility of this evidence to support the remaining Count 2.

EPA's evidence of five alleged discharge events is:

(1) June 25, 2003. Jeff Prier testified that on this date he observed a discharge down gradient from the Vos feedlot to the unnamed tributary of Elliot Creek. Ex. C-54, Tr. 887–893, 919-921, 922-945. However, this allegation fails to meet the standard to subject Vos to a violation for failure to apply for an NPDES permit for the following reasons:

a. Mr. Prier did not testify nor did EPA present any other evidence that this alleged discharge was from less than a 25-year, 24-hour storm. As discussed below, as a newly defined CAFO, Vos was allowed to discharge without an NPDES permit if the discharge resulted from a 25-year 24-hour or greater precipitation event. It is EPA's burden to submit evidence to show that this discharge was from less than a 25-year, 24-hour storm.

b. Mr. Prier observed the alleged discharge from the gravel road 75 yards away without field glasses or any other means of assisting him in accurately seeing the alleged discharge. Tr. 930. Mr. Prier did not attempt to get closer for observation. Tr. 940.

c. Mr. Prier did not take a sample of the alleged discharge to determine whether there were in fact actual pollutants from the Vos feedlot. Tr. 891, 940. Mr. Prier testified that he was not intending to build a case regarding the discharge and that is why he did not sample. Tr. 890-891. If he had been there on an enforcement case, he would typically sample upstream, downstream, and at the point of discharge. Tr. 892. Mr. Hentges, who

testified on behalf of Mr. Vos, agreed with that this would be the proper sampling procedure. Tr. 1184.

As this testimony shows, Mr. Prier knows the proper procedure to document a discharge in an enforcement action such as this one and chose to not to use those procedures.

d. Mr. Prier did not make any notes of the alleged discharge he observed. Tr. 933. He did not make any note of this alleged discharge in the on-site investigation report. Ex. C-15, Tr. 922, 933. Further, he did not inform Vos of his observations and the first Vos had learned of this alleged discharge was during the hearing. Tr. 1413. Thus, this Court is being asked to give credence to Mr. Prier's testimony based on his memory of an event that occurred more than five years ago.

e. Vos testified that there is an old tile line where Mr. Prier allegedly observed the discharge. Tr. 1415-1418. Vos testified that he has seen water coming from that old and possibly broken tile at that location. Tr. 1418. On cross examination Mr. Prier testified that on the day of the inspection, Vos said there were no tile lines. Tr. 937. He testified that he was referring to the entries on page 2 of the on-site assessment form regarding surface tile intakes and subsurface tile lines in the runoff area. Ex. C-15, Tr. 937-938. He testified that he did not fill the form out but that he believed Ken Hessenius did. Tr. 947. He also testified that there were "two of us asking questions that day" and he doesn't remember if DNR explained to Vos exactly what was meant by runoff area. Tr. 937-938.

Had Mr. Prier taken the initiative to get a closer look, he would have been able to determine if what he thought was a discharge coming from the Vos feedlot was actually water from this broken tile line.

Mr. Prier also testified that on June 25, 2003 he took a field test kit sample from the unnamed tributary of Elliot Creek some distance down gradient from where he observed the discharge. Ex. C-15, Tr. 892. The results of his field test kit sample showed ammonia at a level in the unnamed tributary that he testified was above background levels and that was likely from manure. Tr. 892-893. However, this allegation fails to meet the standard to subject Vos to a violation for failure to apply for an NPDES permit because:

a. Mr. Prier admitted that to his knowledge DNR does not bring enforcement actions based on results of field test kit water samples. Tr. 942. Mr. Hentges testifying for Vos agreed that a field test kit sample is simply an indicator and that further testing with lab samples would be necessary. Tr. 1188. Therefore, this evidence cannot be used to prove a discharge that would require Vos to obtain an NPDES permit.

b. Mr. Prier testified that the level of ammonia was not particularly high, but was above background levels that in his opinion were .5 to 1 milligram per liter. Tr. 892. In addition, EPA presented information from a DNR website indicating that a Mr. Bob Sheets with Iowa DNR considers .1 milligram per liter to be a common level of ammonia for most Iowa streams. Tr. 1244-45. However, Mr. Hentges testified that background levels for an Iowa stream receiving runoff from crop fields on June 25th would be 1 to 6 mg per litter and that the level found by Mr. Prier is within the range he would expect. Tr. 1189, 1280-1281.

c. Although Mr. Prier testified that this level was likely from manure, Mr. Hentges testified that he could not attribute this to the Vos feedlot because there were too many other ammonia inputs in the watershed. Tr. 1189. This reading is indicative of nutrients applied to row crop fields in Iowa, such as in this watershed. Tr. 1189-1190.

