

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE ADMINISTRATOR**

<b>IN THE MATTER OF:</b>	)	
	)	
<b>Lowell Vos</b>	)	<b>Docket No. CWA-07-2007-0078</b>
	)	
<b>d/b/a Lowell Vos Feedlot</b>	)	
	)	
<b>Woodbury County, Iowa</b>	)	
	)	
<b>Respondent.</b>	)	

**INITIAL DECISION**

In this proceeding under Section 309(g) of the Clean Water Act (“CWA” or Act), Complainant, EPA, (“Agency”), alleges that the Respondent, Lowell Vos, doing business as Lowell Vos Feedlot, Woodbury County, Iowa, failed to apply for a National Pollutant Discharge Elimination System permit (“NPDES” permit) for its animal feeding operation or “feedlot,” pursuant to Section 402 of that Act. (33 U.S.C. § 1342). This Count will be referred to as the “permit violation.” As originally filed, the Complaint also alleged that the Respondent had unpermitted discharges of pollutants to waters of the United States, in the form of wastewater flow from its feedlot. This Count will be referred to as the “discharge violation.”

Subsequent to the hearing, EPA, by motion, sought to modify the Complaint, by dropping its discharge violation. That Motion was granted.<sup>1</sup> Thus only the allegation involving the NPDES permit, the “permit violation,” remains. That Count, Count 2, asserts that “[b]ased 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 [the] Respondent began operations around 1975.”<sup>2</sup>

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<sup>1</sup> On December 2, 2009, the Court granted EPA’s Motion, and the Count was withdrawn with prejudice.

<sup>2</sup>Other than reversing the location of the reference to precipitation events in “the last 5 years,” paragraphs 31 and 32 from Count 1 and paragraphs 34 and 35 from Count 2 present identical assertions.

EPA contends that 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. Count 2 goes on to assert that “[l]arge CAFOs that discharge have the duty to apply for a NPDES permit [] [citing] 40 C.F.R. § 122.21(a) [] [and that] 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 had 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. [and] 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.” Complaint at 5-6.

EPA states that to “prove a *prima facie* violation of [the permit violation] Section 1311(a), [it] must demonstrate by a preponderance of the evidence that [the] Respondent : (1) is a person; (2) that discharged a pollutant; (3) from a point source; (4) into navigable waters; and (5) without an NPDES permit or other authorization under the Act.” EPA Br. at 8. The Agency simplifies this burden by expressing that “[t]o establish that Respondent failed to apply for a permit in violation of 40 C.F.R. § 122.212(a), EPA need only show that [Respondent] had a discharge of pollutants to waters of the United States, and he had not applied for a permit.” *Id.* at 8-9. It is EPA’s contention that the evidence establishes that the Respondent failed to apply for a permit prior to the discharge of pollutants to waters of the United States. *Id.* at 9.

Regulations have been promulgated<sup>3</sup> which spell out those animal feeding operations that are covered under the NPDES program. In essence, they apply to a lot or facility where animals are confined in an area that for 45 days in the course of a year, where such area is without crops, vegetation or forage growth. Such a facility is deemed a “concentrated” feeding operation if more than 1,000 (one thousand) slaughter and feeder cattle are confined. However, even if those criteria are met, the animal feeding operation is not regulated if its discharges would only occur in the event of 25 year, 24 hour storm event. EPA Br. at 4. 40 C.F.R. § 122.23. Under new regulations, the definition of a CAFO was revised in 2003 to capture a wider number of feedlots. 68 Fed. Reg. 7176. The new regulations expanded the NPDES program to include any facility that discharged in a 25 year 24 hour rain event. Under the previous as well as the new regulations, CAFOs continued to be obligated to seek a NPDES permit 180 days before any discharge occurred. EPA Br. at 6.

EPA asserts that the Respondent should be found liable for his failure to apply for a [NPDES] permit for the unauthorized discharges of feedlot runoff from his concentrated animal feeding operation [and it proposes] a \$157,500.00 penalty be assessed” for the alleged violation. The Agency notes that the CWA prohibits the discharge of pollutants from point sources to

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<sup>3</sup>The regulations regarding CAFOs were initially promulgated in 1976. 41 Fed. Reg. 11458.

navigable waters, unless authorized and that CAFOs are specifically included within the definition of a point source. The NPDES permit program makes it unlawful for one to discharge pollutants without a permit to do so. Accordingly, CAFOs that discharge must apply for a NPDES permit prior to any discharging. EPA Br. at 3.

While the administrative trial in this matter lasted six days and raised many areas of contention, the critical issue to be resolved is whether EPA established that the Respondent discharged pollutants to waters of the United States. Only by establishing such discharges can EPA prevail in its claim that the Respondent was obligated to obtain an NPDES permit. For the reasons which follow, the Court finds that EPA failed to prove a discharge of pollutants from the Respondent's feedlot to waters of the United States. Therefore, Count 2, the single remaining count, is dismissed.

### **EPA's failure to establish the permit violation.**

The factual essence of EPA's claim is that manure and other feedlot pollutants would leave Respondent's feedlot when a sufficient rain occurred, that those pollutants would travel down drainage paths created during such rains and make their way across a cornfield, eventually arriving at an unnamed tributary. From there such pollutants would then flow to Elliot Creek. Both the unnamed tributary and Elliot Creek are waters of the United States.

The Court's analysis of whether EPA established that pollutants from Vos' feedlot reached waters of the United States examines three aspects of that claim: EPA's direct evidence of discharge; the circumstantial evidence EPA relied upon to establish the violation; and the effect of EPA's withdrawal of Count 1.

Although EPA withdrew Count 1, with its central allegation that the Respondent made unpermitted discharges of pollutants to a water of the United States, the Agency seems to want it both ways regarding the claim of unpermitted discharges. This is evident because EPA asserts that it "continues to contend that the proximity of the Respondent's CAFO in relation to waters of the United States, the lack of adequate runoff controls, and other factors presented at the hearing provide overwhelming circumstantial evidence that Respondent illegally discharged feedlot-related pollutants to Elliott Creek and its unnamed tributary ("UNT") whenever significant precipitation occurred." EPA Br. at 7-8, n.10. Despite its claim of "overwhelming circumstantial evidence,"<sup>4</sup> EPA concedes that, to establish the discharge violation, it intended to rely on "runoff

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<sup>4</sup>EPA similarly casts a favorable slant on another matter, the Court's ruling against its attempt to supplement its prehearing exchange on September 5, 2008, ten days before the start of the hearing, with Iowa Department of Natural Resources photos taken more than five years earlier, in June 2003. For this, EPA maintains that it had made a "diligent file search and review" but still was unaware of the photos until September 3, 2008. EPA contends that the Respondent did not assert EPA lacked "good cause" for its late discovery of the photos, but only that introducing them created "unfair surprise." EPA Br. at 7, n. 9. EPA's description that it

modeling to identify specific days that Respondent's CAFO illegally discharged . . . [but it] recognizes that the inconsistencies in [its] Discharge Modeling Report . . . make it unlikely that [it] could meet its burden . . .” Thus, EPA concedes that it cannot establish specific days when a discharge to United States waters occurred. As will be discussed *infra* this admission by EPA prompts the question as to whether, by withdrawing the “discharge violation,” the “permit violation” can survive, given that both violations require, as an essential element, that a discharge must be established. In fact, the “permit violation,” having all the elements of the “discharge violation” is more onerous to establish because it contains the additional element of showing that a facility is a “large CAFO.”

\_\_\_\_\_ Still, EPA contends that the evidence at the hearing establishes that the Respondent failed “to apply for an NPDES permit prior to the discharge of pollutants to Waters of the United States.” *Id.* at 9. Several elements of the alleged violation are not in dispute. As such, the Respondent does not contest that it is a “person” nor that “agricultural waste” is a type of pollutant within the ambit of the statute and regulations. 33 U.S.C. § 1362 (6), 40 C.F.R. § 122.23(a) (1976 and 2003). Water which comes into contact with raw materials, including manure or bedding, are defined as “process waste water.” 40 C.F.R. § 122.23(b)(7), (2003). So too, Respondent does not dispute that a “point source” includes concentrated animal feeding operations from which pollutants are or may be discharged. Nor does Respondent dispute that his feedlot was a CAFO during the times alleged in the Complaint.<sup>5</sup> Further, EPA asserts that the Respondent does not challenge that Elliot Creek and its unnamed tributary are “waters of the United States.”<sup>6</sup>

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made “a *diligent* file search and review” is not persuasive because a truly diligent review would have disclosed the photos initially. This is evident because, when a diligent review was actually made, albeit at the last moment, the photos were found. There was no explanation offered to explain how such a review, had it been timely made, would not have revealed their presence years earlier. The rules regarding disclosure must have consequences if they are to be meaningful. The consequence, which was appropriately applied in this instance, is that the failure to timely disclose available evidence required that the evidence not be admitted.

<sup>5</sup>EPA notes that “Respondent admitted that at all times relevant his feedlot confined and fed or maintained cattle for a total of 45 days or more in any twelve-month period . . . [that] neither crops, vegetation, forage growth, nor post-harvest residues were sustained over any portion of the feeding areas . . . that at all relevant times his feedlot was an animal feeding operation as defined by [the applicable regulations and the CWA] [and] that he confined greater than 1,000 head of cattle and his feedlot was a Large CAFO at all times relevant to the Complaint.” EPA Br. at 22. Further, it was not until February 19, 2007 that the Respondent “reduced the number of cattle to fewer than 1,000 head.” *Id.*

<sup>6</sup>EPA asserts that Elliott Creek and the UNT are both perennial and connect downstream to a navigable in fact water body. The Respondent admitted that Elliot Creek is a water of the United States. EPA also points to Elliot Creek being denoted as a solid blue line on U.S.

Vos admits that Elliot Creek is a water of the United States. As to the unnamed tributary, Respondent acknowledges that EPA presented evidence that it connects to Elliot Creek and that Respondent did not allege, nor produce evidence to the contrary. However, Respondent then notes certain problems with EPA's evidence on the connectivity issue. It notes that EPA witness Doty acknowledged that while the SWAT modeling indicated daily flow in the unnamed tributary, ("UNT"), the graphs contradicted that claim, as zeros in the graph represented days when there was no flow. Further, the graph's representation that there was a flow rate of 20 to 30 billion gallons of water was incorrect as well. From this, Respondent expresses "concern" about "any reliance on Ms. Doty's testimony or report on the issue of connectivity." Thus, Respondent suggests that EPA did not establish connectivity between the unnamed tributary and Elliot Creek. However, on the basis of the record as a whole, the Court finds that the UNT is a perennial stream, that it connects to Elliot Creek and that it is a water of the United States.

Regarding the central issue of establishing a discharge of pollutants, EPA, citing this Court's decision in *Leed Foundry*, 2007 WL 1934721 (2007), ("*Leed*") notes that in that case common sense was applied where "a facility has many sources of pollutants available for transport." Under its reading of that case, EPA contends that it is not required to sample each site and show that such pollutants actually flow from the facility, where such pollutants would naturally travel along with the storm water. EPA Br. at 10. EPA argues that the Lowell Vos feedlot is no different than the circumstances in *Leed*. The Respondent's feedlot is located on a hill and the unnamed tributary is near to and downhill, that is, at a lower elevation from, from that feedlot. EPA maintains that there are "at least three discharge paths from the feedlot to the [UNT] and they vary from 250 feet [83 yards] to 0.7 miles." EPA Br. at 10, citing CX 23 at pages 4 and 6.

Respondent responds that, upon applying the preponderance of the evidence standard, EPA has failed to provide proof of an actual discharge and that its evidence of discharge is "largely based on circumstantial evidence that was collected to support a computer model." EPA relied upon that computer model to prove there were unauthorized discharges but inadequacies with that model forced it to withdraw Count 1. Respondent's Reply at 1. Respondent contends that EPA must show an actual discharge to establish a violation but that the evidence it presented was "limited primarily to topographical elevations and flowpaths" which cannot be a substitute for "specific, actual proof [of] a discharge." *Id.* at 2.

