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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the matter of:	)	CWA Appeal No. 06-(06)
	)	
J. Phillip Adams	)	
Bannock County, Idaho	)	**RESPONDENT'S**
	)	**APPELLATE BRIEF**
Respondent.	)	
	)	
	)	

COMES NOW the Respondent, J. Phillip Adams ("Respondent"), by and through counsel, and respectfully submits this brief pursuant to Order of the Environmental Appeals Board ("EAB" or "Board") dated February 27, 2007, and in response to the Notice of Appeal and Supporting Brief submitted by Region 10 of the Environmental Protection Agency ("EPA") January 17, 2007. For the reasons set forth below, Respondent respectfully requests that the Board sustain the Initial Decision of Judge William B. Moran issued October 18, 2006.

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TABLE OF AUTHORITIES

ISSUES PRESENTED

1. Whether the Presiding Officer acted within his discretion in considering the applicability of the CWA § 404(f)(1)(E) "farm road exemption."

2. Whether the Presiding Officer's factual finding that Respondent's structure qualifies under the farm road exemption is supported by the record.

PROCEDURAL HISTORY

EPA filed a Complaint against Respondent on June 16, 2004, alleging that Respondent violated section 404 of the Clean Water Act ("CWA") by dislodging native soil into 0.1 acres of Potter Creek while constructing a farm road across the creek in 2001. The Complaint sought to impose a $25,000 fine against Respondent for the alleged violation. Respondent contested the charges in the Complaint and a hearing was held on the matter before the Honorable William B. Moran (the "Presiding Officer") from July 27 through August 1, 2005, in Pocatello, Idaho. Both parties filed post-hearing briefs, reply briefs, and supplemental briefs to address the effect on this litigation of the United States Supreme Court's recent decision in *Rapanos v. United States*, 547 U.S. ___, 126 S. Ct. 2208 (2006). The Presiding Officer issued the Initial Decision October 18, 2006. EPA appealed the Decision to the Environmental Appeals Board and filed a supporting brief January 17, 2007.

STANDARD OF REVIEW

The Environmental Appeals Board generally reviews findings of fact and conclusions of law *de novo*; however, "considerable deference" is granted to findings of fact based on the testimony of witnesses because the Presiding Officer is in the best position to assess each witness's credibility. EAB Practice Manual at 20, n.16 (2004).

By this appeal EPA challenges the Presiding Officer's application of the "farm road exemption," CWA § 404(f)(1)(E), which is an extremely fact-specific determination.[1] The Presiding Officer's thorough analysis and detailed Initial Decision is heavily grounded on extensive witness testimony and, therefore, warrants extraordinary deference from the Board.

STATEMENT OF FACTS

Respondent farms a number of elevated foothills west of Marsh Valley in Bannock County, Idaho. Potter Creek entirely bisects Respondent's elevated farmland, flowing in an easterly direction for two to three miles through a steep and narrow ravine that previously made it geographically impossible for Respondent to move its farm equipment between adjacent fields. Tr. 930-931. Instead, equipment had to be circuitously transported 6-7 miles via the County road along the valley floor to the east as necessary to plant and harvest adjacent fields separated by Potter Creek. Tr. 704:18-705:8; 932.

A. Potter Creek.

Potter Creek is a trivial stream—only one to two feet wide and a few inches deep—that can be easily stepped across at any location. Tr. 281:3-15. It is not known to sustain any fish. Tr. 633:14-21. It is not used by the public for recreation or aesthetic purposes. Tr. 635:1-5. Potter Creek was historically dammed for at least 25 years. Tr. 127, 862-863. It is a farm creek, entirely diverted into a series of artificial ditches in its lower reaches and used for irrigation for more than fifty years. Tr. 157:12-21; 697:21-

[1] The completely subjective nature of the 15 best management practices makes their application inherently fact-specific on a case-by-case basis. EPA itself points out that the determination is "highly fact-specific." Complainant's Appellate Brief, at 7.

698:12. The ditches through which Potter Creek flows are regularly dredged for maintenance purposes. Tr. 691-692, 849-850. Water reaches the terminus of Potter Creek's channel only sporadically. Tr. 920:24-20. Even then, any remaining water dissipates into a hay field approximately six hundred feet west of Marsh Creek. Ex. C-2. There is no contiguous channel connecting Potter Creek to Marsh Creek or any other waterway. Tr. 141:9-14; 462:24-463:10; 853:12-20.

B. Farm Road.

To save time and expense and eliminate safety concerns associated with commuting heavy farm equipment along the County road, Respondent decided to improve an existing farm road through the ravine and across Potter Creek. Tr. 705:9-706:9. Respondent chose the location midway up the ravine because an unimproved farm road crossing had already existed for over fifty years. Tr. 703:17-24; 931-932. The existing road was too steep and narrow for use by modern farm equipment, requiring Respondent to install a culvert, build up the road crossing, and ease the grade of the approach roads on the north and south sides of the ravine.[2] Tr. 704:10-17. To ensure safe travel in rain or snow and to avoid having to dismantle farm equipment each time it crossed the ravine, Respondent desired a crossing 100 feet wide. Upon the request of the United States Army Corps of Engineers (the "Corps"), however, Respondent agreed to narrow the crossing to 40 feet.[3]

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[2] EPA witness James Joyner of the Corps recognized that Respondent's farm road would require some building up due to the steepness of the ravine. Tr. 318; Initial Decision at 12 n.32.

[3] Respondent has always felt that the Corps' request was unreasonable. Nevertheless, Respondent agreed to the lesser width in the interest of cooperation and satisfying the government.