(2) May 31, 2006. This is the date that EPA conducted the onsite inspection that in effect initiated this case. During this onsite inspection, at which time Mr. Vos had more than 1,000 head of cattle in his feedlot, Mr. Sena took photos of what he called runoff paths, flow paths, and discharge paths. Ex. C-23 p. 2 of 16 to p. 16 of 16, Ex. C-23A through 23M, Tr. 70-71. However, Mr. Sena testified that he did not observe any manure, feedlot runoff or anything like that in any of these flow paths. Tr. 123. Further, he did not take gather any evidence such as water samples. Tr. 124. He testified that he has done that "in the event of an actual discharge where it's flowing." Tr. 124. However, Mr. Sena nonetheless concluded that Vos' feedlot "was capable of discharging to surface waters." Tr. 97.

Mr. Hentges testified regarding the photos in Ex. C-23 p. 2 of 16 to p. 16 of 16. Tr. 1276-1278. He stated that the photos depicted erosional type features, he called them rills which he said were small erosional features that are not necessarily permanent or long term and that occur during rapid runoff events. Tr. 1277-78. He testified that in his experience these are the type of features one might see in any Iowa cornfield. Tr. 1278.

If EPA is alleging that these photos meet the standard to subject Vos to a violation for failure to apply for an NPDES permit, this allegation fails because there is no evidence of discharge of pollutants in less than the 25-year, 24-hour storm event. In addition, this allegation fails due to Mr. Sena's own testimony that he did not observe any runoff event or any manure in the runoff paths and he took no samples. Mr. Sena's conclusion that based on these photos and his observations during the inspection Vos' feedlot "was capable of discharging to surface waters" is not supported by the evidence and certainly does not rise to the standard of an actual discharge as required by the *Waterkeeper* decision.

(3) March 11, 2008. Steve Pollard testified extensively regarding his observations of channelized flow paths and observations of manure and feedlot runoff in

those paths. Ex. 28 and Ex. 28 Pollard, Tr. 167-185, 219-280. However, this allegation fails to meet the standard to subject Vos to a violation for failure to apply for an NPDES permit for the following reasons:

a. On this date, Vos' feedlot had less than 1,000 head. Therefore, he was not a large CAFO and not subject to the Clean Water Act requirements for an NDES permit. Tr. 221. Mr. Pollard repeatedly testified that he was there to establish the channelized flow paths. Tr. 264. As Mr. Pollard put it, Vos "appeared to be in compliance." Tr. 222. Therefore, these photos and Mr. Pollard's testimony are not relevant or material to the issue presented by Count 2 of the Complaint.

b. If these photos are found to be relevant and material to Count 2, they still do not rise to the level of proving an actual discharge of pollutants that would require Vos to apply for an NPDES permit. None of the photos showed manure or feedlot pollutants in the unnamed tributary or in Elliot Creek (see discussion in next section regarding photo 38, Ex. R-16). Mr. Pollard did testify that he saw a solid material that he believed was manure near the channels. Tr. 246-274. However, he did not sample that material. Tr. 264. He testified that he considered it but did not because he did not have the proper sampling equipment. Tr. 264. He had made a conscious decision not to take the proper sampling equipment with him because 'the purpose of this visit was to establish or further document the channelized flow path." Tr. 264, (also see Tr. 338, "I made a decision before I went up that I did not need to take a sampling kit.")

   Mr. Hentges testified that in his review of these photos he did not see evidence of manure in what he described as seasonal rills and gullies that Mr. Vos farmed through annually. Tr. 1131 – 1149. Also see Vos' testimony that he farms through this area at Tr. 1452-1453.

