IN RE BRICKS, INC.

CWA Appeal No. 02-09

FINAL DECISION

Decided October 28, 2003

Syllabus

Bricks, Inc. ("Bricks") appeals an Initial Decision of Administrative Law Judge Carl C. Charneski ("ALJ") assessing a $65,000 penalty against it. The Director of the Water Division, United States Environmental Protection Agency Region V (the "Region"), brought this administrative enforcement action against Bricks for alleged violations of the Clean Water Act ("CWA" or "Act") § 301(a), 33 U.S.C. § 1311(a). The ALJ concluded that Bricks discharged pollutants (fill material) into "waters of the United States" without first obtaining a permit from the United States Army Corps of Engineers, pursuant to CWA § 404(a), 33 U.S.C. § 1344(a). Specifically, the ALJ found Bricks liable for discharging pollutants into wetlands, which he determined were adjacent to a tributary of a navigable water of the United States.

On appeal, Bricks contests both the ALJ's liability and penalty determinations. Although Bricks raises several specific issues on appeal, the central issue is whether the ALJ erroneously concluded that the wetlands at issue in this case are "navigable waters" within the meaning of the CWA.

Held: The Region has failed to prove by a preponderance of the evidence that the wetlands at issue in this case are "navigable waters" within the meaning of the Act. Specifically, the Region failed to prove that the wetlands are hydrologically connected to a navigable water or a tributary thereof. The Board, therefore, reverses the Initial Decision and vacates the penalty.

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich, and Kathie A. Stein.

Opinion of the Board by Judge Stein:

I. *STATEMENT OF THE CASE*

Bricks, Inc. ("Bricks") appeals an Initial Decision of Administrative Law Judge Carl C. Charneski ("ALJ") assessing a $65,000 penalty against it. The Director of the Water Division, United States Environmental Protection Agency Region V (the "Region"), brought this administrative enforcement action against

Bricks for alleged violations of the Clean Water Act ("CWA" or "Act") § 301(a), 33 U.S.C. § 1311(a).[1] *See* Initial Decision (Oct. 9, 2002) ("Init. Dec.").

The ALJ concluded Bricks discharged pollutants (fill material) into "waters of the United States" without first obtaining a permit from the United States Army Corps of Engineers ("Corps"), pursuant to CWA § 404(a), 33 U.S.C. § 1344(a). *See* Init. Dec. at 1. Specifically, the ALJ found Bricks liable for discharging pollutants into wetlands, which he determined were adjacent to a tributary of a navigable water of the United States.

On appeal, Bricks contests both the ALJ's liability and penalty determinations. Although Bricks raises several specific issues on appeal, the central issue we must decide is whether the ALJ erroneously concluded that the wetlands at issue in this case are "navigable waters" within the meaning of the CWA.

For the reasons stated below, we hold that the Region failed to meet its burden of establishing that the wetlands are "navigable waters." We therefore reverse the Initial Decision and vacate the penalty.

II. *PRINCIPLES OF APPLICABLE LAW*

The Act states that its goal is "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985); *In re Richner*, 10 E.A.D. 617, 619 (EAB 2002). Except as the Act otherwise provides, the Act prohibits discharges of pollutants into navigable waters[2] and subjects violators to civil penalties under CWA § 309, 33 U.S.C. § 1319.

In an enforcement proceeding, the Board reviews an ALJ's factual and legal conclusions *de novo*. 40 C.F.R. § 22.30(f) ("The Environmental Appeals Board shall adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed, and shall set forth in the final order the reasons for its actions."); *see Richner*, 10 E.A.D. at 619; *In re City of Marshall*, 10 E.A.D. 173, 180 (EAB 2001).

---

[1] Section 301(a) states: "[E]xcept as in compliance with this section * * * the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a).

[2] *See, e.g.*, CWA § 404(a), 33 U.S.C. 1344(a) (requiring issuance of a permit for the discharge of dredged or fill material into navigable waters of the United States); CWA § 502(12), 33 U.S.C. § 1362(12) (defining "discharge of pollutant" to include, *inter alia*, the addition of pollutants to navigable waters from any discrete conveyance known as a "point source").

The complainant, the Region in this case, bears the burdens of presentation and persuasion to establish that the violations occurred "as set forth in the complaint and that the relief sought is appropriate." 40 C.F.R. § 22.24(a); *City of Marshall*, 10 E.A.D. at 180. To prevail, the Region must satisfy a "preponderance of the evidence" standard. 40 C.F.R. § 22.24(b); *Richner*, 10 E.A.D. at 620. This standard of proof "'instruct[s] the fact finder concerning the degree of confidence society thinks he [or she] should have in the correctness of his [or her] factual conclusion.'" *In re Echevarria*, 5 E.A.D. 626, 638 (EAB 1994) (quoting *In re Winship*, 397 U.S. 358, 370 (1970)). This standard is achieved if the ALJ determines "'that his [or her] factual conclusion is more likely than not.'" *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998) (quoting *Echevarria*, 5 E.A.D. at 638).