C. Erosion Control & Restoration.

Respondent routed Potter Creek around the crossing site as necessary to install and secure the culvert while avoiding erosion and ensuring the uninterrupted flow of Potter Creek. Tr. 952:4-20; 954:10-21. Respondent installed silt fences immediately upon the request of the government. Tr. 955:5-956:17. When the initial fences failed to withstand the heavy snow pack, Respondent voluntarily installed new, heavier silt fences. Tr. 959:20-960:19. In addition, Respondent performed interim restoration work and implemented a professionally-designed restoration plan that resulted in a post-project vegetative condition markedly superior to the site's pre-project condition.[4] Ex. R-1, 4.

D. Culvert.

The road crossing installed by Respondent included two horizontal culverts—one 18" and one 12" in diameter—each with a 90-degree "elbow" on the upstream end to prevent clogging. Tr. 939:11-16; 951:21-952:3. The crossing was designed to enable Potter Creek to flow uninterrupted through the 18" pipe, with the 12" pipe available as an overflow valve in the event of a flood. The elbow on the 12" overflow pipe was extended to position its opening at a slightly higher elevation than the 18" pipe in order to ensure that Potter Creek flowed exclusively through the 18" pipe except during a high flows. Initial Decision at 19.

E. Perforated Standpipe.

After the state and federal government intervened, the lead agency at the time, the Idaho Department of Water Resources ("IDWR"), instructed Respondent to add a

[4] It is notable that the Corps and the EPA continuously criticized Respondent's restoration efforts and never fully approved Respondent's restoration plans, which nevertheless proved to be extremely successful.

perforated extension ("standpipe") to the 18" pipe and to add a perforated cap to the 12" overflow pipe as anti-clogging devices. Tr. 492:18-493:7. EPA representative Carla Fromm was in attendance and agreed with IDWR's recommendation. Tr. 509:15-21. Respondent followed the government's instructions and installed the perforated standpipe and cap, which have worked perfectly to prevent clogging.[5] The government later changed its mind and demanded that the perforated standpipe be removed, claiming it prevented the passage of aquatic wildlife. Ex. C-34. By reason of Potter Creek's trivial size and volume, its complete diversion into various ditches and use for irrigation, the existence of a historic dam, the regular dredging of the creek, its lack of any contiguous connection to Marsh Creek, Respondent's personal knowledge of the Creek and other factors, Respondent has continuously maintained that Potter Creek does not sustain a fishery and that the farm road does not interfere with any other hypothetically-existing aquatic wildlife.

F. Current Status of Farm Road Crossing.

Respondent has regularly used the farm road to move farm equipment across the ravine ever since its completion in 2002. Respondent initially considered creating a fish pond at the crossing if possible, as shown on the initial Joint Application for 404 Permit. However, when the Corps informed Respondent that his structure could not have a dual use, Respondent dropped the proposed pond and continued with the single farm road purpose.[6] The record unequivocally established that any desired use of the crossing as a fish pond was merely incidental to Respondent's principal motivation to move farm

[5] EPA's assertion that the vertical standpipe was installed prior to the culvert upon which the standpipe is attached defies reason and is without support in the record.
[6] EPA failed to provide any substantive support for the Corps' assertion that the Respondent's farm road could not have a dual use. Initial Decision at 5 n.8.

equipment across the ravine. Regardless, the crossing has never been utilized to impound water.

When EPA obstinately demanded removal of the standpipe, Respondent inquired about other alternatives that might be available to retain the pipe in order to avoid the risk of clogging and avoid having to excavate the culverts and ruin Respondent's restoration work. IDWR recommended that Respondent apply for the necessary permits to create a small dam, which would allow the perforated standpipe to remain without question and remove the matter from EPA hands and back under IDWR jurisdiction. Accordingly, Respondent submitted to IDWR a Small Dam Application, an Application to Appropriate Water for a recreational pond, and an Application to Transfer part of a nearby water right for the purpose of mitigating evaporation loss from the proposed pond. Ex. R-12, R-13, R-14. Additionally, Respondent amended its Joint 404 Application to change the purpose from a road crossing to a small dam. Ex. R-16. The Corps, however, refuses to even conditionally process Respondent's 404 Application, which has been pending since 2001.

Nothing more than a farm road crossing currently exists at the site. EPA's incessant proclamation that the crossing "is a dam" is utterly false.[7] Respondent has never obtained the necessary permits and accompanying water right to store water at that location. Moreover, Respondent has never installed the necessary modifications to utilize the structure as a dam, which would include a headgate on the lower or upper end of the culvert to impound water and an emergency spillway over the top of the crossing. That the crossing could possibly be utilized as a dam with certain modifications does not in fact make it "a dam." The Presiding Officer specifically addressed EPA's dam argument

[7] EPA's argument that the temporary existence of a small puddle of water at the elbow of the 18 inch culvert effectively turns the crossing into a dam is laughable.

and found with certainty that "the crossing was for that single use ... as a farm equipment crossing." Initial Decision at 5 n.8. The crossing does not now impound water, has never in the past impounded water, and will never in the future impound water without additional permits and important modifications.[8] Instead, Potter Creek flows uninterrupted through the culvert under the road and down the ravine.

ARGUMENT

I. THE PRESIDING OFFICER PROPERLY ACTED WITHIN HIS DISCRETION IN CONSIDERING THE APPLICABILITY OF THE § 404(f)(1)(E) FARM ROAD EXEMPTION.