   Mr. Pollard's failure to sample the material he believed was manure to confirm, or not confirm, his beliefs is inexcusable. Mr. Pollard had a duty – and Vos is entitled to have that duty fulfilled – to take the affirmative step of sampling what he thought was manure if his observations were going to be used in an enforcement action as they are here. If Mr. Pollard made the conscious decision not to have the proper equipment with him to document what he believed to be proof of a discharge, then his testimony alleging a discharge should not have been presented at the hearing and should be given little if any weight.

c. While Mr. Pollard testified that foaming he saw in photo 38 was from feedlot runoff, he did not sample the foam because it did not occur to him at the time that the foaming was from the feedlot. Ex. R-16, Tr. 277-280. Mr. Hentges testified that the foam Mr. Pollard circled in R-16 could have been caused by a lot of things and is indicative of a grade drop in the

stream. Tr. 1148. He found no evidence in the photo that is was manure or feedlot runoff. Tr. 1148. The photo was inconclusive and he would need a sample to know if feedlot runoff was present. Tr. 1148.

Mr. Pollard's testimony regarding this photo is telling of the entire case. EPA consistently did not take samples under the general position that it is too burdensome. Tr. 334-336. However, on cross examination Mr. Pollard admitted that Iowa DNR has taken samples for EPA and that even though EPA is several hours away from the Vos feedlot, they could contact DNR to take a sample after a runoff event. Tr. 334, 339.

Mr. Pollard also stated that he does not sample if no runoff is occurring. Tr. 315. However, when he observed the foaming in Ex. R-16, he had the perfect opportunity to take a sample but once again he intentionally was not prepared and/or chose not to take advantage of that opportunity.

(4) July 1, 2008. As with the March 11 site visit, Steve Pollard testified extensively regarding his observations of channelized flow paths and observations of manure and feedlot runoff in those paths. Ex. 42 and Ex. 42 Pollard, Tr. 187-193, 282-310. He noted stagnant water that smelled of manure and had flies around it. Tr. 192. 193. However, these allegations again fail to meet the standard to subject Vos to a violation for failure to apply for an NPDES permit for the following reasons:

a. As with the March 11, 2008 visit, on this date Vos' feedlot had less than 1,000 head. Therefore, he was not a large CAFO and not subject to the Clean Water Act requirements for an NDES permit. Tr. 284. Mr. Pollard testified that he was there to validate the parameters used in the computer model by Ms. Doty. Tr. 310. Mr. Pollard testified that Vos was "right under 1,000" head and that this was not a compliance visit. Tr. 284-85. Therefore, these photos and Mr. Pollard's testimony are neither relevant nor material to the issue presented by Count 2 of the Complaint.

b. If these photos are found to be relevant and material to Count 2, they still do not rise to the level of proving an actual discharge of pollutants that would require Vos to apply for an NPDES permit. None of the photos showed manure or feedlot pollutants in the unnamed tributary or in Elliot Creek. Mr. Pollard saw pooled liquid that he believed was manure and feedlot runoff, but did not sample the material. Tr. 288-303.

Mr. Hentges testified that he did not see anything in the photos that appeared to be manure or feedlot pollutants and that the green substance was algae normal for stagnant water in an Iowa cornfield in July. Tr. 1143-1147. He also did not see any flies in any of the photos, just as Mr. Pollard did not. Tr. 1143, 293. Mr. Hentges also testified that he would have collected a sample for nutrient components that would be associated with manure. Tr. 1144.

Mr. Pollard's failure to take samples during this visit is even more egregious than during his March 11, 2008 visit because based on the previous visit he should have known that there was a good chance he would testify as to his observations and that he should document those observations. Tr. 339. In fact, Mr. Pollard admitted on cross examination that without samples "there's some question" as to what he was observing. Tr. 326 Again, he had the perfect opportunity to establish credibility regarding his observations of what he claims was manure. All he had to do was take a sample for lab analysis and there is absolutely no excuse for his failure to do that.

(5) August 5, 2008. Mr. Bryan Hayes, along with other employees of the Iowa DNR, conducted an aquatic life assessment and concluded based on that assessment that contaminants from the Vos feedlot were the cause of low fish numbers and low diversity of aquatic life in Elliot Creek and the unnamed tributary of Elliot Creek. Tr. 731-32. However, these allegations again fail to meet the standard to subject Vos to a violation for failure to apply for an NPDES permit for the following reasons:

a. Vos had reduced his feedlot capacity to less than 1,000 head on Feb. 19, 2007 and therefore on this date Vos' feedlot was not a large CAFO and not subject to the Clean Water Act requirements for an NDES permit. Tr. 1456.

b. Mr. Hayes did not testify that he observed any manure or other discharge from the Vos feedlot and he did not take any water samples. Tr. 758. He testified that the low levels of aquatic life appeared to be from a chronic condition as opposed to an acute release of a contaminant. Tr.725-730. Even though he did not take water samples[3], he agreed that water sampling would be more appropriate in this type of ongoing condition than in an acute event. Tr. 793.

