IN RE HENRY STEVENSON AND PARKWOOD LAND CO.

CWA Appeal No. 13-01

DECISION AND REMAND ORDER

Decided October 24, 2013

Syllabus

Henry Stevenson and Parkwood Land Co. (together, "Parkwood") appeal from an Initial Decision issued by Regional Judicial Officer ("RJO") Pat Rankin on February 11, 2013. The U.S. Environmental Protection Agency ("EPA" or "Agency"), Region 6 ("Region"), in turn, filed a cross appeal. The Agency's administrative complaint charged Parkwood with violations of Clean Water Act ("CWA" or "Act") sections 301(a) and 404, 33 U.S.C. §§ 1311(a) and 1344, when it discharged fill material into wetlands while repairing a levee by constructing a truck ramp and truck turnaround on the levee. The levee is located along the Neches River near Rose City, Texas. The Region proposed a $32,000 administrative civil penalty, derived from the Agency's *Clean Water Act Section 404 Settlement Penalty Policy* ("Settlement Penalty Policy").

In his Accelerated Decision as to liability, the RJO applied the CWA jurisdiction test described in Justice Kennedy's concurrence in *Rapanos v. United States*, 547 U.S. 715 (2006), and determined that Parkwood discharged fill material into wetlands adjacent to the Neches River without an authorizing permit. In the Initial Decision, the RJO rejected Parkwood's argument that Nationwide Permit ("NWP") 3 authorized the discharge of fill associated with the construction of the truck ramp and truck turnaround. The RJO, relying on the Settlement Penalty Policy, assessed a $7,500 administrative civil penalty.

Parkwood appeals the RJO's finding of liability because his CWA jurisdictional determination was based solely on the so-called Kennedy test described in *Rapanos*, and even if there was CWA jurisdiction, Parkwood contends that NWP 3 authorized the activities that led to the discharge of fill into jurisdictional wetlands. The Region's cross-appeal challenges the RJO's penalty assessment on the basis that the RJO misapplied the CWA statutory factors and the Settlement Penalty Policy when rendering his penalty assessment.

Held: The Board denies Parkwood's appeal and grants the Region's appeal in part. The Board remands the RJO's penalty assessment for further consideration consistent with the Board's ruling.

(1) The Board follows its earlier holding in *In re Smith Farm Enters., LLC*, 15 E.A.D. 222 (EAB 2011), *appeal docketed*, No. 11-1355 (4th Cir. Apr. 18, 2011), which construed the *Rapanos* decision and held that CWA jurisdiction may be determined under either the Plurality test or the Kennedy test. Under the Kennedy test, there is CWA jurisdiction over a wetlands upon finding a significant nexus between the wetlands and navigable waters in the traditional sense. Because Parkwood's wetlands are adjacent to the Neches River, a navigable-in-fact river subject to the ebb and flow of the tide, it was appropriate to infer an ecological connection sufficient to establish a significant nexus and CWA jurisdiction.

(2) NWP 3's authorization to discharge fill was limited to discharges associated with the repair of the levee, including those resulting in minor deviations to the levee's configuration. NWP 3 did not extend to discharges related to the truck turnaround or truck ramp/staging area, even presuming those could be characterized as minor.

(3) By relying on the Settlement Penalty Policy, the RJO's detailed penalty assessment failed to adequately explain how he applied the statutory penalty criteria and the EPA general civil penalty policies to the facts of this case. The RJO erred in his assessment of the gravity of the violations, particularly in his finding that there was "no need for deterrence" of future potential conduct by the defendant. The RJO further erred in his assessment of the defendant's culpability in focusing exclusively on the defendant's lack of sophistication and the defendant's reliance on an outside consultant.

Before Environmental Appeals Judges Leslye M. Fraser, Randolph L. Hill, and Kathie A. Stein.

Opinion of the Board by Judge Hill:

I. *STATEMENT OF THE CASE*

Respondents Henry Stevenson and Parkwood Land Co. (together, "Parkwood") appeal from an Initial Decision issued by Regional Judicial Officer ("RJO") Pat Rankin on February 11, 2013, assessing a $7,500 administrative civil penalty against Parkwood for violations of Clean Water Act ("CWA" or "Act") section 301(a), 33 U.S.C. § 1311. In an earlier Accelerated Decision on liability issued April 17, 2012, the RJO applied the CWA jurisdictional test described in Justice Kennedy's concurrence in *Rapanos v. United States*, 547 U.S. 715 (2006) – the so-called "Kennedy test" – and concluded that Parkwood violated the Act by discharging fill material into wetlands adjacent to the Neches River without an authorizing permit under CWA section 404, 33 U.S.C. § 1344. In so doing, the

RJO determined that Army Corps of Engineers' Nationwide Permit 3 ("NWP 3") did not authorize Parkwood's activities.

Parkwood appeals the RJO's application of the Kennedy test to assert EPA authority over the wetlands into which Parkwood had discharged fill material. Parkwood argues that had the RJO applied the plurality's test in *Rapanos*, he would have found that there is neither a "continuous surface connection" with the Neches River nor a "hydrological connection" as required for CWA jurisdiction. Parkwood also appeals the RJO's determination that NWP 3 does not cover the activities that led to the discharge of fill into jurisdictional wetlands. The U.S. Environmental Protection Agency ("EPA"), Region 6 ("Region"), has filed a cross-appeal challenging the RJO's penalty assessment. The Region asserts that the RJO misapplied the CWA statutory factors and the Agency's CWA Settlement Penalty Policy when rendering his penalty assessment that reduced the Region's requested penalty by 75% from $32,500 to $7,500.

For the reasons explained below, the Environmental Appeals Board ("Board") affirms the RJO's jurisdictional and liability determinations and remands the penalty assessment to the RJO for further consideration.

II. *ISSUES ON APPEAL*

The parties' appeals give rise to the following issues and sub-issues for the Board's consideration:

(1) Did the RJO err in determining that EPA has CWA jurisdiction over the wetlands?

(2) Did the RJO err in concluding that Nationwide Permit 3 does not authorize the discharge of fill associated with the truck turnaround/staging area and the truck ramp, and therefore, such discharge is a violation of CWA section 301, 33 U.S.C. § 1311?

(3) Did the RJO properly apply the statutory factors in his penalty assessment?

   (a) Did the RJO err in evaluating the nature, circumstances, extent and gravity of the violation?

   (b) Did the RJO err in evaluating Parkwood's culpability?

III. *FACTS AND PROCEDURAL HISTORY*

Mr. Stevenson is the Chief Executive Officer and sole shareholder of Parkwood Land Co., which owns approximately 79 acres along the Neches River near Rose City, Texas. Accelerated Decision at 1-2; Parkwood Appeal Brief at 5; *see also* Initial Decision at 14. The property is bounded on two sides by the Neches River and on one side by a former oxbow of that river. Acc. Dec. at 1, 3-4. The tract's interior is primarily forested wetlands, which cover approximately 71.2 acres of the property and include Bald Cypress-Tupelo Swamps; these swamps are "considered 'rare,' 'unique' and 'valuable' habitats in the Galveston [Texas] District." Init. Dec. at 2, 11; *see also* Acc. Dec. at 2. The Neches River flows approximately 416 miles southwest from Van Zandt County in East Texas and empties into the Gulf of Mexico near Port Neches. Tex. Parks & Wildlife Dep't, *An Analysis of Texas Waterways* 26 (1974), *available at* http://repository.tamu.edu/bitstream/handle/1969.1/93349/Bull1184a.pdf.[1] In the vicinity of the tract and downstream, the Neches River is a navigable-in-fact water subject to the ebb and flow of the tide. Acc. Dec. at 2. An existing levee constructed nearly 100 years ago separates Parkwood's tract from the river. *Id.*; *see also* Parkwood App. Br. at 11 ("[Parkwood Land Co.] has stipulated that the Neches River flows adjacent to the site; however, the site and the Neches River as previously noted, are separated by a thirteen-foot-high levee."). There is no direct hydrological connection between Parkwood's wetlands and the Neches River. Acc. Dec. at 2.

In 2006, Parkwood sought to repair the levee, and through a consultant, GTI Environmental, Inc. ("GTI"), Parkwood submitted project plans to the U.S. Army Corps of Engineers, Galveston District ("Corps"), requesting authorization to perform maintenance on the levee. *Id.* By letter dated April 17, 2007, the Corps concluded that the levee could be repaired pursuant to NWP 3.[2] *Id.* at 2-3; *see also* Letter from Bruce H. Bennett, Leader, North Evaluation Unit, Galveston

[1] Although the parties do not cite this report, the Environmental Appeals Board takes official notice of it as a public document. *In re Howmet Corp.*, 13 E.A.D. 272, 288 n.32 (EAB 2007) (following *In re Cutler*, 11 E.A.D. 622, 650-51 (EAB 2004) (explaining that information in the public domain is subject to official notice by the Board)); *see also* 40 C.F.R. § 22.22(f) (stating that official notice may be taken of any matter that can be judicially noticed in the federal courts).

