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

In re:	)
	)
Henry Stevenson and	)
Parkwood Land Co.	)
	)
Docket No. CWA-06-2011-2709	)

APPEAL BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

Complainant, the Director of the Water Quality Protection Division, United States Environmental Protection Agency, Region 6, appeals the penalty assessment from an Initial Decision of Regional Judicial Officer Pat Rankin ("RJO"), issued February, 11, 2013, under Section 309 of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. § 1319. Complainant specifically appeals the more than three-fourths reduction of its proposed penalty of $32,500 to $7,500 by the RJO in his Initial Decision. For the reasons set out below, the Initial Decision is in error because the RJO abused his discretion and ignored the seriousness of the violations by imposing such a steep reduction of the proposed penalty.

ISSUES PRESENTED FOR REVIEW

I. The RJO Abused his Discretion and Ignored the Seriousness of Respondents' Violations by Imposing such a Steep Reduction of the Proposed Penalty

FACTUAL AND PROCEDURAL BACKGROUND

Mr. Henry Stevenson and Parkwood Land Co. ("Respondents") discharged dredged and fill material into 1.26 acres of jurisdictional wetlands without a permit issued under the CWA. RJO Initial Decision at 5-6. The unauthorized fill had remained in place for three years at the time of Complainant's calculations despite the issuance of an EPA compliance order that ordered Respondents to remove it. RJO Initial Decision at 11; Transcript at 163, 181-182.

This violation was not Respondents' first interaction with the Section 404 regulatory requirements and process. *See* RJO Initial Decision at 15-18; Transcript at 15-18, 36, 165. Testimony from personnel at the United States Army Corps of Engineers ("Corps") established that Mr. Stevenson's first interaction with the Section 404 program took place in 1991 and that he has had substantive interactions with the Corps for the last 20 years. Transcript at 15-18, 36. As a result of both the extent of the violation and Respondents' prior history with and knowledge of the Section 404 program, the Corps referred the case to EPA for enforcement.

Complainant issued an Administrative Complaint pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), on July 18, 2011. The RJO issued an Accelerated Decision as to liability on April 17, 2012. An evidentiary hearing was then conducted on November 14, 2012. The RJO then issued his Initial Decision on February 11, 2013, in which he reduced the penalty to $7,500, representing a more than three-fourths reduction of Complainant's assessed penalty. Respondents then filed a notice of appeal on March 13, 2013. This appeal is accordingly filed under the authority of 40 C.F.R. § 22.30(a)(1), which allows "any other party to file a notice of appeal on any issue within 20 days after the date on which the first notice of appeal was served."

STANDARD OF REVIEW

Appeals from administrative enforcement decisions are governed primarily by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, codified at 40 C.F.R. Part 22. In enforcement proceedings, the Board generally reviews both the factual and legal conclusions of the presiding officer, in this case the RJO, *de novo*. *See* 40 C.F.R. § 22.30(f); *See also In re Smith Farm Enterprises, LLC*, 15 E.A.D. ___ (EAB 2011). 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). *Id*. The EPA Region bears the burden of demonstrating that the alleged violation occurred. 40 C.F.R. § 22.24(a).

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 decision making. *Smith Farm*, 15 E.A.D. ___; *See also In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998). "This approach recognizes that the [presiding officer] observes first-hand a witness' demeanor during testimony and therefore is best suited to evaluate his or her credibility." *Id*. When a 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 derivatively made. Id.; *See also In re Bricks, Inc.*, 11 E.A.D. 224, 233, 236-39 (EAB 2003).

On appeal, the Board is likewise authorized to review a penalty assessment *de novo* and may assess a penalty that is higher (or lower) than that which was proposed by the Region or assessed by the presiding officer. *Smith Farm*, 15 E.A.D. ___; *See also* 40 C.F.R. § 22.30(f). Yet the Board will generally defer to the presiding officer's judgment unless an appellant can demonstrate that the Presiding Officer's judgment is clearly erroneous or otherwise constitutes an abuse of discretion. *Smith Farm*, 15 E.A.D. ___; *See also In re Vico*, 12 E.A.D. 298, 333 (EAB 2005).