c. He listed three conditions as detrimental to aquatic life from a feedlot, ammonia, organic matter, and sediment. Tr. 763. However, he did not test for ammonia and did not observe any organic matter or sediment. Tr. 764-765.

d. Mr. Hayes' testimony was rebutted by Mr. Mike Beavers. Mr. Beavers has lived down stream from the Vos feedlot for 22 years. Ex. C-6, Tr. 966-967. His farmplace is within 100 yards of the unnamed tributary of Elliot Creek. Tr. 968. For the last 15 to 16 years he and his son have trapped minnows, chubs, and crawdads from the creek near their home. Tr. 969. They do this for several months during the summer just about

[3] There apparently was some confusion as to whether Iowa DNR took water samples in connection with this aquatic life investigation. Mr. Pollard testified that although EPA did not take samples of the unnamed tributary, "IDNR Fisheries did" in connection with this case. Tr. 330-331.

every weekend and check their traps about every three days. Tr. 982 In his words, they have pretty good luck and have never had a problem getting chubs and minnows except when there has been some type of rock or something placed in the creek that prevents the migration of the minnows, etc. Tr. 970-971. They also find crawdads and frogs. Tr. 972. He and his boy also hunt near the creek. Tr. 978.

He has never noticed manure or other contaminants in the creek. Tr. 978. He grew up on a farm and has lived on a farm his whole life, as well as working in a hog confinement. Tr. 984. In response to being questioned whether he would know what feedlot runoff would look like, he testified: "I'm pretty sure I think I'd know what it was." Tr. 984, 985.

When these five alleged discharge events are analyzed separately, it becomes abundantly clear that EPA has no evidence of an actual discharge of pollutants from the Vos feedlot in violation of the Clean Water Act. To summarize the critical points addressed above, the three allegations in 2008 all occurred after Vos had reduced his feedlot capacity to less than the large CAFO threshold of 1,000 head. Because Vos' feedlot was not a large CAFO, it was not a point source under the Clean Water Act. The Sixth Circuit in *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) held that "for NPDES requirements to apply to any given set of circumstances, five elements must be present: (1) a pollutant must be (2) added (3) to navigable waters (4) from (5) a point source." *Id.* at 583. The court held that no NPDES permit is required to discharge when any of the five elements, which together define the Clean Water Act term discharge, is missing. Because Vos was not a large CAFO and therefore not a point source, these allegations are not material or probative to the issue of whether Vos failed to apply for an NPDES permit.

That leaves the two remaining allegations that did occur when Vos had more than 1,000 head and was therefore a large CAFO. The allegation from the inspection on May 31, 2006 fails for lack of any evidence that even approaches proof of an actual discharge. The allegation from the June 25, 2003 event allegedly witnessed and testified to by Mr. Prier fails primarily for basic lack of attention to detail to meet EPA's burden of proof. Nowhere is the failure to collect verifiable – and easily attainable — sample results to prove an actual discharge more apparent than here.

III. VOS COMPLIED WITH THE CLEAN WATER ACT UNDER EPA RULES IN EFFECT BEFORE APRIL 13, 2003 AND HE IS THEREFORE A "NEWLY DEFINED CAFO." AS A NEWLY DEFINED CAFO HE IS NOT REQUIRED TO OBTAIN AN NPDES PERMIT UNDER FEDERAL RULES UNTIL FEB. 27, 2009 AND UNDER IOWA LAW UNTIL JULY 31, 2007.

As discussed in the introductory sections of this brief, prior to April 14, 2003, EPA regulations did not require an NPDES permit for an animal feeding operation with more than 1,000 animal units if the operation discharged only in the event of a 25-year 24-hour storm. 40 CFR. Pt. 122, App. B (2000), Ex. R-1 interpreting 40 CFR §122.23 as

it was in effect until April 13, 2003. Iowa law followed this same standard. Ex. R-3, p. 2, footnote 4 and Mr. Tinker's testimony, Tr. 851.

