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ENVIR. APPEALS BOARD

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

In the matter of:	)	
	)	
J. Phillip Adams	)	
Bannock County, Idaho	)	CWA Appeal No. 06-(06)
	)	
	)	COMPLAINANT'S NOTICE OF APPEAL
	)	AND SUPPORTING BRIEF
	)	
Respondent.	)	
	)	
	)	

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INTRODUCTION

Pursuant to 40 C.F.R. §§ 22.30 and the Environmental Appeals Board's ("EAB's" or the "Board's") Orders dated November 9, and December 13, 2006, Region 10 of the Environmental Protection Agency ("Region 10" or "Complainant") submits the following Notice of Appeal and Supporting Brief. For the reasons set out below, Region 10 respectfully requests that the Presiding Officer's Initial Decision be reversed regarding liability and that the proposed penalty of $25,000 be assessed.

ISSUES PRESENTED

(1) Part 22 requires a respondent to state in his answer to the complaint "the circumstances or arguments which are alleged to constitute the ground *of any defense* . . . ." Respondent did not assert a § 404(f) defense in his Answer, but raised it for the first time six working days prior to hearing in the context of a motion to dismiss. Did the Presiding Officer err in allowing Respondent to assert the § 404(f) defense at hearing?

(2) Section 404(f) is a defense for which the respondent carries the burden of proof. In his Initial Decision, the Presiding Officer held that Complainant had not proved Respondent did not qualify for the § 404(f) farm road exemption. Did the Presiding Officer err by shifting the burden of proof on the 404(f) defense to the Complainant?

(3) 33 C.F.R. § 323.4(a)(6) sets forth best management practices ("BMPs") that a discharger must implement to qualify for the farm road exemption. The record shows that Respondent did not implement most of the BMPs, particularly the requirements to minimize impacts and to allow free passage of aquatic life underneath the road. Did the Presiding Officer err by finding that Respondent implemented the BMP requirements set forth in 33 C.F.R. § 323.4(a)(6)?

(4) To qualify for an exemption from the § 404 permitting requirements, a discharger must meet the § 404(f)(1) requirements, <u>and</u> show his activities did not recapture under § 404(f)(2). Respondent's dam converted the upstream portion of Potter Creek from a creek to a pond. The Presiding Officer made no finding regarding (f)(2). Did the Presiding Officer err by dismissing the case without making a finding on recapture?

SUMMARY OF ARGUMENT

In 2001- 2002, Respondent constructed an earthen bridge across Potter Creek in a rural area south of Pocatello, Idaho. The structure was designed and constructed from the beginning to be both a road and a dam. In two after-the-fact permit applications, Respondent described the structure as both a road to transport farm equipment and a dam to create a pond for fishing. After an evidentiary hearing, the Presiding Officer dismissed the Complaint on the grounds that Respondent's structure was exempt under § 404(f) of the Clean Water Act ("CWA").

The Presiding Officer erred both procedurally and substantively. First, he allowed Respondent to assert the § 404(f) defense at hearing when he had not pled it as a defense in his Answer to the Complaint. Respondent waived the right to assert § 404(f) when he failed to raise this defense in his Answer, and Complainant was prejudiced by the last-minute assertion of the defense. The Presiding Officer also improperly shifted the burden of proof on the § 404(f) defense from Respondent to Complainant. Section 404(f) is a defense for which Respondent bears the burden of proof at hearing.

The Presiding Officer erred by concluding that the structure Respondent built across Potter Creek was merely a farm road, and not also a dam. A dual-use structure like the one Respondent built does not meet the minimal impacts requirements of § 404(f). The Presiding Officer also erred by concluding that Respondent met all of the BMP requirements to qualify for an exemption from § 404. Finally, the Presiding Officer erred in finding § 404(f) exempted Respondent's activities without ruling on whether Respondent's project was nevertheless required to have a permit under the § 404(f)(2) recapture provision.

STANDARD OF REVIEW

Section 22.30(f) of the Consolidated Rules of Practice ("CROP") state that the Board "shall adopt, modify, or set aside the findings of fact and conclusions of law or discretion" contained in an appealed initial decision.[1] The Board reviews a Presiding Officer's determination *de novo.*[2] Nevertheless, the Board generally defers to the Presiding Officer's assessment of the facts and the witnesses where the Presiding Officer is in a position to assess their credibility.[3] All matters in controversy must be established by a preponderance of the evidence.[4]

BACKGROUND

On June 16, 2004, EPA filed an administrative Complaint against Respondent, alleging the unauthorized placement of fill material into Potter Creek with the purpose of constructing a farm road crossing and an impoundment of the creek. Respondent filed an Answer to the Complaint on July 1, 2004, admitting to the construction of the crossing/dam, but otherwise denying that Potter Creek is a water of the United States, that he discharged pollutants, and that he was the real party in interest. Respondent raised no other defenses,[5] and he never amended his

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[1]40 C.F.R. § 22.30(f).

