IN RE LARRY RICHNER, NANCY SHEEPBOUWER & RICHWAY FARMS

CWA Appeal No. 01-01

DECISION AND REMAND ORDER

Decided July 22, 2002

Syllabus

The United States Environmental Protection Agency Region X (the "Region") appeals an Initial Decision of Regional Judicial Officer Steven W. Anderson ("Presiding Officer"), finding Respondent Larry Richner ("Respondent") not liable for a violation of Clean Water Act ("CWA") § 301(a), 33 U.S.C. § 1311(a).

The Region filed an Administrative Complaint ("Complaint") which generally alleged that Respondent discharged dairy wastes to unnamed creeks on his dairy farm (a concentrated animal feeding operation), which eventually carried the pollutants to the Nooksack River, a water of the United States, in violation of the CWA. The Region requested a civil penalty assessment of $11,000 under CWA § 309(g)(2)(A).

In the Initial Decision the Presiding Officer found Respondent not liable for the violations alleged in the Complaint. Reading the Complaint narrowly, the Presiding Officer determined that the Complaint charged Respondent with an illegal discharge to the Nooksack River and was not predicated on an illegal discharge into the unnamed creeks on Respondent's property. The Presiding Officer went on to conclude that the Region had failed to show there was a discharge into the Nooksack River at the approximate time of the inspection because it had failed to demonstrate that the waters on the farm side of the railroad embankment on the boundary of the farm were connected to waters on the other side of the embankment. The latter waters eventually flowed to the Nooksack River. At the time of the inspection, however, the culvert under the railroad embankment, which connected the waters on each side, was blocked, thus inhibiting the flow of the waters on the farm to the other side of the embankment.

With regard to liability, the Region asserts on appeal that the Environmental Appeals Board ("Board") should set aside the Presiding Officer's conclusion that the Region was required to show that at the approximate time of the inspection there was a discharge to the Nooksack River from the unnamed creeks on Respondent's property. The Region also asserts that, given that the railroad culvert was cleared two weeks after the inspection and uncontested expert testimony showed that microscopic pathogens survive for months, the Board should set aside the Presiding Officer's conclusion that the Region failed to show a discharge of pollutants to the Nooksack River. Finally, the Region asserts that any pleading error in its Complaint did not prejudice Respondent, and that, accordingly, its claim should not be defeated based on a narrow reading of the Complaint.

Held: The Presiding Officer's determinations regarding liability are reversed. This matter is, however, remanded to the Presiding Officer for further proceedings to determine an appropriate penalty.

The Presiding Officer erred in limiting the Region's case to what he identified as the specific allegation of the Complaint, namely, that there was a discharge to the Nooksack River. In this regard, the Board finds that the Presiding Officer was reading the Rules of Practice too narrowly. The Rules of Practice are to be liberally construed and where, as here, Respondent's Answer and defense in this matter reflect an understanding that Respondent knew he was being charged with the unpermitted and, therefore, illegal discharge of pollutants into waters for which a permit was required under the CWA, no prejudice resulted from the literal wording of the Complaint. Furthermore, where it appears that the issues were fairly and knowingly tried, the Board's case law, as well as that of the federal courts, does not preclude a finding of liability where no formal post-hearing amendment was sought to conform the pleadings to the proof.

The Board further finds that the Presiding Officer erred in not finding that creeks on Respondent's farm were waters of the United States. The principal issue that arises with respect to this issue is whether or not the obstruction of the culvert, which the Board finds was temporary in nature, had any effect on the jurisdictional status of the unnamed creeks. We find that waters on the farm side of the railroad embankment did not lose their character as waters of the United States merely because the obstructed culvert may have blocked the flow of water to the other side for a period of time. Case law holds that waters that flow intermittently are waters of the United States for CWA purposes. In this case, the evidence and testimony in the record indicate that the waters on the farm side of the embankment were not isolated from the waters leading to the Nooksack River on the other side. Accordingly, the Region has established by a preponderance of the evidence that a connection exists between the waters on Respondent's property and those on the other side of the culvert such that the discharge of pollutants to the waters on Respondent's property constitutes a CWA violation.

The Board attempted to evaluate the penalty proposed by the Region to determine if it is appropriate. The Board finds, however, that the record upon which to make such an evaluation is inadequate. Accordingly, the matter is remanded to the Presiding Officer to issue a penalty decision, appealable to the Board pursuant to 40 C.F.R. § 22.30.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Kathie A. Stein.

Opinion of the Board by Judge McCallum:

I. *INTRODUCTION*

On April 16, 1997, U.S. EPA Region X (the "Region") filed an Administrative Complaint ("Complaint") alleging that Respondent discharged dairy wastes to unnamed creeks on his dairy farm which eventually carried the pollutants to the Nooksack River in violation of Clean Water Act ("CWA" or the "Act") § 301(a),

33 U.S.C. § 1311(a).[1] On February 15, 2001, Regional Judicial Officer Steven W. Anderson ("Presiding Officer") issued an order finding, among other things, that Respondent Larry Richner ("Respondent") was not liable for the alleged violation.[2] In particular, the Presiding Officer determined that a culvert under a railroad embankment connecting the unnamed creeks on Respondent's property to waters that eventually flowed to the Nooksack River was not sufficiently open to allow contaminated water to flow through it at the time of the Region's inspection in this matter. On March 20, 2001, the Region filed a Notice of Appeal ("Appeal") with the Board. On appeal, the Region asserts that several portions of the Initial Decision pertaining to Respondent's liability constitute clear error and warrant reversal by the Board. For the reasons set forth below, the Board reverses the Initial Decision's liability determination and remands the matter to the Presiding Officer for a penalty determination.