As has been discussed in this brief, EPA has presented no credible evidence that Vos discharged in any precipitation event, much less a precipitation event which was less than a 25-year, 24-hour precipitation event. Beyond that, any alleged evidence of a discharge from the Vos feedlot at any time that he had more than 1,000 head (i.e., prior to February 19, 2007) would have to be a discharge from a storm that is less than the 25-year, 24-hour storm. For the one alleged discharge that occurred while Mr. Vos had more than 1,000 head (June 25, 2003), EPA has presented no evidence that it determined that the alleged discharge occurred from less than a 25-year, 24-hour storm. Accordingly, Vos was not required to have an NPDES permit under regulations in effect until April 13, 2003.

Under federal EPA CAFO rules, Vos is a "newly defined CAFO" and has until February 27, 2009 to seek to obtain coverage under an NPDES. 40 CFR §122.23(f)(2). However, the Iowa legislature set the deadline for "newly defined CAFOs" to apply for an operating/NPDES permit at July 31, 2007. Iowa Code §459A.202(1) and (2). In any event, 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. Accordingly, Vos is in compliance with EPA regulations and Iowa law and EPA's allegations and proposed penalty for failure to apply for an NPDES permit under the Clean Water Act must be dismissed.

IV. VOS' NPDES PERMIT OBTAINED IN 1991 IS IRRELEVANT TO THIS PROCEEDING.

Vos sought and obtained a construction permit and an NPDES permit for his feedlot in 1991. Ex. C-9. EPA alleges that the fact that Vos sought NPDES permit coverage in 1991 and allowed it to expire is evidence supporting its claim in this proceeding that he has failed to apply for NPDES permit coverage.

In his testimony, Vos provided the necessary background regarding the circumstances of the 1991 permit. Although he was not required to have an NPDES permit at that time, Vos applied for one because he was considering enlarging his feedlot and wanted to be safe even though he was in compliance without one. Tr.1398. He didn't own the land but was confident he could purchase it from the landowners. Tr. 1399. However, after he obtained the permits at his own expense the landowners decided they did not want to sell the land. Tr. 1399-1400. He knew he was not out of compliance and he did not want to spend money on structures and basins on rented land, so he "put it on the shelf." Tr. 1400.

The 1991 permits are not a material fact to this proceeding because:

(1) Evidence of any such violation should not be considered this case because the violation, if any, occurred more than five years ago. See *Donald*

Cutler, Docket No. CWA-10-2000-0188, December 31, 2002, pp. 44-45 (ALJ ruled that violations more five years before complaint filed "are not to be considered in determining Respondent's 'prior history of such violations' for penalty calculation purposes pursuant to CWA section 309(g)(3), because general Agency policy limits consideration of prior violations for penalty enhancement purposes to those occurring within five years from the instant violation." (footnote omitted)). However, this portion of the ALJ decision was overturned by the Environmental Appeals Board (EAB). See *In Re Donald Cutler,* Final Decision and Order, CWA Appeal No. 03-01, Sept. 2, 2004, pp. 642-648. As applied to the case at bar, the ALJ decision should be followed because the *Cutler* decision involved a Clean Water Act §404 wetlands case. Further, it must be noted that the EAB noted that the ALJ followed a Clean Water Act settlement policy "which EPA developed primarily for use in CWA section 402" NPDES cases. *Id.* at 643. It should also be noted that the EAB recognized that ALJ's "may exercise discretion in calculating appropriate penalties and may depart from a proposed penalty based on an Agency policy if they explain their reasons for the departure." *Id.* at 645.

For these and other reasons applicable to the Vos case, the ALJ's decision and reasoning should be followed in this case and any evidence or testimony regarding the 1991 permits should be excluded. Vos objected to the 1991 permits at the hearing (Ex. C-23, attachment No. 1, pp. 1 of 27, 2 of 27 and 3 of 27, Tr. 52-55, and Ex. C-9, Tr. 61), and subsequent testimony pertaining to that portion of that exhibit and that objection should now be sustained.

(2) As discussed previously and as clearly understood by Vos at the time, Vos was not required by Iowa or federal law to get an NPDES permit until July 31, 2007 because of the 25 year, 24 hour storm exemption to NPDES permitting. Because an NPDES permit was not required, a construction permit under Iowa law was not required.

(3) A Vos testified, he did not own the feedlot at the time and did not want to spend money to install the controls recommended by the permit on rented land. Tr. 1400.