[2] The Corps also added a special condition to the authorization, related to the permittee's obligations in case of future operations by the United States or a Corps determination that the structure causes unreasonable obstruction, which is not relevant to this proceeding. Authorization Letter at 2.

Dist., Corps of Eng'rs, Dep't of the Army, to James G. White, GTI Ent'l Inc. (Apr. 17, 2007) ("Authorization Letter") (Compl. Ex. 46).

Two anonymous citizen complaints led the Corps to inspect the tract on September 3, 2009, and July 22, 2010. Acc. Dec. at 3. On both dates, the Corps found evidence of discharges of fill into wetlands that were not authorized by NWP 3 or any other permit. *Id.* During the first inspection, the Corps found that a truck ramp and a truck turnaround had been constructed on the levee using fill material, which were still intact at the time of the second inspection. *Id.* During the second inspection, the Corps found additional fill had been discharged to wetlands inside the levee. *Id.* In particular, an unrelated "contractor working on nearby Interstate 10 needed a place to dispose of concrete it was removing from the road * * * [, and] Mr. Stevenson directed the highway contractor to deposit the concrete rubble on uplands at the southwest end of the levee." Init. Dec. at 4-5. Parkwood used some of the concrete rubble to construct an access ramp, or "truck ramp," and hauled additional rubble "down the crown of the levee and dump[ed] it where it would come to rest along the levee's inner base" to create a "stabilizing base for the levee repairs." *Id.* at 5. Unfortunately, the deliveries of concrete rubble outpaced Mr. Stevenson's rate of using the rubble, and eventually, a stockpile formed and encroached upon wetlands. *Id.*

The Corps referred the matter to EPA for enforcement in October 2010. Acc. Dec. at 4. EPA issued an administrative compliance order on January 31, 2011, requiring Parkwood to submit a plan for restoring the filled wetlands. *Id.* Parkwood appealed the administrative compliance order to the Board, which dismissed the appeal due to the Board's lack of authority to review CWA administrative compliance orders. *In re Stevenson*, CWA Appeal No. 11-02 (Apr. 19, 2011) (Order Dismissing Appeal for Lack of Jurisdiction). Parkwood now appeals the Initial Decision issued in this matter, which the Board does have the authority to consider. 40 C.F.R. § 22.30; *see also Stevenson*, at 4 & n.3 (explaining scope of Board's jurisdiction pursuant to 40 C.F.R. part 22).

On June 18, 2011, the Region issued an administrative complaint to Parkwood alleging that Parkwood violated the CWA by discharging dredged and fill material into wetlands without a permit. The Region proposed a $32,500 penalty, the statutory maximum for a Class I penalty.[3] Administrative Complaint

[3] For violations set forth in CWA § 309(g)(1), the CWA establishes two classes of administrative penalties: Class I, which may not exceed $10,000 per day, up to a maximum penalty of $25,000, and Class II, which may not exceed $10,000 per day, up to a maximum penalty of $125,000. CWA § 309(g)(2)(A)-(B), 33 U.S.C. § 1319(g)(2)(A)-(B). These numbers have been adjusted upward to $11,000/$32,500 for Class I and

at 4. The Region stated that it relied on the statutory penalty factors set forth in CWA section 309(g)(3), 33 U.S.C. § 1319(g)(3), and primarily considered the need for deterrence, Parkwood's prior history of violations, and Parkwood's degree of culpability. Complainant's Motion for Accelerated Decision as to Both Liability and Penalty at 18. In his April 17, 2012 Accelerated Decision as to liability, the RJO applied the CWA jurisdiction test described in Justice Kennedy's concurrence in *Rapanos v. United States*, 547 U.S. 715 (2006), and determined that Parkwood discharged fill material into wetlands adjacent to the Neches River without an authorizing permit. Init. Dec. at 1; Acc. Dec. at 6, 10. The RJO denied the motion for Accelerated Decision as to penalty.[4]

Parkwood's response to the Region's Motion for Accelerated Decision as to Penalty raised a new issue on liability: Parkwood argued that NWP 3 authorized the discharge of fill associated with construction of the truck turnaround/staging area and the truck ramp.[5] Init. Dec. at 1. The RJO held a one-day evidentiary hearing on November 14, 2012, on the issues of NWP 3's applicability and penalty. After the hearing, the RJO concluded that NWP 3 did not authorize such dredge and fill activities and that they constituted violations of the CWA. *Id.* at 6. In particular, the RJO rejected Parkwood's contention that the truck turnaround and concrete rubble stockpile (i.e., truck ramp/staging area) were "minor deviations to the structure's configuration or filled area" as contemplated by the nationwide permit. *Id.* Additionally, the RJO noted testimony that suggested that another nationwide permit, Nationwide Permit 33 ("NWP 33"), could have covered the fill discharges associated with the truck turnaround and truck ramp/staging area had they been identified in Parkwood's preconstruction notification to the Corps.

The RJO assessed a $7,500 penalty, finding Parkwood's violations to have "minor," rather than "moderate," environmental and compliance significance, as the Region had proposed. *Id.* at 22. The RJO also found the duration of violation

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$11,000/$157,500 for Class II, due to inflation. *See* 40 C.F.R. § 19.4 tbl. 1 (list of revised penalties).

[4] In denying the motion in part, the RJO explained that "[the Region] submits no evidence or argument, e.g., a penalty calculation worksheet or declaration, showing specific amounts it attributes to the factors identified in the statute, guidelines, or [Complainant's Motion for Accelerated Determination as to Both Liability and Penalty]." Acc. Dec. at 10-11.

[5] The RJO construed Parkwood's response as a motion for reconsideration of his Accelerated Decision on liability. Init. Dec. at 1.

to be less significant than the Region had indicated, Parkwood to be less culpable than proposed, and the need for deterrence to be less.[6] *Id.* at 11-19, 21.

Parkwood's appeal challenges the RJO's decision to apply the Kennedy test from *Rapanos* to establish the Region's CWA jurisdiction and the RJO's determination that NWP 3 does not apply. The Region cross appealed and challenges the RJO's penalty assessment. Parkwood did not file a response to the cross appeal.

IV. *STANDARD OF REVIEW*

A. *Findings of Fact and Conclusions of Law*

In enforcement proceedings such as this one, the Board generally reviews both the factual and legal conclusions of the presiding officer, in this case the RJO, *de novo*. 40 C.F.R. § 22.30(f) (providing that in an enforcement proceeding, "[the 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"); *see also* Administrative Procedure Act, 5 U.S.C. § 557(b) ("On appeal from the review of [an] initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *In re Friedman*, 11 E.A.D. 302, 314 (EAB 2004) (explaining that in an enforcement proceeding, the Board reviews "the [presiding officer's] factual and legal conclusions on a *de novo* basis"), *aff'd*, No. 2:04-CV-00517-WBS-DAD (E.D. Cal. Feb. 25, 2005), *aff'd*, 220 Fed. App'x 678 (9th Cir. 2007).

In reviewing *de novo* an initial decision in an administrative penalty proceeding, the Board applies the "preponderance of the evidence" standard established by 40 C.F.R. § 22.24(b). *In re Bullen Cos.*, 9 E.A.D. 620, 632 (EAB 2001) (defining standard). Also pursuant to section 22.24, the Region bears the burden of demonstrating that the alleged violation occurred. 40 C.F.R. § 22.24(a).

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[6] These considerations arise from the Agency's CWA section 404 settlement penalty policy ("Settlement Penalty Policy"), which sets forth a number of factors to be taken into account when determining an appropriate penalty. Office of Enforcement & Compliance Assurance, U.S. EPA, *Clean Water Act Section 404 Settlement Penalty Policy* (Dec. 2001) ("*CWA Section 404 Settlement Penalty Policy*"). Although the Administrative Complaint and the Motion for Accelerated Decision as to Penalty both state that the Region relied on the statutory factors in its proposed penalty, the Region ultimately relied heavily on the Settlement Penalty Policy when proposing the penalty, as did the RJO when assessing the penalty. Administrative Complaint at 4; Mot. for Acc. Dec. as to Penalty at 7-9; Init. Dec. at 7; RJO Hearing Transcript ("Tr.") at 160, 162.

That is, the Region must show, by a preponderance of the evidence, that the factual prerequisites exist for finding a violation of the applicable regulatory requirements. *See In re Bricks, Inc.*, 11 E.A.D. 224, 233 (EAB 2003) (rejecting an administrative law judge's findings of fact because the Region had failed to demonstrate that the facts were supported by a preponderance of the evidence); *see also In re Julie's Limousine & Coachworks, Inc.*, 11 E.A.D. 498, 507 (EAB 2004) (explaining standard); *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998) (same). A factual determination meets the preponderance of the evidence standard if the fact finder concludes that it is more likely true than not. *See Julie's Limousine*, 11 E.A.D. at 507 n.20; *In re Lyon Cnty. Landfill*, 10 E.A.D. 416, 427 n.10 (EAB 2002), *aff'd*, No. Civ-02-907 (D. Minn. June 7, 2004), *aff'd*, 406 F.3d 981 (8th Cir. 2005); *Bullen*, 9 E.A.D. at 632.