II. *STATUTORY BACKGROUND AND STANDARD OF PROOF*

The stated goal of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). Except as in compliance with various sections of the Act, discharging pollutants into navigable waters is unlawful. *See, e.g.*, 33 U.S.C. § 1311(a); *id.* § 1342(a) (authorizing the Administrator to issue permits for the discharge of pollutants under the National Pollutant Discharge Elimination System ("NPDES")); *id.* § 1362 (defining "discharge of a pollutant" to include, *inter alia*, the addition of pollutants to navigable waters from any discrete conveyance known as a "point source"). Violators of the Act are subject to civil penalties under CWA § 309. *Id.* § 1319.

In an enforcement proceeding, the Board reviews a Presiding Officer's factual and legal conclusions *de novo*. 40 C.F.R. § 22.30(f) ("The Environmental Appeals Board shall adopt, modify, or set aside findings of fact and conclusions of law or discretion contained in the decision or order being reviewed, and set forth in the final order the reasons for its actions."). *In re City of Marshall*, 10 E.A.D. 173 (EAB 2001); *In re Billy Yee*, 10 E.A.D. 1 (EAB 2001), *appeal dismissed*, 23 Fed. Appx. 636, 2002 WL 87636 (8th Cir. 2002).

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[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] In addition to Larry Richner, two other parties — Richway Farms and Nancy Sheepbouwer — were named as respondents in the Region's Complaint, but were found not liable by the Presiding Officer for reasons not relevant here. The Region appeals only those aspects of the Presiding Officer's decision relating to Larry Richner's liability.

The complainant has the burdens of presentation and persuasion to establish that the violation(s) 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. Once complainant's prima facie case has been established, "respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief." 40 C.F.R. § 22.24(a). For "affirmative defenses" the respondent bears the burdens of presentation and persuasion. *Id.; See also City of Marshall*, 10 E.A.D. at 180.

In order to establish its case, the complainant is subject to a "preponderance of the evidence" standard. 40 C.F.R. § 22.24(b); *City of Marshall*, 10 E.A.D. at 180; This standard of proof is intended to "'instruct the fact finder concerning the degree of confidence society thinks he should have in the correctness of his factual conclusion.'" *In re Echevarria*, 5 E.A.D. 626, 638 (EAB 1994) (quoting *In re Winship*, 397 U.S. 358, 370 (1970)). This means that the Presiding Officer should believe "'that his 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).

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 Respondent: (1) discharged a pollutant;[3] (2) from a point source;[4] (3) into a navigable water;[5] (4) without an NPDES permit or other authorization under the Act.

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[3] Under CWA § 502, the "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12).

[4] A "point source" is defined as "any discernible, 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." 33 U.S.C. § 1362(14) (emphasis added).

[5] "[N]avigable waters means the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The EPA has interpreted "waters of the United States" to mean:

> (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;
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> (b) All interstate waters, including interstate "wetlands;"
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> (c) All other waters such as intrastate lakes, rivers, streams, (including intermittent streams) * * * the use, degradation, or destruction of which could affect interstate or foreign commerce * * *;
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> * * * * * * *
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> (e) Tributaries of waters identified in paragraphs (a) through (d) of this definition * * *.

40 C.F.R. § 122.2.

III. *FACTUAL BACKGROUND*

For a number of years, Larry Richner owned and operated the Richway Farms[6] dairy facility (the "farm" or the "property") located at 3909 Hoff Road, Everson, Washington. In 1995, Mr. Richner transferred the farm ownership and operation to his wife, Marilyn Richner, and his daughter, Nancy Sheepbouwer. Motion to Strike Defenses, Attachment 4 (Milk Producer's License Issued to Marilyn Richner or Nancy J. Sheepbouwer).

The farm is bordered on the north by a road and on the west by Burlington-Northern Santa Fe railroad tracks. Located on the farm are several barns, a heifer confinement area, a manure catch basin, and a lagoon. Photos of the property indicate that at the time of the inspection, many parts of the property were rather wet. Complainant's Exhibit ("Ex.") 2. At that time, an unnamed creek ("Creek No. 1") ran along the southern portion of the property. Complainant's Ex. 3. Another unnamed creek ("Creek No. 2") ran diagonally from northeast to southwest through a pasture on the property. This unnamed creek ran through a manure pile as it flowed through the pasture. *Id*. Both unnamed creeks flowed toward the railroad tracks. There is a culvert under the railroad tracks intended to connect the unnamed creeks with another unnamed creek ("Creek No. 3") on the opposite side of the culvert that flows to Smith Creek and eventually to the Nooksack River.