(4) Contrary to testimony of Mr. Gene Tinker of the Iowa DNR (Tr. 824-828, 868-874), these permits did not establish any duty that Vos construct controls. Nor did these permits require Vos to apply for an NPDES permit. The requirements of the construction permit were in effect only if the runoff control system was constructed. No where in the permit does it say that the controls must be constructed. The NPDES permit simply authorizes Vos to operate the feedlot runoff control system and discharge pollutants as authorized by the permit. Ex. C-9, first page of NPDES

permit issued August 19, 1991. The NPDES permit created no duty upon Vos unless he constructed the runoff control system.

Perhaps the best evidence that Vos had no duty to have these permits in place is the fact that DNR took no steps to require Vos to comply with the permits. First, the NPDES permit contained monitoring and reporting requirements. Ex. C-9, sixth unnumbered page, §V. When Vos did not submit these reports, DNR surely would have contacted him and required him to submit these reports *if* the permit had created any legal duty as testified by Mr. Tinker. Second, DNR did not require Vos to construct the runoff control system nor did it penalize him when he did not. The construction permit expired within one year of issuance (Ex. C-9, second unnumbered page, ¶2) and the NPDES permit expired on July 1, 1996 (Ex. C-9, fourth unnumbered page). When Vos shelved his plans to construct pursuant to the permits and allowed them to expire, DNR took no action to require him to move forward. The first Vos heard from DNR regarding these permits was on June 8, 2000 and September 13, 2000, when he received letters from DNR inquiring as to the status of the NPDES permit. Ex. C-10 and Ex. C-11, Tr. 1401. These letters, dated four years after the NPDES permit expired, acknowledged that the NPDES permit had expired and requested Vos to complete an enclosed application, *if* his feedlot still met any of the criteria listed in section II of the application. Ex. C-10 and 11. The application that was to be enclosed with these letters is not in the record of this proceeding so we don't know what was criteria were in section II. In any event, Vos testified he did not respond because he knew he was not out of compliance. Tr. 1400. Vos testified that he knew a new plan was coming from the DNR to "try to get it all straightened out" and new regulations were coming. Tr. 1402- 1403. He waited to see what was coming, with the exception that he constructed some control structures on his own. Tr. 1403-1406. Then, on April 4, 2001 he registered for the Iowa Plan. Ex. C-12, Tr. 1406-1407.

As this chain of events shows, Vos knew he was in compliance with applicable environmental regulations for his feedlot without having the permits in Ex. C-9 in place. That understanding was confirmed when DNR took no action to require compliance with the terms of the NPDES permit while it was in place and when it expired.

For all of these reasons, the 1991 permits in Ex. C-9 and C-23 cannot be used as evidence that Vos failed to apply for an NPDES as alleged in Count 2 of EPA's Complaint.

V. VOS COMPLIED WITH THE IOWA PLAN AND THEREFORE COMPLIED WITH CLEAN WATER ACT REQUIREMENTS TO APPLY FOR NPDES PERMIT COVERAGE.

If EPA's allegations of discharges that required him to apply for an NPDES permit are sustained, EPA's claim in Count 2 that Vos failed to apply for an NPDES permit still fails because of Vos' participation in the Iowa Plan. The Iowa Plan (Iowa Department of Natural Resources, Environmental Protection Division, Policy Procedure Number 5-b-15, Iowa Administrative Code 567-65.6(12)) was adopted on March 22, 2001. Ex. R-3. The Plan provided amnesty to Vos and other Iowa feedlot producers from enforcement action for failure to have an NPDES permit. Vos registered for the Iowa Plan on April 4, 2001. Ex. C-12, Tr. 1406-1407.

A. THE IOWA PLAN CONTINUED BEYOND APRIL 1, 2006 AND ACCORDINGLY VOS CONTINUED TO QUALIFY FOR THE AMNESTY WHEN HE RECEIVED NPDES PERMIT COVERAGE ON DECEMBER 6, 2006.

The Iowa Plan was adopted with the following underlying premise:

"The goal of the department will be to have all high priority facilities on a compliance schedule within two years, and to have all facilities in compliance in five years." Ex. R-3, pages 3 and 4, Tr. 1375.

The key point is that the Iowa Plan established a goal of compliance in five years, not an absolute requirement. This was specifically and expressly communicated to EPA Region VII in a letter dated March 22, 2001 from the Director of the Iowa DNR and past President of the Iowa Cattlemen's Association. On page 1 of the letter, EPA was informed of the following:

"This plan has the goal of bringing open feedlots into compliance within five years, yet recognizes the real-world limitations of staffing and time for the DNR, time and money for cattlemen, and infrastructure problems with existing engineering, cost-share and contractors." Ex. R-2, p. 1, Tr. 1372.