B. *Witness Credibility Determinations*

Although findings of fact are reviewed *de novo*, the Board generally defers to a presiding officer's factual findings when those findings rely on witness testimony and when the credibility of the witnesses is a factor in the presiding officer's decisionmaking. *See Ocean State*, 7 E.A.D. at 530 (explaining that the appellant failed to demonstrate that any of the administrative law judge's factual findings were unsupported by a preponderance of the evidence after giving due deference to his observation of witnesses). This approach recognizes that the presiding officer observes first-hand a witness's demeanor during testimony and therefore is best suited to evaluate his or her credibility. *Id.*; *Julie's Limousine*, 11 E.A.D. at 507 n.19; *In re Echevarria*, 5 E.A.D. 626, 639 (EAB 1994) (explaining that when a presiding officer has "the opportunity to observe the witnesses testify and to evaluate their credibility, his factual findings are entitled to considerable deference"); *In re Port of Oakland*, 4 E.A.D. 170, 193 n.59 (EAB 1992) (stating that "the presiding officer's findings are entitled to weight because he has 'lived with the case'" (quoting *Universal Camera v. NLRB*, 340 U.S. 474, 496-97 (1951))); *accord NLRB v. Transpersonnel, Inc.*, 349 F.3d 175, 184 (4th Cir. 2003) ("The balancing of the credibility of witnesses is at the heart of the fact-finding process, and it is normally not the role of reviewing courts to second-guess a fact finder's determinations about who was the more truthful witness."). When the presiding officer's credibility determinations are unsupported by the record, however, the Board will not defer to the presiding officer and is not bound by any findings of fact based on such determinations. *Bricks*, 11 E.A.D. at 233, 236-39 (identifying unexplained ambiguities in testimony and rejecting, as unsupported in the record, an ALJ's rationale for crediting that testimony); *see also W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 872 (6th Cir. 1995) ("[A]n administrative law judge's opportunity to observe witnesses' demeanor 'does not,

by itself, require deference with regard to his or her derivative inferences.'" (quoting *Penasquitos Vill., Inc. v. NLRB*, 565 F.2d 1074, 1079 (9th Cir. 1977))).

C. *Penalty Assessments*

Although the Board is authorized to "assess a penalty that is higher or lower than the amount recommended to be assessed in the decision or order being reviewed," 40 C.F.R. § 22.30(f), the Board generally gives deference to a presiding officer's penalty determination. *In re Britton Constr. Co.*, 8 E.A.D. 261, 293 (EAB 1999); *In re Slinger Drainage, Inc.*, 8 E.A.D. 644, 669 (EAB 1999) ("We see no obvious errors in the Presiding Officer's penalty assessment and, therefore, we see no reason to change his penalty assessment."), *appeal dismissed*, 237 F.3d 681 (D.C. Cir. 2001); *In re Predex Corp.*, 7 E.A.D. 591, 597 (EAB 1998) ("[The] Board generally will not substitute its judgment for that of a presiding officer absent a showing that the officer committed an abuse of discretion or clear error in assessing the penalty.").

"In view of the highly discretionary nature of the penalty assessment, the requirement that a presiding officer provide a detailed discussion of how the applicable statutory penalty criteria relate to the assessed penalty serves the purposes of ensuring both that interested parties are fairly informed of the reasons driving the presiding officer's penalty assessment and 'that the (presiding officer's) reasons for the penalty assessment can be properly reviewed on Appeal.'" *In re City of Marshall*, 10 E.A.D. 173, 188 (EAB 2001) (quoting *Britton Constr.*, 8 E.A.D. at 282). Although the presiding officer may deviate from a region's proposed penalty, the presiding officer "must also ensure that the penalty he or she ultimately assesses reflects a reasonable application of the statutory penalty criteria to the facts of the particular violations." *In re Employers Ins. of Wausau*, 6 E.A.D. 735, 758 (EAB 1997) (construing 40 C.F.R. § 22.27(b)); *accord City of Marshall*, 10 E.A.D. at 189.

V. *APPLICABLE LAW*

Congress enacted the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a). Under section 301(a) of the Act, the discharge of pollutants from any point source into navigable waters is prohibited without first obtaining appropriate permits under the CWA. CWA §§ 301(a) (prohibiting discharge of pollutants), 502(12) (defining "discharge of a pollutant" as specifically into a navigable water), 33 U.S.C. §§ 1311(a), 1362(12). The Act defines the term "pollutant," as is relevant to this case, to include, among others, dredged spoil, rock, and sand. CWA § 502(6), 33 U.S.C. § 1362(6).

The CWA defines "navigable waters" as expressly including all "waters of the United States." CWA § 502(7), 33 U.S.C. § 1362(7). While the Act does not define "waters of the United States," EPA regulations promulgated pursuant to CWA authorities contain a detailed definition of this term. 40 C.F.R. § 122.2. This regulation contains an expansive definition "encompassing not only traditional navigable waters of the kind susceptible to use in interstate commerce (navigable-in-fact waters), but also waters that are subject to the ebb and flow of the tide[,] * * * tributaries of traditional navigable waters, and wetlands adjacent to covered waters." *In re Smith Farm Enters., LLC*, 15 E.A.D. 222, 239 (EAB 2011), *appeal docketed*, No. 11-1355 (4th Cir. Apr. 18, 2011); *see* 40 C.F.R. § 122.2. In turn, wetlands are defined as areas "inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstance do support, a prevalence of vegetation typically adapted for life in saturated soil conditions * * * generally includ[ing] swamps, marshes, bogs, and similar areas." 40 C.F.R. § 122.2.

Clean Water Act section 404 regulates the discharge of dredged and fill material into navigable waters. CWA § 404, 33 U.S.C. § 1344. The EPA and the Army Corps of Engineers jointly administer the permitting program created by this section. Generally, this section protects navigable waters from filling where such activity would have a "unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." CWA § 404(c), 33 U.S.C. § 1344(c).

Under CWA section 404, the Corps may issue either individual permits on a case-by-case basis or general permits on a class-wide basis. CWA § 404(a), (e), 33 U.S.C. § 1344(a),(e). The Corps issues individual permits after reviewing site-specific applications, evaluating the probable impacts to the public interest of the proposed activities and their intended uses, and taking into account comments received through the public participation process. *See generally* 33 C.F.R. §§ 320.4, 323, 325 (providing individual permit procedures); *In re Adams*, 13 E.A.D. 310, 312-13 (EAB 2007) (discussing individual permit process).

By contrast, general permits are issued on a state, regional, or nationwide basis for any category of activity when it is determined that these activities will cause only minimal adverse environmental effects, both individually and cumulatively. CWA § 404(e)(1), 33 U.S.C. § 1344(e)(1). A nationwide permit allows discharges of dredged or fill material under specified circumstances and conditions, and a person engaging in discharges under the specified circumstances and in accordance with the listed conditions does not need to obtain an individual permit. 33 C.F.R. § 330.1(b),(c); *see also In re Hoffman Group*, 3 E.A.D. 408,

415 (CJO 1990) (discussing nationwide section 404 permits). In many cases, one may proceed with an activity authorized by a nationwide permit without notifying the Corps. Some nationwide permits require project proponents to submit a preconstruction notification to and obtain approval from the Corps prior to commencing the activity. 33 C.F.R. § 330.6(a)(1). The Corps determines whether the proposed project complies with a nationwide permit and may also "add conditions on a case-by-case basis to clarify compliance with the terms and conditions of a nationwide permit or to ensure that the activity will have only minimal individual and cumulative adverse effects on the environment, and will not be contrary to the public interest." *Id.* § 330.6(a)(3)(I).

In this case, the applicability of NWP 3 and, to a lesser degree, NWP 33, are at issue. NWP 3 authorizes

> [t]he repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure, or fill, or of any currently serviceable structure or fill authorized by 33 C.F.R. § 330.3, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification.

Reissuance of Nationwide Permits, 72 Fed. Reg. 11,092, 11,181 (Mar. 12, 2007). A regional condition for the State of Texas requires preconstruction notice to the Corps for NWP 3 when the proposed discharge or fill is into Bald Cypress-Tupelo Swamp habitat type or area. Init. Dec. at 2; Fort Worth Dist., U.S. Army Corps of Eng'rs, *Nationwide Permit Regional Conditions for the State of Texas* 1 (Mar. 2002) (Compl. Ex. 42).

NWP 33 also requires preconstruction notice to the Corps. 72 Fed. Reg. at 11,188. NWP 33 authorizes "[t]emporary structures, work, and discharges, including cofferdams, necessary for construction activities or access fills or dewatering of construction sites, provided that the associated primary activity is authorized by the Corps of Engineers * * *. This [nationwide permit] also authorizes temporary structures, work, and discharges, including cofferdams, necessary for construction activities not otherwise subject to the Corps * * * permit requirements." *Id.* at 11,187.

VI. *ANALYSIS*

A. *Jurisdictional Analysis*

The first question the Board must resolve in this appeal is whether the RJO erred in determining that EPA has Clean Water Act jurisdiction over

Parkwood's wetlands. To resolve this threshold question, the Board must address the application of the Supreme Court decision in *Rapanos v. United States*, 547 U.S. 715 (2006), to the instant case.