Due to the number of dairy cattle on the farm (in excess of 200), as well as meeting other criteria specified in the regulations, 40 C.F.R. part 122, appendix B, the farm is considered a concentrated animal feeding operation ("CAFO") and thus qualifies as a potential point source of pollutants under the Act. Initial Decision ("Init. Dec.") at 12-13. On March 13, 1997, EPA Inspectors Dennis Lazzar and Phil Wong (the "Inspectors") conducted an unannounced NPDES inspection of Richway Farms. Complainant's Ex. 2, CAFO Inspection Report. At the farm, the Inspectors observed a milking parlor that was next to a manure catch basin. *Id.* Manure is pumped from the catch basin to a lagoon located to the south. *Id.* The Inspectors also saw cows walking through Creek No. 1 as it ran along the east side of the property. *Id.* In their report the Inspectors noted that they saw a trail of manure from the catch basin to the unnamed creek. *Id.* The Inspectors also saw two large areas of manure slurry on a pasture on the south side of the property. *Id.* Creek No. 1 flowed through one of the manure piles. *Id.*

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[6] The correct name of the dairy business operated at 3909 Hoff Road during 1995-1997 is Rick**k**way Farms. The Initial Decision, as well as the pleadings filed before the Presiding Officer and the Board refer to the farm as Rich**h**way Farms. In fact, Respondent has referred to the farm as Rich**h**way Farms in his briefs. *See* Respondent's Response. Accordingly, we will use that same designation in our decision.

The Inspectors took three water samples from the farm's surface waters.[7] Sample 313918A came from the south pasture at the junction of the manure pile and Creek No. 1. Sample 313918B came from the waters in the upper confinement area just outside the heifer confinement area and adjacent manure slurry. Sample 313918C, an upstream sample, came from Creek No. 2, to which cattle also had free access. A laboratory analysis of the three water samples revealed that surface waters contained fecal bacterial colonies in the amounts of 5,000 per 100 milliliters ("ml."), 50,000 per 100 ml., and 20 per 100 ml., respectively. Complainant's Ex. 2, CAFO Inspection Report.

On April 16, 1997, the Region filed a Complaint pursuant to section 309(g) of the Act, alleging that the dairy had unlawfully discharged pollutants into waters of the United States in violation of CWA § 301(a), 33 U.S.C. § 1131(a). The Region requested a civil penalty assessment of $11,000 under CWA § 309(g)(2)(A).

Larry Richner responded to the Complaint by requesting a hearing, filing an Answer, and later supplying explanatory supplements to denied paragraphs. Based on information provided by Mr. Richner, the Region sought leave to amend its Complaint to add Marilyn Richner and Nancy Sheepbouwer as liable parties. The language in one sentence of one of the allegations in the Complaint was also changed. Whereas the original Complaint provided in part, "The unnamed creek which flowed through the manure pile flows to the Nooksack River," as amended, the sentence reads, "The unnamed creek contained pollutants which flowed from the manure pile and discharged to the Nooksack River." Amended Complaint ¶ 2.3 (formerly ¶ 6). Despite Mr. Richner's opposition, the Presiding Officer granted the Region's motion to amend. Mr. Richner did not file an amended answer.

An evidentiary hearing was held on July 25, 2000. Mr. Richner appeared with counsel present to assist and to confer with if needed. Hearing Transcript ("Tr.") at 5.

The Presiding Officer issued an Initial Decision on February 20, 2001. He determined that the Region's Complaint and its Amended Complaint charged Richway Farms, Larry Richner, and Nancy Sheepbouwer with a discharge to the Nooksack River and not a discharge into the unnamed creek on the property. Although he concluded that (1) the manure pile was the primary source of the contamination; (2) an act of God — referring to a mudslide that is an alleged source

[7] During their inspection of the farm, the Inspectors did not walk to the point where the unnamed creek flowed to the railroad embankment. Transcript at 41, 47.

of flooding on the farm — was no defense to the strict liability statute;[8] and (3) there was a discharge from a point source, he nonetheless ruled that the Region failed to meet its burden of proof in showing a discharge to the Nooksack River. The Presiding Officer stated, in part, that the Region failed to show there was a discharge into the Nooksack River at the approximate time of the inspection, and failed to demonstrate that the railroad culvert was partially open on March 13, 1997.

On March 20, 2001, the Region filed its Appeal and a Motion for Extension of Time to file its appellate brief.[9] The Board granted the request for additional time on March 22, 2001. The Region filed its brief on April 23, 2001. Respondent filed a Response to the Region's brief on May 22, 2001.

The Region states that the Board should set aside the Presiding Officer's conclusion that the Region failed to show that at the approximate time of the inspection there was a discharge to the Nooksack River from the unnamed creeks on the property. The Presiding Officer held that the Region did not prove by a preponderance of the evidence that the railroad culvert that connected Creek Nos. 1 and 2 on Respondent's farm to Creek No. 3 was sufficiently open to allow the discharge of pollutants at the time of the EPA inspection on March 13, 1997. Init. Dec. at 17. The Region also asserts that, given that the railroad culvert was cleared two weeks after the inspection and uncontested expert testimony showed that microscopic pathogens survive for months, the Board should set aside the Presiding Officer's conclusion that the Region failed to show a discharge of pollutants to the Nooksack River. Appeal at 2-3. Finally, the Region asserts that any

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[8] In the proceeding before the Presiding Officer, Respondent asserted that mudslides from a hill to the east of his property caused the creek at the foot of the hill to flood. Init. Dec. at 10. This, in turn, flooded the concrete slab between the cow sheds and the manure catch basin. *Id*. Accordingly, manure from the catch basin was able to enter Creek No. 2 on the property. *Id*. The mudslides also destroyed a fence that prevented cows from getting into the unnamed creeks on the property. *Id*.