[2]*In re Vico Construction Corp. and Amelia Venture Properties*, 12 E.A.D. ___, CWA Appeal No. 05-01 (EAB 2005), slip op. at 21; *In re Donald Cutler*, 11 E.A.D. 622, 630 (EAB 2004).

[3]EAB Practice Manual at 20.

[4]*Cutler*, 11 E.A.D. at 630.

[5]Respondent's Answer to Complaint at 1-2.

Answer. On July 19, 2005, six business days prior to hearing, Respondent filed a Motion to Dismiss.[6] In the Motion to Dismiss, Respondent raised the § 404(f) defense for the first time. Complainant filed a motion to strike to exclude the § 404(f) defense on the grounds that it was not timely raised. The Presiding Officer denied Complainant's motion.[7]

An evidentiary hearing was held in Pocatello, Idaho from July 27 - August 1, 2005. The parties filed simultaneous post-hearing briefs on Sept. 16, 2005, and response post-hearing briefs on October 12, 2005. Supplemental post-hearing briefs were filed on September 5 and September 13, 2006. The Presiding Officer filed his Initial Decision in this matter on October 18, 2006, in which he dismissed Complainant's case on the grounds that the fill placed in Potter Creek was exempt under CWA § 404(f). The Board granted Complainant's two Motions for Extension of Time to file a Notice of Appeal and Supporting Brief, making Complainant's brief due no later than January 17, 2007.

ARGUMENT

I. RESPONDENT WAIVED HIS RIGHT TO ASSERT THE § 404(f) DEFENSE.

The Presiding Officer erred by allowing Respondent to assert the § 404(f) defense at hearing when he failed to raise the defense in his Answer to the Complaint. Respondent asserted the defense for the first time just six business days prior to hearing, which limited Complainant's ability to mount an effective rebuttal at hearing. Raising the § 404(f) defense on the eve of hearing was more than a mere technical correction to the pleadings. Respondent added an

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[6]Respondent filed his Motion to Dismiss six weeks past the deadline set by the Presiding Officer for dispositive motions. *See* Notice of Hearing (May 18, 2005).

[7]Tr. 17:5-18:11.

entirely new and distinct defense to the case.

A. Respondent Waived the § 404(f) Defense Because He Did Not Raise it in His Answer to the Complaint.

Six business days prior to hearing, Respondent raised the § 404(f) defense for the first time. Complaint filed a Motion to Strike,[8] arguing that Respondent had waived his right to assert the defense because he had not raised it in his Answer to the Complaint or any other pleading until just prior to hearing.[9] The Presiding Officer denied the motion, erroneously characterizing the § 404(f) farm road exemption as a jurisdictional matter which may be raised at any point in the proceedings.[10]

The rules of procedure are clear. Respondent must raise all defenses in his answer to the complaint.[11] Defenses not raised in the answer to the complaint may not be raised in the post-hearing brief.[12] "One purpose of the answer is to identify the points in dispute through Respondent's statement of such circumstances, arguments, and factual challenges. Without such

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[8]Complainant's Motion to Strike Respondent's Motion to Dismiss and Prehearing Brief.

[9]Respondent's Answer to the Complaint raised four defenses: failure to state a claim, real party in interest, Potter Creek not a water of the United States, and no discharge of pollutants. There is no mention of or reference to § 404(f) in Respondent's Answer.

[10]Tr. 17:5-18:11.

[11]40 C.F.R. § 22.15(b) ("The answer shall also state: The circumstances or arguments which are alleged to constitute the ground *of any defense* . . . ") (emphasis added).

[12]*See e.g., In re B.J. Carney Industries, Inc.* 7 E.A.D. 171, 223 n.69 (EAB 1997) ("Because the statute of limitations is an 'affirmative' defense, it was incumbent upon B.J. Carney, not the Region, to raise it as an issue in this matter" (citing *Davis v. Bryan,* 810 F.2d 42, 44 (2d Cir. 1987) (The statute of limitations is an affirmative defense that is waived if not promptly pleaded)); *In re Martex Farms, Inc.*, 2006 WL 1582510 (ALJ Biro 2006) (citing *Menendez v. Perishable Distributors, Inc.*, 763 F.2d 1374 (11th Cir. 1985)).

a statement by Respondent, issues cannot be joined on any points in dispute, and a tribunal lacks a basis upon which to adjudicate a case."[13]

Language creating an exception to a statute's general applicability is interpreted to create an affirmative defense.[14] Section 404(f) imposes the burden on respondent to show that the statute does not apply because it creates an exception to the general requirement that one must obtain a permit prior to discharging dredged or fill material into a water of the United States. The EAB has characterized § 404(f) as a defense,[15] and the federal courts interpreting § 404(f) have uniformly held that the defendant has the burden of showing that the activity is exempt under one of the provisions of § 404(f)(1) and is not recaptured under § 404(f)(2).[16]

Since Respondent had the burden of showing he qualified for an exemption under § 404(f) and never asserted § 404(f) as a defense in his Answer to the Complaint (or in any other document until the eve of hearing), he waived his right to assert that defense at hearing and in his post-hearing briefs. The Presiding Officer thus erred by relying on § 404(f) to dismiss Complainant's case.