In the present case, to prove a *prima facie* violation of CWA § 301(a), 33 U.S.C. § 1311(a), the Region must demonstrate by a preponderance of the evidence that Bricks: (1) discharged a pollutant; (2) from a point source;[3] (3) into a navigable water; (4) without authorization under the Act (in this case, a permit from the Corps pursuant to section 404(a), 33 U.S.C. § 1344(a)).

As noted above, this case turns on whether or not the wetlands at issue are navigable waters of the United States. The Act defines "navigable waters" to mean "waters of the United States, including the territorial seas." CWA § 502(7), 33 U.S.C. § 1362(7). EPA regulations define "waters of the United States" to include:

> (a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> * * * *
>
> (e) Tributaries of waters identified in paragraphs (a) through (d) of this definition; [and]
>
> * * * *

[3] The Act defines a "point source" as "any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." CWA § 502(14), 33 U.S.C. § 1362(14). As the ALJ observed in his Initial Decision, point sources include earthmoving equipment such as bulldozers, backhoes, and dump trucks. *See* Init. Dec. at 3 n.1.

> (g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

40 C.F.R. § 122.2.[4]

III. *PRIOR HISTORY OF THE CASE*

A. *Factual History*

Bricks, a commercial real estate developer, owns a piece of property in Northern Aurora, Illinois, known as the Gateway Commercial Site. The property consists of a western portion and an eastern portion. The eastern portion contains approximately fifteen acres, which in turn is comprised of a northern and southern part. *See* Init. Dec. at 4. The northern part is at issue in this case and will hereinafter be referred to as the "site." Deerpath Road, which runs north and south, borders the site on the west. Orchard Road, a four-lane county highway, which also runs north and south, borders the site on the east. Deerpath and Orchard roads are roughly parallel. Interstate 88 ("I-88"), which runs east and west, bisects both Deerpath and Orchard roads and borders the site on the south. *Id*; Complainant's Exhibit ("CX") 4 (Wetlands Delineation Report). The parties do not dispute that wetlands are located on the site. However, they strongly disagree on whether the wetlands are adjacent to navigable waters and, thus, whether the wetlands themselves can be considered navigable waters within the meaning of the Act.

In 1997, Bricks sought to develop the site for construction of two hotels and other commercial facilities and undertook various steps toward that end. In particular, Bricks hired an environmental consultant, Environmental Planning Team ("EPT"), to delineate wetlands at the site. In April 1997, EPT prepared a Wetlands Delineation Report ("Delineation Report") (CX 4) using procedures the Corps established in its 1987 Wetlands Delineation Manual.[5] *See* Appeal at 8; Respondent's Exhibit ("RX") 1 (1987 Manual). The Delineation Report concluded that the site contained wetlands.[6]

In July or August 1999, Bricks gave the Delineation Report to its engineering consultant, Manhard Consulting, Inc. ("Manhard"), and it directed Manhard to

---

[4] This definition also appears in 40 C.F.R. § 232.2. The Corps has promulgated regulations containing a virtually identical definition. *See* 33 C.F.R. § 328.3(a).

[5] The Manual's purpose is "to provide users with guidelines and methods to determine whether an area is a wetland for purposes of Section 404 of the Act." *Corps of Engineers Wetlands Delineation Manual* at 1 (Jan. 1987).

[6] As stated above, the parties do not dispute that wetlands are present at the site.

obtain from the Corps any necessary permits. *See* Init. Dec. at 6; Hearing Transcript ("Tr.") at 434-35. To accomplish this, Manhard hired Environmental Consultants and Planners ("ENCAP"), a firm specializing in wetlands projects. Tr. at 436-37. On April 19, 1999, ENCAP conducted a site visit to confirm EPT's wetland delineation. CX 4. Thereafter, on July 21, 1999, ENCAP submitted a Pre-Construction Notification ("PCN") to the Corps seeking authorization to proceed with construction activities. In August 1999, before Bricks received a reply from the Corps, Bricks constructed an access road across the site.

By letter dated August 23, 1999, the Corps acknowledged that it received the PCN, and stated, in part:

> A preliminary evaluation of your project indicates that it may require authorization under Nationwide Permit 26, or require an Individual Permit.
>
> * * *
>
> You are advised not to undertake any activity in connection with the proposed work in any water of the United States until the required [Corps] authorization has been obtained.

CX 5 (Letter from Kathy G. Chernich, Project Manager, Regulatory Branch, U.S. Army Corps of Engineers, to Ronald Dunbar (Aug. 23, 1999)) .[7]

The Corps inspected the site on August 24, 1999. The inspector, Keith Wozniak,[8] observed that Bricks had constructed an access road and placed fill material in a wetland area. Tr. at 34-35. On August 26, 1999, based on this inspection, the Corps issued a Cease and Desist Order to Bricks. CX 7 (Letter from Keith Wozniak to Ronald Dunbar (Aug. 26, 1999)).

On August 30, 1999, Randolph Briggs, a Resource Conservationist with the Kane/DuPage Soil Conservation District,[9] inspected the site and took photographs. At the hearing before the ALJ, he testified that fill material was being

---

[7] Ronald Dunbar is Bricks' Vice President of New Construction, and he was responsible for all daily operations at the project at issue in this case. Tr. at 428-29.