ARGUMENT

I. The RJO Abused his Discretion and Ignored the Seriousness of Respondents' Violations by Imposing such a Steep Reduction of the Proposed Penalty

The RJO erred in his application of both the statutory penalty factors contained in the CWA and the U.S. EPA *Clean Water Act Section 404 Settlement Penalty Policy* (Dec. 21, 2001) ("Penalty Policy" or "CWA 404 Settlement Penalty Policy"). Because the RJO's error regarded his application of the law and the Penalty Policy, he is not due the same deference as he would be with regard to determining the credibility of a witness. Instead, Complainant respectfully requests that the Board reject the RJO's steep reduction of the penalty and replace it with a penalty more in line with the seriousness of the violation.

Although presiding officers have broad discretion on the issue of penalty assessment, "this broad discretion must be exercised within the context of the regulations, which require that the presiding officers: 'consider any civil penalty guidelines issued under the Act;'" and explain in the initial decision the specific reasons for increasing or decreasing a proposed penalty. *In re Mountain Village Parks, Inc.*, 15 E.A.D. ___, n. 7 (EAB 2013); 40 C.F.R. § 22.27(b). A presiding officer must justify its penalty determination on the penalty criteria set forth in the Act. 40 C.F.R. § 22.27(b). Because there is no specific penalty policy for use in CWA litigation, the Environmental Appeals Board looks to general penalty policies for guidance. *Smith Farm*, 15 E.A.D. ___; *Vico*, 12 E.A.D. at 333-34 & n. 69. In this case, both Complainant and the RJO looked to the CWA 404 Settlement Penalty Policy.

Complainant does not allege that the RJO failed to look at the relevant statutory factors or that he erred by choosing to review the penalty policy during his analysis. Rather, the RJO made an error in law by misapplying the CWA statutory factors and the penalty policy to Respondents' violations. Specifically, the RJO erred in his application of the law by reducing the proposed values for the following subfactors: a) Degree of Culpability; b) Duration of Violation; c) Need for Deterrence; and d) Multiplier.

a. Degree of Culpability

Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3) lays out certain broad statutory factors that should be considered in assessing an administrative penalty under the CWA. The statute specifically states the Administrator shall take into account the violator's "degree of culpability." *Id*. Both the RJO and Complainant turned to the EPA's CWA 404 Settlement Penalty Policy before each assessed a penalty. Pursuant to the penalty policy, values ranging from 0 to 20 must be assigned to each subfactor, including degree of culpability, in the calculation of a penalty. Complainant assigned a value of six to this subfactor while the RJO reduced the value to four. RJO Initial Decision at 13.

"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." Penalty Policy at 13. While both Complainant and the RJO analyzed Respondents' degree of culpability using the guidance, RJO Rankin wrongly focused the majority of his analysis on Respondents' past violations rather than on the totality of Respondents' experience with the Section 404 regulatory requirements.

The record indicates that Complainant focused more broadly on Respondents' experience with the Section 404 regulatory requirements, which is more in line with the penalty policy guidance. Ms. Barbara Aldridge, an enforcement officer with EPA, testified that in calculating the penalty she looked at Respondents' knowledge of the regulatory program and not just strictly the past violations. Transcript at 163, 165. Mr. John Davidson, from the Corps, further established that Mr. Stevenson's first interaction with the Section 404 program took place in 1991 and that he has had substantive interactions with the

Corps for the last 20 years. Transcript at 15-18, 36. Mr. Davidson even compiled a summary of all of Respondents' interactions with the Corps since 1991, which consisted of approximately 28 separate interactions with the Corps over that period. Exhibit C-45. Mr. Davidson and Mr. Stevenson both testified regarding the various contacts between Respondents and the Corps. Further, Respondents exercised direct control over the discharges themselves, and have never asserted otherwise. *See* Transcript at 228-230.

The RJO put significant weight when reducing the penalty on Mr. Stevenson's lack of sophistication as evidenced by an undisclosed "disability," lack of education, and a failure to understand the documents. *See* RJO Initial Decision at 14-15, 18-19. Yet irrespective of any formal education that Respondents may lack, Mr. Stevenson has had more than twenty years of practical experience with the Corps and the 404 regulatory requirements. Transcript at 15-18, 36. And it is this level of experience with the regulatory program that is relevant to the determination of Respondents' degree of culpability, not Respondents' formal education. Additionally, as the RJO noted in his initial decision, the nature of Mr. Stevenson's disability is not in the record. RJO Initial Decision at 14. Thus it is not appropriate to consider it in reducing Respondents' degree of culpability. Finally, while imagining Mr. Stevenson engaged in research of the relevant rules and regulations may strain the RJO's belief (RJO Initial Decision at 15), the penalty policy is concerned with "whether the violator knew or *should have known* [emphasis added] of the need to obtain a Section 404 permit." Penalty Policy at 13. Ignorance of the law, in this case, is not an excuse.

