UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
901 NORTH FIFTH STREET
KANSAS CITY, KANSAS 66101

BEFORE THE ADMINISTRATOR



| | | |
|---|---|---|
| IN THE MATTER OF | ) | |
| | ) | Docket No. CWA-07-2007-0078 |
| LOWELL VOS | ) | |
| | ) | |
| d/b/a LOWELL VOS FEEDLOT | ) | |
| | ) | |
| WOODBURY COUNTY, IOWA | ) | **ANSWER AND REQUEST** |
| | ) | **FOR HEARING** |
| Respondent. | ) | |

COMES NOW the Respondent, Lowell Vos d/b/a Lowell Vos Feedlot, by and through his attorney, Eldon L. McAfee, and for his Answer to the EPA's Complaint, Notice of Proposed Penalty and Notice of Opportunity for Hearing, states:

1. Respondent admits paragraph 1.

2. Respondent denies paragraph 2.

3. Respondent admits paragraph 3.

4. Respondent admits paragraph 4.

5. Respondent admits paragraph 5.

6. Respondent admits paragraph 6.

7. Respondent admits paragraph 7.

8. Respondent admits paragraph 8.

9. Respondent admits paragraph 9.

10. Respondent admits paragraph 10.

11. Respondent admits paragraph 11.

12. Respondent admits paragraph 12.

13. Respondent admits paragraph 13.

14. Respondent admits paragraph 14.

15. Respondent admits paragraph 15.

16. Respondent admits paragraph 16.

17. Respondent admits paragraph 17.

18. Respondent denies paragraph 18.

19. Respondent admits paragraph 19.

20. Respondent admits paragraph 20.

21. Respondent admits paragraph 21.

22. Respondent admits paragraph 22.

23. Respondent admits paragraph 23 but affirmatively states that the Facility qualifies as a "newly defined" CAFO pursuant to 40 C.F.R. section 122.23(g)(2).

24. Respondent admits paragraph 24 but affirmatively states that the Facility qualifies as a "newly defined" CAFO pursuant to 40 C.F.R. section 122.23(g)(2).

25. Respondent admits paragraph 25.

26. Respondent denies paragraph 26.

27. Respondent admits paragraph 27.

28. Respondent denies paragraph 28.

29. Respondent denies paragraph 29.

30. Respondent denies paragraph 30.

31. Respondent's answers to paragraphs 17 through 30 above are hereby incorporated in answer to the allegations in paragraph 31.

32. Respondent denies paragraph 32.

33. Respondent denies paragraph 33.

34. Respondent's answers to paragraphs 17 through 30 above are hereby incorporated in answer to the allegations in paragraph 34.

35. Respondent denies paragraph 35.

36. Respondent denies paragraph 36.

37. Respondent denies paragraph 37.

38. Respondent admits paragraph 38.

39. Respondent denies paragraph 39.

40. Respondent denies paragraph 40.

41. Respondent denies paragraph 41.

42. Respondent admits paragraph 42.

43. Respondent denies paragraph 43 for lack of information sufficient to form a belief.

44. Respondent admits paragraph 44.

45. Respondent admits paragraph 45.

46. Respondent admits paragraph 46.

47. Respondent admits paragraph 47.

48. Respondent admits paragraph 48.

49. Respondent admits paragraph 49.

50. Respondent admits paragraph 50.

51. Respondent admits paragraph 51.

52. Respondent admits paragraph 52.

53. Respondent admits paragraph 53.

## DEFENSES TO PROPOSED CIVIL PENALTY

Respondent submits that the EPA's proposed penalty is inappropriate considering the statutory factors and specific facts of this case.

1. **RESPONDENT COMPLIED WITH THE CLEAN WATER ACT UNDER EPA RULES IN EFFECT BEFORE APRIL 13, 2003.** 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. There is no evidence that Respondent discharged in an event less than a 25 year, 24 hour precipitation event. Accordingly, Respondent was not required to have an NPDES permit under regulations in effect until April 13, 2003.