Respondent asserted that he should not be held responsible for the flooding on his property resulting from the mudslides because the mudslides were caused by a natural gas pipeline explosion that were triggered by a landslide. *Id; see also* Tr. at 99. He also attributed the mudslides to building activities on hills above the dairy. Init. Dec. at 10.

The Presiding Officer held that under the CWA, a strict liability statute, an "Act of God" defense does not shield Respondent from liability for damage caused by the pipeline explosion or construction activities by other parties. *Id*. at 10-11.

[9] Subsequent to filing its Appeal before the Board, the Region filed a Motion for Reconsideration with the Presiding Officer on April 13, 2001. On July 19, 2001, the Presiding Officer issued an Order on Complainant's Motion for Reconsideration ("Reconsideration Order") denying the Region's Motion for Reconsideration except as to the Initial Decision's Findings of Fact and Conclusions of Law No. 40, which was amended. The relevance of this amendment is addressed in Section IV.A of this decision.

pleading error in its Amended Complaint did not prejudice Respondents, and that, accordingly, its claim should not be defeated on this basis. *Id.*

IV. *DISCUSSION*

A. *Whether a Discharge of Pollutants Must Enter a Navigable Water on the Same Day as Its Release*

The first issue raised by the Region is presented as follows:

> The Presiding Officer's conclusion that the discharge of manure and water observed by EPA inspectors on March 13, 1997, would have been an unauthorized discharge of pollutants to waters of the United States and a violation of section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), only if the contaminated water had been able to flow through the culvert under the railroad embankment into Smith Creek and the Nooksack River on the same day as the release of the pollutants constitutes legal error and should be reversed.

Appeal at 8. The focus of the Region's argument addressing this issue is limited (or largely limited) to its contention that the Presiding Officer held that, in order for a violation to have occurred, there must have been a discharge to the Nooksack River "on the same day as the release of the pollutants." *Id.*[10]

The Region had also earlier made the same contention in a Motion for Reconsideration filed with the Presiding Officer. *See supra* note 9. In response, the Presiding Officer stated in his Reconsideration Order that the Initial Decision was not "intended to imply that pollutants observed in the creeks on the farm property by EPA inspectors on March 13, 1997, had necessarily to enter the Nooksack River on that same day in order for there to be a violation of the Clean Water

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[10] The portion of the Initial Decision cited by the Agency provides:

> I find that the Complainant has failed to show by a preponderance of the evidence that the railroad culvert in the embankment running along the southwest side of the dairy farm at 3909 Hoff Road was at least partially open at the time of the EPA inspection on March 13, 1997. The Complainant has therefore also failed to show that at the approximate time of the inspection there was a discharge to the Nooksack River from creeks on the property at 3909 Hoff Road.

Init. Dec. at 17.

Act." Reconsideration Order at 4. Accordingly, the Presiding Officer amended his Findings of Fact and Conclusions of Law No. 40 to state:

> (40) It has not been shown by a preponderance of the evidence that as of the approximate time of the March 13, 1997, inspection the culvert under the railroad embankment was open so that contaminated water could pass through it from the property at 3909 Hoff Road to Smith Creek and the Nooksack River.

Id. at 20.

It thus appears that the Presiding Officer's focus was on the apparent absence of any connection *at the approximate time* of the alleged violation between the waters on the farm and those on the other side of the railroad embankment, rather than on the very *same day* of the alleged violation. Based on other statements of the Presiding Officer, he likely would have found a violation had there been such a connection. *See* Init. Dec. ¶¶ 35, 39. In any event, it is not productive to dwell on the minor temporal distinctions that divide the Region and the Presiding Officer, for there is no requirement that a discharge of pollutants reach navigable waters on the same day or at the approximate time as their release. *See United States v. Eidson*, 108 F.3d 1336, 1342 (11th Cir. 1997) (holding Respondents liable under the CWA for an unlawful pollutant discharge after reasoning that "pollutants need not reach interstate bodies of water immediately or continuously in order to inflict serious environmental damage"); *United States v. Texas Pipeline Co.*, 611 F.2d 345, 347 (10th Cir. 1979) (stating that "[i]t makes no difference that a stream was or was not at the time of the spill discharging water continuously into a river navigable in the traditional sense"); *United States v. Holland*, 373 F. Supp. 665, 675 (M.D. Fla. 1974) (stating that pollutants disposed of on dry land that is periodically inundated by waters of the United States are not beyond the reach of the CWA). Accordingly, we see no need to address the issue further as the Region has framed it. Instead, we will concentrate on whether the waters on each side of the railroad embankment were connected for purposes of satisfying the jurisdictional requirements of the CWA. More specifically, we will examine whether the Region has proven that there was a connection between the unnamed creek on the farm and the waters on the other side of the railroad embankment, such that the discharge of pollutants into the unnamed creek should be regarded as a discharge into waters of the United States by reason of the interconnection of the unnamed creek with Smith Creek and eventually the Nooksack River. *See, e.g., Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001) (finding that irrigation canals connecting to natural lakes and streams are waters of the United States). As discussed in Section IV.C, without this connection, there is no proof that the unnamed creek on the farm is a "water of the United States" within the meaning of the CWA. We turn first, however, to a matter of pleadings and proof.

