UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	**)**	
	)	
RAY AND JEANETTE VELDHUIS,	**)**	**DOCKET NO. CWA-9-99-0008**
	)	
	)	
RESPONDENTS	**)**	

ORDER DENYING MOTION TO REOPEN HEARING

ORDER DENYING MOTION FOR A STAY OF THE INITIAL DECISION

I. BACKGROUND

By a Complaint filed September 30, 1999, the United States Environmental Protection Agency ("EPA" or "Complainant") initiated this action against Ray and Jeanette Veldhuis ("Respondent")[1/] pursuant to Sections 301(a) and 309(g) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. §§ 1311(a), 1319(g). An evidentiary hearing was held December 11 through 13, 2000 in Modesto, California. Then, on June 24, 2002, the undersigned Administrative Law Judge ("ALJ") issued an Initial Decision in this matter, finding that Respondent's activity of "deep-ripping" violated Section 301(a) of the CWA by discharging pollutants from a point source into waters of the United States without a permit issued under the Act. An administrative penalty of $87,930 was assessed against Respondent.

Pursuant to Section 22.28 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of

---

[1/] As noted in the Initial Decision (p.4, n.1), the caption of the Complaint identifies both Ray and Jeanette Veldhuis as Respondents, but use of term "Respondent" refers to Mr. Ray Veldhuis only. Thus, for the purposes of this Order, "Respondent" shall hereinafter refer only to Mr. Ray Veldhuis.

Practice"), 40 C.F.R. § 22.28, Respondent filed a Motion to Reopen Hearing ("Motion") on July 15, 2002.[2/] In addition to Respondent's motion to reopen, Respondent also moves for a stay of the Initial Decision pending the United States Supreme Court's decision in *Borden Ranch Partnership v. United States Army Corps of Engineers*. 261 F.3d 810 (9th Cir. 2001), *cert. granted*, 70 U.S.L.W. 3562 (June 10, 2002) (No. 01-1243).

Respondent contends that two of three core issues on appeal in *Borden Ranch* are identical to the questions ruled upon in the Initial Decision. Specifically, the *Borden Ranch* appeal addresses whether deep-ripping "may result in a discharge of a pollutant for purposes of the Clean Water Act" and, also, whether deep-ripping may "qualif[y] for the conditional exemption from regulation under Section 404(f) of the Clean Water Act." Motion at 2. Respondent claims that if the Supreme Court determines the *Borden Ranch* petitioner (also a farmer who practiced deep-ripping) did not violate the CWA, then Respondent similarly cannot be held in violation of the Act.

In support of his motion, Respondent also argues that the hearing should be reopened "to determine which vernal pools are isolated" because, if isolated, such waters are exempt from CWA regulation. Motion at 2. Respondent submits that his case should be reevaluated in light of the Supreme Court's ruling in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("*SWANCC*"), which held that the Corps cannot exert CWA jurisdiction over non-navigable, isolated, intrastate waters based on the "Migratory Bird Rule." 531 U.S. 159, 166, 174 (2001).

On August 7, 2002, Complainant filed a response to Respondent's motion. Complainant does not oppose Respondent's request for a stay of the proceedings pending the Supreme Court's decision in *Borden Ranch*. However, Complainant does oppose the motion to reopen the hearing in this matter. First, Complainant argues that Respondent does not meet the evidentiary requirements regarding a motion to reopen. Second, Complainant asserts that any new evidence Respondent seeks to introduce to prove a possible exemption under Section 404(f), or that his wetlands qualify as "isolated" under *SWANCC*, should have been adduced at the hearing or in the post-hearing briefs. According to Complainant, Respondent has put forth no good cause, as required by 40 C.F.R. § 22.28(a), explaining why such evidence was not introduced earlier.

[2/] The filing of a motion to reopen a hearing "automatically stay[s] the running of the time periods for an initial decision becoming final under § 22.27(c) and for appeal under § 22.30." 40 C.F.R. § 22.28(b).

II. DISCUSSION

A. *Motion to Reopen*

The standard for adjudicating a motion to reopen a hearing, filed after the issuance of an initial decision, is found at Section 22.28(a) of the Rules of Practice. Section 22.28(a), in pertinent part, provides that a motion to reopen a hearing "to take further evidence" must "state the specific grounds upon which relief is sought." 40 C.F.R. § 22.28(a). The moving party, seeking to introduce new evidence, must "[1] state briefly the nature and purpose of the evidence to be adduced; [2] show that such evidence is not cumulative; and [3] show good cause why such evidence was not adduced at the hearing." 40 C.F.R. § 22.28(a).