[8] At the time of this proceeding, Mr. Wozniak served as the Chief of the Corps' Permit Enforcement Section and Regulatory Branch. Tr. at 30.

[9] The Kane/DuPage Soil Conservation District is a state and local government unit funded by the Illinois Department of Agriculture. Tr. at 175. Mr. Briggs' responsibilities include preparing natural resource inventories throughout the county and conducting soil erosion and sediment plan control inspections. *Id.* at 176.

brought onto the site and deposited in a wetlands area. Init. Dec. at 11; Tr. at 180-81. On September 10, 1999, Kathy Chernich, a project manager with the Corps, conducted a follow-up inspection. Tr. at 83. Ms. Chernich testified at the administrative hearing that during her inspection she observed that fill material had been placed in a wetland area at the site. *Id*. Thereafter, on September 13, 1999, the Corps sent another letter to Bricks emphasizing that the fill activities at the site required Corps authorization. CX 13 (Letter from Leesa A. Beal, Chief, Permit Section, Regulatory Branch, Corps, to Ronald Dunbar (Sept. 13, 1999)).

The Corps, EPA, and the Kane/Dupage Soil Conservation District conducted a multi-agency inspection on October 19, 1999. Tr. at 228. Amy Nerbun, an Enforcement Specialist in the Region V Wetlands Section of the Water Division, represented EPA. On November 30, 1999, the Region issued a Compliance Order to Bricks under CWA § 309(a), 33 U.S.C. § 1319(a). *See* RX 2 (Findings of Violation and Compliance Order) ("Compliance Order"). The Compliance Order informed Bricks it was violating the Act and outlined corrective actions necessary to come into compliance.[10]

B. *Procedural History*

On July 21, 2000, the Region filed its Complaint in the present proceeding, alleging that Bricks, "using bulldozers and/or other various earth moving machinery, discharged approximately 8,000 cubic yards of fill into 1.05 acres of the wetlands * * * ." CX 26 (Complaint at ¶ 13). The Complaint alleges that the wetlands at issue "are adjacent to an unnamed tributary to Blackberry Creek, which is a tributary to the Fox River, which is an interstate water." *Id*. ¶ 14. Thus, according to the Region, the wetlands are "'waters of the United States' as defined at 40 C.F.R. §§ 230.3(s) and 232.2, and 'navigable waters' as defined in Section 502(7) of the CWA, 33 U.S.C. § 1362(7)." *Id*. ¶ 15. The Complaint further alleges that by discharging fill material from the machinery referenced above, Bricks discharged a "pollutant" from a "point source." The Complaint asserted that because Bricks had not obtained from the Corps a CWA § 404 permit authorizing such discharges, Bricks violated CWA § 301, 33 U.S.C. § 1311. *Id*. ¶¶ 16-22. The Region sought a penalty of $68,750. *Id*. ¶ 23.

---

[10] The Order directed Bricks to immediately cease discharging fill material into wetlands on the site, except in compliance with a permit. Compliance Order ¶ 1. It also directed Bricks to remove fill material from certain specified portions of the wetlands. *Id*. ¶ 3. In addition, the Order imposed certain filing requirements. In particular, the Order required Bricks to: (1) submit a restoration plan that would return wetlands affected by the unauthorized discharges of fill material to their "original condition and contours," *id*. ¶ 4; and (2) apply to the Corps (with a copy to the Region) for an after-the-fact ("ATF") permit, and any other applicable permit, authorizing Bricks to retain any fill not removed under the restoration plan. The Compliance Order further required that the ATF application contain a mitigation plan, acceptable to the Corps and EPA, that ÷offset[s] project impacts at a minimum ratio of 5:1.[2] *Id*. ¶ 7.

Following a hearing, the ALJ issued his Initial Decision finding Bricks in violation of the Act and assessing a penalty of $65,000.

C. *Findings Below*

The ALJ, among other things, rejected Bricks' assertion that the Corps lacked jurisdiction over the wetlands at issue in this case. Bricks argued that because the wetlands were "isolated," they did not constitute "waters of the United States" under the Supreme Court's Decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*") (holding that "isolated" ponds serving as habitat for migratory birds are not navigable waters). If the wetlands were "isolated," the Corps would lack jurisdiction under the Act, and, thus, Bricks would not need a permit under CWA § 404.

The ALJ stated that whether the wetlands on the site are hydrologically connected to the Fox River "is a close question." He nonetheless concluded that "considering the entire record, * * * EPA has made the requisite hydrological connection so that under the holding of *Riverside Bayview Homes*, 474 U.S. 121 (1985), these wetlands are 'waters of the United States.' Accordingly, EPA has Clean Water Act jurisdiction over the involved wetland area." Init. Dec. at 25. As stated above, the ALJ assessed a civil penalty of $65,000. *Id*. at 38. This appeal followed.