B. *Whether Dismissal with Prejudice Due to a Failure to Prove Allegations as Presented in the Complaint Was Appropriate*

The Region also appeals a determination made by the Presiding Officer regarding the language used by the Region in its Amended Complaint. The portions of the Amended Complaint at issue provide:

> 2.3. On March 13, 1997, the EPA conducted a[n NPDES] inspection of the [farm]. The Inspectors observed a manure pile located in the [farm's] south pasture with an unnamed creek flowing through it. * * * The unnamed creek contained pollutants which flowed from the manure pile and *discharged* to the Nooksack River.
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> 2.4. This *discharge* of wastewater constitutes a discharge to "navigable waters" within the meaning of Section 502(7) of the [CWA].

Amended Complaint ¶¶ 2.3-2.4 (emphasis added).

Focusing on the word "discharge" in the above paragraphs, the Presiding Officer determined that the "sole violation" alleged in the Amended Complaint was a discharge to the Nooksack River — not a discharge to the unnamed creeks on the dairy property. Init. Dec. at 14-15. Determining that the Region failed to prove a discharge to the Nooksack River, the Presiding Officer concluded that the Region had not met its burden of proof in establishing the prima facie case as alleged in the Amended Complaint and dismissed the Complaint against Respondents. *Id*. at 21. As support for his ruling that the Region had not met its burden of proof regarding a discharge to the Nooksack River, the Presiding Officer relied on 40 C.F.R. § 22.4, which places the burden on the Region to prove the violation "as set forth in the complaint."[11]

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[11] The Presiding Officer quotes both the most current and previous versions of 40 C.F.R. § 22.4, Init. Dec. at 15, which provide:

> The complainant has the burden of going forward with and of proving that the violation occurred as set forth in the complaint and that the proposed civil penalty * * * is appropriate.

40 C.F.R. § 22.24 (1980).

> The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate.

40 C.F.R. § 22.24(a) (1999 revision).

On appeal, the Region asserts that the violation alleged in the Amended Complaint was a violation of CWA § 301(a), which it proved. Appeal at 13. The Region states that the reference in the Amended Complaint to pollutants in the unnamed creeks reaching the Nooksack River was an insignificant allegation that, standing alone, was insufficient to defeat the Complaint. *Id*. at 14-15. The Region asserts that the allegations of the Complaint in their totality charge Respondent with a discharge into navigable waters and did not disadvantage or prejudice Respondent in the defense of his case. *Id*. at 13-14.

As a general rule, specificity in pleading is not required under the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. part 22 ("Rules of Practice" or "Rules"). Their purpose is to provide notice. An administrative complaint need only reasonably inform an individual of the matters to be dealt with at the hearing. *In re Sporicidin Int'l*, 3 E.A.D. 589, 596-98 (CJO 1991). It is widely accepted that administrative complaints are "liberally construed and easily amended," even after the close of the hearing. *Yaffe Iron & Metal Co. v. EPA*, 774 F.2d 1008, 1012 (10th Cir. 1985), *aff'g* TSCA Appeal No. 81-2 (JO Aug. 9, 1982). Further, the complaint, after the close of the hearing, may be amended to conform to the evidence adduced during the proceeding. *In re J.V. Peters & Co.*, 3 E.A.D. 280, 282 (CJO 1990). Dismissal with prejudice is rarely invoked. In fact, it is reserved for repeated instances of vagueness, or where a more carefully drafted complaint would not show a right of relief for the complainant. *In re Asbestos Specialists*, 4 E.A.D. 819, 827 (EAB 1993).

The Presiding Officer was reading the Rules of Practice too narrowly when he ruled that the Region failed to prove the specific allegation of the Complaint, namely, that there was a discharge to the Nooksack River. As stated previously, while it is true that the Rules of Practice require the Region to prove its allegation, the Rules are to be liberally construed. In this case, the Complaint put Respondent on notice that he was being charged with the unpermitted and, therefore, illegal discharge of pollutants into waters for which a permit was required under the CWA. It was explicitly stated in the Complaint that those waters were connected to the Nooksack River, i.e., by way of the waters on the other side of the railroad embankment, which in turn were connected to Smith Creek, which in turn flowed into the Nooksack River. Complaint ¶ 6. Indeed, Respondent's Answer and defense[12] reflect understanding that this was the nature of the violation with

[12] As reflected by Respondent's answer to the original Complaint (Respondent did not file an answer to the Amended Complaint), as well as other pleadings of Respondent, Respondent does not appear to have any trouble in understanding the thrust of the Region's charge. In fact, Respondent asserts in his Proposed Findings of Fact and Conclusions of Law that the violation charged generally involved the "discharge of pollutants into navigable waters in violation of the federal Clean Water Act." Respondent Larry Richner's Proposed Findings of Fact and Conclusions of Law ("Respondent's

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which Respondent was charged. Explanations to Answer ¶¶ 6-10. Therefore, no prejudice resulted from the literal wording of the Complaint.