While the RJO has wide discretion in weighing witness credibility, an RJO abuses his discretion when he selectively weighs certain aspects of a statutory factor more heavily while disregarding others. Here the RJO improperly disregarded Respondents' past experience with the Section 404 regulatory program and instead focused almost exclusively on Respondents' prior violations, which constitutes a separate subfactor. The RJO further erred by reducing Respondents' degree of culpability as a result of Mr. Stevenson's lack of formal education and an undisclosed "disability." Neither consideration was appropriate for this factor.

B. Duration of Violation

Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3) lays out certain broad statutory factors that should be considered in assessing an administrative penalty under the CWA. The statute specifically states the Administrator shall take into account the "extent and gravity" of the violation. *Id*. Both the RJO and Complainant turned to the EPA's CWA 404 Settlement Penalty Policy before each assessed a penalty. Pursuant to the penalty policy, to calculate a "preliminary gravity factor" one must assign values ranging from 0 to 20 to certain subfactors representing "environmental significance." Duration of Violation is one such subfactor. Complainant assigned a value of four to this subfactor while the RJO reduced the value to one. RJO Initial Decision at 12.

In assigning a number to this subfactor, "consideration should be given both to the length of time that the discharge activity occurred in waters of the U.S., and the length of time that dredged or fill material has remained in place in such waters." Penalty Policy at 12. In assigning a value of four, Complainant looked to the facts and applied them to the policy.

At hearing, Ms. Aldridge explained her calculation for this subfactor by explaining that she looked to the fact that at the time of the Complaint, the fill had remained in place for three years. Transcript at 163. Mr. Stevenson even admitted in his testimony that the pile of fill still remains in the wetlands. Transcript at 215.

With regard to the length of time the discharge activity occurred, the RJO concluded that there is no basis on the record for concluding the unauthorized discharges occurred on more than two days. RJO Initial Decision at 12. Yet Mr. Stevenson said the highway department would bring the fill onto the site, at his direction, and that he would then get some equipment and go move the deposited fill. Transcript at 228-230. Further dates of discharge are evidenced as the RJO notes in his initial decision, by the fact that new fill was placed between the Corps' first and second inspections. RJO Initial Decision at 12.

While Complainant followed the penalty policy in calculating its value, the RJO ignored the majority of the policy to instead focus mainly on a portion of the third sentence under Duration of

Violation. The RJO ignored all evidence regarding the fact the fill material discharged by Respondents had remained in place for three years and counting and instead focused solely on a subsequent sentence in the Penalty Policy stating that "the longer dredged or fill material has remained in place compared to other violations in the same watershed, regionally or nationally, the higher the value should be assigned to this factor." RJO Initial Decision at 12; Penalty Policy at 12. The RJO then abused his discretion by reducing the penalty without giving any weight to the years the fill remained in the jurisdictional wetlands. As a result, the RJO incorrectly applied the Penalty Policy and thus committed clear error in reducing Complainant's assigned value to the subfactor of Duration of Violation.

C. Need for Deterrence

Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3) lays out certain broad statutory factors that should be considered in assessing an administrative penalty under the CWA. Both the RJO and Complainant turned to the EPA's CWA 404 Settlement Penalty Policy before each assessed a penalty. Pursuant to the penalty policy, to calculate a penalty one must assign values ranging from 0 to 20 to certain subfactors representing "compliance significance." Need for Deterrence is one such subfactor. Complainant assigned a value of five to this subfactor while the RJO reduced the value to zero. RJO Initial Decision at 21-22.