IV. *ANALYSIS*

On appeal, Bricks asserts, among other things,[11] that the Corps lacked jurisdiction over the site because the wetlands in this case are isolated, non-navigable waters. In particular, Bricks asserts that the Region failed to establish a hydrological connection between the site and a navigable water or a tributary thereof, as alleged in the complaint. Bricks states, in part:

> The [ALJ's] finding of flowing water between the ditch on Bricks' property and the East Run of the Blackberry Creek, more than 1.5 miles away from the Bricks prop-

[11] Bricks raises the following additional issues on appeal: (1) whether the Corps' failure to respond within 30 days to Brick's PCN effectively authorized the project to proceed; (2) whether the Region abused its discretion by issuing a compliance order requiring Bricks to submit an ATF permit request to the Corps containing a 5:1 mitigation plan; and (3) whether the Corps' July 7, 2000 issuance of an ATF permit resolved all alleged violations. Appeal at 1. However, because we hold that the Region failed to meet its burden of establishing that the wetlands at issue in this case are "navigable waters," we find it unnecessary to address these issues. For the same reason, we find it unnecessary to reach Bricks' July 30, 2003 request that the Board consider supplemental authority related to Bricks' assertion that the Region abused its discretion in issuing the compliance order.

> erty, is unsupported. The [ALJ] did not make a finding that a channel, or "tributary," runs on or near Bricks' property and continues down to the East Run of Blackberry Creek, and there is no evidence in the record establishing the existence of a continuous channel or series of jurisdictional waters for 1.5 miles to the East Run of Blackberry Creek.

Appeal at 15. Thus, according to Bricks, the Region failed to prove that the wetlands were "waters of the United States" within the meaning of the Act.

Bricks has also asserted that the Supreme Court's decision in *SWANCC* narrowed the scope of the Corps' authority to regulate waters under the Act. According to Bricks, after *SWANCC*, the Corps lacks jurisdiction over wetlands, such as those at issue here, that are not adjacent to actually navigable water bodies. Appeal at 23-29. Thus, even if the Region had established that the wetlands at issue in this case were hydrologically connected to a tributary of the Fox River, Bricks maintains that the Corps nevertheless lacked jurisdiction.[12] However, because we conclude that the Region did not meet its burden of establishing a hydrological connection between the wetlands at the site and a navigable water, or a tributary thereof, we do not reach this argument. That is, even under a narrow reading of *SWANCC*, to establish the Corps' jurisdiction on the basis of adjacency (*see supra* note 4 and accompanying text), the Region must prove a hydrological nexus between the wetlands and navigable waters by a preponderance of the evidence. *See SWANCC*, 531 U.S. at 167.[13] As explained *infra*, the Region has not shown such a hydrological nexus in this case.

We now turn to a fuller discussion of the nexus requirement. As previously stated, the CWA defines "navigable waters" as "waters of the United States, including the territorial seas." CWA § 502(7); 33 U.S.C. § 1362(7). "Waters of the

---

[12] In *SWANCC*, a consortium of 23 suburban Chicago cities and villages purchased and sought to develop a disposal site for baled, nonhazardous solid waste. *SWANCC*, 531 U.S. at 162-63. The site, an abandoned sand and gravel pit mining operation, contained permanent and seasonal ponds. (The site did not contain wetlands as defined by the Corps' regulations at 33 C.F.R. § 328.3(b) (1999). 531 U.S. at 164.) Because the consortium sought to fill the ponds, it requested a permit from the Corps under CWA § 404(a). The Corps asserted jurisdiction over the site pursuant to the "Migratory Bird Rule," which the Corps issued in 1986. *See* 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986). Under that rule, the Corps defined the term "waters of the United States" to include waters used, or that could be used, as a habitat for migratory birds which cross state lines. *Id*.; *SWANCC*, 531 U.S. at 164. The Supreme Court rejected the Corps' position, concluding that "the 'Migratory Bird Rule' is not fairly supported by the CWA." *SWANCC*, 531 U.S. at 167. In so doing, the Court declined to extend the Corps' jurisdiction "to ponds *not* adjacent to open water." *Id*. at 168.

[13] We note that the majority of courts have interpreted the holding in *SWANCC* narrowly. *See generally In re Veldhuis*, 11 E.A.D. 194, 222-23 (EAB 2003) (citing cases interpreting the holding in *SWANCC* narrowly); *but see Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001).

United States" include wetlands adjacent to navigable waters or their non-navigable tributaries. *See supra* note 4 and accompanying text; *see also United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (concluding that the term "navigable" is of limited import, and that the Corps reasonably interpreted the term "waters" to include wetlands adjacent to navigable waters); *United States v. Ashland Oil & Transp. Co*., 504 F.2d 1317, 1325 (6th Cir. 1974) (CWA applies to tributaries of navigable waters). Wetlands are adjacent to waters of the United States if there is a "significant nexus" between the wetlands and a navigable water. *See SWANCC*, 531 U.S. at 167; *United States v. Rapanos*, 339 F.3d 447, 453 (6th Cir. 2003); *United States v. Deaton*, 332 F.3d 698, 712 (4th Cir. 2003); *see also Riverside Bayview*, 474 U.S. at 134 (the Corps has jurisdiction over wetlands that are "inseparably bound up" with waters of the United States).