EPA's assertion that Respondent waived the farm road exemption by not specifically raising it in his answer is baseless. No law or regulation states that § 404(f) defenses are waived if not raised in a respondent's answer. The pleading provisions of the Consolidated Rules of Practice ("CROP") simply require notice of "the circumstances or arguments which are alleged to constitute the grounds of any defense." 40 C.F.R. § 22.15. Unlike the Federal Rules of Civil Procedure, which identify certain specific defenses that must be raised in the Answer, the CROP simply require notice of *circumstances* that may provide the grounds for a defense. EPA cannot legitimately claim to have had no notice of the circumstances making the § 404(f) farm road exemption relevant to this case.

As the singular expert on CWA regulation, EPA is undoubtedly aware that certain activities, including the maintenance and construction of farm roads, are exempt from the CWA permitting process. Consequently, EPA cannot legitimately argue that it was

[8] The Presiding Officer noted that even if the crossing were modified in the future to enable its use as a fish pond incidental to its principal use as a farm road, EPA provided no authority for its claim that dual use structures are prohibited. Initial Decision at 5 n.8.

unaware of the potential applicability of the § 404(f) farm road exemption to Respondent's farm road across Potter Creek. Respondent made it specifically known from the beginning that the purpose of the road crossing was to move farm equipment between adjacent fields separated by Potter Creek. In fact, there is no maintained access road on either side; rather, one must drive directly through cultivated fields just to access the crossing. Representatives of the Corps and EPA personally visited the crossing and witnessed its unmistakable farm use on numerous occasions prior to EPA's filing of its Complaint. Further, the Corps specifically considered the exemption's potential applicability for more than four months before make a less-than-certain determination that it did not apply. Thus, EPA cannot honestly claim to have been surprised that the farm road exemption was relevant to this litigation.

Furthermore, the Board has not previously required that § 404(f) exemptions be specifically raised in a respondent's answer. *In re Ray & Jeanette Veldhuis*, CWA Appeal No. 02-08 at 204 (October 21, 2003) ("Veldhuis"). The respondent in *Veldhuis* raised the normal farming exemption for the first time on appeal. *Id.* at 201-202. In that case EPA argued that the respondent waived its right to assert the exemption for failing to raise it in the pleadings, briefs, or evidentiary hearing. *Id.* However, the Board found the exemption issue properly before it because it had been "perhaps raised implicitly" at the hearing. *Id.* at 203. The Board further noted that the ALJ's decision to rule on the issue was "at least an implicit acknowledgement that in her view all necessary facts for a legal ruling on that defense were present." *Id.*

The Board's refusal to strictly require that exemptions be specifically raised in a respondent's answer is at least partially grounded in practicality and fairness. The mere

existence of § 404(f) exemptions is certainly not a matter of common knowledge outside the Corps and EPA, let alone the exemptions' treatment as a defense rather than a jurisdictional issue.[9] In fact, the Presiding Officer noted that "federal courts have provided scant gloss to the [farm road exemption]." Initial Decision at 3. Where an obscure CWA provision may exempt a person from the § 404 permit requirement it would certainly be unjust to allow EPA to keep the provision secret just long enough to close the door on its application via procedural maneuvering. Therefore, the EAB "adheres to the generally accepted legal principal that 'administrative proceedings are liberally construed and easily amended.'" EAB Practice Manual at 20 n.17 citing *In re Port of Oakland*, 4 E.A.D. 170, 205 (EAB 1992).

The Board's practice of "not revers[ing] decisions based on minor pleading deficiencies"[10] is consistent with the Federal Rules of Civil Procedure, which freely permit express or implied amendments to pleadings as justice so requires, so long as the opposing party is not unduly prejudiced. Fed. R. Civ. P. 15. The Presiding Officer noted the Board's policy in deciding to consider the applicability of the farm road exemption. Tr. 18. Like the Federal Rules, the CROP must "reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson*, 355 U.S. 41 (1957).

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[9] Section 404(f) exemptions remove CWA authority over certain activities so that a farmer "may consider whether he even needs to apply for a § 404 CWA permit." Initial Decision at 4 n.6, citing *Jones v. Thorn*, 1999 WL 1140863 (D.Or.). Thus, the exemptions have the effect of limiting CWA jurisdiction. Their treatment as a defense rather than a jurisdictional issue is not inherently obvious. The distinction was not immediately clear to the Presiding Officer at the hearing. Tr. 17. EPA's failure to clarify the distinction at the hearing demonstrates a similar lack of certainty.

[10] EAB Practice Manual at 20.

EPA's claim that the Presiding Officer's consideration of the farm road exemption was unduly prejudicial is purely smoke and mirrors. As explained *supra*, EPA was aware from the beginning that the exemption was relevant to the case, and that "the Corps took it upon itself to determine whether Respondent's structure met the requirements for the § 404(f) exemption, and concluded that it did not apply."[11] Complainant's Appellate Br. at 12 n.31. EPA called as a witness Mr. Joyner, the Corps' representative who made the determination, and placed into evidence extensive testimony of the Corps' basis for its determination. EPA also placed into evidence his report, which had been prepared more than 3 years prior to the hearing. Furthermore, EPA argued the farm road exemption in both is post-hearing brief and reply brief without at any time claiming undue prejudice by its consideration. Only after losing on the merits did EPA claim it was unduly prejudiced by the Presiding Officer's consideration of the exemption.

EPA's claim that the farm road exemption is "entirely new" is likewise hollow. Complainant's Appellate Br. at 8 n.20. The Corps considered the exemption internally for more than four months before making an equivocal decision.[12] Ex. C-10. As the Presiding Officer pointed out, the exemption certainly "did not come out of the blue" to EPA. Tr. 74-75. Rather, EPA's defense was formulated years prior when the Corps' voluntarily evaluated the exemption and determined it did not apply. In truth, the only

[11] For all practical intents and purposes, the actions of the Corps and EPA are one and the same, as the agencies acted jointly to enforce the CWA against Respondent.