1. Rapanos *Offers Two Tests by which to Establish CWA Jurisdiction*

In *Rapanos v. United States*, the Supreme Court considered two consolidated cases where the wetlands in question appeared to have an uncertain connection to a navigable water in the traditional sense.[7] 547 U.S. at 729-30. The *Rapanos* case involved four wetlands lying near ditches or man-made drains, which eventually emptied into traditionally navigable waters, either directly or through a tributary. *Id.* On review, a divided Supreme Court found insufficient evidence to determine jurisdiction and remanded for further proceedings. *Id.* at 757. In doing so, the Court articulated two new and distinct tests for determining CWA jurisdiction, with neither test commanding a majority of the Court. *See In re Smith Farm Enters., LLC*, 15 E.A.D. 222, 241-42 (EAB 2011), *appeal docketed*, No. 11-1355 (4th Cir. Apr. 18, 2011) (discussing *Rapanos*).

Justice Scalia wrote the plurality opinion, which held that a wetland is covered by the Act if: (1) the adjacent channel contains a "water of the United States" (i.e., a relatively permanent body of water); and (2) the wetland has a continuous surface connection with that water ("Plurality test"). *Rapanos*, 547 U.S. at 742. In his concurring opinion, Justice Kennedy took the position that there is CWA jurisdiction over a wetlands upon finding a significant nexus between the wetlands and navigable waters in the traditional sense ("Kennedy test"). *Id.* at 779 (Kennedy, J., concurring). This "significant nexus" is established if "the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable." *Id.* at 780 (internal quotations omitted). In the case of a wetland adjacent to a navigable-in-fact water, Justice Kennedy wrote that it was appropriate to infer an ecological connection, which in itself is sufficient to establish a significant nexus upon a showing of physical adjacency. *Id.* By regulation, a wetland is "adjacent" when it is "bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms,

[7] Corps regulations define navigable waters of the United States in the traditional sense as "those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." 33 C.F.R. § 329.4.

beach dunes and the like are adjacent wetlands." 33 C.F.R. § 328.3(c) (internal quotations omitted).

Justice Stevens wrote a dissenting opinion in *Rapanos*, which stated that "[g]iven that all four Justices who have joined [the dissent] would uphold the Corps' jurisdiction * * * in all [] cases in which either the plurality's or Justice Kennedy's test is satisfied[, jurisdiction may be established if] *either* of those tests is met." 547 U.S. at 810 (Stevens, J., dissenting).

2. *Both the Plurality and Kennedy Jurisdictional Tests Apply*

As the Board observed in *Smith Farm*, the divided *Rapanos* decision has created much debate and confusion over which of these tests controls subsequent jurisdictional determinations. *Smith Farm*, 15 E.A.D. at 241-42. Following the suggestion of Justice Stevens in *Rapanos*, the Board reasoned that CWA jurisdiction exists if *either* the Plurality or Kennedy test is satisfied, *id.* at 245-46, and noted that the U.S. Courts of Appeal were divided on the issue, *id.* at 241. Most importantly, the Fifth Circuit, where Parkwood's property is located, discussed the issue in *United States v. Lucas* but did not decide the question of which test governs as the court found the wetlands at issue in that case subject to CWA jurisdiction under either test. 516 F.3d 316, 326-27 (5th Cir.), *cert. denied*, 555 U.S. 822 (2008).

When the Board decided *Smith Farm*, only four Circuits — the First, Seventh, Eighth, and Eleventh — had definitively weighed in on the issue of which test under *Rapanos* should apply. *Smith Farm*, 15 E.A.D. at 243-44. Currently, as discussed below, two Circuits have held that only the Kennedy test applies; three Circuits have clearly held that CWA jurisdiction may be found under either the Kennedy test or the Plurality test, and seven of the twelve Circuits have not definitively decided the question. None have decided that the Plurality test alone applies.

The First, Third, and Eighth Circuits have held that jurisdiction may be established using either the Plurality or the Kennedy test. *See United States v. Donovan*, 661 F.3d 174, 176 (3rd Cir. 2011), *cert. denied*, 132 S. Ct. 2409 (2012); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009); *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006), *cert. denied*, 552 U.S. 948 (2007). The Fourth Circuit has twice applied the Kennedy test, either reserving decision of which test is controlling for another day or applying it in a fashion that suggests the court considers either test appropriate to establish jurisdiction. *See Deerfield Plantation Phase II-B Prop. Owners Ass'n v. U.S. Army Corps of Eng'rs*, 501 F. App'x 268, 273-74 (4th Cir. 2012) (deferring to the Corps' interpretation that

CWA jurisdiction may be established if either test is met)*; Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278, 288 (4th Cir. 2011) (determining it was unnecessary to decide which test controls because the parties agreed the Kennedy test controlled and offering only passing comment on the Plurality test in a footnote). The Sixth Circuit in *United States v. Cundiff* considered which test was controlling but ultimately decided it was unnecessary to decide based on the facts of the case before it. 555 F.3d 200, 210, 213 (6th Cir.), *cert. denied*, 558 U.S. 818 (2009). The Seventh and Eleventh Circuits have held that *only* the Kennedy test is controlling. *United States v. Robison*, 505 F.3d 1208, 1222 (11th Cir. 2007), *cert. denied sub nom. McWane, Inc. v. United States*, 555 U.S. 1045 (2008); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006). The Ninth Circuit has expressed somewhat conflicting views on which test controls.[8] Finally, in addition to the Fifth Circuit, the Second, Tenth, and D.C. Circuits have not yet addressed the issue of which test controls. And, critically for Parkwood's contentions in this case, no Circuit has held the Plurality test alone is controlling. *See Smith Farm*, 15 E.A.D. at 245; *see also* Robert Meltz & Claudia Copeland, Cong. Research Serv., RL 33263, *The Wetlands Coverage of the Clean Water Act (CWA):* Rapanos *and Beyond* 7 (2013). None of the cases decided since *Smith Farm* provide the Board with any reason to deviate from the holding in *Smith Farm*.

Nor does Parkwood offer any significant analysis to suggest otherwise. In the Initial Decision, the RJO found jurisdiction based on Justice Kennedy's assertion that it is reasonable to infer a significant nexus when a wetland meets the regulatory definition of "adjacent." Acc. Dec. at 7 (discussing the Corps' "conclusory standard" of adjacency, which is defined by 33 C.F.R. § 328.3(c)); *see also* 33 C.F.R. § 328.3(c) (defining "adjacent"). It appears that Parkwood simply disagrees with the Board's decision in *Smith Farm* and the Circuit Courts that have also addressed the issue. In Parkwood's view, "utilizing Justice Kennedy's approach alone interprets a Supreme Court opinion as that of only one justice." Parkwood App. Br. at 13. Yet, as the Board explained in detail in *Smith*

[8] As the Board noted in the *Smith Farm* decision, the Ninth Circuit, relying on the Seventh Circuit's reasoning in *United States v. Gerke Excavating*, held that the Kennedy test was controlling in *Northern California River Watch v. Healdsburg*; however, in a subsequent case, *Northern California River Watch v. Wilcox*, the court stated that its *Healdsburg* holding was case-specific and that it had not definitively decided which test is controlling. *Smith Farm*, 15 E.A.D. at 243 (citing *N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 780-81 (9th Cir. 2011); *N. Cal. River Watch v. Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006)).

Farm, where no opinion of the Supreme Court in *Rapanos* commanded a majority, lower courts must determine on what grounds would a majority of the Court determine that a wetland is jurisdictional. *Smith Farm*, 15 E.A.D. at 241-46. In light of the nature of the *Rapanos* opinion, the Board held that is best accomplished by relying on either the Plurality test or the Kennedy test. *Id.* at 246.

Parkwood further argues that allowing for jurisdiction over wetlands adjacent to a traditionally navigable water without a showing of a "hydrological connection" is inconsistent with the Supreme Court's holding in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"). There, the Court concluded that "waters of the United States" did not include "nonnavigable, isolated, intrastate waters" that did not "actually abu[t] on a navigable waterway." 531 U.S. at 167-69; *see* Parkwood App. Br. at 11, 13. But, *SWANCC* involved an isolated wetland where, by definition, there could be no hydrological connection to a traditionally navigable water. Justice Kennedy's opinion in *Rapanos* explains how his test, which is the controlling test for waters that meet the significant nexus test, is consistent with *SWANCC*. *Rapanos*, 547 U.S. at 776-77 (Kennedy, J., concurring).[9]

The Board reaffirms its decision in *Smith Farm* that CWA jurisdiction may be determined under either the Plurality test or the Kennedy test. *See Smith Farm*, 15 E.A.D. at 245-46. The Board's holding that CWA jurisdiction may be established under either test is consistent with the position the U.S. Department of Justice, arguing on behalf of EPA and the Corps, has consistently taken in post-*Rapanos* cases and with guidance EPA and the Corps jointly issued following the *Rapanos* decision, as well as with the reasoning articulated by Justice Stevens and the First, Third, and Eighth Circuits. *Smith Farm*, 15 E.A.D. at 246; U.S. EPA & U.S. Army Corps of Eng'rs, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decisions in* Rapanos v. United States & Carabell v. United States at 3 (Dec. 2, 2008). Parkwood has not met the high burden of convincing the Board to depart from its prior holding in *Smith Farm*; therefore, the Board will continue to determine CWA jurisdiction if either the Plurality test or the Kennedy test is met.