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[13]*In re Dearborn Refining Co.*, Docket No. RCRA-05-2001-0019 (ALJ Gunning Jan. 17, 2003), Order on Motion for Accelerated Decision, slip op. at 6.

[14]Richard Marcus, Martin Redish & Edward Sherman, *Civil Procedure: A Modern Approach*, 3d. ed. at 196 (West 2000). Although the FRCP does not apply to EPA administrative proceedings, the EAB looks to the Federal Rules of Civil Procedure for guidance in interpreting the CROP. EAB Practice Manual at 4 (June 2004).

[15]*In re Ray & Jeanette Veldhuis*, 11 E.A.D. 194, 204 (EAB 2003).

[16]*Greenfield Mills v. O'Bannon*, 361 F.3d 934, 949(7th Cir. 2004); *United States v. Brace*, 41 F.3d 117, 124 (3d Cir. 1994); *United States v. Akers*, 785 F.2d 814 (9th Cir. 1986), *cert. denied*, 479 U.S. 828 (1986); *United States v. Sargent County Water Resource Dist.*, 876 F. Supp. 1090, 1097 (D.N.D. 1994).

B. Complainant Suffered Prejudice as a Result of the Untimely Assertion of the § 404(f) Defense.

Respondent first raised the § 404(f) defense on July 19, 2005. The hearing in this case began on July 27, 2005. Respondent never moved to amend his Answer to the Complaint to add the § 404(f) defense, nor did he ever explain why he waited more than a year to first raise the defense.[17] Although it is within the Presiding Officer's discretion to allow an amendment to an administrative pleading, the "most significant" factor in its decision should be "whether an amendment would 'undu[ly] prejudice' the opposing party."[18] Respondent's oversight in not asserting the § 404(f) defense until the eve of hearing was more than a mere technical pleading problem. His failure to raise the defense impacted Complainant's ability to effectively rebut it at hearing.

In *Carroll Oil*, the EAB upheld the Presiding Officer's decision not to grant leave to amend a pleading "late in the proceedings" because allowing new claims at such a late point would only serve to prejudice the opposing party.[19] Here, the eleventh-hour introduction of a § 404(f) defense prejudiced the Region by robbing it of time to prepare for this complex and highly fact-specific defense. To prove that the farm road exemption applies, a discharger must establish that the discharge met the requirements of § 404(f)(1) and (f)(2), as well as the implementing regulations for subsection (f)(1) found at 33 C.F.R. § 323.4(a)(6)(i) - (xv). To

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[17]The Complaint was filed June 16, 2004. Respondent filed his Answer to the Complaint on July 1, 2004. He first raised the § 404(f) defense in his Motion to Dismiss, which was filed on July 19, 2005.

[18]*In re Carroll Oil Co.*, 10 E.A.D. 635, 650 (EAB 2002) (quoting *In re Lazarus, inc.*, 7 E.A.D. 318, 331-32 (EAB 1997)).

[19]*Id.* at 651.

effectively rebut any evidence presented at hearing regarding this defense, Complainant needed more than six business days to prepare.[20]

Given that the very first notice of a § 404(f) defense came just days prior to hearing, Complainant was unable effectively prepare that rebuttal. For example, one of the primary shortcomings of Respondent's dam/crossing is it impounds the water of Potter Creek.[21] The applicable regulation, 33 C.F.R. § 323.4(a)(6)(vii), requires that "the design, construction and maintenance of the road crossing shall not disrupt the migration or other movement of those species of aquatic life inhabiting the water body." In his Initial Decision, the Presiding Officer held that Complainant failed to prove that there was aquatic life in Potter Creek.[22] Complainant's witness on this issue, Carla Fromm, testified regarding the presence of aquatic life based on phone calls with Idaho Department of Environmental Quality ("DEQ") and Idaho Department of Fish & Game.[23] These phone calls were made in the last few days prior to hearing in a last-

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[20]In its Motion to Strike the § 404(f) defense, Complainant argued:

> Complaint is well into its preparation for next Wednesday's evidentiary hearing. It is unfair to complainant to raise this entirely new defense at the eleventh hour, forcing Complainant to rethink it's entire case. Complainant's witness list, documents submitted in its prehearing exchange, and summary of proposed testimony would have been different if it had known that Respondent was raising a § 404(f) defense.