[12] The Corps did not finally make a decision on the farm road exemption until March of 2002. Ex. C-10. By that time it had already demanded that the Respondent submit a Joint Application, Ex. C-6, had begun processing the Application, Ex. C-8, and had plans for enforcement, Ex. C-20 (4 February 2002).

party to whom the exemption was "new" was Respondent,[13] who certainly would have raised the exemption long before EPA ever filed its Complaint had Respondent been aware of the provision. The testimony presented at hearing clearly demonstrated that the regulators deliberately "kept the Respondent in the dark" about the potential applicability of the farm road exemption. Initial Decision at 12. Had EPA chosen to operate forthrightly and above-board, the entire permitting process, three-day administrative hearing, this appeal, and extraordinary expenses incurred by Respondent and taxpayers would have easily been avoided.[14] If Respondent's assertion of the farm road exemption was "new" to EPA, it is EPA's own subterfuge that made it so.

EPA brazenly argues that it has no obligation to apprise CWA permit applicants of relevant exemptions because applicants bear the burden of proving such defenses. Complainant's Appellate Br. at 12. Apparently EPA expects farmers to not only divine the existence of § 404(f) exemptions, but also to divine EPA's subjective application of relevant exemptions under the circumstances. Essentially, EPA is arguing for authority to hide such defenses in hopes that they will not be discovered. In contrast, the Presiding Officer's Initial Decision encourages EPA to act forthrightly when dealing with the very taxpayers that finance the Agency's operation.

In any case, the Presiding Officer properly acted within his discretion in considering the applicability of the farm road exemption. While the EAB has previously considered § 404(f) exemptions that were not explicitly raised until appeal, Respondent specifically raised the farm exemption via motion more than a week prior to the hearing.

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[13] Neither the Corps nor EPA ever informed Respondent of the farm road exemption. Tr. 329:7-12; 617:16-24; 997:11-17.

[14] Respondent had ample time to make any necessary modifications, having submitted his design plans to the Corps before initiating construction on the crossing.

Furthermore, both parties argued the exemption at the hearing, EPA asserted that its evidence would negate the applicability of the farm road exemption, and EPA devoted a substantial portion of its post-hearing brief and reply brief to the exemption without ever claiming undue prejudice by its consideration. Only after losing on the exemption did EPA decide it was unfairly prejudiced by the Presiding Officer's consideration of the exemption's applicability. As in *Veldhuis*, the Presiding Officer's decision to rule on the farm road exemption verifies his determination that "all necessary facts for a legal ruling on that defense were present," CWA Appeal No. 02-08 at 204, and that EPA was not unduly prejudiced by his consideration of the exemption. Similarly, the Presiding Officer's decision on the issue constitutes an implicit amendment to Respondent's pleadings to the extent necessary to conform to the evidence and preserve the Presiding Officer's consideration of the farm road exemption.

II. THE PRESIDING OFFICER'S FACTUAL FINDING THAT THE RESPONDENT'S FARM ROAD FALLS WITHIN THE FARM ROAD EXEMPTION IS WELL-SUPPORTED BY THE RECORD.

Congress expressly exempted from the Clean Water Act ("CWA") § 404 permit requirement the discharge of dredge or fill material "for the purpose of construction or maintenance of farm roads ... in accordance with best management practices" (the "farm road exemption"). 33 U.S.C. § 1344(f). The Presiding Officer specifically acknowledged that the farm road exemption is to be narrowly construed and cover only those activities "that cause little or no adverse effects either individually or cumulatively...." Initial Decision at 3, citing *United States v. Heubner*, 752, F.2d 1235, 1242 (7th Cir. 1985). Nevertheless, "the exemption must be taken seriously as Congress

intended to limit the CWA burden on farmers." Initial Decision at 4, citing *Jones v. Thorn*, 1999 WL 1140863 (D.Or.).

After an exceptionally exhaustive and well-documented analysis of the evidence and arguments presented by both sides, and having visited the farm road in person as part of the hearing, the Presiding Officer found that Respondent's improvement of an existing farm road "was exempt from the CWA permitting provisions per 33 U.S.C. § 1344(f) of the Clean Water Act." Initial Decision at 19-20. The Presiding Officer's extremely thorough and highly fact-specific determination warrants extraordinary deference by the EAB.[15] Nevertheless, EPA brashly discounts the Presiding Officer's factual findings, claiming he (a) improperly shifted the burden of proof from Respondent to Complainant, (b) erroneously found that Respondent's farm road crossing qualified for the § 404(f) exemption, and (c) critically failed to rule on the § 404(f)(2) recapture provisions. As explained below, EPA's claims are inadequately supported and fall far short of justifying a reversal of the Presiding Officer's detailed and well-reasoned decision.

A. The Presiding Officer properly placed the burden upon Respondent to prove the applicability of the farm road exemption.

EPA's allegation that the Presiding Officer improperly shifted the burden of proof is absolutely false. The Presiding Officer expressly acknowledged that "it is the Respondent's burden to establish both that it qualifies for the exemption and that it does not come within that section's recapture provisions." Initial Decision, at 4-5. Further, in explaining his decision, the Presiding Officer confirmed that Respondent's burden is to prove the prima facie case, after which, if successfully proved, EPA may present contrary

[15] The completely subjective nature of the 15 best management practices necessarily makes their application highly fact-specific on a case-by-case basis. EPA itself points out that the determination is "highly fact-specific." Complainant's Appellate Brief, at 7.

evidence to show that the farm road could have been constructed with less impact on the waters of the United States while still accomplishing its purpose. Initial Decision, note 46, at 18. With that in mind, the Presiding Officer meticulously evaluated the farm road exemption, concluding that Respondent's improvement of an existing farm road did in fact qualify. *Id*, at 19. Ultimately, "EPA never countered with any expert who presented an alternative construction plan that would accommodate the farm equipment and yet would impact Potter Creek to a lesser extent that the activity which occurred there." Initial Decision at 19.