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Geological Survey topographic maps and it contends that the evidence at the hearing shows that the UNT is a perennial stream that flows year round into Elliott Creek. It observes that the U.S.G.S. topographical map for the area shows the UNT as a solid blue line and therefore indicating it is a perennial tributary of Elliott Creek. It also states that the evidence shows that the UNT has a defined bed and bank, citing TR 162:16-17; CX 23, Attachment 4, 2 Of 16; CX 24 Photo2 & 3;CX 28 Pollard Photo 1-4,; CX 42 Pollard Photo 11 &12. Further, EPA notes that its witnesses observed flowing water in the UNT on each visit to the Respondent's feedlot. It also points out that the Respondent's neighbor testified that the UNT has been a source for baitfish and he contended that it is fed by springs.

Respondent further asserts that the facts in *Leed* are distinguishable. In that regard it notes that the Respondent Vos denies that he was required to obtain a permit, while *Leed* conceded a permit was needed.<sup>7</sup> Respondent also notes that in *Leed*, there were two samples taken, and those samples revealed the presence of pollutants. In contrast, here EPA had many opportunities to take samples, but elected not to do so. This is especially so given that EPA was at Vos's feedlot for the purpose of gathering evidence for this litigation. Yet, despite this acknowledged purpose, EPA decided not to do sampling. It strikes the Respondent as odd that, with better evidence available, EPA still preferred to rely upon elevation differences and "surface waters and the flow paths . . . [and] aerial photography and other circumstantial evidence . . . ." Although it concedes that EPA cannot be expected to be stationed at a given site to obtain evidence of a discharge, the evidence EPA did muster "falls far short of their burden to prove that there was an actual discharge from Vos' feedlot to waters of the U.S." *Id.* As Vos expresses it, merely showing that water flows downhill is insufficient to meet EPA's burden of proof. Respondent maintains that the remaining Count cannot be sustained because the proof needed to establish a violation is proof of an actual discharge, not simply the potential for a discharge.

Vos points out that he scraped his feedlot pens regularly and that, as this practice returned the lots to nearly bare ground, this minimized manure runoff. His use of cornstalk bedding in the winter resulted in the cattle depositing much of their manure in that bedding. Further this bedding was placed away from areas of the pens where runoff would occur. Brad Woerner and EPA itself observed that Vos' lots were clean and well maintained. R's Br. at 11. Respondent then speaks to the five specific dates that EPA attempted to show discharges from the feedlots. Those dates were June 25, 2003, May 31, 2006, March 11, 2008, July 1, 2008 and August 5, 2008. It notes that the 2008 dates all pertain to a time after Vos' feedlot was below 1,000 head. Thus, there was no NPDES permit required for the feedlot at those times. More importantly, Vos asserts that as the number of head was below 1,000 at those times, it was no longer considered a point source. *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6<sup>th</sup> Cir. 1988) sets forth the elements that must be present for the NPDES requirements to apply: there must be a pollutant, which is added to navigable waters from a point source. The absence of any one of the elements removes the requirement to obtain an NPDES permit. R's Br. at 18. As for the June 25, 2003 and the May 31, 2006 dates, dates when the Respondent did have more than 1,000 head of cattle, Respondent contends that in neither instance did EPA prove an actual discharge.

For several reasons, the Court finds that *Leed* is factually distinguishable from the case at hand. While this Court, which authored *Leed*, took notice in that case that sand, dirt and dust would "naturally travel along with the storm water during a rain event," *Leed*'s own storm water sample confirmed that pollutants were exiting the property. Although true that the Court did apply a measure of common sense in concluding that the sand and dirt "would naturally travel along with the storm water during a rain event," the distinction with the Vos Feedlot is the distance such pollutants would need to travel before reach a U.S. Water. Water and its contents

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<sup>7</sup>Respondent also notes that *Leed* involved whether there were discharges, but that for Respondent Vos that claim has been withdrawn by EPA. Respondent's Reply at 2.

exiting the *Leed* site moved from there directly to the municipal storm sewer. In contrast, as the discussion *infra* shows, there is no such evidence in Vos' case that feedlot pollutants were able to migrate sufficiently along the channelized flow paths to reach U.S. waters. While *Leed* was an inherently dusty facility and the conclusion that dirt and sand would naturally move in storm water exiting the property relied in part on that common sense conclusion, it is manure and feedlot products, not dirt or sand, that is at issue here. The Court notes that any fair assessment of pollutants exiting Vos's property must consider both Vos's practice of regular scraping of the lot and the distance any remaining pollutants in that water would need to travel as it exited the property before reaching U.S. waters. Further, one must not lose sight that the flow paths exiting the property, which develop each season, are not such U.S. waters. In Vos' case, waters of the United States only begin with the unnamed tributary and it is at that point, not before, that the preponderance of the evidence must establish that such pollutants arrived. Rather than, as in *Leed*, pollutants moving directly from that property to the municipal storm sewer system, a system designed and intended to convey discharging water, any remaining pollutants in Vos traveled through a corn field. In fact, in *Leed*, three of the outfalls from the site were pipes and the fourth outfall was a direct inlet to the municipal storm sewer. Thus, *Leed* presents a very different factual setting from the corn fields in Vos. If anything, a corn field would operate to impede such flow but at a minimum a corn field is not designed to move discharged water. Put more simply, a corn field is not analogous to a storm sewer.

### **1. Direct Evidence of Pollutants Reaching the UNT**

In its attempt to establish discharges from the Respondent's feedlot reached U.S. waters, EPA first looks to the Iowa Department of Natural Resources ("IDNR") June 25, 2003 assessment of the Respondent's feedlot. On that occasion IDNR inspectors allegedly "observed a discharge from the northwest corner of the feedlot, [which continued] through a terrace and going down through the crop field and into the stream bank and into the [unnamed tributary]." EPA Br. at 13. The IDNR witness, Mr. Prier, stated that the discharge was a brown color and that it caused foaming in the UNT. A downstream water field sample was taken, measuring ammonia and pH. Apart from the field sample numbers, EPA stresses that the feedlot's terrace would not block suspended solids and dissolved pollutants from flowing over it and moving downhill to the unnamed tributary. EPA considers a rainfall amount of 1.82 inches or more to be significant in this case because the Respondent's feedlot had received that much precipitation on June 25, 2003, the day when IDNR observed a discharge from the feedlot's settling basin to the unnamed tributary. It deduces that similar discharges must have occurred on any other date when rainfall met or exceeded that amount. From that premise it calculates that there were many other such rainfall events during the time when the Respondent had 1,000 head of cattle at his site. EPA Br. at n.11 and page 14 and CX 46. EPA looks at the rainfall data and notes that there were "at least 20 [] rain events of 1.82 inches or greater between April 2001 . . . and February 2007" and that each of these would have resulted in discharges. EPA Reply at 21-22. EPA asserts that "[a]t a minimum, Respondent violated the duty to apply for an NPDES permit 180 days prior to the June 25, 2003 discharge to the UNT." EPA Reply at 22, citing 40 C.F.R. § 122.21(c).

In its Reply Brief, EPA points out that the Respondent has not argued that it was able to eliminate all runoff from the feedlot. Instead, it contends that the Respondent's feedlot maintenance efforts served only to minimize runoff. While EPA accepts that the Respondent regularly scrapes his feedlot, he admitted that manure is always present. In this regard it is noted that EPA's argument makes a fundamental error of reasoning, by blurring the distinction between runoff and manure, improperly using the terms, as if they were interchangeable. The terms are not interchangeable. The issue is not whether there is any manure, the issue is whether, given the Respondent's practices, such manure makes its way to waters of the United States.

EPA also points to testimony that the Respondent stockpiled the scraped manure inside the feedlot pens. This practice of stockpiling, it submits, did not alter the manure's exposure to rain or snow. Further, EPA disputes the Respondent's characterization of EPA witness testimony that his feedlot was a "well kept lot."<sup>8</sup> All that referred to, EPA asserts, was a reference to the health of Respondent's animals, not his CWA compliance. EPA Reply at 7.

EPA believes that the Court should adopt Mr. Prier's field test results, taken on June 25, 2003, and consequently reject the Respondent's challenges to that evidence. Prier's field test revealed an ammonia level which was above the background levels in northwest Iowa, a result he attributed to the feedlot. He found ammonia at 3 mg per liter which contrasted with "background levels rang[ing] from 0.5 to 1.0 mg per liter in Iowa." Prier also stated that the pH measurement was different in the unnamed tributary than the background levels. He attributed both results to manure. Although Respondent's witness Hentges stated that the background levels for ammonia were 1 to 6 mg per liter, EPA notes that those figures were not derived from any published literature nor did they arise from any personal field experience. Prier's opinion about ammonia and pH levels, on the other hand, was based on his personal experience taking hundreds of such samples in northwest Iowa. Respondent replies that the DNR downstream field sample is not reliable because, as Mr. Prier stated, the appropriate protocol is not to simply test at the point of discharge, as was done, but to test upstream and downstream as well. In addition, Respondent contends that a field test kit sample is only an "indicator" and therefore is inadequate for enforcement purposes. Samples for laboratory analysis are needed to make a reliable conclusion. Thus, Respondent contends that such inadequate sampling means that one can not make conclusions about the background level of ammonia or pH.

EPA asserts that the Respondent's claim that Prier's observation was simply water flowing from a broken drainage tile, is without merit. It notes that Prier stated he observed the discharge flowing through the terrace and then to the crop field, not from the drainage tile site. EPA Reply at

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<sup>8</sup>In fact, for EPA witness Pollard, EPA maintains that Pollard did not describe Vos's feedlot as "well kept." Instead, Pollard testified that manure would still be present, no matter what Vos's scraping efforts entailed. EPA Reply at 7. EPA is correct, but only in a technical sense, as it was another one of its witnesses, Mr. Sena, who did in fact describe Vos' lot as "well kept, well maintained." and that to him it looked like Vos "scraped regularly, scraped manure [from his lot]." See Tr. 114. Sena's description was not restricted to animal health.

10. Similarly, EPA points to Prier’s testimony that the discharge was “brown” to refute Respondent’s claim that it was merely water.

The Agency also contends that the Respondent’s claim that Prier had no assistance in accurately seeing the discharge is misleading because he took photos of the discharge using a camera with a telephoto lens.<sup>9</sup> However, this is misleading in its own right, because Prier did not testify that he saw the alleged discharge only by using the telephoto lens. Instead, it was his testimony that as he drove by the area he perceived the discharge from his car. Thus, he testified that he could see the discharge from 75 to 100 yards away, using his unaided eyesight. In the Court’s view, that in itself is an incredible claim – that the witness could see the discharge from his car, while driving along, at a distance of between three quarters to a full football field away. Further, it seems odd that the witness was so nonchalant upon viewing this alleged condition. His curiosity was not aroused; he never decided to get closer to what he claimed to have seen, he made no note or record of this asserted observation, and the two other IDNR employees in the car with him at the time did not even get out of the car to witness the discharge. Accordingly, for the host of reasons just cited, the Court rejects this claimed observation, as simply not credible. Further, Prier admitted that Vos had within the terrace a sedimentation basin. Tr. 962. He agreed that such an installation has as its purpose “to settle the solids out before the effluent or liquid manure is released into the proper runoff control basin.” Tr. 962. However, there were no sedimentation basins at the north or south discharge points. Tr. 963. Still, regarding the north discharge point, he agreed that there is a gravel road with grass in a ditch there and that such vegetation and natural features can serve the purpose of settling solids. Tr. 963.