Because Respondent was not required to have an NPDES permit until EPA rules effective April 12, 2003 became the law, Respondent has until July 31, 2007 to have an NPDES permit in place. Respondent received its final NPDES permit from DNR on December 6, 2006. Accordingly, Respondent is in compliance with EPA regulations and EPA's allegations and proposed penalty for failure to obtain a permit under the Clean Water Act must be dismissed.

2. **EPA HAS NO PROOF OF AN ACTUAL DISCHARGE.** In this case EPA relies entirely on computer modeling as support for the proposed penalty. Respondent objects to the modeling procedures, including but not limited to use of generalized precipitation data, soils infiltration, and defining the watershed for modeling purposes to include the entire watershed that includes the feedlot. In addition, Respondent's underlying concern is that this model was not developed by the U.S.D.A.

Natural Resources and Conservation Service for another purpose – it was not developed to determine if runoff from a particular source has occurred.

EPA's authority to regulate, and thus bring an enforcement action against, feedlots such as Respondent's was clarified in the case of *Waterkeepers Alliance, Inc., et. al. v. U.S. E.P.A.*. Although not a case that dealt with an enforcement action, the case clearly set the parameters for authority under the Clean Water Act and is therefore directly applicable to this case. The court ruled:

> *"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."* (emphasis added).
>
> While this language is clear enough, the court went on:

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

To be a violation of the Clean Water Act, there must be proof of an actual discharge and computer modeling does not meet this requirement established in *Waterkeepers*. The computer model, as used in this case to support a penalty for a violation of the Clean Water Act, is based on table-derived information, calculations, and conclusions and in no way meets the high standard set in *Waterkeepers* for proving an actual discharge.

3. **RESPONDENT COMPLIED WITH 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. It provided protection to Respondent and other Iowa feedlot producers from enforcement action for failure to have an NPDES permit. Respondent signed up for the Iowa Plan on April 4, 2001.

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."* See the Iowa Plan, pages 3 and 4.

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."*

EPA responded to this letter on April 9, 2001 and while noting it was not a party to the plan and therefore not bound by its terms, EPA expressed support for the Plan and stated: "Our goal is for the Concentrated Animal Feeding Operations (CAFO's) in Iowa to achieve compliance with Clean Water Act requirements as soon as possible." Of particular note is that EPA did not dispute the emphasis in the IDNR and ICA letter that the plan had the *goal* of bringing Iowa feedlots into compliance within five years, nor did EPA convey any disagreement with the Iowa letter's express warning about "real-world limitations" on achieving that goal.

Later, by letter dated July 22, 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." However, this position was taken by EPA more than 3 years into the Iowa Plan – long after producers like Respondent signed up for the plan.

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 Lowell's feedlot was medium priority. Under the terms of the Iowa Plan, Respondent 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 2 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. Respondent also experienced delay with engineering because due to NRCS staff time constraints, NRCS was unable to meet time deadlines set out by DNR. Accordingly, notices of violation were issued to Lowell. After several instances of this happening, NRCS contracted with a private engineer and the remaining engineering work was completed in a timely manner.

Finally, 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 the possibility of one 30 day continuance by DNR). Respondent's construction permit application was submitted on December 2, 2005. And even though submittal was delayed by the factors noted previously, Respondent could still have constructed controls by April 1, 2006, if DNR met the time requirements of Iowa law for issuing the construction permit. As it turned out, DNR did not issue the construction permit until August 21, 2006, 262 days after it was submitted.

Under Iowa law, Respondent could not begin construction of his feedlot controls required to comply with the Iowa Plan until a construction permit was issued. Respondent 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.

## REQUEST FOR A HEARING

Pursuant to 40 C.F.R. section 22.15(c), Respondent requests a hearing on the issues raised in the Complaint and in this Answer.

Dated this 17th day of September, 2007.

BEVING, SWANSON & FORREST, P.C.

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

*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 17th day of September, 2007.

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

Signature: Nancy Franklin

Copy to:

William A. Spratlin, Director
J. Daniel Breedlove, Asst. Regional Counsel
U.S. EPA
Region VII
901 North 5th Street
Kansas City, KS 66101

Kenneth Hessenius
Field Office Supervisor
Field Office #3
Iowa Department of Natural Resources
1900 North Grand Avenue
Spencer, IA 51301