By letter dated July 21, 2004, the EPA notified the Iowa DNR that Iowa feedlot operators who participated in the Iowa Plan would be required to be in full compliance within five years and that this deadline was "a firm one." Ex. C-58, Tr. 1391. However, this position was taken by EPA more than 3 years into the Iowa Plan – long after producers like Vos register for the Plan.

Vos experienced the "real-world limitations" recognized from the outset under the Iowa Plan. DNR first conducted an in-house assessment of Respondent's feedlot on October 16, 2001 and then conducted an on-site assessment on June 25, 2003, and determined that Vos' feedlot was medium priority. Ex. C-14 & 15. Under the terms of the Iowa Plan, Vos was not to begin any work towards compliance with Clean Water Act

and Iowa law requirements until the on-site assessment was completed. More than two years of the five-year compliance goal under the Iowa Plan was lost due to DNR not conducting the on-site assessment until June 25, 2003. Ironically, Vos' medium ranking (which meant his feedlot presented less environmental risk) caused his on-site inspection to occur after the higher risk feedlots thereby contributing Vos' delay in being able to meet deadlines under the Plan.

Vos also experienced delay with engineering because due to NRCS staff time constraints, NRCS was unable to meet time deadlines set out by DNR. Tr. 1422-1440. Accordingly, notices of violation were issued to Vos. When he would receive these notices he would immediately contact NRCS and urge them to move forward as soon as possible. Tr. 1423, 1434, 1436. After several deadlines were missed, NRCS contracted with a private engineer, Mr. Brad Woerner, and the remaining engineering work was completed and a construction permit application was submitted on December 5, 2005. Tr. 1069, 1121, 1430-1436.

Iowa Code section 459A.201(3)(a) requires the DNR to approve or disapprove a construction permit application within 60 days after receiving the application (with DNR allowed to grant themselves one 30 day continuance). Vos' construction permit application was submitted on December 5, 2005 and even though submittal was delayed by the factors noted previously, Vos and his engineer testified he could still have constructed controls by April 1, 2006, if DNR met the time requirements of Iowa law for issuing the construction permit. Tr. 1074, 1122, 1438. As it turned out, DNR did not issue the construction permit until August 21, 2006, 262 days after it was submitted. Tr. 1075, 1439. By then it was too late to begin construction before winter of 2006-2007. Tr. 1075, 1439.

Under Iowa law, Vos could not begin construction of his feedlot controls required to comply with the Iowa Plan until a construction permit was issued. Vos was taking all reasonable steps to comply with the Iowa Plan but was being hindered by the "real-world limitations" EPA was warned about at the inception of the Iowa Plan in 2001. Vos should not be denied the amnesty protections under the Iowa Plan due to delays beyond his control.

B. EPA'S ALLEGATIONS THAT VOS WAS REMOVED FROM THE IOWA PLAN ON APRIL 28, 2005 ARE CONTRADICTED BY DNR'S ACTIONS AND EPA'S LETTER TO VOS INITIATING ENFORCEMENT ACTION.

EPA presented extensive testimony at the hearing alleging that Vos had been removed from the Iowa Plan as a result of failing to meet a deadline for submitting a final engineering plan as stated in a letter from DNR dated April 28, 2005. Ex. C-22. This letter, entitled "Notice of Violation/Imminent Termination of Participation in Iowa Plan", stated that if Vos' final engineering plan was not submitted within 30 days of receiving the certified letter, his feedlot would no longer be a participant in the Iowa Plan. Ex. C-22. Gene Tinker of Iowa DNR testified that this letter was the only notice producers

were to receive and if they did not meet the 30 day deadline, they were removed from the Plan without further notice. Tr. 830-836, 875-876, 880-882. He also testified that there was no amnesty after removal from the Plan and agreed that a producer's liability would be reinstated as though they had never been in the Plan. Tr. 832, 836.