The Presiding Officer is correct that a complaint should be formally amended pursuant to 40 C.F.R. § 22.14(c) if an issue to be adjudicated is not properly reflected in the pleadings. However, the Board's case law and that of the federal courts[13] allows for post-hearing amendments to conform the pleadings to the evidence respecting issues actually tried at the hearing. *See In re H.E.L.P.E.R., Inc.*, 8 E.A.D. 437, 449-50 (EAB 1999) ("While the Consolidated Rules [of Practice] do not contain a procedure explicitly authorizing amendment of pleadings to conform to the evidence, *see* 22 C.F.R. § 22.14(d), the rules have been interpreted as allowing such amendments."); *see also Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1522 (9th Cir. 1985). In the absence of prejudice to the other party, this doctrine has been applied in instances where no formal post-hearing amendment has been sought, provided it is clear that the issue was fairly tried and thus there was no prejudice. *H.E.L.P.E.R.*, 8 E.A.D. at 449-51; *Dunn v. Trans World Airlines, Inc.*, 589 F.2d 408, 412-13 (9th Cir. 1978) (stating that the lack of an amendment to the pleadings will not affect the judgment in a matter where the issue on which the amendment would have been based was knowingly tried by the parties).

The Board finds that the failure of the Region to formally amend its Complaint to explicitly charge Respondent with a discharge to the waters on the farm is not fatal to the Region's case. Accordingly, the Board turns its attention to determining whether the discharge of pollutants on the farm constituted a discharge to "waters of the United States" under the CWA and its implementing regulations.

(continued)
Facts") ¶ 2. Furthermore, Respondent appears to recognize the significance of the discharges to the unnamed creek on his property because he asserted a defense stating that he should not be held liable for violations of the Act resulting from mudslides caused by a natural gas pipeline explosion that caused flooding on his property. *Id.* ¶¶ 12, 13. Respondent's statements about the flooding on his property indicate, in part, Respondent's concern about the legal implications of discharges to waters on his property. Accordingly, the Board determines that Respondent was aware of the Region's theory of its case.

[13] Federal Rule of Civil Procedure 15(b) provides in part, "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." It is important to note that while we are not bound by the Federal Rules, they are instructive in some circumstances. *In re H.E.L.P.E.R., Inc.*, 8 E.A.D. 437, 449 n.20 (EAB 1999).

C. *Whether a Preponderance of the Evidence Showed There Was a Discharge to Navigable Waters*

The Presiding Officer concluded that the Region had failed to prove that as of the approximate date of the inspection the culvert was open sufficiently to allow the manure-contaminated waters on the farm to flow to the waters on the other side of the railroad embankment, such that there would be a connection with Smith Creek and the Nooksack River. Reconsideration Order at 4. Because of this failure of proof, and taking into account the wording of the Complaint, the Presiding Officer also concluded that there was no unauthorized discharge of pollutants to waters of the United States as of the approximate date of the inspection. Init. Dec. ¶ 39. Had there been a connection between the waters at the approximate time of the inspections, the Presiding Officer stated that there would have been an unauthorized discharge of pollutants to waters of the United States. *Id.*

Implicit in the Presiding Officer's findings is the suggestion that the waters on the farm side of the embankment were not waters of the United States at the time of the discharge, whereas if the waters had been allowed to flow through the culvert they would have been waters of the United States. This aspect of his decision was left largely to implication, for the decision does not provide any meaningful analysis or discussion of this foundational issue.[14] Because there does not appear to be any dispute that pollutants were discharged to the unnamed creeks, the question of whether those creeks were waters of the United States is potentially dispositive as to whether a violation occurred. It is in the Presiding Officer's assumption that the unnamed creeks were not waters of the United States that we find reversible error in the decision.

As previously stated, the Board finds that the Complaint, read in the expansive light encouraged by the governing rules and case law, states a claim based on the discharge of pollutants into waters that were allegedly ultimately connected to the Nooksack River. Accordingly, we must assess EPA's case in that light.

The Supreme Court has stated that waters need not be navigable in fact to be protected under the CWA. *United States v. Riverside Bayview Homes*,

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[14] The Initial Decision's discussion of the issue was limited to a footnote that provides:

> Both creeks on the property appear to be tributaries of Smith Creek and the Nooksack River. Thus, in spite of the fact that the creeks may sometimes be blocked from flowing to Smith Creek and the Nooksack River, the discharge of pollutants into the creeks appears to violate the Clean Water Act.

Init. Dec. at 14 n.11. The Board does not rely on this portion of the Initial Decision. The Presiding Officer's statement that the discharge of pollutants into the creeks on the farm property appears to violate the CWA was irrelevant to his determination of the matter, and therefore, dicta.