In attempting to prove a significant nexus in this case, the Region has asserted that the site is hydrologically connected to the Fox River. In both its Complaint and in its brief before this Board, the Region argued that the site is adjacent to a tributary of the Fox River, a navigable interstate water. In particular, the Region states that the wetlands are adjacent to a drainage way or ditch on Brick's property, which flows through culverts under I-88. According to the Region, the water then continues south for approximately 1.5 miles until it reaches the East Run of Blackberry Creek. *See* Brief of the United States Environmental Protection Agency Complainant/Appellee ("Region's Response") at 34. The water then flows into Blackberry Creek and thereafter makes its way to the Fox River, fifteen miles south of the site.

Although the ALJ considered the presence or absence of a hydrological connection "a close question," *see* Init. Dec. at 25, he ultimately agreed with the Region on this issue. In support of his conclusion, the ALJ relied on the following: (1) the testimony of Thomas Kehoe, an ENCAP employee, that water flowed through a ditch at the site, *id*.; Tr. at 404; (2) the testimony of Randolph Briggs that: (a) a channel or ditch existed on the property that carried water south from the site, through culverts, and then under I-88, Init. Dec. at 25; Tr. at 198-201; and (b) an "S" shaped channel existed to the south of the site, Init. Dec. at 26; Tr. at 206-07; (3) the testimony of Amy Nerbun that a surface connection existed between the wetlands on the site and the Fox River, Init. Dec. at 27; Tr. at 299-301, 311; (4) the testimony of Bricks' expert witness, Tom Slowinski, that drainage from the "general area" goes into Blackberry Creek, Init. Dec. at 26; Tr. at 498; and (5) a site map prepared by Bricks' contractor, EPT, which refers to "Blackberry Creek Tributary A" at the point where the site borders I-88, Init. Dec. at 27; CX 2. According to the ALJ:

> [N]o one piece of evidence in this case establishes a sufficient nexus between the wetlands on respondent's Aurora Commerce Center site and the Fox River to support the

> proposition that the filling of those wetlands invokes Clean Water Act jurisdiction. However, building upon the testimony of complainant's witnesses Briggs and Nerbun, and the testimony of respondent's witnesses Kehoe and Slowinski, as well as Complainant's Exhibit 2 [site map], it is held that EPA has established, by a preponderance of the evidence, that the wetlands on the Bricks site are "waters of the United States" as defined at 33 C.F.R. 328.3(a) and 40 C.F.R. 232.2, and "navigable waters" as defined at Section 502(7) of the Clean Water Act. 33 U.S.C. § 1362(7).

Init. Dec. at 27. The Region cites to this same evidence, asserting the Board should uphold the ALJ's determination. *See* Region's Response at 33-39. Our analysis of the evidence the ALJ and the Region relied on follows.

Although the Board generally defers to an ALJ's findings of fact where the credibility to be afforded the testimony of witnesses at a hearing is at issue, *see In re CDT Landfill Corp.*, 11 E.A.D. 88 (EAB 2003), the Board is not bound by these findings. See *In re Everwood Treatment Co.*, 6 E.A.D. 589, 612 n.39 (EAB 1996) (citing Administrative Procedure Act, 5 U.S.C. § 557(b)) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision * * * ."), *aff'd*, 96-1159-RV-M (S.D. Ala. Jan. 21, 1998); *see also W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 872 (6th Cir. 1995) (an administrative law judge's opportunity to observe a witness's demeanor "does not, by itself, require deference with regard to his or her derivative inferences" (quoting *Penasquiotos Vill., Inc. v. NLRB*, 565 F.2d 1074, 1079 (9th Cir. 1977)); *Bishopp v. District of Columbia*, 788 F.2d 781, 785 (D.C. Cir. 1986) (although a trial judge's credibility determinations demand deference, an appeals court may nevertheless reject such determinations if they are without support in the record). Thus, where as here the ALJ's findings of fact are not supported by a preponderance of the evidence in the record, the Board is not bound by those findings. *See* 40 C.F.R. § 22.30(f) ("Environmental Appeals Board shall adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed.").

A. *Kehoe Testimony*

Both the ALJ and the Region rely on the testimony of Thomas Kehoe, an employee of ENCAP, to demonstrate that the ditch on the site is hydrologically connected to the Fox River. Upon review, however, we conclude that his testimony does not support the Region's position.

The following exchange occurred when Complainant's counsel conducted his direct examination of Thomas Kehoe.

> Q. Are you familiar with the - can you describe the wetlands as far as any manmade characteristics in them?
>
> A. The wetlands are, essentially, located in the parcel. They are - every time I have been out there, there was water within a ditch that pretty much runs through the center of that designated area.
>
> Q. Is it fed by or how - how is it - where does the water sometimes come from?
>
> A. Walking the site, we determined the water comes from the culvert underneath, actually a series of culverts underneath Orchard road, three culverts, maybe. It appears to flow across the property to the South.
>
> Q. Okay.
>
> A. And then, eventually, enters another culvert under the road. I-88, I believe, is the road to the South.