Mr. Woerner testified that in his communications with Iowa DNR for Vos after Vos received Ex. C-22, he was never informed that Vos had been removed from the Iowa Plan. Tr. 1069-1070. Vos testified that he first learned he had been kicked out of the Iowa Plan during the evidentiary hearing in this case. Tr. 1448. Evan Vermeer, formerly with the Iowa Cattlemen's Association, testified that he knew of other producers who received termination notices. Tr. 1332. One producer in particular had been removed from the Iowa Plan and that producer received a final termination notice in January of 2005 that did not use the term "imminent." Tr. 1333. The termination letter was signed by Jeff Prier. Tr. 1333. Subsequently, Mr. Vermeer testified, EPA conducted an inspection in April and issued a "violation and fine notice", "probably in June." Tr. 1333. In the case of Vos, he did not receive a final notice of termination. In addition, EPA did not inspect his facility until May 31, 2006, after the scheduled termination of the Iowa Plan. Ex. C-23.

While all of these facts call into question whether Vos had actually been terminated from the Iowa Plan, the most telling fact was the letter he received from EPA dated January 19, 2007. Ex. R-20[4]. Vos received this letter with the Finding of Violation and Order for Compliance. Ex. R-19[5]. Although these documents were received by Vos from EPA and are critical to this proceeding, EPA chose not to include them as exhibits. In any event, regarding Vos' participation in the Iowa Plan, Ex. R-20 states: "You participated in the Iowa Plan, however because of your failures to meet deadlines, you were unable to obtain an NPDES permit and install adequate controls by the end of the Iowa Plan (April 1, 2006)." Ex. R-20, p. 1 (emphasis added), Tr. 1447. This letter was copied to three individuals at Iowa DNR, including Gene Tinker. Putting aside all the other evidence and questions as to whether one notice of imminent termination actually terminated Vos' participation in the Iowa Plan, this letter makes it clear that Vos had not been terminated from the Iowa Plan.

C. THE PENALTY PERIOD, IF ANY, FOR FAILURE TO APPLY FOR AN NPDES PERMIT MUST BEGIN ON APRIL 1, 2006 AND END FEBRUARY 19, 2007.

If it is determined that Vos has failed to apply for an NPDES permit as set forth in Count 2, the penalty period must begin on April 1, 2006 and end on February 19, 2007. April 1, 2006 is the day the Iowa Plan ended and along with it the amnesty protections. However, the fact that Vos qualified for the amnesty provided by the Iowa Plan until April 1, 2006 means the penalty period would not begin until that date. The penalty

[4] Ex. R-20 is a letter from EPA but was not included in either the prehearing exchange of documents nor was it introduced as an exhibit by EPA at the hearing.

[5] Ex. R-19, EPA's Finding of Violation and Order for Compliance, was included in the prehearing exchanges but was not introduced as an exhibit by EPA at the hearing.

period would then end on February 19, 2007, the date Vos reduced his the number of head in his feedlot to less than 1,000 head and was no longer a large CAFO.

The economic benefit portion of any penalty would also be calculated using these dates. EPA's expert Jonathan Shefftz testified that he was "pretty confident" that using these dates the economic benefit penalty "would be less than half of that $65,000" and "fairly confident" that a quarter of that $65,000 figure is in the ball park." Tr. 694.

V. CONCLUSION.

EPA's withdrawal of Count 1 in this case changed the complexion of this case, after the evidence was presented. First, the withdrawal emphasized the lack of evidence of discharges from the Vos feedlot. Trying to continue with this case under Count 2 presents insurmountable challenges to EPA. As a matter of law, EPA cannot maintain a separate cause of action for failure to apply for an NPDES permit. Second, even if the Court determines EPA can proceed with a separate claim for Count 2, EPA must prove an actual discharge of pollutants to a water of the United States. EPA's proof of that is the premise that "water runs downhill." Proof of water running down hill is woefully short of proving an actual discharge of pollutants for an NPDES permit. Hence, EPA's claim in Count 2 of its Complaint must be dismissed.

Dated this 9th day of January, 2009.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon each of the attorneys of record of all parties to the above-entitled cause herein at their respective addresses disclosed on the pleadings of record on the 9th day of January, 2009.

By: ☒ U.S. Mail ☐ FAX
☐ Hand Delivered ☐ Overnight Courier
☐ Federal Express ☐ Other:_____

Signature: Nancy Franklin

Original and one copy to:

Kathy Robinson
Regional Hearing Clerk
U.S. EPA
901 North 5th Street
Kansas City, KS 66101

A copy by regular U.S. Mail to:

Judge William B. Moran
U.S. Environmental Protection Agency
Office of Administrative Law Judges
1200 Pennsylvania Ave., N.W.
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Washington, D.C. 20005

A copy by regular U.S. mail to:

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