EPA complains that the Presiding Officer criticized the Agency for keeping Respondent in the dark about the farm road exemption and for failing to provide any compelling evidence that Respondent violated the exemption's 15 best management practices ("BMPs"). Complainant's Appellate Br. at 11-12. Apparently EPA would excuse itself from any responsibility to evaluate the farm road exemption, instead expecting farmers to divine the Agency's subjective application of the BMPs under the given circumstances.[16] As the Presiding Officer noted, such a standard would impose an impossible burden on farmers to "prove a negative by having to establish there are no more intrusive means of constructing a farm road." *Id.* at 18. Further, it would contravene Congress' express purpose for the exemption which is to lessen the CWA burden on farmers.

EPA misreads the Initial Decision by claiming it requires the Agency to "first disprove the exemption to enforce the law." As shown *supra*, the Presiding Officer properly placed the burden on Respondent to make a prima facie showing that the farm

[16] The BMPs are entirely subjective, making their application subject to sundry interpretations on a case-by-case basis. 33 C.F.R. 323.4(a)(6).

road exemption applied. Only after the finding that Respondent met its burden[17] did the Presiding Officer consider rebuttal evidence offered by EPA. Moreover, the Presiding Officer's critique of EPA for failing to provide any compelling rebuttal evidence is particularly well-placed in this case. Initial Decision at 17. It is undisputed that the Corps and EPA were aware from the beginning that Respondent's farm road crossing may be exempt from the permitting process, yet the regulators chose to keep that fact secret. Instead, as EPA points out, "the Corps took it upon itself to determine whether the Respondent's farm road met the requirements for the § 404(f) exemption, and concluded that it did not apply."[18] Complainant's Appellate Br. at 12 n.31. One would expect that the government would not keep Respondent in the dark about the exemption without a solid basis for its conclusion that the exemption did not apply. Yet that was clearly not the case here, as manifested by the Corps' less-than-certain conclusion that the exemption did not apply[19] and EPA's failure to provide compelling evidence that any of the 15 BMPs were violated.

It is obvious that EPA has hurt feelings over the Presiding Officer's criticism for keeping Respondent in the dark about the farm road exemption. Complainant's Appellate Br. at 12. Yet rather than accept the constructive criticism as such, EPA denies it as "misguided" and continues to refuse any responsibility to operate above-board and

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[17] The Presiding Officer found that Respondent offered ample proof that the road crossing was installed to facilitate ongoing farming activities and that BMPs were followed so as to maintain Potter Creek's natural characteristics, not reduce the reach of navigable waters, and minimize adverse effects to the aquatic environment. Initial Decision, at 7-8.

[18] EPA now claims that the Corps' practice of voluntarily assuming the burden of disproving the exemption is a "dangerous standard." Complainant's Appellate Br., at 11.

[19] Initial Decision at 14 n.38.

in good faith with the very taxpayers that finance the Agency's operation. *Id.* EPA maintains that citizens should be left alone to divine the intricacies of the CWA.[20]

B. The Presiding Officer's factual finding that the farm road exemption applies is well-reasoned, well-supported, and well-documented.

In a last-ditch effort to avoid the farm road exemption, EPA declares that the Presiding Officer "ignored the requirement that § 404(f) exemptions are to be narrowly construed." Complainant's Appellate Br. at 9. EPA's assertion is certainly brash considering the Presiding Officer devoted substantial text to the exemption's limited application and specifically cited its narrow construction at least twice. Initial Decision at 3-4, 5 n.7. To support its assertion EPA merely rehashes a number of arguments that the Agency made previously in its post-hearing brief and reply brief, namely: (1) the crossing was larger than necessary, (2) the crossing interferes with aquatic wildlife, (3) the crossing is not culverted to allow continuous flow, (4) the Respondent did not prevent erosion, and (5) the Respondent did not minimize vegetative disturbance. Complainant's Appellate Br. at 13-18. The Presiding Officer specifically addressed each of EPA's repeat arguments in his Initial Decision, provided a detailed and well-supported analysis, and concluded that Respondent's farm road did in fact qualify for the § 404(f) exemption. Initial Decision at 17-19. While Respondent sees no need to burden the EAB with a similar repackaging of its arguments or recitation of the Initial Decision, Respondent does feel compelled to briefly substantiate the Presiding Officer's factual findings regarding EPA's repeat claims.

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[20] To its credit, EPA does imply that it may have an obligation to act in good faith with unsophisticated persons. Complainant's Appellate Brief, note 30, at 12. "Sophisticated persons," on the other hand, are on their own to run the gauntlet of CWA regulation.

1. Respondent's farm road crossing as constructed is no larger than necessary to ensure a degree of safety.

The Presiding Officer specifically considered the requirement that the size of qualified farm roads be "consistent with the purpose of [the] specific farming ... and local topographic and climatic conditions." Initial Decision at 17; 33 C.F.R. 323.4(a)(6)(i). While Respondent initially intended to build a crossing 100 feet wide in order to ensure safe travel in rain and snow and to avoid having to dismantle large farm equipment each time it crossed the Potter Creek ravine, Respondent agreed to reduce the crossing to a width of 40-50 feet to satisfy the Corps' demands. The Corps admitted that the actual 40-foot width of the crossing as constructed is satisfactory. Thus, the Presiding Officer easily found "no legitimate contention that the [Respondent's] road did not meet these requirements." Initial Decision at 17.