The Court also has difficulties with Prier’s statement that he found evidence of discharges from the feedlot during his visit and that the facility was discharging from northwest corner of the feedlot, flowing over a terrace, and that the discharge then continued through a crop field, moving to a stream bank and then into the unnamed tributary. Tr. 887-888. As noted, Prier revealed that he observed the alleged discharge *from a road which was a significant distance away*. Tr. 888. From that vantage point, he nevertheless described the discharge as brown in color and that, as it

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<sup>9</sup>EPA correctly notes that the Court ruled against the Agency’s attempt to introduce these photos, though it had them for a very long time, a few days before the hearing commenced. See footnote 3. As discussed there the procedural rules allow the Court to disallow such late produced documents from being admitted into the record. As noted, while EPA called the photos “newly discovered” that is quite misleading itself, as it had access to these photos for a very long time but “discovered” them only at the last minute when it asked IDNR to review its files. Sloppy practice is not within the realm of long existing documents, that have been present in fact and only “newly discovered” because the Agency thought it might be a good idea to examine existing files just before trial. Accordingly, the Court rejected EPA’s request that the Court revisit its ruling at the trial and consider the photographs that were not admitted. As explained, apart from the photos which were barred, and Prier’s assertion that he viewed brown water, there were more fundamental problems with Prier’s testimony on this claim.

cascaded down the unnamed tributary, foaming<sup>10</sup> was present in the liquid. Tr. 888. Prier also stated that he saw other points of discharge, on the south and northeast corner of the feedlot, during his visit. Tr. 894. Of significance to the central issue in this case, Prier stated that IDNR only deals with manure when it is found to be entering waters of the state and on June 25, 2003, despite a neighbor's allegations that manure was exiting Vos's feedlot and entering his property, Prier found no such violation. Tr. 924. While at the feedlot, Prier and those with him, also took a field sample of water to assess its ammonia and the pH values. However the sample was not taken at the point where the discharge was leaving the terrace, because *their purpose* on this visit was for an "educational" demonstration for the IDNR people accompanying him, *not for enforcement evidence*.<sup>11</sup> Tr. 890. Had proper procedure been employed to test the water, Prier would have taken three samples, one upstream, one at the alleged point of discharge and one downstream from the facility.<sup>12</sup> Tr. 892. Not a single aspect of the appropriate protocol was followed. At the feedlot itself, where Prier stated he observed a discharge "coming over the berm," he was about 100 yards away from the claimed discharge point. This estimate was simply that, an estimate, as Prier used no measuring device, such as a range finder, to confirm his guess. Nor did he make any notation or record of his estimate at the time he viewed the discharge or even later. Instead, his estimate offered at the hearing came from reliance on his memory of the scene, five years' past, along with a refreshing of his recollection, based on a visit to the site just before the hearing. Tr. 933. It was Prier's testimony that he viewed only "liquid" manure, not any solids. However, on the issue of establishing pollutants reaching waters of the United States, he could not see any liquid manure in the cornfields. Yet, as the corn was only about knee high at the time, one would expect that it would be readily visible. Tr. 936. Also, he admitted that sediment, not manure, could account for the brown color he observed. Tr. 943.

In sum, because of the infirmities described, Prier's testimony did not establish a discharge of pollutants to the UNT.

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<sup>10</sup>Although Prier talked about the presence of foam, he eventually admitted that he has seen foam present when water runs over a bank without organic matter being present. Tr. 939.

<sup>11</sup>EPA Counsel inquired about the sampling location, asking why it was taken "so far" from the discharge point. Prier's response was that he was looking for the "easiest point to take a sample" as he was trying to educate a fellow employee about how to take samples. Prier repeated that the sample was not taken for the purpose of establishing a case against Vos' feedlot. Putting aside the deficiencies for a moment, Prier stated that the ammonia content was not particularly high, though higher than the typical background level. Tr. 892. Given that admission that the testing procedure was invalid, and for the other deficiencies described in this Initial Decision, the Court cannot consider the sample to establish a discharge of pollutants from the feedlot.

<sup>12</sup>Prier further admitted that he has never known of an instance when IDNR has brought an enforcement action based on a field test kit. Rather, they would take water samples for lab analysis. Tr. 942.

EPA also contends that its May 31, 2006 inspection of the feedlot provides further support for its contention that feedlot pollutants made its way to the unnamed tributary. Before examining the contention, the Court notes that the May 31, 2006 inspection was virtually six months after December 2, 2005, the end date of the alleged period of violation. EPA Inspector Lorenzo Sena stated that on that date he observed and documented three distinct flow paths from the feedlot to that tributary, which tributary was flowing at the time of his visit to the site. The Agency describes these flow paths as “well-defined and unimpeded drainage ways leading from the feedlot pens through fields to the south, north and west of the feedlot to the [unnamed tributary].” EPA Br. at 15. EPA asserts that the admitted photographs as well as aerial photographs support this contention. CX 1 Pollard through CX 4 Pollard and CX 6 Pollard, and CX 23 D through K. According to EPA, the aerial photography shows “channelized flow paths connecting Respondent’s feedlot to the [unnamed tributary].” EPA Br. at 17. EPA witnesses Prier and Sena also asserted that the “Respondent’s ‘farm through’ efforts are quickly and consistently eroded by the volume of runoff leaving the Respondent’s feedlot and flowing to the [unnamed tributary].” *Id.*

However, it is the Court’s view that Mr. Sena’s testimony did not especially advance EPA’s case in terms of the critical question – whether EPA has met its burden of proof in terms of establishing that there was a discharge of pollutants to the unnamed tributary. In this respect, Sena’s testimony focused upon Complainant’s Exhibit 23, his report, with its many attachments, all derived in connection with his May 31, 2006 visit to the feedlot. Although Sena’s testimony established that there were drainage paths leaving the feedlot, that is not enough for a *prima facie* case, as the more important issue is whether such paths reached the unnamed tributary *with pollutants* in them. CX 23, attachment 4 at page 1 of 16, provides an informative illustration of this point, as it shows that the feedlot is not adjacent to the unnamed tributary. Sena stated, for example, from points 11 and 12 on that exhibit (with the corresponding photos, numbers 11 and 12), the distance from the runoff to the unnamed tributary was 7/10ths of a mile, although he later scaled that distance down to a half mile, based on the text in his report. Taking a half mile as the figure, the Court still considers this to be a significant distance between the feedlot and the unnamed tributary. Photo 14, also identified as “23A, 15 of 16,” makes this point as well. Further, while Sena opined that the “majority” of the discharges would come from south of the lot, that area also represents the greatest distance to the unnamed tributary.

One need not rely upon the Court’s assessment of this alone, as EPA’s own action in this litigation supports the same conclusion. This is evident because of the Agency’s decision to turn to expert help for the development of modeling to show that pollutants *would reach the unnamed tributary*, reveals that it also felt that more was needed to establish its case. Nor is the analysis simply about the distance that pollutants would need to travel because there is undisputed testimony that Vos scraped his feedlot regularly. Sena, for example, admitted that the photos he took show no evidence of manure or any other type of pollutant from the feedlot. Tr. 123. In fact, he conceded that during his whole inspection that day he saw no evidence of discharge from the feedlot of any pollutants. He did not see any manure stockpiles at the site either and he agreed that the feedlot pens were “well kept, well maintained” and it looked to him that Vos “scraped regularly, scraped manure.” Tr. 114. Sena also saw nothing in the flow paths that evidenced the presence of manure nor anything of that sort in the unnamed tributary. In fact, in a remarkable display of a lack of curiosity, Sena only looked at the unnamed tributary at the point of the culvert

on 100<sup>th</sup> Street, a location above where the flow path would theoretically reach the unnamed tributary. It is fair to add that Sena's testimony was a bit slanted as well. That conclusion is based on his earlier remark on direct examination that there were "no controls" at the site. However, upon cross-examination, he explained that he had a narrow interpretation of "controls," as he admitted that there was a terrace and a basin present. He omitted those controls, because he only counted controls that would contain a 25 year 24 hour precipitation event. Further, when asked if the terrace was constructed to divert or channel whatever gets to the terrace to then go to the basin, Sena offered only that he could not recall. Tr. 108. Accordingly, the Court concludes that Sena's testimony fails to establish that pollutants reached the UNT.

EPA believes that Mr. Stephen Pollard's March 11, 2008 visit to the site reinforces the conclusion that there are channelized flow paths between the feedlot and the unnamed tributary. However, this is not in dispute. It is noted that by this time the March 2008 visit was 2 years and 3 months after December 2, 2005, the end date of the violation alleged in Count 2. At any rate, Pollard testified to the presence of a channelized flowpath from the terrace/settling basin, on the west side of the feedlot, to the unnamed tributary, as well as a path "at the extreme northwest corner . . . flowing [from the feedlot] westerly down to the [unnamed tributary]," and a path "exiting the feedlot at the southwest corner . . . [and] continu[ing] across . . . the cornfield toward the [unnamed tributary]." A subsequent site visit, on July 1, 2008, revealed the flow path from the south end of the feedlot and there was no observation of obstruction to such flow.

EPA contends that this March 11, 2008 evidence of discharges is relevant and the fact that the Respondent's feedlot, having fewer than 1,000 head of cattle, was then outside of regulatory coverage does not diminish the value of that evidence. It takes this position because the March 2008 evidence still demonstrates the presence of flow paths from the feedlot to the unnamed tributary, an observation that is valid regardless of whether the feedlot regulations apply. It argues this is especially true as the evidence is that the feedlot conditions, albeit with fewer head of cattle present, were the same during the time of the alleged violations as they are now. EPA Reply at 13. On the same basis, EPA points to its evidence from July 1, 2008 to establish discharges. That evidence included areas smelling of manure, which areas were fly infested. EPA Reply at 15. Although Respondent attempted to diminish the evidentiary value of Pollard's photographs and their use to establish the presence of pollutants within the southern erosional pathway to the unnamed tributary, EPA contends that Pollard's testimony of his observations, apart from the photos, establishes the presence of pollutants being discharged. EPA Reply at 15-16.

As with Mr. Sena's testimony, it is the Court's view that Mr. Pollard's testimony did not advance the government's case on the critical issue of demonstrating whether pollutants from the feedlot reached the unnamed tributary. *It is quite important to recognize that pollutants moving along flowpaths from this feedlot, or any feedlot, are not sufficient to constitute a violation. Rather, a violation only comes into existence at the point EPA can demonstrate such pollutants enter waters of the United States.* In this case that means showing that pollutants entered the unnamed tributary. Pollard visited the area on three occasions, the first occurring in December 2006. A second visit occurred on March 11, 2008 and the third on July 1, 2008. His first visit to the site was only to gather information about the unnamed tributary and Elliot Creek. He did not visit the feedlot then, nor did he talk with Respondent Vos. Tr. 217-218. Pollard testified that

Respondent's feedlot sits on top of a hilltop or ridge and that there is a slope or gradient that exists between the feedlot and the unnamed tributary. Tr. 145-146. However, the Respondent does not contest the topography of the feedlot and the surrounding area. It is also undisputed that there are channelized flow paths exiting the feedlot and that these develop each year. Tr. 149-152, 157.

On his second visit to the Site, Pollard's purpose was to document the channelized flow paths.<sup>13</sup> By that time Vos had less than 1,000 head of cattle and therefore was outside of the requirement to obtain an NPDES permit. To document flow, Pollard walked the channelized flow paths from feedlot to unnamed tributary. Tr. 187. Pollard stated that typically runoff is contained in these situations by installing sedimentation basins, which then flow into an effluent basin and then accumulations are disposed of, usually through land application. Tr. 203. As with his first visit, he did not create a report on this occasion either. Tr. 219. According to Pollard, Vos told him that his feedlot was scraped once every two weeks. Tr. 202. Pollard did allow that the terrace restricted flow "to a certain extent" but that the flow "ultimately overtopped the terrace." Tr. 174. Photographs were also taken at this time to document flow and in an attempt to show the presence of manure in the channelized flow south of the feedlot. Tr. 180 and CX 28, photographs 23, 26, and 27. Pollard did not take any water samples. Tr. 225-226. While the witness referred to the flow as "runoff" he admitted that no liquid was actually moving on that day, as the runoff was frozen on that day. Tr. 227. Further, although he expressed seeing some runoff coming from feedlot's terrace, he conceded that it could just as well have been snow melt. Tr. 230. Accordingly, he then conceded that he was not able to determine if pollutants were actually coming from the feedlot at that time. Tr. 231, 235. Similarly, while he asserted that runoff was coming from the berm of the sedimentation basin, he allowed that it was possible what he observed was coming from the outside of the berm, as opposed to the inside of it. Nor did he ever walk up to that location to determine exactly if it was coming from the outside or inside of the berm. Tr. 232. He also could not recall if there were any cattle on that day in the portion of the feedlot that drained to that area. Tr. 232.