Tr. at 404. Although Mr. Kehoe testified there is a drainage ditch on the site, and that the water appears to flow to the South under I-88, he did not testify about any hydrological connection to the south of I-88, i.e., between the site and Blackberry Creek or a tributary thereof. Thus, contrary to the ALJ's and the Regions's suggestion, Mr. Kehoe's testimony does not establish that the wetlands at issue are ultimately hydrologically connected to the Fox River.

B. *Briggs Testimony*

The Region repeatedly cites the testimony of Randolph Briggs, a Resource Conservationist with the Kane/DuPage Soil Conservation District, to support its assertion that a surface connection exists between the ditch at the site and Blackberry Creek. We are not persuaded that Mr. Briggs' testimony provides the critical missing link in proof.

In response to questions Bricks' attorney posed, Mr. Briggs testified, in relevant part, as follows:

> Q: Now, south of 88, I don't believe there is any defined sort of channel, is there? There is just wetlands in that south property, isn't there?
>
> A: No. Actually, there is - there is a defined channel that *now* S curves through this in this area right here.

> Q: They are not on your aerial?
>
> A: No, because this photo was taken about a year and a half ago, *and this channel was constructed within the last year*, and it actually comes down here and meanders through there.
>
> Q: So there is a *new*, manmade-constructed channel that goes through these wetlands?
>
> A: That is the construction you are talking about. It doesn't show because this was taken prior to this project by about a year.

Tr. at 206-07 (emphasis added).

Both the ALJ and the Region rely on Mr. Briggs' testimony that an "S" shaped channel exists to the south of I-88. In fact, the ALJ's conclusion that the site was hydrologically connected to Blackberry Creek or a tributary thereof was based, in part, on the existence of this "S" shaped channel to the south of I-88. *See* Init. Dec. at 26. Similarly, the Region repeatedly cites to Mr. Briggs' testimony regarding the existence of an "S" shaped channel south of I-88 to support its assertion that the site is hydrologically connected to Blackberry Creek or a tributary thereof. *See* Region's Response at 7, 33-34. Thus, the existence of this channel is material to the outcome in this case.[14] In citing Mr. Briggs' testimony regarding the existence of an "S" shaped channel to the south of I-88, however, the Region and the ALJ fail to account for Mr. Briggs' statement that this channel did not appear on aerial photos because the channel is a new one, created "within the last year." Tr. at 206. Complainant did not attempt to prove that this "S" shaped channel south of I-88 existed at the time Mr. Briggs inspected the site in 1999,[15] leav-

---

[14] We note further that, as discussed above, the ALJ found the existence of a hydrological connection between the site and Blackberry Creek or a tributary thereof to be a "close question," and stated that "no one piece of evidence establishes a sufficient nexus between the wetlands on [the site] and the Fox River." Init. Dec. at 25, 27. The ALJ includes Mr. Briggs' testimony regarding the "S" shaped channel as one piece of evidence supporting his determination. Thus, the ALJ's reliance on Mr. Briggs' testimony is material to the outcome in this case. *See id.* at 27 ("building upon the testimony of complainant's witnesses Briggs and Nerbun * * * it is held that EPA has established, by a preponderance of the evidence, that the wetlands on the Bricks site are 'waters of the United States'.").

[15] Since the hearing took place in January of 2001, the channel, according to Mr. Briggs' testimony, would have been constructed sometime after January 1, 2000. As the Region points out in its Response, Mr. Briggs' inspections of the site occurred in 1999. *See* Region's Response at 16-21. We note further that the ALJ's liability and penalty determinations concern violations occurring in 1999, prior to the construction of the "S" shaped channel.

ing this Board to guess as to whether it did or did not. At best, we can only speculate, which we decline to do.

The ALJ also relied on Mr. Briggs' statement, made just prior to the exchange quoted above, that a channel existed in the area that has been "*flowing continuously since I have been looking at it - so it has never dried up.*" *See id.* (emphasis added); Init. Dec. at 26. Specifically, the following exchange occurred during Bricks' attorney's cross examination of Mr. Briggs:

> Q: And, determining that the water from the Bricks property goes down there, that would be a hydrologic exercise, wouldn't it? I mean, wouldn't you have to consider rates of evaporation, percolation, volume, all those sorts of hydrologic things to really determine whether, you know, how, how the Bricks property and if the Bricks property has any effect on the Blackberry Creek?
>
> A. Well, it's my belief that when they did the Blackberry Watershed Plan * * * they actually did all that modeling for it, although I don't have it in my hand. * * * I am sure that that modeling has already been done.
>
> Q. Okay, but you don't know? You - it's not your - you have not done evaporation, percolation, transpiration, okay?
>
> A. No. I have, however, for the last year, been reviewing and monitoring a project just to the south of Interstate-88 * * * [w]hich deals with the restoration and wetland construction south of 88.
>
> Q. Right, I am familiar with that.
>
> A. Of that same channel, and that has been flowing continuously since I have been looking at it, so -it has never dried up.

