



# NEWS RELEASE

## Iowa Cattlemen's Association

2055 Ironwood Court, P.O. Box 1490, Ames, Iowa 50014

Phone: 515-296-2266 Fax: 515-296-2261

### FOR IMMEDIATE RELEASE

September 2, 2009

Contact:

515-296-2266

Bruce Berven, ICA Executive Vice President

[bruce@iabeef.org](mailto:bruce@iabeef.org)

### Vos Feedlot Cleared of Unjustified EPA Charges

**Ames, Iowa**— The Federal Environmental Protection Agency's (EPA) ability to cite feedlots for discharging waste without physical evidence was nullified in the Vos versus EPA case recently ruled upon.

In January 2007, the EPA charged four Iowa cattle feedlot operators with illegally discharging pollutants from their feedlots. EPA claimed that although all four cattle feeders had participated in the Iowa Plan (a five year Iowa DNR amnesty program developed in 2001 in cooperation with the Iowa Cattlemen's Association (ICA) and supported by the EPA), none of the four had obtained National Pollution Discharge Elimination System (NPDES) permits and installed runoff controls by April 1, 2006, the date EPA contended the Iowa Plan ended. EPA further claimed that the violations at the feedlots "have resulted in the discharge of manure-laden waste water to waters of the United States." To support its claims of illegal discharges, the EPA relied on computer modeling and the fact that there were "flowpaths" from each feedlot to waters of the U.S.

Three of the four feedlot operators agreed to settle. Lowell and Judy Vos of Kingsley (Woodbury County) knew they had done nothing wrong and declined to pay EPA a monetary settlement. "My father taught me years ago that right is right, and wrong is wrong," said Lowell Vos. EPA then filed a suit seeking \$157,500 in penalties.

The EPA contracted with a computer modeling expert to conduct further modeling using computer programs that are commonly used as planning tools to design soil and water conservation and runoff control systems. However, instead of using the models to estimators for planning purposes in this case, EPA used the models to try to prove that discharges had actually occurred. Vos challenged EPA's approach arguing that there had been no discharges and that EPA needed samples or visual evidence that manure had discharged from his feedlot to a water of the U.S. In addition, Vos steadfastly maintained that he had complied with the Iowa Plan. "I just consider myself to be an average guy attempting to manage my feedlot to the best of my ability," said Lowell.

On June 8, the Federal Administrative Law Judge dismissed EPA's case after reviewing the briefs, 1,473 pages of trial transcript and 78 exhibits of more than one thousand pages. All time periods for an appeal by EPA and the Environmental Appeals Board have passed with no appeals being filed, thus making the Judge's decision final.

In his decision, the Judge began by noting that the essence of EPA's claim against Vos was that "manure and other feedlot pollutants would leave [Vos'] 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" a water of the U.S. The Judge also noted that EPA intended to rely on computer modeling to identify specific days that Vos discharged, but that "inconsistencies in [its] Discharge Modeling Report" caused EPA to concede on that issue. The testimony presented by EPA's

modeling expert witness, the Judge noted, “could fairly be described as a disaster for the government . . . evidenced by the fact that, post-hearing, the government elected to not refer to any of her testimony.”

The Judge ruled that even though Lowell participated in the Iowa Plan, EPA attempted to penalize him because he did not have his feedlot runoff control structures in place by April 1, 2006. The Judge recognized that Vos made a good faith effort to comply and that his failure to meet the deadline was due to delays, some attributable to Iowa DNR, which were unintentional and unavoidable.

The Judge concluded his discussion of the Iowa Plan by stating:

“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 Iowa 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 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.”

“On behalf of all cattle producers, ICA would like thank the Vos’ for standing for what was right,” said Kent Pruisman, ICA President. “The decision in this case determines that models may no longer be solely used as circumstantial evidence; there must be physical evidence before penalties are enforced upon feedlots.”

This case is very important to all feedlot producers. It is clear under this decision that EPA cannot rely solely on circumstantial evidence of a discharge to penalize a producer for alleged violations of the Clean Water Act. The EPA must have samples or other credible evidence of a discharge of pollutants to a water of the U.S. This case stresses the importance that feedlot producers must keep their feedlots in good condition to control manure runoff. A pivotal factor in this case was that Lowell Vos diligently kept his feedlot clean and well maintained. Finally, the Judge confirmed that a discharge under the Clean Water Act occurs only when manure or pollutants from a CAFO reach a water of the U.S. In other words, it is not a discharge when manure or pollutants leave a feedlot, but do not reach a water of the U.S.

Currently, the Court is being petitioned to require EPA to pay for the Vos’ legal defense.

The September issue of the *Iowa Cattleman* magazine contains two articles that feature the Vos case. Bruce Berven, ICA Executive Vice President, sat down with the Vos’ to get a personal perspective on the impact this situation has had on them. And Vos’ attorney, Eldon McAfee, who also represents ICA on environmental issues, has produced an article summarizing the legal aspects of this case and its implications.