Respondent's motion to reopen the hearing lacks merit on several grounds. As Complainant points out, Respondent fails to meet the evidentiary requirements for a motion to reopen as set forth in Section 22.28(a) of the Rules of Practice. Respondent requests this tribunal to take further evidence, but neglects to state the nature of such evidence, fails to show that the evidence would not be cumulative, and does not explain why such evidence was not adduced at the hearing. Indeed, Respondent fails to specify what new evidence, if any, he intends to introduce.

Insofar as Respondent moves this tribunal to take further evidence on the issue of isolated wetlands, as raised by the *SWANCC* case, the motion lacks merit.[3/] In the Initial Decision an extensive discussion was given to the impact of *SWANCC* on this case. Initial Decision at 64-87. The Initial Decision recognizes that *SWANCC* invalidated the "Migratory Bird Rule" as a basis for federal jurisdiction over non-navigable, isolated, intrastate wetlands. Complainant also acknowledged the effect of the Supreme Court's ruling and withdrew its allegations pertaining to the 3.16 acres of "isolated wetlands" over which jurisdiction had been premised on the "Migratory Bird Rule." Nonetheless, the EPA continued to assert jurisdiction over the remaining 21.04 acres of

---

[3/] In the Order setting the post-hearing briefing schedule, the parties were afforded the opportunity to brief the issues in light of the *SWANCC* decision. At that time, Respondent did not assert that further evidence should be taken as to whether the wetlands qualify as "isolated" under *SWANCC*.

wetlands based on the principle of navigability.[4/] None of the wetlands at issue was found to be "isolated" as defined by *SWANCC*. The pertinent wetlands were determined by the undersigned ALJ to be either adjacent to tributaries or tributaries of navigable waters. Initial Decision at 87. Accordingly, Respondent has demonstrated no basis for reopening the hearing to adduce new evidence on the issue of isolated wetlands.

Respondent's motion is more than a motion to reopen the hearing for the purpose of introducing new evidence. Because Respondent asks this Court "to determine which vernal pools are isolated," Respondent in essence is asking the Court to reconsider its original determination as to EPA's exercise of jurisdiction based on navigability. The Rules of Practice which govern this proceeding do not specifically provide for motions for reconsideration of any order issued by an ALJ. However, the Rules of Practice do provide for reconsideration of final orders issued by the Environmental Appeals Board ("EAB"). 40 C.F.R. § 22.32.

Generally, in adjudicating motions for reconsideration before the EAB, consideration has been limited to intervening changes in controlling law, new evidence, or the need to correct a clear error or to prevent manifest injustice. *See In the Matter of Southern Timber Products, Inc. D/B/A Southern Pine Wood Preserving Company, and Brax Batson*, RCRA Appeal No. 89-2, 3 E.A.D. 880, 888-90 (JO, 1992); *see also* In the Matter of Cypress Aviation, Inc., RCRA Appeal No. 91-6, 4 E.A.D. 390, 392 (EAB, 1992). Therefore, assuming that a motion for reconsideration from an initial decision may be brought properly before an ALJ, such motion would be subject to the same standard of review as that of the EAB. In the instant matter, I assume that Respondent moves impliedly for a reconsideration of the Initial Decision. Nonetheless, I am not persuaded that Respondent meets the standard set forth by the EAB.

[4/] The Initial Decision points out, on pages 71-2, that Complainant asserts jurisdiction over Respondent's wetlands based on "the language paralleling 33 CFR §§ 328.3(a)(1) (waters susceptible to use in interstate or foreign commerce, including those subject to the ebb and flow of the tide), 33 CFR § 328.3(a)(5) (tributaries to such waters), and 33 CFR § 328.3(a)(7) (wetlands adjacent to such waters)." According to the U.S. Army Corps of Engineers, 33 C.F.R. § 328.3(a) provides regulatory definitions of the term "waters of the United States." *United States v. Interstate General Company*, 2002 WL 1421411, at *1 (4th Cir. 2002). The term "navigable waters," as defined in Section 502(7) of the CWA, means the "waters of the United States." As *SWANCC* invalidated only 33 C.F.R. § 328.3(a)(3) (1999), "as clarified and applied... pursuant to the 'Migratory Bird Rule,'" Complainant could and did validly assert jurisdiction over Respondent's wetlands on their connection to navigability. *SWANCC*, 531 U.S. at 174.