While repeating its argument that Respondent's farm road was "wider than necessary," EPA still conspicuously fails to identify an acceptable narrower width that would be sufficient for Respondent's farming practices. Complainant's Appellate Br. at 13. In truth, EPA says almost nothing about the *size* of the crossing;[21] rather, it concentrates solely only on the *use* of the crossing, claiming it "is a dam." Complainant's Appellate Br. at 13. The Presiding Officer also thoroughly analyzed EPA's argument that Respondent's farm road crossing was a dam, yet concluded with certainty that "only a crossing has been constructed." Initial Decision at 12-13. EPA obstinately refuses to accept that fact.

[21] The Presiding Officer noted that "no EPA witness claimed that a width less than 40 feet would suffice under these usage conditions." Initial Decision at 18.

Respondent's farm road has since its construction been used exclusively for transporting farm equipment between adjacent fields.[22] Respondent has never obtained the necessary small dam permit and accompanying water right to store water at the crossing. Nor has Respondent ever installed the modifications necessary to utilize the crossing as a dam, which would include a headgate on the lower or upper end of the culvert to impound water and an emergency spillway over the top of the crossing. That the crossing could possibly be utilized as a dam to impound water for a fish pond if the requisite permits were granted and necessary modifications implemented does not in fact make it a dam.[23] There is simply no denying the fact that the road crossing does not now impound water,[24] has never in the past impounded water,[25] [26] and will never in the future impound water without additional permits and important modifications.[27] EPA witness Joyner even admitted that the road was a farm road crossing. Initial Decision at 12 n.34, citing Tr. 933. The structure is a road and only a road, as was abundantly clear to the Presiding Officer: "the only supportable finding ... is that the Respondent constructed a road crossing." Initial Decision at 13 n.37.

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[22] Although Respondent initially considered utilizing the road crossing as an impoundment, Respondent agreed to eliminate any impoundment aspect from the crossing at the government's request, as attested by EPA witness Ballou. Tr. 505.

[23] Moreover, the CWA does not provide the farm road exemption is retroactively nullified in the event the farm road is modified so as to be utilized as a dam.

[24] EPA counsel personally witnessed the fact that no water is stored at the crossing during a site visit held during the hearing.

[25] EPA's argument that a shallow puddle of water at the elbow on the 12" culvert turns the crossing into a dam is patently absurd.

[26] It is undisputed that Potter Creek is a "perennial stream" in its upper reaches, meaning it flows year-round. As a result, if the crossing did actually operate as a dam as alleged, it would necessarily impound water during all times of the year. EPA witnesses personally visited the crossing on at least seven different occasions without water ever being impounded at the crossing.

[27] EPA witness Ballou characterized the structure as a "culvert crossing" and confirmed that the structure was not competent to hold water and lacked a spillway. Tr. 494.

As a matter of correction, the Presiding Officer did not misstate the facts in reporting that the standpipe was installed subsequent to the placement of the culverts beneath the road. Complainant's Appellate Br. at 14. EPA's misunderstanding of the fact stems from a failure to distinguish between the 90-degree "elbows" on the upstream end of the culverts and the perforated extension ("standpipe") later installed on the 18-inch pipe at the request of Mr. Ballou from IDWR. At the time the culverts were installed, a short extension on the 12-inch overflow culvert placed its intake slightly above the elbow on the 18-inch culvert to ensure that Potter Creek flowed entirely through the 18-inch culvert except during a flood event. Both culvert were already in place at the time Mr. Ballou instructed Respondent to install a perforated cap on the 12-inch pipe and a five-foot perforated extension ("standpipe") on the 18 inch pipe. The perforated cap and standpipe are simply anti-clogging devices. They do not impound water, but rather ensure its uninterrupted flow. In fact, Respondent disagreed with the Corps' demand to remove the standpipe due to its efficacy at preventing the culverts from clogging. The standpipes remain to ensure that the crossing does not inadvertently act as a dam.[28] Since Respondent has not installed the necessary spillway modification, that course of events could destroy the crossing altogether.

2. Potter Creek's continuous flow beneath Respondent's farm road in no way harms aquatic wildlife.

Respondent presented ample evidence that his farm road does not significantly harm or otherwise interfere with aquatic life. Potter Creek is not known to sustain any fish. Tr. 633:14-21. It is a trivial stream only one to two feet wide and a few inches deep

[28] It is wildly ironic that the EPA has gone to great lengths to disparage the Respondent for installing standpipes installed at the very request of the government.

that can be easily stepped across at any location. Tr. 281:3-15. It is not used by the public for recreation or aesthetic purposes. Tr. 635:1-5. It was previously dammed at a location downstream from Respondent's crossing. It is purely a farm creek, entirely diverted into a series of ditches in its lower reaches and used for irrigation. Tr. 157:12-21; 697:21-698:12. The creek is regularly dredged for maintenance purposes—an activity which undoubtedly deposits substantially more fill into the creek than Respondent's road crossing. Even on the occasion that water does reach the end of the Potter Creek ditch it dissipates into a hayfield 200 feet west of Marsh Creek, the nearest waterway. There is no contiguous channel connecting Potter Creek to Marsh Creek. Tr. 141:9-14; 462:24-463:10; 853:12-20. It is hardly conceivable that Potter Creek even harbors aquatic wildlife, let alone that Respondent's farm road crossing significantly interferes with any such life. Since Potter Creek flows uninterrupted beneath Respondent's farm road year-round,[29] common sense dictates that there is no significant harm to any theoretical aquatic species that may exist in the creek.[30] Moreover, Congress realized that the farm road exemption would "necessarily result in incidental filling and minor harm to aquatic resources." *Veldhuis* at 213, citing *Legislative History of the Clean Water Act of 1977*, at 474 (1978) (Senate Debate, Dec. 15, 1977). Thus, the Presiding Officer's conclusion that the Respondent met its burden is well-supported.