474 U.S. 121, 133 (1985). The Court determined that the CWA's definition of "navigable waters" as "waters of the United States" demonstrates that the use of the term navigable in the CWA is of limited import. *Id.* The Court also stated that the CWA's definition of navigable waters illustrates Congress' intent to broadly define the waters covered under the Act. *Id.*

In determining whether the unnamed creeks on the farm were "waters of the United States," the principal issue that arises is whether or not the obstruction of the culvert had any effect on the jurisdictional status of the unnamed creeks. In this regard, it is reasonable to assume that the waters on each side of the embankment were connected prior to the blockage. Furthermore, the very fact that a culvert was constructed suggests that the culvert was intended to allow water to flow from one side of the railroad embankment to the other. Also, the fact that it became blocked strongly suggests that the blockage was the result of water depositing debris or soil in the culvert as water flowed from one side to the other.[15] Indeed, even the Presiding Officer remarked that "[b]oth creeks on the property appear to be tributaries of Smith Creek and the Nooksack River." Init. Dec. at 14 n.11.

The federal circuits have grappled with determining the scope of the CWA as it relates to tributaries of navigable waters. In *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001), the court held that irrigation canals that, on occasion, exchange water with a number of natural streams and at least one lake, are "waters of the United States." *Headwaters*, 243 F.3d at 533-34. The appellee in *Headwaters* asserted that irrigation canals were not tributaries to navigable waters because waste gates sealed off the canals from natural streams during the application of herbicides. *Id*. The court was not persuaded by the appellee's argument and determined that whether the waste gates were effective was a disputed question of fact.[16] The court further held that even if the waste gates were effective, at times, in preventing the exchange of water between the canals and the natural streams, that did not prevent the canals from being "waters of the

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[15] Richner testified at the hearing that he was present when the railroad crew "unplugged" the culvert approximately two weeks after the inspection. Tr. at 131-32. He stated, "Mostly mud is what they took out. * * * I didn't see any chunks of cement. It wasn't cemented shut. It wasn't clogged shut. But it was full of mud." *Id*. at 132. Richner also stated, "If this culvert had been open there would have been water that would have gone through under the track and would have gone to the Nooksack River." *Id.* at 103.

[16] Whether the culvert was completely successful in blocking waters on the farm from mixing with Smith Creek is a disputed issue of fact in this matter. Because of high water levels in the area of the culvert, the Inspectors did not examine the culvert during their inspection of the farm. Tr. at 47. Therefore, the Inspectors could not testify to the nature of the blockage. Furthermore, Brian Bregar, a railroad maintenance employee, provided general testimony regarding culvert maintenance. *Id*. at 49-52. Based on his testimony, it is unclear whether the culvert was actually plugged up, or whether it merely had debris in front of it.

United States" because "[e]ven tributaries that flow intermittently are 'waters of the United States.'" *Id*. at 534. The *Headwaters* court stated that "as long as the tributary would flow into the navigable body [under certain conditions], it is capable of spreading environmental damage and is thus a 'water of the United States' under the Act." *Id*. (quoting *United States v. Eidson*, 108 F.3d 1336, 1342 (11th Cir. 1997)).[17]

Case law cited by the Region in its post-hearing brief also supports the proposition that even waters that flow intermittently are "waters of the United States" for CWA purposes. Complainant's Post-Hearing Brief at 4-5 (citing *United States v. TGR Corp.*, 171 F.3d 762, 764 (2d Cir. 1999); *Eidson*, 108 F.3d at 1342 (stating that it is unlikely Congress intended to exclude from "waters of the United States" waters that flow intermittently); *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1325 (6th Cir. 1974) (discussing Congress' intent to include within the scope of the CWA "all water bodies, including main streams and their tributaries"); *United States v. St. Bernard Parish*, 589 F. Supp. 617, 621 (E.D. La. 1984) (finding that intermittent discharges controlled by pumps and levees are not exempt from CWA requirements); *United States v. Holland*, 373 F. Supp. 665, 675 (M.D. Fla. 1974) (stating that pollutants disposed of on land that is periodically inundated by waters of the United States are not beyond the reach of the CWA)). Like the present matter, in all of the cases cited by the Region there was a direct connection between the tributary and a navigable water — even if the flow of the water in either water body or between them was intermittent.

On balance, we conclude that the waters on the farm side of the embankment did not lose their character as waters of the United States merely because the obstructed culvert may have blocked the flow of water to the other side for a period of time. Several considerations factor into our conclusion.

The subsequent clearing of the obstruction[18] so that the culvert would function properly reinforces the temporary, rather than permanent, nature of the blockage of the flow from one side of the embankment to the other. The testimony at the hearing suggests that blockage occurs intermittently in the ordinary course of events, much the same as an intermittent stream fluctuates between wet and dry in the course of arid-land weather patterns. *See* Tr. at 104, 131-32; *See also Quivira Mining Co. v. EPA*, 765 F.2d 126, 130 (10th Cir. 1985) (dry creeks and arroyos

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[17] In the case before us, Stephanie Harris, an employee with EPA's microbiology unit, testified to the "environmentally resistant" nature of microorganisms like E. coli and cryptosporidium parvum and stated that they can survive for long periods of time in surface waters. Tr. at 89-92. Furthermore, the Region states that a free flow of water is not necessary for these pathogens to pass through the railroad culvert. Appeal at 12.