[9] Justice Kennedy also reasoned that it was sometimes the "absence of an interchange of waters * * * that makes protection of the wetlands critical to the statutory scheme." *Rapanos*, 547 U.S. at 775. In other words, the lack of a surface connection between the wetlands and a navigable water is sometimes the source of the significant nexus between those wetlands and the navigable waters.

3. *Parkwood's Wetlands Are Subject to CWA Jurisdiction under the Kennedy Test*

Applying the Kennedy test to the facts of this case clearly demonstrates CWA jurisdiction. The parties agree Parkwood's wetlands are adjacent to the Neches River, which is a navigable-in-fact river subject to the ebb and flow of the tide in the vicinity of Parkwood's property and downstream to the Gulf of Mexico. Acc. Dec. at 1-2. The fact that the levee separates Parkwood's wetlands from the river and the wetlands otherwise lack a hydrological connection to the river is inconsequential under the Kennedy test. *Rapanos*, 547 U.S. at 775 (Kennedy, J., concurring). Parkwood does not dispute that his wetlands, as described here, are adjacent to the Neches River. Acc. Dec. at 1 n.1; *see also* Parkwood App. Br. at 11 ("[Parkwood Land Co.] has stipulated that the Neches River flows adjacent to the site."). Upon a showing that Parkwood's wetlands are adjacent to the Neches River, it is appropriate to infer an ecological connection between the two sufficient to establish a significant nexus under the Kennedy test. *Rapanos*, 547 U.S. at 780. On this basis, the Board affirms the RJO's determination that Parkwood's wetlands are subject to the CWA because they are adjacent to the Neches River. Acc. Dec. at 10.

B. *Nationwide Permit 3 Does Not Authorize the Discharge of Fill Associated with the Truck Turnaround or the Truck Ramp/Staging Area*

By letter dated April 17, 2007, the Army Corps of Engineers informed Parkwood's consultant that the project as proposed in the December 11, 2006 preconstruction notice could be repaired pursuant to NWP 3. Authorization Letter. The letter provided in pertinent part:

> [Y]ou may proceed with the repair of the existing levee as proposed in your December 11, 2006 letter sent on behalf of Parkwood Land Company provided the activity complies with the enclosed three-sheet project plans and Nationwide General Permit (NWP) General/Regional Conditions. * * * The levee is considered to be previously authorized and can be repaired pursuant to NWP 3.
>
> NWP 3 authorizes the repair of a previously-authorized currently-serviceable structure or fill provided the structure or fill is not put to a different use than that for which it was originally constructed. Minor deviations due to changes in construction techniques, materials or the like are authorized.

Id.

In finding that NWP 3 did not authorize discharge of fill associated with Parkwood's construction of a truck turnaround/staging area and truck ramp, the RJO determined that the term "'minor deviations' reference[d] the levee's original construction, not the work proposed in the preconstruction notification." Init. Dec. at 6. Moreover, NWP 3 itself provides that the term "minor deviations" refers to minor deviations to the *structure's* configuration.[10] Reissuance of Nationwide Permits, 72 Fed. Reg. 11,092, 11,181 (Mar. 12, 2007). NWP 3 further describes the types of deviations that are contemplated: "those due to changes in materials, construction techniques, or current construction codes or safety standards that are necessary to make the repair, rehabilitation, or replacement." *Id.* Reading together NWP 3 and the authorization letter, it is apparent that Parkwood's authorization to discharge fill was limited to discharges associated with the repair of the levee, including those resulting in minor deviations to the levee's configuration, but did not extend to discharges related to new or different structures, even presuming those could be characterized as minor.

The RJO relied on testimony adduced at hearing to determine that certain discharges of fill were associated not with the repair of the levee but rather with the construction of a truck turnaround and a truck ramp/staging area.[11] Init. Dec. at 5-6. As the RJO correctly concluded, such structures are not those "minor deviations" to levee repair that NWP 3 contemplates.

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[10] NWP 3 authorizes discharge of fill into waters of the United States for

> [t]he repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure, or fill, or of any currently serviceable structure or fill authorized by 33 C.F.R. 330.3, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area, including those due to changes in materials, construction techniques, or current construction codes or safety standards that are necessary to make the repair, rehabilitation, or replacement are authorized.

72 Fed. Reg. at 11,181.

[11] Although the RJO found the Corps' authorizing letter to be ambiguous in whether its use of the term "minor deviations" referred to deviations from the preconstruction project plan or from the original construction of the levee, that ambiguity did not affect the RJO's determination that the construction of the truck ramp/staging area and truck turnaround did not constitute "minor deviations" under NWP 3. Init. Dec. at 6.

The Board also finds unpersuasive Parkwood's argument that the Region's witnesses could not "testify that [Parkwood] placed fill beyond the ten foot [sic] indicated in the pre-construction notification," Parkwood App. Br. at 14-15, and, thus, that the Region did not demonstrate that the discharges associated with the truck turnaround and truck ramp/staging area were inconsistent with the preconstruction notification. As the RJO found, Parkwood's construction activities themselves deviated from the preconstruction notice and thus constituted unauthorized discharges into wetlands. Init. Dec. at 4-5; *see also* Region's Resp. Br. at 10 ("The unauthorized discharges of fill for which [the Region] sought an administrative penalty were those discharges into wetlands that were not contained in the three sheet project plans approved by the Corps."). Whether the discharges occurred within the geographic extent of the preconstruction notification is irrelevant; the discharges were not within the scope of activities described in the preconstruction notification and authorized by NWP 3.

Accordingly, the Board concludes that NWP 3 did not apply to the discharge of fill associated with the truck turnaround and the truck ramp/staging area. The Board affirms the RJO's determination that Parkwood violated CWA section 404 by discharging fill into navigable waters of the United States without a permit.

C. *The RJO Did Not Apply the CWA Statutory Penalty Factors and EPA General Civil Penalty Policies Correctly in Determining the Penalty for Parkwood's Violations*

For violations occurring on the dates relevant to this action, CWA section 309(g)(2)(A) and the Civil Monetary Penalty Inflation Adjustment Rule at 40 C.F.R. part 19 authorize EPA to assess a Class I administrative penalty of no more than $11,000 for each day of each violation of the CWA or EPA's implementing regulations, up to a maximum of $32,500. CWA § 309(g)(2)(A), 33 U.S.C. § 1319(g)(2)(A); 40 C.F.R. § 19.4. In determining an appropriate penalty, a presiding officer must "explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act." 40 C.F.R. § 22.27(b). Section 22.27(b) further provides that "[i]f the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease." *Id.* Accordingly, in enforcement actions arising from violations of the CWA section 404 permit requirement, a presiding officer must examine nine statutory factors, four relating to the violation and five to the violator. In particular, a presiding officer must

> take into account the 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.

CWA § 309(g)(3), 33 U.S.C. § 1319(g)(3).

The CWA "prescribes no precise formula by which these factors must be computed." *In re Britton Constr. Co.*, 8 E.A.D. 261, 278 (EAB 1999) (citing *Tull v. United States*, 481 U.S. 412, 426-27 (1987)); *In re Pepperell Assocs.*, 9 E.A.D. 83, 107 (EAB 2000). Although the presiding officer must also "consider any civil penalty guidelines issued under the Act," 40 C.F.R. § 22.27(b), the Agency has not developed a penalty policy specific to litigation under section 404 of the CWA. *In re City of Marshall*, 10 E.A.D. 173, 189 n.28 (EAB 2001).

Absent a specific penalty policy for CWA section 404 litigation, it is appropriate for the presiding officer to analyze directly each of the statutory factors. *In re Phoenix Constr. Servs., Inc.*, 11 E.A.D. 379, 395 (EAB 2004) (citing *In re Advanced Elecs., Inc.*, 10 E.A.D. 385, 399 (EAB 2002); *City of Marshall*, 10 E.A.D. at 189 & n.29; *In re Wallin*, 10 E.A.D. 18, 25 n.9 (EAB 2001)). The Board has also looked to general Agency penalty policies for guidance. *Smith Farm*, 15 E.A.D. at 282 (citing *In re Vico Constr. Co.*, 12 E.A.D. 298, 333-34 & n.69 (EAB 2005)); *Phoenix*, 11 E.A.D. at 395 (citing EPA General Enforcement Policy #GM-21, *Policy on Civil Penalties* (Feb. 16, 1984) ("*Policy on Civil Penalties*"), and EPA General Enforcement Policy #GM-22, *A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties* (Feb. 16, 1984) ("*Penalty Framework*")); *see also City of Marshall*, 10 E.A.D. at 189; *Wallin*, 10 E.A.D. at 25 n.9.