With all the photos he took, it seemed odd to the Court that, although he walked right up to the alleged pollutant deposits, he did not take a closer photo of the suspected material. Tr. 236. Nor did he take a sample, though he was right there. Yet, he admits that in an investigation like this, there have been times when EPA has taken a sample.<sup>14</sup> Tr. 236-237. In fact, he has taken

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<sup>13</sup> The Court concludes that the witness lacked objectivity, as he was evasive and reluctant to admit even obvious matters such as whether the feedlot was then in compliance due to its reduced feedlot size. Tr. 222. Further, also impacting credibility, it struck the Court as odd that Pollard admitted that he never wrote down at the time he was at the site or even later, any report or notes about his inspection and that absence of recorded observations included any remarks about foaming being observed. Tr. 333.

<sup>14</sup>On the subject of sampling, EPA does have its own sampling test kit and the actual equipment to take such a sample is quite manageable and Pollard has used them. Pollard stated at first that the EPA field test kit is large, consisting of a large, 4 foot by 4 foot, ice chest and sample bottles. However, only the sample bottles are brought to the water to be tested, so the task is not in fact onerous. Tr. 329.

samples himself in the past. Tr. 237. Similarly, though Pollard maintained that there was a channel going through the terrace, he took no photo of that either. Tr. 243. While he asserted that manure was present, this conclusion was based at least in part on his deduction that a feedlot pen will always contain manure.<sup>15</sup> Tr. 245. More to the critical issue here, Pollard admitted that he saw no manure in the channelized flow path, at least regarding photos 17 through 20 and 22. Tr. 252-254. Although he expressed that photo 23 from EPA Exhibit 28, shows manure in the channelized flow path, based on his experience and his sense of smell, again he did not sample to confirm this. He stated that photos 26, 27, 28, and 30 did not show evidence of manure or any other feedlot pollutants. Tr. 276. For photos 31 through 38, only photo 38 raised the possibility of a feedlot pollutant but that conclusion was reached only because of the presence of foam. Foam can be an indicator of high nutrient levels, but he agreed foaming can occur without any feedlot pollutants or contaminants. Tr. 277, 311. It is noteworthy that, as he conceded, his written description accompanying that photo makes no mention of foam. Pollard conceded that what he observed could be feed from the feedlot. Tr. 269.

As with his March visit, Pollard's purpose for visiting the feedlot on July 1, 2008 was to further document channelized flow paths from Respondent's feedlot. Tr. 283. From that visit, he asserted that at least one of the channelized flows had the smell of manure and that flies were present. CX 42, Pollard. Also, as he did in connection with his prior visit, he identified some photos which possibly showed manure or other pollutants. These were photographs 2, 4, 5,<sup>16</sup> 6, and 9. In contrast, there was no evidence of manure or any other feedlot pollutant in photographs 11 and 12. Pollard consciously elected not to take sampling equipment with him. Tr. 288.

Given the absence of evidence to confirm his opinion of his observations, it is noteworthy that the explanation Pollard offered was that the purpose of the visit was *only* to document the channelized flow path, *not* what may have been in it. Tr. 264, 313. With that testimony, that his purpose was limited to document flow paths only, *and not what was in those paths*, the Court can hardly use his testimony to show more than that. As mentioned, there is no dispute that there were flow paths leaving the feedlot. Again, the core dispute centers on what, if anything, was in those flow paths.

Lowell Vos, the Respondent, testified in the proceeding. He described the structures on his feedlot. To the west side he has a basin and a terrace. Below that is a cornfield. Tr. 1404. The west side is the side closest to the UNT. Tr. 1405. To the southeast corner there are two terraces and they act as settling basins too. Tr. 1405. He built his feedlot pen to fit that terrace so it would act a settling basins. Tr. 1405. Vos stated, and the Court credits, that DNR said nothing to him

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<sup>15</sup>Although Pollard marked on Photo 16, from Ex 28, Pollard, where he saw manure, he admitted that when he took the photo he did not go over and examine the material more closely. Tr. 248. Nor did he make the determination at the time the photo was taken that this was possibly manure. Thus, he made this determination only at the time of his hearing testimony.

<sup>16</sup>Respondent separately denominated the same photograph as one of its exhibits, RX 17. While Pollard asserted there were flies at that spot, he admitted that no flies appear in the photo. Tr. 292.

during its visits to the feedlot about seeing a discharge from his lot. Tr. 1413. One would expect that the government would have raised such a matter had it been observed. Thus, Vos stated it was not until the hearing in this matter that he heard the allegation about a discharge. Tr. 1413.

On the basis of the evidence of record, the Court finds that EPA's direct evidence of pollutants entering the UNT is wanting and fails to establish that element of the prima facie case.

## **2. Inferential evidence of a violation**

EPA also attempted to establish, through inferences, that the Respondent discharged pollutants. To do this, it first points to Respondent's feedlot operational history, noting that, in 1991, Vos was issued construction and NPDES approvals to enlarge his feedlot, but the permits contained a requirement that the feedlot have "sufficient storage to contain the feedlot runoff resulting from the 25-year, 24-hour precipitation event (5.0 inches of rain)." EPA Br. at 11, citing CX 9, Special Conditions. That permit, EPA notes, designated "the unnamed tributary of Elliot Creek as the receiving watercourse for runoff from Respondent's feedlot." *Id.* at 11. EPA contends that by the Respondent's obtaining such permits, but never constructing the runoff controls required by such permits, one can conclude that pollutants must have entered U.S. waters. However, the Court concludes that the mere act of applying for and receiving an NPDES permit does not constitute an admission that a facility would discharge pollutants, nor does it prove that such pollutants would, and did in fact, reach U.S. waters.

As a second inference that pollutants must have reached U.S. waters, EPA contends that the area where Respondent's feedlot is located "receives a lot of rain." It supports this description by noting that Sioux City, the location designated as the official precipitation gauge for Respondent's feedlot, received, on average, 29 inches of rainfall and 29 inches of snowfall, annually, during the six year period from January 2002 through December 2007.<sup>17</sup> The Court observes that on the rainfall issue, the parties talk past one another. EPA points to evidence of the rainfall-created gullies from the Respondent's feedlot, which reform every year. It then equates the gully as synonymous with a discharge of pollutants. While water flows in the gully, the Respondent's argument does not challenge that occurrence. Rather, it is Respondent's chief contention that there is no credible evidence that such water contains pollutants nor is there evidence that, if such pollutants were in the gully, they would reach the unnamed tributary.

While EPA acknowledges that, at some time after April 4, 2001, the Respondent constructed a basin and a terrace to the west of his feedlot and also "some additional cattle pens to take advantage of a pre-existing terrace to the southeast of his feedlot so the terrace would act as a basin," it contends that basin only slowed water flow from the feedlot, but it did not prevent runoff.

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<sup>17</sup>EPA cites other statistics from the Sioux City precipitation records during this time frame, including that there "were 53 days when it rained 0.05 inches or more" and that on one occasion 5.73 inches of rain fell over the period from September 9<sup>th</sup> through the 11<sup>th</sup> in 2003. EPA Br. at 11- 12. It also notes that none of the rainfalls were of the 25-year, 24-hour magnitude so as to create an exempted discharge.

It adds that although a settling basin functions to cause solids to sink before water is released, suspended solids and dissolved pollutants do not drop out. Instead they would flow downhill with the water and exit the feedlot. Further, while Respondent's son testified that, as of 2008, a berm surrounds the majority of the south side of the feedlot, there is an opening in that berm and the son acknowledged there are no retention ponds on the feedlot's south side and that water runs off the feedlot to the south. EPA Br. at 13, citing TR 1029 -1030. Accordingly, EPA infers that sufficient rainfall and insufficient barriers mean that pollutants must have exited the property. However, as expressed earlier, assuming that some pollutants would exit the feedlot is not the equivalent of demonstrating that pollutants would reach the UNT.

Addressing what it perceives as Respondent's chief contention, that EPA failed to prove its case by virtue of the absence of effluent sampling data, EPA responds that such evidence is not the exclusive means to prove a discharge. EPA Reply at 12. In this regard while EPA notes that IDNR *did* take a sample, its larger contention is that sampling is not informative unless it is done when a feedlot is actively discharging. Sampling after that point in time is not valuable, EPA maintains, because contaminants would have already moved downstream. Accordingly, EPA contends that the other evidence it put forth amply demonstrates that discharges occurred. *Id.* at 12. EPA also adds that, contrary to Respondent's focus, discharges are not limited to manure. Feedlot related materials, as feed and bedding, and other pollutants such as process wastewater and litter are also prohibited discharges. EPA Reply at 14, citing 40 C.F.R. § 122.23(a). Thus, it is EPA's contention that, whatever the actual nature of the pollutants, EPA has made its case by showing that pollutants leave the feedlot, travel along the erosional pathways and make their way to the unnamed tributary and Elliot Creek. EPA Reply at 14. Again, it is the Court's conclusion that EPA failed, both through direct evidence and by inference to show that pollutants from the Respondent's feedlot made their way to U.S. waters. Showing that an area receives "a lot of rain" does not show that pollutants were present in any discharges from the feedlot, nor that any assumed pollutants would migrate sufficiently to reach the UNT. EPA knew there was a deficiency in its evidence on this subject and plainly that is why it attempted to develop the models to show that pollutants would reach that destination. In the end EPA itself knew that its own models were fatally flawed and upon consideration of all of the evidence it presented at the hearing, the Agency concluded that it could not establish Count 1.

With that last thought in mind, not much needs to be said concerning the testimony of government witness Sandra Doty<sup>18</sup>. While she is a nice person, her testimony could fairly be described as a disaster for the government. That this is a fair conclusion is evidenced by the fact that, post-hearing, the government elected to not refer to any of her testimony and to drop Count 1.

Bryan Hayes, a fishery biologist employed by the Iowa Department of Natural Resources, also testified for EPA. He certainly has relevant experience in assessing small Iowa streams such as those involved here, the unnamed tributary and Elliott Creek. Along with others from IDNR, he

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<sup>18</sup>As EPA has failed to establish the violation alleged in Count 2, there is no purpose served to any discussion of the testimony of EPA witness Jonathan Shefftz, whose testimony pertained to alleged economic benefit derived from the Respondent's alleged lack of compliance.

did a fish survey at the site on August 5, 2008, taking two samples in Elliot Creek and one in the unnamed tributary. CX 53. Tr. 712. Suffice it to say that he found low abundance and low diversity in both the lower and upper stream sample he took at Elliot Creek. Hayes believed that the resident fish population at Elliot Creek has been wiped out, but the issue is whether EPA has demonstrated that the Respondent's feedlot has played a role in that. Although Hayes pinned the blame on Vos's feedlot, that conclusion cannot be sustained absent evidence that pollutants from that feedlot entered the unnamed tributary, not to mention that such pollutants traveled further downstream to Elliot Creek.<sup>19</sup> While he opined that a chronic stream water quality problem existed, this finding was made at a time, August 2008, when Vos's feedlot was outside of any NPDES regulatory coverage. And this was not a brief period of time. Vos' feedlot fell below the regulated number of cattle more than a year and a half *before* the fish sampling. That sampling, it strikes the Court is too far removed from the point in time when Vos' feedlot was under regulatory coverage to have probative value. Also, there was testimony from EPA witness Hayes that fish are resilient and that populations recover once the pollution source is removed. Yet, as one must assume that EPA determined that a feedlot of less than 1,000 cattle would not adversely affect waters, the fish count was still low a year and a half later.<sup>20</sup>

In any event, the Court concludes that the fish survey results are insufficient by themselves, absent evidence that pollutants from Vos' feedlot reached the UNT. Therefore, even if it were true that Vos's feedlot was the reason for the low diversity and low population, the reduction of the feedlot to a non-regulated size, has not favorably impacted the fish at the locations tested. Further, while the fish population was assessed, the actual water quality was not evaluated. Tr. 760. This would seem relevant, as Hayes believed that ammonia and organic matter were the culprits for the low fish count. In fact, he conceded that a water sample would have been useful to his assessment, but such samples are not part of the usual routine in these matters. Tr. 760. Because the water was not tested, he could not say whether in fact the ammonia level was high, and therefore that view remained a suspicion, not a fact. So too, he conceded that sediment runoff can cause a low fish population. In terms of organic matter as the source of the problem, Hayes noted that he did not observe any when he was there. Tr. 764. Also casting some doubt on the witness' conclusions,

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<sup>19</sup>As with EPA witness Pollard, Hayes did not generate any report from his study. While he took notes, which contained raw data, he did not bring them to the hearing. No conclusions about his data were put in writing. Tr. 743, 748. Again this seems odd and contrary to this Court's decade-long experience with experts evaluating situations. Further, Hayes did not make his assessment in a vacuum. Rather, he knew before arriving at the scene, that his assessment was requested in connection with the issues surrounding Vos's feedlot. Tr. 750.