The Environmental Appeals Board has emphasized the important impact of deterrence on the regulatory program in the past. *Smith Farm*, 15 E.A.D. ___ (citing *Vico*, 12 E.A.D. at 343). The Board has pointed out that, even where only a small amount of acreage is impacted by a particular 404 violation, "because private landowners' (or hired contractors') filling 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." *Id.* (quoting *In re Phoenix Constr. Servs., Inc.*, 11 E.A.D. 379, 399 (EAB 2004)).

The Penalty Policy is in line with the Board's prior decisions when it states that "the need to send a specific and/or general deterrence message for the violations at issue" should be considered. Penalty Policy at 14. The Policy continues that staff should also consider "the extent to which the violator appears likely to repeat the types of violations at issue and the prevalence of this type of violation in the regulated community." *Id*.

Although the RJO implies that Complainant's calculation of this subfactor was based solely on the idea that developers may see the violation (RJO Initial Decision at 21-22), the record paints a more accurate picture. In addition to its visibility to the local developer community, Ms. Aldridge from the EPA testified that in calculating the penalty she considered its visibility to the community at large. Transcript at 163. The fact that the violation was first reported to the Corps by way of an anonymous citizen complaint demonstrates that the visibility of the violation, despite the RJO's dismissal, was more than merely hypothetical. *See* Transcript at 163-164.

Complainant also followed the policy by assigning a value, in part, based on the likelihood that Respondents would repeat the violation. Respondents' past history with the Corps included multiple prior violations of the CWA, including a violation severe enough to warrant the payment of a penalty. *See* Ex C-45; Transcript at 197-200; RJO Initial Decision at 19-20. Thus, Complainant was justified in its thinking that there was a high likelihood that Respondents would repeat the type of violations at issue, as they had before.

The RJO abused his discretion both by failing to follow the Penalty Policy or the precedent of this Board by rejecting that there was any need for deterrence in the present matter. By assigning a value of zero to this subfactor, the RJO indicated that there was no need for deterrence in this case. In so doing, the RJO neglected to consider the full visibility of the violation to the general community, evidenced by the anonymous citizen complaint. Further, the RJO failed to properly consider the Respondents' likelihood of repeating this type of violation based on Respondents' history of noncompliance. Finally, the RJO failed

to heed the reasoned opinion of the Board that even where only an apparently small amount of fill was discharged, the need for deterrence can still be great.

D. Multiplier

Under the Penalty Policy, the total of the appropriate values for the relevant gravity subfactors must be multiplied by a dollar amount to reach a preliminary gravity amount. The Penalty Policy explains the various choice of multiplier:

> M (Multiplier) = $500 for minor violations with low overall environmental and compliance significance, $1,500 for violations with moderate overall environmental and compliance significance, and $3,000-$10,000 for major violations with a high degree of either environmental or compliance significance. Penalty Policy at 10.

In addition, the penalty policy offers the EPA case teams "broad discretion to assess the appropriate penalty" given the highly fact specific nature of CWA 404 cases. Penalty Policy at 10. In the present case, Complainant designated the overall environmental and compliance significance of Respondents' violations as "moderate" and thus assigned a multiplier of $1,500. The RJO, on the other hand, felt that the environmental and compliance significance of Respondent's violations were "minor" and accordingly assigned a multiplier of $500. RJO Initial Decision at 22.

There is admittedly some level of ambiguity about the dividing lines between when a violation should be considered "minor" versus "moderate" versus "major." The Board's discussion in *Vico* offers some insight into determining the significance of a violation. In *Vico*, the Board stated that "the placement of fill into a wetland is inherently significant in its potential impact." 12 E.A.D. at 342. The Board has further held in the past that

> "[W]here a respondent has failed to obtain necessary permits or failed to provide required notice, such failure causes harm to the regulatory program. * * * Thus, for example, in holding that a respondent's failure to obtain a RCRA permit prior to disposing of hazardous wastes was of major significance, we have stated that 'the RCRA

> permitting requirements go to the very heart of the RCRA program. If they are disregarded, intentionally, or inadvertently, the program cannot function.' * * * Similar to the principles enunciated in the RCRA context, the failure to obtain a permit goes to the heart of the statutory program under [section 404 of] the CWA." *Id*.; *Phoenix Constr. Servs*., 11 E.A.D. 397-398 (quoting *In re Everwood Treatment Co*., 6 E.A.D. 589, 602 (EAB 1996)).