In this case, the Region supported its proposed penalty at hearing by employing, without adaptation, the methodology in the Agency's CWA section 404 settlement penalty policy. RJO Hearing Tr. at 160 (referring to *CWA Section 404 Settlement Penalty Policy* at 7). The RJO's Initial Decision, in turn, did not distinguish between civil penalty policies authorized for use in litigation and settlement penalty policies. Init. Dec. at 7. Accordingly, the RJO followed the framework set forth in the CWA Settlement Penalty Policy. *Id.* at 7-8.

The Board generally disfavors the use of settlement guidelines outside the settlement context. *Phoenix*, 11 E.A.D. at 394 & n.37 (citing *Britton*, 8 E.A.D. at 287 n.16). Nonetheless, "[a]lthough settlement policies as a general rule should

not be used outside the settlement context, * * * there is nothing to prevent our looking to relevant portions thereof when logic and common sense so indicate." *Britton*, 8 E.A.D. at 287 n.16 (citing U.S. EPA, *Interim Clean Water Act Settlement Penalty Policy* 22 (Mar. 1, 1995)); *see also CWA Section 404 Settlement Penalty Policy* at 4, 7 (discouraging policy use for determining penalties in litigation but authorizing adaptation of policy's settlement methodology in such circumstances). Penalty policies that are intended solely for settlement can be consulted for their "instructive value" in determining how to assess a penalty under the relevant statutory factors. *In re Mountain Vill. Parks, Inc.*, 15 E.A.D. 790, 795 (EAB 2013). For example, the Region and/or the presiding officer could consult the penalty policy to determine what dates should be considered when calculating economic benefit, or what types of harm to consider when determining the nature, circumstances, extent, and gravity of the violation. Overreliance on a settlement penalty policy can, however, interfere with the presiding officer's assessment of the penalty in light of the statutory penalty factors and relevant EPA general penalty policies. Therefore, when relying on a penalty policy generally not intended for application outside the settlement context, the presiding officer must explain adequately how he or she applied the statutory penalty criteria to the facts of a particular case.

The Region challenges the RJO's findings on three specific Settlement Penalty Policy factors – duration of violation, degree of culpability, and need for deterrence – and the multiplier.[12] However, where, as in this case, the only

[12] The Settlement Penalty Policy sets forth the minimum settlement penalty as the sum of (1) the economic benefit to the respondent of noncompliance and (2) the adjusted gravity amount, less litigation considerations, ability to pay, and mitigation credit for supplemental environmental projects. *CWA Section 404 Settlement Penalty Policy* at 8. At issue in this case are certain "factors" and the monetary "Multiplier" related to the *unadjusted* gravity amount. *Id.* at 10. To calculate the unadjusted, or preliminary, gravity amount, the multiplier is multiplied by values assigned to factors pertaining to "environmental significance" and "compliance significance." *Id.* at 10, 13. The value of the monetary multiplier is "$500 for minor violations with low overall environmental and compliance significance, $1,500 for violations with moderate overall environmental and compliance significance, and $10,000 for major violations with a high degree of either environmental or compliance significance." *Id.* at 10.

Pursuant to the Settlement Penalty Policy methodology, six environmental significance subfactors are each assigned a numerical value between 0 and 20. These subfactors are "Harm to Human Health or Welfare"; "Extent of Aquatic Environment Impacted"; "Severity of Impacts to the Aquatic Environment"; "Uniqueness/Sensitivity of the Affected Resource"; "Secondary or Off-site Impacts"; and "Duration of Violation." *Id.* at 10-12 (describing factors). The three compliance significance factors are also

relevant penalty policy is intended primarily for settlement purposes, arguments over the numerical values or the multiplier to apply from the penalty policy miss the central point.[13] The Board's concern is neither with the specific numerical value the RJO assigned to each factor nor with the monetary multiplier used to determine the penalty. Rather, the question is whether, by relying on the Settlement Penalty Policy, the RJO's detailed penalty assessment adequately explains how he applied the *statutory penalty criteria* to the facts of this case and whether the RJO has applied those statutory criteria properly. The statutory criteria implicated in this appeal are the "nature, circumstances, extent and gravity of the violation" and Parkwood's "degree of culpability." The Board addresses these criteria in turn.

1. *The RJO Erred in Determining the Nature, Circumstances, Extent, and Gravity of Parkwood's Violations*

The CWA requires that any penalty amount be based, in part, on "the nature, circumstances, extent and gravity of the violation, or violations." CWA § 309(g)(3), 33 U.S.C. § 1319(g)(3). The Region's challenge to the RJO's evaluation of the duration of violation factor and the multiplier as set forth in the Settlement Penalty Policy essentially questions his evaluation of "the nature,

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assigned numerical values between 0 and 20. These factors are "Degree of Culpability"; "Compliance History of the Violator"; and "Need for Deterrence." *Id.* at 13-14. "After establishing the preliminary gravity amount * * *, the case development team may adjust this amount to reflect the recalcitrance of the violator and other relevant aspects of the case * * * ." *Id.* at 14.

[13] The Board does recognize the value of a penalty policy intended for use in litigation in helping to give content to statutory penalty factors and to aid both the parties and presiding officers in determining the range of appropriate penalties in administrative litigation. It is for this reason that 40 C.F.R. part 22 contemplates that EPA will generally propose a penalty in its administrative complaint, 40 C.F.R. § 22.14(a)(4)(I), and why the Board expects presiding officers either to follow litigation penalty policies or explain clearly why the presiding officer has deviated from those policies and resorted to consideration of statutory penalty factors. *See, e.g.*, *In re CDT Landfill Corp.*, 11 E.A.D. 88, 118-19 (EAB 2003) (citing *In re Capozzi*, 11 E.A.D. 10, 31-32 (EAB 2003)); *In re Chem Lab Prods. Inc.*, 10 E.A.D. 711, 725-26 (EAB 2002); *In re M.A. Bruder & Sons, Inc.*, 10 E.A.D. 598, 609-10 (EAB 2002). The lack of a litigation penalty policy for CWA section 404, and yet the use of the Settlement Penalty Policy in the hearing both by the Region and the RJO, certainly affected the outcome of the proceedings before the RJO. Had there been a litigation penalty policy in place for CWA section 404 at the time of this case, many of the difficulties with the Initial Decision discussed in the text might have been avoided.

circumstances, extent and gravity of the violation, or violations."[14]

When considering the nature, circumstances, extent and gravity of CWA section 404 violations, the Agency's Penalty Framework guides the Board and sets forth a number of factors the Agency may consider. *E.g.*, *In re San Pedro Forklift, Inc.*, 15 E.A.D. 838, 880 (EAB 2013); *Phoenix*, 11 E.A.D. at 397. These factors include – among other considerations – importance to the regulatory scheme and actual or possible harm. *Penalty Framework* at 14; *see also San Pedro Forklift*, 15 E.A.D. at 880 (listing factors).

The Board has repeatedly held that circumventing the CWA permitting process harms the regulatory program. *Smith Farm*, 15 E.A.D. at 286; *Vico*, 12 E.A.D. at 342; *Phoenix*, 11 E.A.D. at 397-400; *see also In re Everwood Treatment Co.*, 6 E.A.D. 589, 602 (EAB 1996) (Resource Conservation and Recovery Act penalty appeal), *aff'd*, No. 96-1159-RV-M (S.D. Ala. Jan. 21, 1998). Seeking a CWA section 404 permit decreases the likelihood that projects will cause irreparable harm to wetlands because, once apprised of the project, the Corps may either deny a permit in the first instance or place conditions on issued permits to minimize the impact of the activity. *Phoenix*, 11 E.A.D. at 399. In this case, failure to disclose to the Corps the full extent of the repair project, i.e., that a truck turnaround and ramp would be constructed, essentially divested the Corps of the opportunity to determine whether such an activity would require a section 404 permit. Although the RJO may be correct that Parkwood's conduct was negligent instead of willful, Init. Dec. at 18, Mr. Stevenson nonetheless effectively substituted his own judgment for that of EPA and the Corps, thus frustrating the objectives of the wetlands program.

The RJO also recognized the likelihood that the Corps would have authorized the discharge of fill associated with the construction truck ramp/staging area and the truck turnaround under NWP 33, discussed in Section V above, had Parkwood's consultant identified and requested such authorization. *Id.* at 6. It may be reasonable to conclude, therefore, that the violations in this case were not very environmentally significant. Nonetheless, as the RJO notes, the failure to obtain the proper permits "deprived the government

[14] Notably, although the RJO reduced the Region's proposed monetary "Multiplier" and proposed environmental significance factor associated with "Duration of Violation," he assigned *greater* values to the factors associated with "Severity of Impacts to Aquatic Environment" and "Uniqueness/Sensitivity of the Affected Resource" than the Region had recommended. Init Dec. at 10-11. Of course, these factors also influence the determination of the "nature, circumstances, extent and gravity" of the violations.

of opportunity to obtain compensatory mitigation," *id.* at 6-7, which also causes harm to the regulatory program and to the environment.