<sup>20</sup>EPA also finds support in witness Hayes' dismissal of other explanations for the low fish results, such as barriers and adjacent crop land. It asserts that, because of his expertise, Hayes' testimony is more reliable than that of Respondent's witness Beavers. Further, EPA contends that Beavers' testimony does not refute Hayes' views. This is because Hayes expressed that fish are resilient and, at those times when the stream is unpolluted, fish would migrate back upstream. EPA Reply at 16-17. Yet, as noted above, a year and a half after Vos was outside of regulatory requirements, the fish population remained low. Given the inadequacies identified with EPA's evidence on this issue, the Court concludes that Beavers' testimony is more reliable.

Hayes admitted that he did not know how far feedlot was from where he did the unnamed tributary assessment. Nor did he drive up to the feedlot that day. He has only observed the feedlot through aerial photos. Tr. 778. Beyond these deficiencies, the August 2008 findings certainly do not, per force, relate back more than two years earlier, to December 2005, which is the end date for the period of the alleged violation.

EPA looks to Vos's actions to show that he knew a permit was needed. The Agency attempts to use the issuance of the NPDES permit in 1991 to Vos as evidence to establish the violation asserted in Count 2. Vos contends that his 1991 NPDES permit is irrelevant to this proceeding. The Court agrees that Vos' earlier actions cannot be used to establish that he was required to obtain a permit. As Vos explained, he sought the permit in anticipation of purchasing the feedlot site and expanding its size, but when he was unable to buy the land he abandoned those plans and consequently never undertook the construction allowed under the NPDES permit. Quite apart from Vos' explanation, his action in seeking a permit cannot be used to establish his obligation to obtain one. That an individual may mistakenly think a permit is necessary, or may elect to obtain a permit in anticipation of future expansion, cannot act as a substitute for the government's obligation to affirmatively establish its case. Accordingly, inferring a duty to seek an NPDES permit by an individual's act of applying for such a permit is inadequate proof for the government to establish the violation. The Court also agrees that one incurs an obligation upon receiving an NPDES permit only when one actually undertakes the construction. In that event, the permit holder must construct in accordance with the permit's requirements.

Using similar reasoning, EPA points to Vos' registering under the Iowa State Plan, and that Plan's affording a period of amnesty from enforcement. EPA observes that IDNR confirmed that Vos needed runoff controls and Vos never challenged that finding. EPA Response at 25. Further, in June 2004, Vos sent IDNR a plan which included the construction of settling basins and holding ponds. Finally, in 2005, Vos submitted "final plans" for controls to deal with runoff. All of these actions are consistent with one who knows he has an operation which is discharging pollutants and therefore in need of discharge controls. EPA Response at 26. EPA also construes Vos's testimony, as showing that he was aware he needed such controls but consciously decided not to construct them because he only rented the feedlot land.

EPA notes that while the Respondent claims that there is no credible evidence that his feedlot discharged except in the event of a 25 year, 24 hour storm, there is no basis to conclude that his feedlot would prevent runoff from lesser storm events. To the contrary, EPA argues that the NPDES permit issued to the Respondent in 1991 required him to build sufficient runoff controls to contain all runoff short of a such a storm event. EPA Reply at 19. EPA contends that the Respondent failed in this obligation and that he opted to register in the Iowa Plan in 2001 because he had failed to construct the controls provided by the 1991 NPDES permit. Further, EPA asserts that the June 25, 2003 IDNR on-site assessment demonstrated that Respondent's feedlot lacked the controls to contain the 25 year 24 hour storm and Respondent did not challenge this determination. EPA Reply at 20, Tr. 886, 893-894, 896. EPA also contends that Respondent's own proposed construction runoff plan, submitted on his behalf by the Natural Resources Conservation Service (NRCS), with its proposed sediment detention basins, waste storage ponds and diversions, itself shows that Respondent needed such controls. EPA Reply at 20. Likewise, Respondent's

December 2, 2005 application for an NPDES permit, which included such runoff control structures to deal with any storms less than a 25 year 24 hour storm, shows that such controls were needed. *Id.* at 21.

EPA also believes that the testimony of Respondent's witnesses, Mr. Hentges and Mr. Brad Woerner, supports the Agency's contentions. Noting that Hentges believed that bedding or feed was present in the erosional rills and gullies, EPA observes that such materials are considered to be "pollutants" under the Clean Water Act. They also point out other concessions made by Hentges, such as his observation that berms at the feedlot did not surround the entire area, and that "there were erosional features coming off the feedlot." Tr. 1229:24-1230:1. Mr. Hentges also recognized Respondent's feedlot is on the top of a hill and that water runs downhill from the feedlot. Tr. 1231:2-4; Tr. 1231:5-6. He opined that "water would run off the site during a heavy rain and that the water would primarily migrate to the west and the south through the erosional features." Hentges further agreed that "photographs presented by EPA demonstrate a continuous path from the edge of the feedlot down to the [unnamed tributary]."<sup>21</sup> Further, he conceded that if any "dissolved pollutants [were] entrained in the water, they would likely reach the [unnamed tributary]." EPA Br. at 20. EPA adds that Respondent's witness Hentges conceded that erosional pathways would develop during rapid runoff events. Though Hentges did not believe these to be permanent nor long term, EPA states that this shows such rain events create pathways which form and reform each year between the feedlot and the unnamed tributary.

Respondent counters that Mr. Hentges believed the field test sample itself showed an expected ammonia level, not an unusual one. Respondent's Reply at 6. Respondent also contends that EPA's use of Mr. Hentges remark that pollutants will likely reach the unnamed tributary distorts his full remark on that issue. Although Respondent acknowledges that Hentges stated that it is likely that water from the feedlot would reach the unnamed tributary and that it was possible that pollutants travel down the runoff flowpaths from the feedlot, he agreed that pollutants would reach the unnamed tributary only *if* there were dissolved pollutants entrained in that water. The "*if*" Hentges spoke about would depend upon a number of factors such as the "intensity and amount of rainfall as well as the saturation of the soils." Respondent's Reply at 7. In Respondent's view, Hentges ultimately stated that sampling was the only reliable way to establish whether a discharge of pollutants actually occurred. *Id.* The Court agrees with Respondent's assessment. It is possible that feedlot pollutants reached the UNT, but the issue is whether EPA proved that by a preponderance of the credible evidence.

As to EPA's interpretation of the testimony of the Respondent's feedlot design engineer, Brad Woerner, the Agency notes that Woerner's design took into account the drainage area of the feedlot and where such water drainage would travel. Woerner then designed structures that would be able to handle that runoff, consistent with the IDNR regulations. EPA notes that Woerner's design for holding ponds to address the feedlot runoff corresponded to the lot's discharge pathways

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<sup>21</sup>Not all of EPA's review of Hentges' testimony was laudatory. It criticizes his concession that "fecal coliform, phosphorous, and nitrogen are pollutants," because he only considered manure in his pollutant assessment.

to the north, south and west and that this was consistent with EPA's testimony identifying the same runoff routes. Woerner also agreed that Elliott Creek was the receiving water for the Respondent's feedlot runoff. EPA observes that Mr. Woerner would only have designed holding ponds with a total capacity of 830,000 cubic feet because such a large retention area was needed.

However, it should be noted that Woerner's testimony also spoke to the existing arrangement at Vos' feedlot. Woerner identified R's Ex. 9 as a photo<sup>22</sup> of Vos' feedlot looking to the west, where he noted the presence of a catch basin. Woerner also considered Vos' facility as one of the cleaner feedlots he has seen. Tr. 1059. So, too, referring to R's Ex. 10, Woerner noted that it is a view on the south side of the feedlot, looking north and that there is a significant grass strip in the forefront of that photo Tr. 1060. He described it as a healthy grass strip with no dead spots visible. R's Ex. 11 shows more of the same grass strip facing towards the northeast. He noted that this grass area has a berm to it. Tr. 1062.

EPA did note that the Respondent's son, Mike Vos, testified about the efforts made to maintain the feedlot by frequently scraping away the manure and by land-applying the manure on the fields when crops are not growing. However, the Agency contends that scraping can never remove all the manure and, when land-application cannot be performed, the manure is stockpiled on the feedlot. Further, Mike Vos admitted that there are no retention ponds on the feedlot's south side and that water runs off the feedlot to the south. EPA Br. at 21. Vos testified that in the summer they will stockpile the manure while the crops are growing but once they start to harvest they will load the manure and spread it in the fields. Tr. 997. The fields are large, 296 acres. Tr. 1000. For about half of the summer they are able to deposit in the fields. Tr. 1013. EPA has not claimed that such land application is improper. When snow is an issue, they scrape it all up and dump it in the terraces. Tr. 1000. Mike Vos marked on R's Ex. R-18 the two areas where the snow is deposited and it is noted that the area to the south of the feedlot is a significant distance apart from the flow paths which leave the feedlot. Both areas he marked on the exhibit have terraces which is to the west of the feedlot. Vos stated that the terrace retain any snow which melts. Tr. 1005. While the second deposit area is just above the UNT, Vos stated that the snow and waste is deposited in a terrace there. For one of the terrace deposit areas, to the west of the feedlot, it is noteworthy that there was no testimony that there were flow paths from that area to the UNT. Rather, the testimony concerned itself only with flow paths leaving the feedlot.

Mike Vos added that when they put down bedding for the cattle, it is placed at the highest end of the feedlot, and thus the furthest distance from runoff locations. Tr. 1007. Although he agreed that when it rains some of the manure will move and that there are times when the manure is stockpiled, with a stockpile created in each pen, this covers only about 1/20th of the area of a given pen. In this way, less surface area is exposed to the rain than if it were not consolidated. Tr. 1014. Vos also maintained that in the winter most of the cattle manure is deposited in the bedding, so the yards themselves do not get that dirty. Tr. 1018.

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<sup>22</sup>The photos Woerner referred to were taken in May 2005.

Upon full consideration of the inferential evidence EPA offered, the Court concludes that such evidence does not show that pollutants did in fact reach U.S. waters.

### 3. The impact of EPA's withdrawal of Count 1

As noted at the outset of this Initial Decision, in the area that matters most for this case, Count 1 employs nearly the same language as Count 2. That is, the essential disputed charge in Count 2 is that the Respondent discharged wastewater containing pollutants into Elliott Creek. Yet, the same essential charge exists in Count 1 as well. This cannot be ignored.

EPA maintains that the Respondent incorrectly focuses upon Section 402 of the Clean Water Act because the basis of EPA's claim is Section 308 of that Act.<sup>23</sup> It is EPA's position that the Respondent had a duty to apply for an NPDES permit under Section 308 that predated the discharge EPA alleges. Thus, Respondent's reliance on the *Waterkeepers* decision is misplaced, because that decision involves Section 402, not Section 308. EPA Reply at 1. EPA asserts that its withdrawal of Count 1 has no bearing on its ability to establish the violation alleged in Count 2. For the reasons expressed, the Court does not agree that the withdrawal has "no bearing" on Count 2.