Tr. at 205-06. The ALJ apparently assumed, without further analysis, that the continuously flowing channel Mr. Briggs referred to in the preceding quotation was a continuously flowing channel south of I-88. Upon careful review of the transcript, however, including a lengthy discussion preceding the above-quoted exchange in which Mr. Briggs was being questioned about the channel to the north of I-88, *see id.* at 197-204, we find Mr. Briggs' testimony ambiguous at best. In particular, it is unclear from Mr. Briggs' testimony whether his reference to a continuously flowing channel refers to the newly constructed "S" shaped channel south of I-88,

the ditch to the north on Bricks' property, or to something else.[16] We find this unexplained ambiguity in Mr. Briggs' testimony consequential, and are not persuaded that the testimony establishes a hydrological connection existed between the site and Blackberry Creek or a tributary thereof at the time Mr. Briggs inspected the site, or at the time the violations purportedly occurred.

Finally, we note that the ALJ credited Mr. Briggs' testimony over that of Bricks' expert witness, Tom Slowinski, because Mr. Briggs "had been monitoring a wetlands restoration project in this area for the prior year." Init. Dec. at 26; Tr. at 205-06. As previously noted, *see supra* note 15, this would mean that Mr. Briggs had been monitoring a project south of I-88 since about January of 2000. Once again, however, this time frame does not coincide with the time during which Mr. Briggs inspected the site or in which the violations purportedly occurred. Absent the Region's demonstration of a temporal linkage between Mr. Briggs' observations about the channel south of I-88 and the time frame in which he inspected the site and in which the violations purportedly occurred, we find Mr. Briggs' testimony unconvincing, and the ALJ's rationale for crediting it, misplaced.

C. *Nerbun Testimony*

Additional testimony allegedly supporting the Region's position is that of Amy Nerbun, an enforcement officer at Region V. In response to questioning by the Region, Ms. Nerbun expressed the opinion that the site was not an isolated wetland but was hydrologically connected, via surface water, to a tributary of Blackberry Creek. Tr. at 299-301. Upon review, however, we conclude that this testimony is also of limited value.

First, Ms. Nerbun's opinion regarding a hydrological connection between the site and Blackberry Creek or a tributary thereof was not based on her personal knowledge or evaluation of the area to the south of I-88. Indeed, it does not appear from the record before us that Ms. Nerbun ever personally inspected the area south of I-88. Rather, Ms. Nerbun based her opinion exclusively on her review of a document entitled: The Blackberry Creek Watershed Plan (the "Plan"). *See* CX 16. According to the record, Ms. Nerbun made no attempt to verify the information in the Plan. *See* Tr. at 304-05. Under these circumstances, we give Ms. Nerbun's testimony less weight than we would had she based her opinion on her personal observations.[17]

---

[16] The ditch on the site to the north of I-88 is inconsistently referred to in the record as a "ditch," a "drainage way," a "channel," and a "tributary."

[17] We note that at the hearing Ms. Nerbun conceded that she was not an expert in hydrology and the Region does not argue otherwise. *See* Tr. at 304.

Second, as the ALJ states in his Initial Decision, the Region "offered [the Plan] into evidence * * * for the limited purpose of showing the gravity of the violation and the respondent's negligence, and it was admitted to the record for that limited purpose."[18] Init. Dec. at 27 n.28; Tr. at 294, 307-10. Thus, the plan itself, which the ALJ made clear was offered into evidence for the purpose of determining an appropriate penalty, may not, at least in this case, serve as a basis for establishing the requisite hydrological connection; its contents were available only for purposes of calculating an appropriate penalty.

Finally, Ms. Nerbun testified the Plan confirmed references to a surface connection between the wetlands and Blackberry Creek contained in a map Bricks' contractor, EPT, prepared. *See* CX 2. As the ALJ pointed out, Init. Dec. at 27, this map contains a reference to "Blackberry Creek Tributary A" at the point where the site borders I-88. CX 2. In addition, on this map the ditch on the site appears to be labeled "East Branch of the Blackberry Creek." *Id*. However, because the purpose of this map is to delineate the wetlands at the site rather than to illustrate water flow to the south, the map only shows the area to the north of I-88. Thus, it does not establish that a surface connection to Blackberry Creek or a tributary thereof exists to the south of I-88. Further, Bricks has asserted that the notations are erroneous and "were prepared by engineers with no particular expertise with wetlands or hydrology and used in a dispute with Illinois Department of Natural Resources concerning the location of the floodway." Appeal at 18. The Region has not specifically responded to this assertion. Under the circumstances, we have serious doubts about the reliability of the notations for the purposes of establishing a hydrological connection, particularly where, as here, the record before us contains no maps or photographs of the area south of I-88 showing such a surface water connection.[19]

D. *Slowinski Testimony*

The Region places significant emphasis on the testimony of Thomas Slowinski, a hydrology expert testifying on Bricks' behalf. In particular, the Region relies on Mr. Slowinski's statement that drainage from the "general area goes into Blackberry Creek which enters the Fox River about 15 miles to the south." Tr. at 498. According to the Region, this confirms that a hydrological connection exists between the site and Blackberry Creek. Once again, however, the waters are far muddier than the Region implies.

---

[18] The Region has not suggested that the ALJ's decision in this regard was erroneous.

[19] Indeed, the Region itself has acknowledged that at least one of the notations may be inaccurate. *See* Region's Response at 6 n.3 ("Bricks' consultant may have used the wrong term in preparing the Site drawings.").