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[29] Potter Creek is classified as a "perennial stream" in its upper reaches, meaning it flows year-round.

[30] Farmers cannot reasonably be expected to hire professional fisheries biologists and hydrologists to perform tests on all aquatic species prior to the construction or maintenance of farm roads. Such a burden would certainly nullify Congress' purpose for the exemption to lessen the CWA burden on farmers.

EPA again hangs its rebuttal on its incorrect assertion that the structure is "a dam ... designed to back up water to form a pond."[31] *Id.* The Presiding Officer carefully considered the testimony of Ms. Fromm but "was unable to conclude that Ms. Fromm was a credible witness." Initial Decision at 15 n.40. Moreover, Ms. Fromm merely speculated about the *existence* of bugs in the creek. The farm road exemption is certainly not negated by the mere existence of aquatic life; rather, the discharge of dredge or fill must cause some meaningful harm. As demonstrated previously, Respondent's road crossing does not impound water, thereby leaving aquatic species free to move up and down the creek.[32] EPA ultimately failed to provide an iota of evidence "that the lower pipe ... could not operate to accommodate whatever common invertebrates, if any, actually do migrate in the creek." Initial Decision at 19. The Presiding Officer thoroughly considered EPA's rebuttal evidence and found it insufficient to negate Respondent's proof that the crossing did not significantly harm aquatic wildlife.

3. Potter Creek flows continuously through the culvert beneath Respondent's farm road.

In sole support of its argument that Potter Creek is not culverted to allow uninterrupted flow, EPA again claims the crossing "serves as a dam." Complainant's Appellate Br. At 17. Interestingly, EPA points out that the structure does not meet Idaho dam safety requirements, which is obviously explained by the fact that the structure has

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[31] The very title of EPA's argument is "the *dam* interferes with the movement of aquatic life." Complainant's Appellate Br. at 15 (italics added).

[32] While EPA does not directly make the argument, it implies that the anti-clogging device somehow interferes with aquatic organisms. Even if such organisms did live in the stream, there is no reason they could not easily pass through the large 1-2 inch perforations in the standpipe. EPA's failure to directly address the argument may stem from the fact that the government instructed Respondent to install the standpipe.

never been permitted or modified to facilitate its use as a dam.[33] EPA also mischaracterizes the testimony of Mr. Ballou, claiming he expressed "concern that if the *standpipes* plugged, the dam would overtop and fail."[34] Complainant's Appellate Br. at 17 (italics added). However, a careful review of Mr. Ballou's testimony clearly shows that his clogging concern stemmed from the prior lack of a perforated standpipe, and that he expressly recommended the standpipe to alleviate that concern. Regardless, EPA's contention that the crossing is not culverted or designed to prevent the restriction of flood flows is unsupported.

4. Respondent took great effort to minimize erosion.

Respondent voluntarily took great efforts to minimize erosion. The farm road required the placement of a culvert and necessary fill to secure it in place. Rather than simply operate its heavy equipment in Potter Creek, Respondent voluntarily routed the creek around the site to facilitate installation of the culvert while minimizing the placement fill directly into the creek. Respondent's efforts were both reasonable and very successful, keeping sediment from traveling no further than a quarter mile downstream. Respondent also willingly installed silt fences at the request of the government, and when they failed to survive the heavy snow pack Respondent installed heavier duty silt fences. Furthermore, Respondent expended great effort to prevent long-

[33] As a matter of record, there was substantial testimony about the capability of the structure to operate as a dam because, if approved for that purpose, it provided an easy solution to the standpipe dispute. Unfortunately EPA rejected the easy solution.

[34] EPA's understandable mistake is explained by Mr. Ballou's reference to the 90 degree elbows on the upstream end of the culvert as "standpipes." Tr. 491. Throughout the hearing the term "standpipe" typically referred to the perforated extension added to the 18-inch culvert, not the elbow to which the perforated standpipe was affixed.

term erosion by seeding the site on multiple occasions, planting trees and shrubs, and restoring the site to better than pre-project conditions.

EPA's assertion that the Respondent "did not prevent erosion" reveals its extreme interpretation of the term "narrow construction." Apparently the Agency equates "minimize erosion" with "no erosion." Congress certainly didn't go so far, realizing that the farming exemptions would necessarily result in incidental filling and minor harm to aquatic resources. *United States v. Akers*, 785 F.2d 814, 819 (9th Cir. 1986) (citing Senator Muskie, the legislation's primary sponsor). EPA's own Complaint alleges only 0.1 acres of filled wetland, which figure proved to be quite inflated. At hearing it was established that less than 0.05 acres were filled. Initial Decision at 8 n.16.

If the EAB is to extend the farm road exemption to those activities having little or no bearing or effect on the Nation's waters, then this is the model case. The exemption must be evaluated in light of the CWA's express purpose to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Here, Respondent's project dislodged a minimal amount of natural fill transported no more than 200 feet down a small stream only a foot wide and a few inches deep that rarely reaches Marsh Creek and even then not by any defined channel but rather by percolation across a hayfield. To argue that Respondent's crossing has *any* effect on the Nation's waters is beyond comprehension, considering Potter Creek's separation from the nearest navigable-in-fact waterway by more than 560 miles and more than a dozen

reservoirs and dams along the Snake River.[35] The Presiding Officer readily recognized that fact.