EPA characterizes Respondent's assertion as a claim that there cannot be an independent cause of action for a failure to apply for an NPDES permit under the Clean Water Act. This claim, EPA asserts, rests upon the idea that the withdrawal of EPA's allegation that the Respondent violated Section 301 precludes the Count 2 claim.<sup>24</sup> Instead, as mentioned, EPA maintains that Count 2 is solely about whether the Respondent violated Section 308. EPA notes that the "CWA is premised on the prohibition against the unauthorized *discharge of pollutants* to waters of the United States from point sources, and it establishes the NPDES permit as the mechanism by which point sources are authorized to *discharge*. In order to receive an NPDES permit, a *discharger* must

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<sup>23</sup>In truth, EPA's Count 2 asserts that the Respondent's failure to apply for a permit violates Sections "301, 308 and/or 402 of the CWA, 33 U.S.C. §§ 1311, 1318 and/or 1342 and implementing regulations." Complaint at 6. The regulation cited is 40 C.F.R. §122.21(a). *Id.* Section 301, entitled "Effluent limitations," is very lengthy, but its core element is that, unless in compliance with various other sections of the CWA, the discharge of a pollutant is unlawful. Section 308 is about records and reports concerning effluent limitations, and Section 402 is about the issuance of permits for the discharge of pollutants including the conditions prescribed for their issuance. To cut to the heart of the matter, Count 2 is based upon Respondent's failure to apply for an NPDES permit, but there is no duty to make such an application unless EPA proves each element to establish a violation of Section 1311(a). These are, as stated earlier, that the Respondent : (1) is a person; (2) that discharged a pollutant; (3) from a point source; (4) into navigable waters; and (5) without an NPDES permit or other authorization under the Act." EPA Br. at 8.

<sup>24</sup>EPA maintains that the decision in *Environmental Protection Information Center (EPIC) v. Pacific Lumber Company*, 469 F.Supp. 2d 803, 826-827, (U.S. Dist. Ct. No. Dist. CA 2007) is not applicable. EPA Reply at 3.

first apply. . . . CAFOs *that discharge* must apply for NPDES permit coverage in advance of *discharging*.” EPA Reply at 4 (emphasis added). However, as the emphasized words highlight, one must be a discharger to fall within the NPDES requirement for a permit, and it is the Respondent’s central contention that EPA did not prove that Vos is a discharger.

As noted, Respondent’s chief contention is that the “NPDES permit requirements do not apply unless there is ‘an actual addition of any pollutant to navigable waters.’” *Id.*, citing *Waterkeeper Alliance, Inc. et al. v. U. S. EPA*,<sup>25</sup> 399 F.3d 486 (2d Cir. 2005). Establishing only that “water runs down hill,” as Respondent puts it, does not meet that burden.

EPA contends that the Respondent misreads the *Waterkeeper* decision. The Agency asserts that *Waterkeeper* holds only that “EPA cannot require a CAFO to apply for a permit based on the potential to discharge.” EPA Reply at 4. EPA agrees that it cannot require one to obtain an NPDES permit on the basis of a mere potential to discharge. *Id.* In fact, EPA asserts that the support for its case is based on its proof of actual discharge of feedlot waste to waters of the United States. It contends that it produced substantial evidence at trial establishing discharges to the unnamed tributary and to Elliott Creek. *Id.* at 5. The *Waterkeeper* decision, EPA sums up, is simply that there must be more than a mere potential to discharge. However, the same decision makes it clear that “actual dischargers must have a permit.” *Id.*

The Court observes that the upshot of the respective assertions by the parties is that they do not have a real disagreement over the import of the *Waterkeeper* decision. Nor do the parties claim that the *Waterkeeper* decision is instructive on the question of the evidence EPA must present to show actual discharges. On the question of the level of proof the Agency must put forth to show an actual discharge, EPA asserts that circumstantial evidence is sufficient and that it has presented a “mass of circumstantial evidence” which it also describes as “overwhelming circumstantial evidence,” in this instance. EPA Reply at 5, 6, citing *In re Service Oil Co.*, Docket No. CWA 08-2005-0010 (ALJ Biro August 3, 2007), *aff’d* 2008 WL 2901869 (EAB 2008).

Speaking more specifically to its contention that the consequence of EPA’s withdrawal of Count 1 impacts Count 2, which is the only remaining count, Respondent maintains that, as Count 2 depends upon the same factual basis as Count 1, and since EPA withdrew Count 1, it follows that Count 2 must be dismissed. Respondent compares the Complaint’s Paragraph 32, pertaining to Count 1, with Paragraph 35, which applies to Count 2, describing the two paragraphs as “identical in substance and nearly word-for-word.”<sup>26</sup> R’s Br. at 6. Respondent contends that, as the basis for

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<sup>25</sup> While Respondent acknowledges that *Waterkeeper* involved rulemaking by EPA, it emphasizes that both this proceeding and *Waterkeeper* were attempts by the Agency to make the CAFO prove that it had no potential to discharge, and thereby shifting the burden away from the Agency.

<sup>26</sup>Paragraph 32 asserts: “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 conditions 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

both Counts 1 and 2 stems from the nearly identical language in Paragraphs 32 and 35, Count 2 must fail because EPA withdrew the same essential allegation from Count 1.<sup>27</sup>

Although EPA concedes its runoff modeling efforts had errors, causing it to abandon the modeling evidence, it still asserts that dropping the “unpermitted discharge count has no bearing on the reliability and credibility of the observations made in the field.” EPA Reply at 7. However, if that is so, EPA’s decision to drop Count 1 made no sense. EPA maintains that the observations made in the field show “that Respondent discharged and continue[d] to discharge feedlot wastes to the UNT and Elliot Creek.” To reiterate, the problem with EPA’s contention is that, if accepted as true, nothing prevented the Agency from continuing with Count 1, sans the modeling evidence.

Associated with the Respondent’s inference that, by dropping Count 1, EPA cannot prevail in Count 2, is its claim that “there is no independent cause of action under the Clean Water Act for failure to apply for an NPDES permit, regardless of whether [the Respondent, Lowell] Vos discharged.” R’s Br. at 7. Vos contends that both Counts “hinge on proving discharge of pollutants to a water of the United States.” R’s Br. at 7. Because EPA dropped count 1, Respondent deduces that “if EPA cannot pursue a claim for unpermitted discharges under section 301 of the Clean Water Act . . . it cannot pursue a claim for Vos’ failure to apply for an NPDES permit.” *Id.* Vos contends that by dropping the unpermitted discharge of pollutants claim in Count 1, the basis for Count 2 evaporates because the Section 402 claim also requires the same evidentiary showing – that there was an unpermitted discharge of pollutants to U.S. waters. Respondent asserts that, given EPA’s withdrawal of Count 1, the remaining Count, the failure to

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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.” By comparison, Paragraph 35 is, as Respondent states, nearly identical, as it provides “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.” The Court has noted earlier in this decision that the only change involved moving the phrase “within the last 5 years” from the middle of a sentence within Paragraph 32 to the end of the same sentence within paragraph 35.

<sup>27</sup>This is not to state that Count 1 and 2 are identical, only that Respondent asserts that the essential language shared in Paragraphs 32 and 35 mean that EPA’s withdrawal of Count 1 necessitates it must fail, by virtue of the shared essential language, in its attempt to prove Count 2. Respondent concedes that, despite dropping Count 1, technically EPA can still pursue Count 2. However, it contends that EPA’s acknowledgment that it cannot prove the Count 1 claim necessarily means it cannot prove the Count 2 claim because both share the requirement of proving a discharge of pollutants to a water of the United States. R’s Br. at 7.

have an NPDES permit, must fail because “there is no independent cause of action for failure to apply for an NPDES permit [and this true] regardless of whether there has been a discharge to waters of the U.S.” R’s Br. at 1., citing *Environmental Protection Information Center v. Pacific Lumber Company*, 469 F. Supp. 2d 803, 826, 827 (U.S. Dist. Ct. No. Dist. Calif 2007) (“*Pacific Lumber*”). The Court does not agree with Respondent’s contention. Count 2 alleges that Vos’ failure to apply for an NPDES permit violates Sections 301, 308, and/or 402 of the CWA. The key sections with regard to Count 2 are Sections 301 and 402. Those sections go hand-in-hand, with 301 making it clear that the discharge of pollutants is unlawful except as in compliance with, among other sections of the CWA, Section 402. The latter section, Section 402, establishes the NPDES permit structure. Thus, the two sections, among several others, are intertwined. Still, the fundamental prerequisite of a discharge is ever present.

Allowing that the Court could interpret the CWA as imposing a duty to apply for an NPDES permit if it is shown that there has been a discharge of pollutants, Respondent still asserts that the Act also can be interpreted to hold that there is no duty to apply for a NPDES permit, only that one cannot discharge pollutants without such a permit. Restated, Respondent argues that there is no cause of action for failure to apply for a NPDES permit, only a cause of action for failure to comply with the terms of such a permit.

The Court holds that EPA’s decision to drop Count 1 does not deprive the Agency of the opportunity to establish the violation of Count 2. Of course, EPA must establish *all* of the elements of the violation alleged in Count 2. Even Respondent acknowledges that the decision it relies upon, *Waterkeeper Alliance, Inc. et al. v. U. S. EPA*, 399 F.3d 486 (2d Cir. 2005), “can be interpreted to say that if there is a discharge of pollutants, there is a statutory obligation to obtain an NPDES permit.” R’s Br. at 8. Therefore, Respondent’s argument that the decision to withdraw Count 1 *necessarily* prevents EPA from proving its Count 2 claim, is rejected.<sup>28</sup> However, affirming that EPA has the opportunity to establish Count 2, regardless of its action to withdraw Count 1, does put EPA in a problematic evidentiary posture for Count 2. That is, EPA’s self-initiated action to withdraw Count 1 cannot be completely ignored in the analysis of whether it was able to establish Count 2. Obviously, EPA felt that the evidence it presented for Count 1 would not support a finding that the preponderance of the evidence established a violation. The next logical question is which element, or elements, among those in Count 1 did the Agency conclude

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<sup>28</sup> The Respondent’s contends that the “only part of the Clean Water Act that directly governs NPDES permits is § 402.” Working from that argument Vos asserts that the provision does not create a duty to apply for a NPDES permit, but only sets forth the procedure for filing an application to obtain a permit. Respondent’s argument is nothing more than a restatement of its initial argument which, reduced to its essence is that: Count 2 requires EPA to show that there has been a actual discharge of a pollutant. Count 1 requires showing that there has been a discharge of a pollutant, and since EPA withdrew Count 1 it has conceded that it cannot show there was such a discharge. At bottom, if EPA can establish that the Respondent discharged a pollutant, and that the Respondent’s feedlot was a large CAFO, the duty to apply for an NPDES permit applied to the Respondent and the failure to so apply would constitute a violation of Sections 301, 308 and/or Section 402 of the CWA, 33 U.S.C. §§ 1311, 1318, and/or 1342.

was wanting? The answer is obvious. EPA was acknowledging that it could not establish the addition of a pollutant to waters of the United States. That is the very same element, equally required to establish a violation of Count 2 and not surprisingly it is the Respondent's chief challenge to Count 2. In short, it makes no sense that EPA has conceded that it cannot establish the discharge of a pollutant element for Count 1 while claiming that it can show the same element for Count 2. The Court cannot simply ignore the significance of EPA's admission of the weakness of its evidence for Count 1 when the same evidentiary issue is presented in Count 2.

## **Conclusion**

In sum, the Court has analyzed the evidence presented by EPA to establish that the Respondent discharged pollutants to the UNT and finds that the Agency failed to establish that element of Count 2. Having independently reached that conclusion, the Court also notes that EPA's decision to drop Count 1, with its admission "that the inconsistencies in [its] Discharge Modeling Report . . . make it unlikely that [it] could meet its burden . . .," EPA has effectively acknowledged the reasonableness of, and support for, the Court's finding that Count 2 must also fail. While EPA presented some evidence from which one could infer that the Respondent's feedlot discharged pollutants, such inferences at least in light of the evidence presented, are not the equivalent of proof of an actual discharge. Beyond that, balanced against those inferences is the fact that the Respondent maintained a clean feedlot, that the lot is not adjacent to the unnamed tributary, and that the berms the Respondent did have some effect in reducing flow from the feedlot. When one considers the Agency's own evaluation of the weakness of its ability to establish discharges, as evidenced by its unilateral decision to drop Count 1, the Court, considering all the evidence, concludes that EPA failed to establish discharges to waters of the United States, per Count 2, by a preponderance of the evidence. Accordingly, the remaining Count, Count 2, and the Complaint, is DISMISSED.