As outlined above, and as found by the RJO, Respondents discharged fill into jurisdictional wetlands without a permit. *See* RJO Initial Decision at 6. Mr. Stevenson has had extensive interactions with the CWA 404 program over the past 20 years, including multiple violations. *See* Transcript at 15-18, 36; *See also* Exhibit C-45. Respondents' repeated violation of the CWA 404 program causes harm to the regulatory program and the environment. The Board's precedent does not indicate anything "minor" about continued violation of the CWA Section 404 statutory program.

In her testimony concerning the selection of a multiplier, Ms. Aldridge from EPA echoed the Penalty Policy when she indicated that the EPA case teams are given broad discretion in selecting a multiplier, based on what makes sense for the case. *See* Transcript at 183-185. Indeed, to ensure consistency in the CWA 404 enforcement program, the multiplier in this case was selected in consultation among a case team, which included an experienced employee who serves as the Region's enforcement coordinator. *See Id*. Ms. Aldridge worked with this enforcement coordinator to ensure that her selection of a multiplier was consistent with regional precedent and in line with the penalty policy. *See Id*.

The RJO erred in reducing the multiplier and designating the violations as "minor" despite the support laid out by Complainant. Indeed, in determining that a repeated violator's discharge of fill material into jurisdictional wetlands without a permit was of low overall environmental and compliance significance, the RJO appeared to ignore the EAB's explanation in *Vico*, quoted above, of the inherent significance of a violator's disregard of the permitting program. Yet the RJO offered little to support his downgrade of the multiplier except to state that the violations were "minor" and that there was no need

for deterrence, an assertion already challenged above. As a result, the RJO abused his discretion by reducing the multiplier without proper justification in the face of the record, the discretion given the regional case team under the Penalty Policy, and the Board's precedent regarding the significance of a violator's disregard of the permitting program. Accordingly, the Board should re-designate the violations as "moderate" and restore the multiplier to $1,500.

ALTERNATIVE CONCLUSIONS OF LAW

For the reasons set forth herein, Complainant requests that the Board find that the RJO improperly interpreted the CWA and the Penalty Policy by reducing the proposed values to the following subfactors: a) Degree of Culpability; b) Duration of Violation; c) Need for Deterrence; and d) Multiplier. Accordingly, Complainant respectfully requests that the Board reevaluate the above subfactors under the CWA and the Penalty Policy to assess a penalty that more properly takes into account the seriousness of the violation, as evidenced by the record.

CONCLUSION

The RJO abused his discretion by lowering the proposed penalty to the extent he did. While the RJO did consider both the CWA statutory factors and the Penalty Policy in assessing his penalty, his ultimate assignment of the penalty was based largely not on the guidance provided in the Penalty Policy, but instead on how serious he personally felt them to be. While the RJO has discretion in assessing a penalty, he errs when he ignores the guidance underlying each relevant subfactor and instead replaces it with his own thoughts or feelings for the case. This is particularly true when these thoughts or feelings are unsupported by the record. For the reasons set forth herein, Complainant respectfully requests that the Board reject the RJO's steep reduction of the penalty in his Initial Decision and replace it with a penalty more in line with the seriousness of the violation.

Respectfully submitted,

/s/ Russell Murdock

Russell Murdock
Assistant Regional Counsel (6RC-EW)
U.S. EPA, Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733
Tel.: (214) 665-3189
Fax: (214) 665-3177
Murdock.Russell@epa.gov

Date: March 28, 2013

CERTIFICATE OF SERVICE

I certify that the original of the foregoing Complainant's Notice of Appeal and accompanying Appellate Brief were electronically filed to the Clerk of the Board and a true and correct copy was sent to the following on this 28th day of March, 2013, in the following manner:

BY HAND DELIVERY:

Regional Hearing Clerk (6RC-D)
U.S. EPA, Region 6
1445 Ross Ave., Suite 1200
Dallas, TX 75202-2733

Regional Judicial Officer Pat Rankin (6RC)
U.S. EPA, Region 6
1445 Ross Ave., Suite 1200
Dallas, TX 75202-2733

VIA CERTIFIED FIRST CLASS U.S. MAIL:

Mr. Charles M. Kibler,
The Kibler Law Firm
765 N. 5th Street
Silsbee, Texas 77656

/s/ Barbara Aldridge