5. Respondent fully restored the work site to better than pre-project conditions.

EPA's late assertion that Respondent caused substantial environmental harm is a surprising about-face. At the hearing EPA argued "we're not here because [Respondent] destroyed some environmental area. We are here today because he would not come into compliance." Tr. 55. EPA's own Complaint alleged only 0.1 acres impacted, and evidence at trial decreased that figure by over 50 percent. Thus, EPA's claim of excess vegetative disturbance is poorly supported. Furthermore, whether Respondent's erosion control and restoration efforts were sufficient is purely a judgment call, of which the Presiding Officer's determination is clearly justified by the record. Ex. R-1. Respondent diverted Potter Creek around the work site instead of operating heavy equipment in the creek itself. Respondent installed standard silt fences, which failed under the stress of a heavy snow pack, after which Respondent installed heavy-duty silt fences. Respondent seeded the site on multiple occasions and planted numerous species of trees and shrubs to restore the site. Prior to the hearing EPA blasted Respondent's restoration efforts on multiple occasions, only to later reverse their position once the efforts proved exceptionally successful. Ex. R-1.

[35] EPA witness James Joyner testified that the Snake River does not become navigable in-fact until it reaches Lewiston, Idaho at the opposite end of the state. Tr. 299:13-300:19; 117. A simple query on the website www.mapquest.com shows the shortest driving distance between "Marsh Valley, Idaho" and "Lewiston, Idaho" to be 562.8 miles via a route roughly paralleling Marsh Creek, the Portneuf River, and the Snake River. Due to the winding nature of those rivers, actual flow distance would be significantly further.

Even more startling is the Agency's resurrection of a grossly inaccurate statement that Respondent "filled approximately 1000 feet of Potter Creek." Complainant's Appellate Br. at 18 n.59. The maker of that statement, Mr. Joyner, reduced his calculation by more than 50% on cross-examination. Tr. 97, 316. Further, the Corps' very notice of violation claimed that only 225 feet of the creek had been filled. Ex. C-11.

EPA's rationale for claiming that Respondent's construction plan "cannot rationally be construed as a 'minimum impact'" is entirely without factual basis in the record. The Agency is apparently trying to misconstrue the term "minimum impact" to mean "no impact." Regardless, after having visited the work site and considered all facts the Presiding Officer found Respondent did not unreasonably impact the environment and sufficiently restored the impacted areas. EPA even admitted the same. Tr. 73, 983-984.

C. The Presiding Officer's decision on the farm road exemption implicitly includes a decision on the § 404(f)(2) recapture provisions.

EPA's contention that the Presiding Officer committed reversible error in relation to the § 404(f)(2) recapture provision is severely wanting. The Presiding Officer explicitly recognized the § 404(f)(2) recapture provision in his Initial Decision, including EPA's argument in support of recapture. Initial Decision at 3, 7. Irrespective, EPA argues on appeal that the Presiding Officer "committed clear error" by foregoing an in-depth analysis of the recapture provision. Complainant's Appellate Br. at 19. Yet the Presiding Officer made it clear that "some contentions ... do not warrant discussion." Initial Decision at 6 n.15. That the Presiding Officer did not engage in a detailed analysis regarding the recapture provision demonstrates its facial inapplicability to this case.

EPA argues for recapture by stating that Respondent's road crossing "converts an area of the waters of the United States into a use to which it was not previously subject, where the flow or circulation of waters of the United States may be impaired ..." Complainant's Appellate Br. at 20. Yet once again EPA supports its argument solely by claiming that "Respondent built a dam ... [that] changed a free flowing creek into a pond." *Id.* The Presiding Officer's thoroughly considered EPA's dam argument and found it unsupported. Initial Decision at 13 n.37. The road simply does not impound water. Consequently, there is no impairment to the reach and circulation of Potter Creek, which flows just as far and wide today as it did historically and as it would without the crossing. EPA's recapture contention simply warranted no further analysis.

The Presiding Officer's decision to rule on the exemption confirms the existence of sufficient facts to make the legal decision.[36] The fact that he made a decision on the exemption confirms there was sufficient evidence to do so. His decision was based on a preponderance of the evidence. That neither Respondent nor the Presiding Officer devoted substantial paper to the fact is a result of its obvious inconsequence.

CONCLUSION

This case never would have been had the Corps and EPA operated above board with respect to the CWA § 404(f)(1)(E) farm road exemption rather than avoid its application at all costs. Had EPA apprised Respondent of the exemptions existence Respondent would not be here, would not have been at the hearing, and would not have spent the last six years in a futile attempt to obtain an unnecessary CWA § 404 permit.

[36] In *Veldhuis* the EAB found that the ALJ properly ruled on an exemption even though neither side made specific arguments regarding the § 404(f)(2) recapture provisions. *Veldhuis* at 213.

Instead, the Corps and EPA kept Respondent in the dark about the potential applicability of the exemption, expecting Respondent to divine the exemption's existence as well as its subjective application under the circumstances.

Regardless, the Presiding Officer acted within his discretion in deciding to consider the applicability of the farm road exemption. His thorough analysis and well-documented decision is grounded on substantial witness testimony and amply supported by the record. Therefore, the EAB is fully justified in sustaining the Initial Decision.

In the event the EAB overturns the Initial Decision, this case must be remanded to the Presiding Officer to determine an appropriate fine under the circumstances. At the initial hearing, EPA had the burden of presentation and persuasion that the alleged violation occurred *and that the relief sought was appropriate.* 40 C.F.R. § 22.24 (italics added). Having found no violation, the Presiding Officer made no finding as to the appropriateness of the relief sought. Initial Decision at 2 n.3.

RESPECTFULLY SUBMITTED this 5th day of March, 2007.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

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