## **ORDER**

For the reasons set forth in this Initial Decision, this matter is hereby DISMISSED.

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William B. Moran  
United States Administrative Law Judge

June 8, 2009  
Washington, D.C.

## APPENDIX

A significant amount of time during the hearing was spent on the “Iowa Plan,” that is, the Plan designed to bring feedlot owners in Iowa into compliance with NPDES requirements, to assist them in reaching compliance and to offer the ‘carrot’ of amnesty, at least from any state prosecution. The evidence concerning this subject will be recounted briefly, but the larger point is that the Iowa Plan, (“Plan”), whether Vos was terminated from it, and whether EPA was estopped from bringing CWA violations for those participating in that state plan, are of no moment if it has not been demonstrated by a preponderance of the evidence that the feedlot owner discharged pollutants in the first place. That is the situation here, as this Initial Decision finds that EPA did not make its case, having failed to meet its evidentiary burden. With that important point in mind, the evidence concerning the Iowa Plan is set forth in the Appendix to this decision, but only for the sake of completeness. As with the body of the Initial Decision, the Court’s determinations in the Appendix also constitute findings of fact.

### **The Iowa Plan**

EPA asserts that participation in the Iowa Plan does not amount to compliance with the Clean Water Act. Simply put, EPA argues that the agreement between the industry group representing feedlot owners and the state regulatory agency does not have the effect of supplanting the federal statute. EPA Response at 27. Apart from that, EPA asserts that, even considering the Plan, the Respondent failed to comply with it, as evidenced by his termination from that Plan. *Id.* at 28. Nor, the Agency contends, is there any basis to accept the Respondent’s claim that the Iowa Plan’s amnesty somehow extended beyond the life of the Plan’s 5 year term. While the term “goals” appeared at times in communications concerning the Plan, EPA asserts that use of that term did not supplant the 5 year time line for compliance. *Id.* Instead, EPA points to the testimony of IDNR’s Tinker, who stated that it was expected that those participating would have their “permits in hand and controls in place at the conclusion of the Iowa Plan.” *Id.* at 29.

By Respondent’s accounting of the facts, Lowell Vos had plans to enlarge his feedlot. However, Vos rented the feedlot land. Although he voluntarily applied for a construction and NPDES permit in 1991, his expansion plan hinged upon being able to buy the feedlot land. When the owners would not sell the land, Vos abandoned his construction plans. Instead, he “voluntarily built runoff control structures” on the feedlot. Respondent contends that at all times he “continued to operate his feedlot in full compliance with applicable regulations.” *Id.* at 2.

When the Iowa Plan became finalized, the Respondent registered under it on April 4, 2001. A major contention of the Respondent is that under the Iowa Plan he was to receive immunity from any penalties for failure to have an NPDES permit. Respondent’s Br. at 2, citing R’s Ex. 3. In conformity with the Iowa Plan, IDNR visited the Respondent’s feedlot, designating it as a “medium priority” facility and assigning a total of 132 “points.” That point total placed Vos’ feedlot in the bottom half of the medium range, with its range of between 125 to 149 points. Respondent contends that he attempted to work “with the USDA Natural Resources Conservation Service to engineer runoff controls for his feedlot and obtain an NPDES permit” but that the

Conservation Service could not meet the Iowa Plan engineering deadlines. *Id.* at 2. Consequently, the Conservation Service referred Respondent to a private engineering firm, Eisenbraun and Associates, to have that work done. Eisenbraun and Associates completed the engineering work and a construction permit application was filed on December 5, 2005. However, while Respondent was prepared to begin the construction earlier, the required construction permit was not issued until September 2006, by which time, with winter approaching, it was too late to start construction. Respondent also notes that it applied for an NPDES permit on December 2, 2005, but did not receive the permit from IDNR until a year later, on December 6, 2006.

At the hearing EPA presented Eugene Tinker, an IDNR employee, on the subject of the “Iowa Plan.” As the IDNR animal feeding operations coordinator, he is the liaison between IDNR and groups associated with feeding operations. Tinker described the Plan as: “a registration plan to get open feedlot operations in the State of Iowa to register with the Iowa Department of Natural Resources so that [it] could work with those producers to help them come into compliance with federal and state laws with regard to manure control runoff, water requirements and any NPDES permitting requirements that those feedlots may have.” Tr. 799. He explained that the origins for the Iowa Plan arose under circumstances where Iowa had not been enforcing the NPDES regulations as stringently as they should have.

Tinker’s role involved implementing the Plan and making sure affected people understood what they needed to do to stay in the Plan. Tr. 799. The Plan allowed feedlots owners to register with the State without fear that it would then show up and “penalize [the feedlot operators] for not having the proper controls in place and it allowed the department to work with those producers to timely develop plans and construct controls and follow through with NPDES permits so they would meet all state and federal regulations.” Tr. 800. Accordingly, Tinker advised that there was an amnesty component to the Plan. Tr. 801. He stated: “The amnesty was that by registering with the department so that the department knew about those feedlots, the department would not immediately go out and do compliance inspections to determine if they were in violation of laws and take enforcement action . . . this was a program to assist [feedlot producers] into coming into compliance . . . so the amnesty that was provided was that there would not be any compliance visits . . . to determine whether or not they were in compliance with state *and federal law.*”<sup>29</sup> Tr. 801-802 (italics added).

Although the plan was set to end in 2006, as long as the feedlot operators met the deadlines, the amnesty would continue. Tr. 802. Tinker elaborated that the producer had to “maintain reasonable progress towards compliance . . . [and cooperate] . . . with the department to achieve compliance within a reasonable time.” Tr. 807. He added that “. . . if a feedlot for some reason wasn’t able to meet [the] deadline, they needed to share with the department what was holding them up from meeting that deadline and provid[e] [IDNR] with a new deadline, *which the*

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<sup>29</sup>A small exception to not taking enforcement actions, the witness explained that there were limited penalties for any water quality violations that may occur throughout the Iowa Plan as the Iowa Department worked with operators to bring their feedlots into compliance. Tr. 801-802.

department in most cases, as far as I know probably in every case, would accept as long as the rationale for not meeting that deadline was acceptable.” Tr. 816, and Respondent’s Exhibit 3, at page 3, Section 2, subparagraph C. (emphasis added).

Tinker agreed that *there were problems with the plan’s implementation*: “[A]s much as we tried to not have a stockpile or backlog of permitting at the end of the plan, it did happen. We had a large number of applications that did come in toward the end of the plan. We also had a finite staff. We were not budgeted to hire additional review engineers to review the permit applications and issue permits. Also at that time we were having record applications for confinement construction permits.” Tr. 817. The confinement, or “roofed,” feedlots were given priority for their construction permits. Consequently, as Tinker admitted, “our review engineers were spending their time reviewing confinement applications because they had to be out in 60 days.” In contrast, for “[t]he open feedlots [like Respondent’s] there was no such requirement at that time; and therefore, they did pile up because we were not mandated to get them out in 60 days.” Tr. 818. Tinker further admitted that a number of feedlots in Iowa received construction permits after the end of the five year period ending the Iowa Plan. Tr. 878.

Tinker acknowledged that Vos did register his feedlot under the Iowa Plan and “was allowed to participate” in it.<sup>30</sup> Tr. 819, 828, EPA Exhibit 12, Respondent’s registration in Iowa Plan, dated April 4, 2001, and EPA Exhibit 14, a letter from IDNR advising Vos that he was within the amnesty plan. Tr. 829. Accordingly, Tinker agreed that the Respondent was covered under umbrella of the five year amnesty. Tr. 828-829. Significantly, that letter advised the Respondent that an on-site assessment should occur sometime in 2003 or 2004. Plainly, with a two year window within which that assessment could occur, the date for the on-site assessment was fluid, to say the least.<sup>31</sup> Thus, although Vos registered for the Plan soon after registration became available,

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<sup>30</sup>Tinker was also asked about the August 19, 1991 letter from IDNR to Respondent which included construction and operating permits for a runoff control system for a 2,000 head beef open feedlot. Tr. 820. EPA Exhibit 9. Respondent objected to that exhibit as well as EPA Exhibits 10 and 11. While the documents were admitted, the Court stated that it would defer a final ruling on these documents, pending its review of any post-hearing arguments on the issue. Directed to EPA ex. 9, the permit Vos applied for, Tinker expressed his opinion that because Vos applied for a permit, to him, that act meant that Vos knew he needed a permit. Tr. 869. While Respondent’s counsel tried, unsuccessfully, to have the witness concede that the permit only created a duty to build *according to its requirements*, not the duty to build it, the Court noted the obligations incurred when a permit is issued is a legal determination and therefore outside of the ken of the witness’s knowledge. The Court concludes that EPA cannot bootstrap its way to establishing the violation at hand by pointing to the fact that the Respondent applied for an NPDES permit in 1991.

<sup>31</sup>As Tinker did not start working for IDNR until April 2003, he acknowledged that his recitation of the Plan’s terms or implementation was based on what he read or others told him about it, not personal knowledge. Still, reading from an IDNR letter predating his employment, it is clear that dates under the plan were “goals,” not fixed dates: “the plan has the goal of bringing open feedlots into compliance within five years. It recognizes the real world limitations

the reality of the Plan's implementation, versus the hopes for its implementation, were such that it took about two years after Vos registered for the on-site evaluation inspection by IDNR to occur. EPA Ex 15, dated June 25, 2003. Tr. 859-860. Subsequently, per a letter dated April 28, 2005, Vos was advised that he was obligated to submit his final engineering plans within 30 days or he would no longer be eligible to remain in the Plan. Tr. 830. EPA Exhibit 22. Those engineering plans were not so submitted within that time, and on the basis of that failure, Tinker expressed at the hearing that Vos was no longer within the Plan. It was also his view that Vos did not make reasonable progress to come into compliance under the amnesty plan. Tr. 835. Tinker reluctantly conceded that his basis for stating that Vos was removed from the Iowa Plan was based solely on the language from that letter that concerning the consequence of failing to submit the engineering plans within 30 days. Accordingly, he admitted there was no subsequent letter formally notifying Vos of the termination. Nor, Tinker conceded, did IDNR ever take any action against Vos after the 30 days passed. Tr. 877. In this regard, the Court noted that the April 28<sup>th</sup> notice, per EPA Ex 22, doesn't simply refer to "termination" under the Plan, rather it is expressed as an "imminent termination," and Tinker agreed that there is a distinction between a notice of termination and a notice which warns of an "imminent termination." Tr. 880.

EPA acknowledges that thereafter, the Respondent submitted a Plan of Action ("POA") on or around June 10, 2004. That "POA called for the construction of three sediment detention basins and three waste storage ponds to control up to the 25-year-24-hour storm, and stated based on the hydrology at the feedlot an NPDES permit was required." It also advised that "final plans for the construction would be submitted by November 30, 2004." *Id.* at 25. Following the Respondent's June 2004 letter, IDNR approved the POA on August 26, 2004, and reminded the Respondent that the final design must be submitted by November 30, 2004. However, the final plans were not submitted for IDNR review and approval until December 2, 2005.

As noted earlier, Brad Woerner, agricultural engineer, testified for the Respondent. Tr. 1036. Woerner's firm, Eisenbraun Engineering, was approved as a qualified firm to provide engineering services for some of the Iowa NRCS' clients. They were an outsource for Iowa NRCS because of a backlog on some of their clients' projects. Tr. 1045. While Respondent was registered under the Plan as of April 4, 2001, Woerner's firm was not assigned to do the engineering work until July 2004. Vos' feedlot was one of the first projects assigned to Woerner's firm. Woerner stated that NRCS gave him the Vos project as NRCS, with its limited resources, had not afforded the proper attention to it. That is, Iowa NRCS had been doing this work for Vos initially, but not in a timely manner. Following the July visit, Woerner's firm came back with a feasibility report for what Vos wanted to do. NRCS was funding Woerner's firm to do this work for clients such as Vos. Tr. 1049. In February 2005 the firm presented Vos with a conventional

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of staffing and time for the DNR, time and money for cattlemen an infrastructure problems with existing engineering, cost share and contractors." Respondent's Ex 2, dated March 22, 2001. Tinker further acknowledged "[t]here are only so many engineering firms in the Midwest that producers could hire to develop plans for them, and those engineering firms only have so many staff and so much time." Tr. 841.

system, that is a holding pond type system for the feedlot.<sup>32</sup>

Woerner stated that Vos had been cooperative and interested in getting the work done. Tr. 1055. Woerner was sent a copy of a letter from Iowa DNR to Vos dated April 28, 2005. Tr. 1055. CX 22. Vos contacted Woerner in early May 2005 and he referred to the April 28<sup>th</sup> letter at that time. Tr. 1056. They discussed options and what needed to get accomplished. Vos conveyed a sense of urgency about the April letter from Iowa DNR. Vos wanted to make a decision that was the right one for his feedlot and to avoid a decision he would regret. Tr. 1057. In May 2005 the firm contacted Vos again to determine how it was to proceed with his permit application.