When asked whether there was any defined channel to the south of the site, Mr. Slowinski responded, "No, there is no stream channel south of I-88." *Id*. at 506-07. Further, according to Mr. Slowinski, a golf course constructed south of I-88 (presumably before the alleged violations occurred) altered the East Run of Blackberry Creek. *Id*. at 506. In particular, the East Run was converted to lakes and wetlands when the golf course was constructed. *Id*. Thus, contrary to the Region's assertion, Mr. Slowinski's testimony does not provide sufficient evidence of a defined channel between the site and Blackberry Creek.[20]

E. *Man-Made Channels*

Finally, in support of its assertion that the ditch is hydrologically connected to the Fox River, the Region has cited numerous cases supporting the proposition that a hydrological connection can exist even when water flows through man-made channels. While this may be true, in each of cases cited, unlike the present case, the hydrological connection was either undisputed or clearly established in the factual record. For example, in *United States v. Lamplight Equestrian Center., Inc.*, 54 Env't Rep. Cas. (BNA) 1217 (N.D. Ill. 2002), which the Region states is "remarkably similar" to the present case, the respondent acknowledged a hydrological connection to a navigable water. *Id.* at 1218. Bricks concedes no such connection in this case. *Cf. United States v. Deaton*, 332 F.3d 698, 702 (4th Cir. 2003) (parties agreed that water from a roadside ditch "takes a winding, thirty-two-mile path to the Chesapeake Bay").

Thus, while the mere fact that water flows through man-made conveyances before reaching a navigable water does not bar jurisdiction under the Act, the Agency still has the burden of demonstrating a hydrological connection. *See In re Richner*, 10 E.A.D. 617, 625 (EAB 2002) (the Region bears the burden of demon-

[20] In its response, the Region states that the existence of a defined channel is "not essential to establish jurisdiction in this case." Region's Response at 34. Although the meaning of this statement is not entirely clear, the Region may be suggesting that it may predicate jurisdiction on the fact that a wetland is in the same watershed as a navigable water. While this may or may not be correct, we need not address this question in this decision. As stated above, the Complaint in this matter asserts jurisdiction because the wetlands are allegedly adjacent to a tributary of Blackberry Creek (the ditch on Bricks' property). Nowhere in the Complaint does the Region assert Clean Water Act jurisdiction on the alternative theory now apparently suggested. Indeed, the Region's brief before this Board is devoted to arguing that the ditch on the site is hydrologically connected to a tributary of the Blackberry Creek. While the Region may have established that the wetlands on the site are adjacent to other wetlands to the south of I-88, this is not sufficient to establish jurisdiction in this case. *See* 40 C.F.R. § 122.2 (excluding from the definition of "waters of the United States," wetlands adjacent to "waters that are themselves wetlands"). Under these circumstances, we need not decide if it is sufficient for a wetland to simply be in the same watershed.

strating a hydrological connection).[21] The Region failed to prove such a connection in this case.

V. *CONCLUSIONS OF LAW*

Based on our review of the testimony and evidence in the record before us, we conclude that the Region has failed to establish that the wetlands at issue are "waters of the United States" and thus "navigable waters" within the meaning of the Act. The Region's case suffers from a fatal lack of clarity. As the ALJ stated, "no one piece of evidence in this case establishes a sufficient nexus between the wetlands on [Bricks' property] and the Fox River to support the proposition that the filling of these wetlands invokes [CWA] jurisdiction." Init. Dec. at 27. Further, as the above discussion demonstrates, the testimony at the hearing that the ALJ relies on in support of his Initial Decision is contradictory and inconclusive at best. Under these narrow circumstances, we must rule against the party possessing the burden of proof, in this case the Region. In so doing, we do not rule out the possibility that a hydrological connection exists between the site and Blackberry Creek or a tributary thereof. Rather, we simply hold that the Region has not met its burden of proving such a connection by a preponderance of the evidence. Thus, we cannot find, on this record, that the Act required a permit in this instance. Absent our ability to make such a finding, we hold that the Region lacked jurisdiction to bring the instant enforcement action.

VI. *ORDER*

For the reasons explained above, we reverse the ALJ's finding of liability and vacate the civil penalty assessed.

So ordered.[22]

---

[21] In *Richner*, this Board, reversing the regional judicial officer, held that waters on one side of an embankment "did not lose their character as waters of the United States merely because [an] obstructed culvert may have blocked the flow of water to the other side for a period of time." *Richner*, 10 E.A.D. at 631. The ALJ had assumed that where a hydrological connection is intermittent, a water may not be considered a water of the United States within the meaning of the Act. This Board reversed. Unlike *Richner*, however, the Region in the present case has failed to meet its burden of proving a hydrological connection, intermittent or otherwise.

[22] By order dated May 27, 2003, the Board scheduled oral argument in this matter. *See* Order Scheduling Oral Argument (May 27, 2003). The Board later postponed the argument indefinitely. *See* Order Postponing Oral Argument (July 2, 2003). Upon further consideration, the Board has decided that oral argument would not be of further assistance in resolving this matter.