First, Respondent proffers no newly discovered evidence, and there has been no intervening change in the controlling law. To the extent Respondent suggests that some of the findings concerning the characterization of the wetlands are erroneous in view of *SWANCC*, I also reject Respondent's attempt for a reconsideration. As articulated above, ample consideration of the Supreme Court's holding in *SWANNC* was given in the Initial Decision. The *SWANCC* holding, moreover, does not alter the determination that the wetlands at issue here are adjacent to and/or tributaries of navigable waters. Therefore, I am not reconsidering or revisiting the issue of "isolated" versus "adjacent" wetlands.

If Respondent's intention is to submit as evidence the fact that the writ of certiorari has been granted in *Borden Ranch*, such evidence would have no bearing on this case at this juncture. In the Initial Decision,[5/] the undersigned ALJ expressly noted the Supreme Court's granting of the writ of certiorari. Initial Decision at 63-4. Yet despite the Court's decision to hear the *Borden Ranch* appeal, the Initial Decision was issued in accordance with existing precedent, namely, the Ninth Circuit's ruling in that case. In short, the current posture of *Borden Ranch* offers Respondent no relief, nor provides any basis for reopening the hearing in this matter.

B. *Motion for a Stay*

Respondent also moves for a stay of the Initial Decision. Respondent argues that the granting of the writ of certiorari in *Borden Ranch* should compel the undersigned judge to await the Supreme Court's determination as to whether deep-ripping may be regulated under the Clean Water Act. The Rules of Practice contain no standards for evaluating a motion to stay. A study of applicable case law, however, reveals that ruling on a motion to stay is largely a discretionary matter and "incident to [the court's] power to control its own docket." *Clinton v. Jones*, 520 U.S. 681, 706 (1997); *see also Landis v. North American Co.*, 299 U.S. 248, 254 (1936). An ALJ should consider a number of factors when deciding whether to grant a stay, including (but not limited to) judicial economy, unnecessary expense or delay, or potential hardship to the parties. *See, e.g.*, *In the Matter of: John Crescio*, Docket No. 5-CWA-98-004, 1999 WL 362862 (1999). Essentially, motions to stay are decided on questions of efficiency and fairness.

[5/] The Initial Decision, dated June 24, 2002, was issued 14 days following the Supreme Court's granting of the writ of certiorari in *Borden Ranch*.

A court may consider granting a stay of the proceedings where a similar case in another, or higher, court has the "propensity to be dispositive" on the issue at hand and a decision has not yet been rendered. *Sam Galloway Ford, Inc. v. Universal Underwriters Insurance Co.*, 793 F. Supp. 1079, 1081 (M.D. Fla. 1992). Here, however, Respondent's motion for a stay differs from other such motions in that an initial decision has already been entered in this case. The procedural rules do not expressly grant an ALJ the authority to stay an already-issued initial decision.[6/] Respondent, moreover, has not cited any authority to support his position that a stay should be granted. As such, I decline to impose a stay on the Initial Decision in this administrative proceeding.[7/] Further, noting that the Complaint in this matter was filed nearly three years ago, I do not find that the interests of judicial efficiency or fairness convincingly command a stay in favor of Respondent.

Accordingly, Respondent's Motion to Reopen Hearing and the Motion for a Stay will be denied.

ORDER

Respondent's Motion to Reopen Hearing and the Motion for a Stay of the Initial Decision are **DENIED**.

_____
Barbara A. Gunning
Administrative Law Judge

Dated: August 13, 2002

[6/] Although the Rules of Practice are silent on motions to stay, I note that Respondent is not precluded from filing a motion to stay the proceedings before the EAB.

[7/] The initial decision of an ALJ does not become a final order if a party appeals the initial decision to the EAB or the EAB elects to review the initial decision on its own initiative. Thus, Respondent has not yet exhausted his administrative remedies.

In the Matter of Ray and Jeanette Veldhuis, Respondents
Docket No. CWA-9-99-0008

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Denying Motion To Reopen Hearing,** dated August 13, 2002 was sent this day in the following manner to the addressees listed below.

_____
Mary Keemer
Legal Staff Assistant

Dated: August 13, 2002

Original and One Copy by Pouch Mail to:

Danielle E. Carr
Regional Hearing Clerk
U.S. EPA
75 Hawthorne Street
San Francisco, CA 94105

Copy by Pouch Mail to:

Elizabeth La Blanc, Esquire
Office of Regional Counsel (ORC-3)
U.S.EPA
75 Hawthorne Street
San Francisco, CA 94105

Copy by Certified Mail Return Receipt to:

William E. Gnass, Esquire
Mason, Robbins, Gnass & Browning
P.O. Box 2067
Merced, CA 95344-0067