Along with some data his firm received from Iowa NRCS, Woerner's firm then added their own information and submitted to Iowa DNR a permit application in December 2005. From July through December 2005, Woerner's firm never received anything from Iowa DNR regarding Vos' status under the Iowa Plan. Tr. 1069. Further, Woerner was aware of the April 2005 letter from DNR (Ex. 22) that Vos would be out of the Plan if his engineering plans were not submitted within 30 days. The point here, obviously, is that Iowa's actions spoke louder than its threats to terminate Vos. Later, in February 2006, Woerner emailed Iowa DNR about Vos's permit application and the applications of five other feedlots for which he was doing similar work. The purpose of the email was to be sure that all the applications would be approved before the Iowa Plan came to an end. Tr. 1071. Iowa DNR then responded to the email and assured Woerner that all six would be approved by the end of February 2006. Tr. 1071. However, IDNR did not meet its February goal and it was not until August 2006 before the permits were issued. Tr. 1071-1072. Based on his experience, Woerner expressed that if Vos had received his permit on time, he would have been able to construct the structures before the Iowa Plan ended. Tr. 1074. Also, Woerner expressed that he would be hesitant about starting a project in the fall because a wet fall or an early frost can cause the project to stop and, having partially completed work can make resumption in the spring be further delayed because holes could be filled up with snow. Tr. 1075.

### **The Court's determinations regarding the Iowa Plan.**

Based on the testimony regarding the Iowa Plan, it is clear that under the Plan's implementation, EPA was more than a mere bystander. As Tinker explained, "EPA was an observer through the development of the Iowa Plan [and] [t]hey participated in the discussions ... [and] once the agreement was signed . . . a letter was sent . . . to EPA to inform EPA of the agreement . . ." Tr. 804-805. Per EPA Exhibit 27, Tinker read from that exhibit that: "[t]he DNR and ICA are also requesting the USEPA to agree to inspect only unregistered, unpermitted lots when they resume inspections." Tr. 844. As Tinker explained, "[t]here was a request made to EPA to discontinue inspections and compliance visits in Iowa feedlots to allow the state's producers to become compliant with adequate control structures." Tr. 845. Notably, Tinker stated that, to his knowledge, EPA only inspected unregistered, unpermitted lots during the period of the

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<sup>32</sup>A public notice for an NPDES permit for Vos' feedlot was published on October 6, 2004. CX 23, at p. 4, Tr. 1051-1052. Tr. 1051. That notice was filed by NRCS for Vos. As noted, later, Eisenbraun Engineering replaced NRCS as Vos' feedlot engineer.

Iowa Plan. Tr. 847. Thus, he admitted that EPA did not inspect feedlots in Iowa unless they were *not* in the Iowa Plan. Tr. 847. Further, to his knowledge, EPA did not disagree with anything in the March 22 letter regarding the Iowa Plan. Tr. 848. Tinker also confirmed that EPA did not conduct inspections during the period of the Iowa Plan for feedlots that were in the Plan. Tr. 867. It is also important to note that Tinker, who was EPA's witness, stated that although the Plan was set to end in 2006, as long as feedlot operators met the deadlines, the amnesty would continue. Tr. 802. As noted, Tinker also admitted there were problems with the plan's implementation. One striking example is that it took more than two years after Vos registered under the Plan for IDNR to visit the feedlot and make its on-site evaluation. IDNR simply did not have sufficient resources to meet the timetable it had set and there were other priorities. For example, roofed feedlots had to be addressed before open feedlots, like Vos'. Thus, in keeping with the reality of the Plan's implementation, a number of feedlots received construction permits *after* the end of the five year period when the Plan was slated to stop.

Respondent's Counsel refers to R's Ex. 20, which is a letter created by EPA, dated January 19, 2007. The letter from EPA stated that "[t]he Iowa Plan created a five-year amnesty program in 2001 that provided facilities like yours an opportunity to come into compliance without the imminent threat of enforcement by EPA and the Iowa DNR. 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." Tr. 1447. Aware that its own statement in the January 19, 2007 letter undercut its claim that it was not bound by Iowa's action affording amnesty, EPA conspicuously decided not to have the letter introduced as one of its own exhibits. That decision only served to highlight that the Agency was seeking to have it both ways on the amnesty plan. Accordingly, by its own words, it is clear that EPA agreed that it would abide by the Plan and not take enforcement action for those under it. The exception to its acquiescence was for those who were ousted from the Plan by IDNR.

That leads to the next issue. When, if at all, was Vos removed from the Plan? There is no dispute that Vos was registered under the Plan on April 4, 2001 and that, at a minimum, he remained in it through May 28, 2005, which was thirty (30) days after he was warned of his "imminent termination" from the Plan, on April 28, 2005. While it can be argued that Vos lost amnesty as of May 28, 2005, one must examine events subsequent to that date. Two dates strike the Court as significant in that regard. First, while Woerner's firm was aware of the April 28, 2005 notice of imminent termination in May 2005, it still submitted a permit application for the feedlot engineering plan over six months later, in December 2005. The reaction to this from IDNR is notable because it did not advise Woerner or Vos that it had been removed from the Plan back in May. Instead, in reaction to an inquiry from Woerner in February 2006, IDNR advised that Vos' application, and those of several others for whom Woerner's firm had submitted applications, were being processed and it was anticipated that approvals would be issued that same month. However, consistent with the delays which became routine under the Plan, it was not until August 2006 that Vos' permit was approved. Given Iowa's actions subsequent to its April 2005 letter of termination, it seems fair to conclude that its actions spoke louder than the words in its April 2005 notice of imminent termination. As with previous dealings with Vos in the process of the implementing the Plan, IDNR continued to consider Vos, even with his instances of tardiness, still in the Plan. The Court concludes that Vos remained in the Plan at least through August 2006.

It is also important to remember the period of time covered by EPA's complaint. That Complaint was filed on August 14, 2007. Accounting for the statute of limitations, EPA is limited to five years preceding that filing, or August 13, 2002. EPA acknowledges this to be the case. However, the Complaint itself lists the end date for the period of alleged violation as December 2, 2005. Therefore the claimed period of violation alleged in the Complaint runs from August 14, 2002 to December 2, 2005. Complaint at 6. As Vos admittedly was under the Plan's amnesty from April 4, 2001, the date he enrolled, through at least May 28, 2005, there is, at most, only an approximate six month period when he was arguably at risk for discharges of pollutants. At the hearing, EPA offered specific testimony with respect to the following dates: June 25, 2003, May 31, 2006, March 11, 2008, July 1, 2008 and August 5, 2008. However, with the parameters of this litigation running from August 14, 2002 through December 2, 2005, it is noted that none of those pertain to the period from May 28, 2005 through December 2, 2005. Therefore, Vos was within the protective umbrella of the Plan's amnesty for most of that time and there was no specific evidence of any discharge during the period when he was arguably no longer within the Plan.

EPA witness James Prier also testified regarding the subject of the Iowa Plan. As noted earlier in this Initial Decision, Prier works for IDNR as an environmental specialist, with duties that included inspecting feedlots under the Iowa Plan and for NPDES permits. His first involvement with the Respondent was to conduct an on-site assessment of the feedlot under the Iowa Plan. That assessment was done on June 25, 2003 for the purpose of verifying, through a personal visit, the accuracy of the office level assignment of the 'medium priority' ranking given Vos's feedlot.<sup>33</sup> Tr. 885-886 and EPA Ex. 15. He identified EPA Exhibit 16 as the on-site feedlot inspection of Vos' lot on July 2, 2003. Tr. 896. According to him that letter established August 22, 2003 as the date by which Vos had to advise DNR of the engineer who would design the containment structures and February 20, 2004 as the date for submittal of the plan of action. Tr. 897. Vos did not meet those dates and a notice of violation was then issued on February 23, 2004. Tr. 898, and EPA Ex 17. Vos did not submit his plan of action until April 6, 2004 at which time it was six months late. Tr. 899. Another letter was then issued to Vos on April 27, 2004, because the plan of action was missing some information and was therefore incomplete. Exhibit 19, Tr. 900. Although Vos was then given 14 days to submit the missing information, he was late again with that submission, as he did not provide it until June 10, 2004. Tr. 901-902.

Nevertheless, the June 10, 2004 submission was accepted. Tr. 902. That acceptance by IDNR establishes that through that date Vos was still within the Plan. It also shows that there was fluidity on the part of IDNR in terms of time lines and due dates under the Plan. Prier noted that under Vos' plan of action, he was to construct three sediment retention basins and three waste storage ponds. Tr. 903. He stated that Vos' preliminary design had retention basins placed pretty close to where Witness noted the locations of discharge during his on-site visit. Tr. 904. Under Vos's estimated time line, he would submit final plans and permits by November 30, 2004, with

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<sup>33</sup>However, on cross-examination, Mr. Prier admitted that his visit was not prompted solely to verify the feedlot's priority assessment, as a complaint had been filed by a neighbor of the Respondent alleging that the facility was discharging manure onto the neighbor's land from its northeast side. Tr. 923.

the anticipation that plans and permits would be approved by January 15, 2005. After that, construction would start by June 1, 2005 and be completed by November 30, 2005. Tr. 903. Prier then issued an approval of Vos's plans on August 26, 2004. Tr. 905.

While Prier stated that Vos missed several of the Iowa Plan "deadlines," he acknowledged that Vos and his engineer were trying to utilize the EQIP program. Trying to use that program resulted in longer times to reach the different requirements. Tr. 949-951. Part of the problem with delays was attributable to the engineering firm Vos selected, as Prier agreed that Mr. Sindt with Natural Resources Conservation Service, was "learning as [he was] go[ing]" in the process of understanding the Iowa Plan. Tr. 953-954. Ultimately Vos turned to a different engineering firm. Tr. 953-954. Further, Vos could not start on any of his feedlot controls until he had a construction permit from IDNR. Tr. 952. Letter from

Thus, there were delays on IDNR's part as well as on the Respondent's. On this record, at least some part of the Respondent's delays were attributable to the engineering firm he selected. The larger point is that it does not seem that either side in the Plan intentionally caused delays in the implementation.

It also seems fair to comment that EPA's position on the amnesty plan, while perhaps technically defensible, lacks essential fairness. This is because the Agency attempted to have it both ways, being fully aware of the Plan, yet silent about any reservations it may have entertained about it, and all the while still holding the option to play its hand by bringing a complaint against an Iowan feedlot owner participating in it. But one must ask what effect would this have on any future agreements, if the Agency cannot be trusted implicitly? If those subject to regulation knew that EPA, aware of such arrangements, yet remaining silent about any enforcement, and in fact not taking any enforcement actions against those operating within such an arrangements, could still ignore such understandings and file complaints in the face of such understandings, it is unlikely that the affected public would engage in such programs in the future. In the Court's view, at a minimum, such an approach is bad policy as it undermines public trust with the Agency.

In the matter of *Lowell Vos, d/b/a Lowell Vos Feedlot, Woodbury County, Iowa.*  
Docket No. CWA-07-2007-0078

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Initial Decision**, dated June 8, 2009, was sent this day in the following manner to the addressees listed below:

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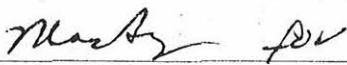
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Knolyn R. Jones  
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**Dated: June 8, 2009**