Additionally, the appearance that the Agency is either not enforcing or unevenly enforcing the section 404 permit requirement has a detrimental effect on the regulatory program. The Board held in *Phoenix* that, because "activities are typically visible to other members of the local community, the perception that an individual is 'getting away with it' and openly flaunting the environmental requirements may set a poor example for the community and encourage other similar violations in the future and/or lead to the acceptance of such activities as commonplace, minor infractions not worthy of attention." 11 E.A.D. at 399. The RJO's Initial Decision concluded the opposite, that "those with knowledge of the [CWA section 404 permitting] program would likely have assumed the work was authorized," and "[h]ad they made inquiries of Mr. Stevenson, he would have informed them he'd obtained a permit." Init. Dec. 21-22. The RJO fails to explain, however, why this assumption is reasonable in light of evidence in the record that there were anonymous complaints about the fill activities. Moreover, extending the RJO's reasoning further reveals that such inquiries could cause other parties to circumvent the permitting program, perhaps unwittingly. If, as the RJO hypothesized, someone "with knowledge of the program" made inquiries of Mr. Stevenson about his levee repair project, the inquirer would have learned that Parkwood had sought coverage only pursuant to NWP 3, not the two nationwide permits that would have been necessary to pursue the project. Developers of future levee projects, following Parkwood's lead, could well conclude that only one permit would be necessary for similar projects and seek fewer than all the requisite authorizations.

When considering the actual or possible harm, the Penalty Framework states that "[t]his factor focuses on whether (and to what extent) the activity of the [violator] actually resulted or was likely to result in an unpermitted discharge or exposure" and recommends that the Agency consider the amount and toxicity of the pollutant of the environment where the violation occurred and the length of time a violation continues. *Penalty Framework* at 14. Here, the RJO discounted the Region's evaluation of the duration of violation by placing great emphasis on the Region's failure to compare Parkwood's violations with other local violations. Init. Dec. at 12 ("[The Region] adduced little evidence with which such a comparative evaluation might be performed."). The RJO relied upon Settlement Penalty Policy language that the Agency consider the duration that "dredged or fill material has remained in place *compared to other violations* in the same watershed, regionally or nationally." *Id.* (quoting *CWA 404 Settlement Penalty Policy* at 12). Yet the Agency's general guidance for considering the "length of

time a violation continues" advises simply that, "in most circumstances, the longer a violation continues uncorrected, the greater is the risk of harm," without comparing the violator's transgressions with those that others committed. *Penalty Framework* at 15. The RJO's analysis in this case focused on the number of days that the Region demonstrated there was illegal discharge, rather than the length of time the truck turnaround/stockpile and truck ramp encroached on wetlands, and also on the lack of evidence in the record regarding other violations in the geographic area. For purposes of settlement, comparison to other violations could help the Region decide whether the settlement achieves similar results to other cases. But, in the litigation context, the Board has made clear that comparing penalties across cases is not an appropriate mode of analysis. *E.g.*, *Phoenix*, 11 E.A.D. at 420 & n.90; *In re Newell Recycling Co.*, 8 E.A.D. 598 (EAB 1999), *aff'd*, 231 F.3d 204 (5th Cir. 2000). Ultimately, the RJO's explanation of how he considered Parkwood's duration of violation illustrates one of the reasons why the Board generally discourages relying in the litigation context on a penalty policy intended for settlement.

Finally, an overarching purpose of civil penalties is deterrence. *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 548 (EAB 1998); *In re B.J. Carney Indus., Inc.*, 7 E.A.D. 171, 207 (EAB 1997) (holding that deterrence is one of the purposes vital to an effective enforcement program); *In re Sav-Mart, Inc.*, 5 E.A.D. 732, 739 (EAB 1995) (noting that the presiding officer reasoned that the assessed penalty "should be enough to inspire Respondent to attend more carefully to its compliance in the future, and enough to deter any carelessness on the part of other similarly situated parties") (internal quotations omitted)); *see also United States v. Mun. Auth. of Union Twp.*, 929 F. Supp. 800, 809) (M.D. Pa. 1996) ("When determining what sum should be added to the violator's economic gain to serve the function of punishment and general deterrence, the court must bear in mind that if the regulated community perceives that violations of the law are treated lightly, the government's regulatory program is subverted.") (internal quotations omitted). As the Agency explained in its Policy on Civil Penalties,

> [t]he first goal of penalty assessment is to deter people from violating the law. Specifically, the penalty should persuade the violator to take precautions against falling into noncompliance again (specific deterrence) and dissuade others from violating the law (general deterrence). Successful deterrence is important because it provides the best protection for the environment.

Policy on Civil Penalties at 3.

The RJO considered the need for deterrence within the framework of the Settlement Penalty Policy and concluded that there was no need for either specific or general deterrence. Init. Dec. at 21-22. Such a conclusion runs counter to the central purpose of penalty assessments. In particular, the RJO stated that "any need for deterring Respondents from further violations was largely accomplished in the past."[15] *Id.* at 21; *see also id.* at 22 ("Nor is there a deterrence need.").

Where, as here, a violator has a history of violations within the same regulatory program, it suggests that the violator has not been deterred by the prior enforcement actions. This enforcement action itself tends to indicate that the prior CWA penalties against Mr. Stevenson and the small businesses with which he has been associated have not provided an effective deterrent. While the Board offers the RJO great deference in assessing witness testimony, the Board questions the RJO's finding that "any need for deterrence is in the past" when presently, after several CWA violations, Mr. Stevenson is facing another CWA enforcement proceeding and the RJO expressly found that it was likely Mr. Stevenson did not read the Corps communication carefully. *Id.* at 18. The RJO has not fully explained with reference to evidence in the record the basis for his conclusion that there is *no* need for deterrence in this case.

As noted earlier, the Board's concern is neither with the specific numerical value the RJO assigned to each factor nor with the monetary multiplier used to determine the penalty. Rather, the Board finds that the RJO has not adequately justified the penalty he assessed in light of the CWA penalty statutory factors and EPA's general policies on civil penalties, i.e., the Policy on Civil Penalties and the Penalty Framework. The RJO's strict reliance on the Settlement Penalty Policy in the litigation context limited his ability to consider the statutory factors

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[15] Specifically, the RJO found:

> Mr. Stevenson indeed believed, albeit incorrectly, that the discharges from which this matter arose were authorized by NWP 3. He likely continues to believe the best way to comply with CWA is to retain a consulting firm to handle permit applications with the Corps. * * * Given his experience in the current action, however, Mr. Stevenson will likely be more careful about reading future communications from the Corps and, if something seems even faintly amiss, seek further advice from Corps, consultant or attorney. No further penalty is required to deter Respondents from careless assumptions about documents they don't understand.

Init. Dec. 21.

in his penalty assessment, and the Board finds that the Initial Decision falls short in explaining how the RJO took into account the nature, circumstances, extent, and gravity of Parkwood's violations.

Ultimately, the RJO's determination on the degree of Parkwood's culpability, discussed in greater detail below, appears to have influenced the RJO's determination on the need for deterrence, and thus the RJO conflated the CWA statutory factors of "degree of culpability" and "nature, circumstances, extent, and gravity." In light of the structure of the Settlement Penalty Policy, which lists these elements together under the "Compliance Significance" factor, the RJO's error is perhaps understandable. Yet the CWA lists culpability and gravity as separate factors, as do EPA's general policies on civil penalties. *E.g.*, *Penalty Framework* at 13-19 (providing that deterrence is a part of consideration for gravity and that degree of wilfulness or negligence is an adjustment factor).[16] If left to stand without correction, the RJO's ruling could send the wrong message regarding the importance of deterrence in establishing penalties under the statutory "nature, circumstances, extent, and gravity" factor.

2. *The RJO Erred in Determining Parkwood's Culpability*

The CWA expressly requires the Agency to consider the violator's degree of culpability when assessing a penalty. Although the Act does not explain how to consider a violator's degree of culpability or what effect culpability should have on the overall penalty assessment, the Board has looked at how the Agency's civil penalty policies apply a violator's degree of willfulness or negligence to determine a violator's culpability. *In re Smith Farm Enters., LLC.*, 15 E.A.D. 222, 287 (EAB 2011) (citing *Penalty Framework* at 17-18). The "Agency['s] civil penalty policies consistently treat the degree of willfulness and/or negligence as an additional factor to be considered in adjusting the gravity component of a civil penalty upward or downward." *Id.*; *see also Penalty Framework* at 18 ("[T]he

[16] A number of other EPA penalty policies follow the general structure of the Penalty Framework – these policies address level of culpability separate from gravity and do not include a "need for deterrence" element in the calculation of the gravity-based penalty. *See*, *e.g.*, Office of Enforcement & Compliance Assurance, U.S. EPA, *Clean Air Act Mobile Source Civil Penalty Policy Title I1 of the Clean Air Act Vehicle and Engine Emissions Certification Requirements* (Jan. 2009); Waste & Chem. Enforcement Div., U.S. EPA, *Section 1018 – Disclosure Rule Enforcement Response and Penalty Policy* (Dec. 2007); RCRA Enforcement Div., U.S. EPA, *RCRA Civil Penalty Policy* (June 23, 2003); U.S. EPA, *Clean Air Act Stationary Source Civil Penalty Policy* (Oct. 25, 1991).

willfulness and/or negligence of the violator should be reflected in the amount of the penalty."). In particular, the Penalty Framework provides:

> In assessing the degree of willfulness and/or negligence, all of the following points should be considered in most cases:
>
> - How much control the violator had over the events constituting the violation.
> - The forseeability of the events constituting the violation.
> - Whether the violator took reasonable precautions against the events constituting the violation.
> - Whether the violator knew or should have known of the hazards associated with the conduct.
> - The level of sophistication within the industry in dealing with compliance issues and/or the accessibility of appropriate control technology (if this information is readily available). This should be balanced against the technology forcing nature of the statute where applicable.
> - Whether the violator in fact knew of the legal requirement which was violated.