[18] Mr. Richner testified at the hearing that sometime around the end of April or the beginning of May 1997, railroad employees cleaned out the culvert. Tr. at 103-04.

connected to streams during intense rainfall are "waters of the United States"); *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181, 1187 (D. Ariz. 1975) (normally dry arroyos are "waters of the United States"). Evidence in this matter also indicates that the railroad had a policy of clearing obstructed culverts on a routine basis, although in this specific instance there may have been a breakdown in the implementation of the policy. Complainant's Ex. 14. Nonetheless, the existence of the policy, coupled with the clearing of the culvert in the spring of 1997, supports the conclusion that any interruptions in the flow of water from one side to the other were temporary.

The fact that the waters on each side of the embankment are immediately adjacent to each other, only separated by the width of the embankment, also weighs in favor of concluding that waters on each side should not be regarded as isolated from each other. The proximity of Creek Nos. 1 and 2 to Creek No. 3 indicates the likelihood of a hydrological connection between the waters on the farm and navigable waters in the present matter. Thus, they are unlike isolated ponds with no connection to navigable waters. *See Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) (holding that isolated ponds *with no connection* to navigable waters that serve as a habitat for migratory birds are not navigable waters). When this consideration is combined with the intermittent character of the blockage separating each side from the other, there is even less reason to treat the waters differently for jurisdictional purposes.

The foregoing discussion supports the idea that waters on the farm met the jurisdictional requirements on the dates of the discharges and the testing. Evidence and testimony presented in this matter establish the connection between the waters on Respondent's property and those on the other side of the culvert by a preponderance of the evidence.

Based on the record before the Board, the Board finds that the Region has established by a preponderance of the evidence that the unnamed creek on Respondent's property is a "water of the United States" such that the discharge of pollutants to it constitutes a CWA violation. Accordingly, the Board finds that the Region has established a discharge of pollutants to navigable waters.

D. *Penalty*

The Region proposes a total penalty of $11,000. Amended Complaint Part III. The Presiding Officer did not assess a penalty in this matter because he determined that the Region failed to meet its burden of proof in showing a discharge to the Nooksack River. In this decision the Board reverses the Presiding Officer's liability determination. Accordingly, the Board may either assess a penalty in the interest of bringing the case to a swift conclusion, 40 C.F.R. § 22.30(f), or remand the case to the Presiding Officer for a penalty determination. *See In re Tifa*

Ltd., 9 E.A.D. 145, 160-61 (EAB 2000); *In re Commercial Cartage Co.*, 7 E.A.D. 784, 804 (EAD 1998) (choosing to assess penalty where matter had been pending for five years, was before the Board for a second time, and involved a company no longer in business).

The assessment of civil administrative penalties for CWA violations is authorized by CWA § 309(g). 33 U.S.C. § 1319(g). This section states that in assessing a penalty the Administrator shall take into account:

> [T]he nature, circumstances, extent and gravity of the violation, or violations, and with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

33 U.S.C. § 1319(g)(3). Because there are no CWA penalty guidelines,[19] a CWA penalty must be calculated based upon the evidence in the record and the penalty criteria set forth in CWA § 309(g). *See In re Pepperell Assoc.*, 9 E.A.D. 83, 107 n.22, *aff'd*, 246 F.3d 15 (1st Cir. 2001).

In this matter the Board has attempted to evaluate the penalty proposed by the Region to determine if it is appropriate. We find, however, that the record upon which to make such an evaluation is inadequate.[20] Aside from a general statement by the Region that it took into account the statutory penalty factors enumerated in CWA § 309(g)(3), *see* Region's Findings of Fact and Conclusions of Law ¶ 62, and a statement by Respondent regarding his ability to pay the proposed penalty,[21] the record in this matter lacks a detailed explanation of the Region's consideration of the statutory penalty factors.[22]

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[19] Nonetheless, the Agency "often relies for guidance on EPA's two general penalty policies: the *Policy of Civil Penalties* ('EPA General Enforcement Policy #GM-21') (Feb. 16, 1984) and EPA General Enforcement Policy #GM-22." *In re City of Marshall*, 10 E.A.D. 173, 189 n.28 (EAB 2001).

[20] The Region bears the burden of demonstrating that the proposed penalty is appropriate. 40 C.F.R. § 22.24(a) (stating "the complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and the relief sought is appropriate").

[21] Respondent stated at the hearing, "Each time that I have talked with [Region's counsel] she has asked me if I'm willing to make a lesser pay out, and I'm not interested in it at all. Either I feel I'm guilty; I'll pay the $11,000; I'll borrow the money and pay the 11,000, or if I'm not guilty it should be dropped." Tr. at 9; *see also* Tr. at 132-33, 141.

[22] The Region presented testimony during the hearing regarding the gravity of the violation; however, there is no indication as to how this factor was weighted in the total matrix of considerations that go into the calculation of a proposed penalty.

Where, as here, the Board finds the record inadequate upon which to evaluate the Region's proposed penalty, a remand to the Presiding Officer is appropriate. Upon consideration of the Board's determination in this matter, the Presiding Officer shall issue a penalty decision, appealable to the Board pursuant to 40 C.F.R. § 22.30.

V. *CONCLUSION*

For the foregoing reasons, the Board reverses the Initial Decision's liability determination. The Region has established the violation alleged in its Amended Complaint. Therefore, Respondent is liable under CWA § 301(a). This matter is remanded to the Presiding Officer for further proceedings to determine an appropriate penalty for the violation.

So ordered.