Penalty Framework at 18.[17] The Board further observed in *Smith Farm* that "the [Agency's general] Penalty Framework specifically provides that the lack of

[17] The Settlement Penalty Policy recites similar considerations. The policy states, in pertinent part:

> The principal criteria for assessing culpability are the violator's previous experience with or knowledge of the Section 404 regulatory requirements, the degree of the violator's control over the illegal conduct, and the violator's motivation for undertaking the activity resulting in the violation.
>
> The criterion for assessing the violator's experience with or knowledge of the Section 404 program is whether the violator knew or should have known of the need to obtain a Section 404 permit or the adverse environmental consequences of the discharge prior to proceeding with the discharge activity. The greater the violator's knowledge of, experience with, and capability to understand the Section 404 regulatory requirements, and the greater the violator's ability to avoid the illegal conduct, the greater the culpability.

CWA Section 404 Settlement Penalty Policy at 13.

knowledge of the legal requirement should never be used as a basis to reduce a penalty because '[t]o do so would be to encourage ignorance of the law.'" *Smith Farm*, 15 E.A.D. at 287 n.60 (quoting *Penalty Framework* at 18).

The RJO based his consideration of Parkwood's culpability on the testimony adduced at hearing. Init. Dec. at 19. The RJO determined that despite a number of interactions between Mr. Stevenson and the Corps for issues related to CWA permits since 1991,[18] Mr. Stevenson's lack of sophistication supported a finding that he possessed a limited ability to navigate the regulatory process, thus giving rise to what appears to be excusable neglect. *Id.* at 17-19. The RJO noted that Mr. Stevenson likely did not give the correspondence he received from the Corps a close review, and the discharges of fill associated with the construction of the truck turnaround were likely negligent, rather than willful. *Id.* at 18 ("It is unlikely Mr. Stevenson read the letter closely or that he understood its nuances if he did."). The RJO then went on to explain that

> [i]n view of his background and education, Mr. Stevenson had very reasonably concluded the best way to approach CWA compliance was to retain a consulting firm with greater expertise than he possessed. His negligence in failing to question the permit coverage received, coupled with some hard luck in the case of the truck ramp/staging area fill, resulted in violations, but not the flagrant violations the record suggested before the hearing.

Id. at 19. Consequently, the RJO found Parkwood to be less culpable than the Region had recommended. *Id.*

In arriving at this conclusion, the RJO's culpability analysis disproportionately emphasized Mr. Stevenson's "capability to understand the Section 404 regulatory requirements" and focused nearly exclusively on his level

[18] According to the Corps, since 1991, Mr. Stevenson and businesses with which he has been associated received four section 404 permits, withdrew three permit applications and requested twelve jurisdictional determinations. *See generally* Init. Dec. at 15-17 (describing Corps' documentation and testimony). The Corps also documented that Mr. Stevenson fell short of regulatory requirements on several occasions prior to this proceeding: three confirmed unauthorized activities before the current violation and two after-the-fact issued permits. *Id.* Thus, Mr. Stevenson is aware that he was engaged in activities that may implicate the federal Clean Water Act. Additionally, he failed to comply with an Administrative Compliance Order for this violation, which required submission of a plan for restoration. Acc. Dec. at 4.

of sophistication. *Id.* at 14 (citing Section 404 Settlement Penalty Policy).[19] Such an approach contravenes the broader approach described in the Penalty Framework. As discussed above, the Penalty Framework's methodology for determining the degree of willfulness and/or negligence includes evaluating – *in addition to* the violator's knowledge of the legal requirement that was violated – the level of control the violator had over the events constituting the violation, the foreseeability of the events constituting the violation, any reasonable precautions the violator took against the events constituting the violation, and whether the violator knew or should have known of the hazards associated with his or her illegal conduct. *Penalty Framework* at 18. Accordingly, despite a finding that Parkwood's violations were "negligent, but not willful" for the truck turnaround and "somewhat less negligent" for the truck ramp/staging area, the RJO's culpability analysis is erroneous due to an overemphasis on Mr. Stevenson's lack of sophistication.

The Board is not questioning the RJO's role in determining witness credibility and recognizes that the presiding officer is in the best position to determine a respondent's level of sophistication, which may bear on his degree of negligence or willfulness. But the RJO's statements in the Initial Decision suggest that Mr. Stevenson's lack of sophistication and retention of a consultant might excuse liability or militate for a small penalty and fail to consider the other factors. Based on the Board's review of the Initial Decision, and under the facts and circumstances of this case, the Board concludes that the RJO erred in his analysis of Parkwood's culpability. On remand, the RJO should examine the statutory factors in light of the Penalty Framework so as not to suggest that culpable conduct is being excused for reliance on a consultant.[20]

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[19] The Initial Decision cites to page 16 of the Section 404 Settlement Penalty Policy; however, that page discusses "Other Factors as Justice May Require" and "Additional Reductions for Settlements." The discussion concerning "Degree of Culpability" and the language quoted in the Initial Decision is found on page 13 of the Section 404 Settlement Penalty Policy.

[20] The Board has recognized that while reliance on the good faith representations of a consultant may justify mitigation of culpability, *In re City of Marshall*, 10 E.A.D. 173, 191 (EAB 2001), mitigation may not be appropriate where a consultant fails to apprise the regulator of all relevant facts, *Smith Farm*, 15 E.A.D. at 288-89. The Board has held similarly in the liability context, i.e., reliance on a hired agent who then fails to perform the regulatory requirements on behalf of the agent's employer, without more, does not generally relieve the regulated entity of liability. *E.g., In re Pyramid Chem. Co.*, 11 E.A.D. 657, 667 (EAB 2004) ("[A]n attorney stands in the shoes of his or her client, and ultimately, the client takes responsibility for the attorney's failings."); *In re Rocking*

3. *Penalty Conclusion*

The Region requests that the Board "reevaluate" the relevant evidence in the record "under the CWA and the Penalty Policy to assess a penalty" that reflects the seriousness of the violations. Region's App. Br. at 14. Although the Board has authority to determine the penalty itself under 40 C.F.R. § 22.30(f), it declines to do so in this case. The Region's brief on appeal discusses the penalty solely in light of the Settlement Penalty Policy, as does the Initial Decision. Accordingly, there is not an exhaustive analysis of the record in light of the statutory factors themselves or the general civil penalty policies – the Policy on Civil Penalties and the Penalty Framework – and Parkwood did not file a response to the Region's cross-appeal. The Board does not, therefore, have a sufficient basis to determine whether the RJO's penalty is appropriate in light of the relevant statutory factors, including the nature, extent, and circumstances of the violations, and culpability.[21] Further consideration by the RJO in light of the proper factors would provide the Board with a more complete basis on which to review the penalty assessment. Therefore, the Board remands the penalty assessment to the RJO for further consideration in light of this opinion.

VII. *ORDER*

The Board affirms the RJO's CWA jurisdictional determination. The Board further affirms the RJO's finding that NWP 3 did not authorize the discharge of fill associated with the staging area/truck ramp and the truck turnaround. Finally, the Board remands the RJO's penalty assessment so that he may consider the record in light of explicit consideration of the statutory factors, the Policy on Civil Penalties, and the Penalty Framework, in determining his penalty assessment. The RJO's decision on remand determining the amount of

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BS Ranch, Inc., at CWA Appeal No. 09-04, at 13 (EAB Apr. 21, 2010) (Final Decision and Order) (holding respondent responsible for accountant's failure to submit documentation regarding ability to pay the penalty).

[21] The Board emphasizes that it is not suggesting that the amount of the penalty that the RJO assessed is necessarily too low in light of the RJO's assessment of Parkwood's culpability. Rather, the RJO's reasoning with respect to the duration of violation, harm to the regulatory program, need for deterrence, and culpability is incomplete and does not fully track the statute and EPA's general penalty policies, and some of the RJO's statements could be read to improperly excuse culpable conduct. It may well be that $7,500 is an appropriate penalty in light of all of the statutory factors and EPA's general policies, but the RJO's decision does not make it possible for the Board to so determine.

the penalty to be assessed against Parkwood shall be appealable to the Board pursuant to 40 C.F.R. § 22.30.

So ordered.