Complainant's Motion to Strike at 3-4.

[21]*See* Exs. C7 (diagram on last page) and C12 (photos showing stand pipes in place with ponded water).

[22]Initial Decision at 19. As noted in more detail below, this was an improper shifting of the burden of proof from Respondent to Complainant. It was Respondent's burden to show there was no aquatic life impacted by the installation of the stand pipe, not Complainant's burden to disprove the negative. Respondent offered no testimony on the presence or absence of aquatic life in Potter Creek to support its application of the farm road exemption.

[23]*See* Tr. 582:2-589:15.

minute effort to mount a rebuttal to the § 404(f) defense. If Complainant had known from the beginning that Respondent would be asserting the § 404(f) defense at hearing, Complainant would have prepared months in advance to rebut any evidence Respondent might put on regarding the absence of aquatic life in Potter Creek.

The Presiding Officer erred by allowing Respondent's last-minute assertion of the § 404(f) defense, and by not addressing the undue prejudice Complainant would suffer as a result. Consequently, Respondent should be deemed to have waived the defense.

II. RESPONDENT'S STRUCTURE IS NOT EXEMPT UNDER § 404(f).

Dismissing all evidence to the contrary, the Presiding Officer concluded that because Respondent used his crossing to move farm equipment from one field to another, he met the conditions for the farm road exemption under § 404(f)(1)(E).[24] In so doing, the Presiding Officer ignored the requirement that all § 404(f) exemptions are to be narrowly construed.[25] As the

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[24]33 U.S.C. § 1344(f)(1)(E). It states in relevant part:

> Except as prohibited in paragraph (2) . . . the discharge of dredged or fill material
> . . .
> (E) for the purposes of construction or maintenance of farm roads . . ., were such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized; . . .
> is not prohibited or otherwise subject to regulation. . .

[25]*In re Ray and Jeanette Veldhuis* 11 E.A.D. 194, 212 (EAB 2003) ("The [404(f)] exemption is a narrow one, extending only to those activities that have little or no adverse effect on the Nation's waters . . ."); *see also Greenfield Mills*, 361 F.3d at 949; *Brace*, 41 F.3d at 124; *United States v. Huebner*, 752 F.2d 1235, 1240-41 (7th Cir. 1985); *Sargent County*, 876 F. Supp. at 1098.

Seventh Circuit noted in *United States v. Huebner*,[26] "[i]t is clear that the amendments that create the subsection (f) exceptions on which defendants rely were not intended to exempt all farming operations from the permit requirements, but only those whose effect upon wetlands or other waters was so minimal as not to warrant federal review and supervision." The mere presence of farming activity does not make Respondent exempt from § 404 of the CWA.

Complainant does not contest that Respondent uses the crossing to transport farm equipment. But Respondent also uses the structure as a dam, and he did not carry his burden of showing that his project satisfied the BMP requirements of § 404(f)(1)(E) and the implementing regulations, 33 C.F.R. § 323.4(a)(6)(i) - (xv), and that he met the recapture conditions of § 404(f)(2).[27] In sum, his structure and the earth work he performed constructing it, as well as the pond he created behind it, went well beyond what was necessary to build a simple farm road crossing. As such, it is not exempt from the § 404 permit requirements.

The Presiding Officer erred in three ways. First, he improperly shifted the burden of proof on the § 404(f) exemption from Respondent to Complaint. Second, he erred by not narrowly construing the exemption as required and by finding that Respondent had met all of the BMP requirements necessary for Respondent to take advantage of the farm road exemption. Finally, the Presiding Officer erred by not ruling on the recapture provision in § 404(f)(2). By

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[26]752 F.2d 1235, 1240-41 (7th Cir. 1985).

[27]Complainant referenced the United States Army Corps of Engineers' ("Corps'") exemption regulations at hearing because the Corps' witness, James Joyner, was the primary witness to testify regarding the permitting history of the project. The EPA exemption regulations, found at 40 C.F.R. Part 232, are substantively identical to the Corps' regulations cited in this brief. For consistency purposes, Complainant will continue to refer to the Corps' codification of the regulations.

overlooking § 402(f)(2), the Presiding Officer did not make an essential finding regarding the second half of any § 404(f) exemption analysis.

A. The Presiding Officer Improperly Shifted the Burden of Proof.

Respondent bears the burden of establishing both that he qualifies for a § 404(f)(1) exemption and that his actions are not recaptured by § 404(f)(2).[28] The Presiding Officer erred in requiring Complainant to come forward with evidence to prove that Respondent did not qualify for the exemption. For example, the Presiding Officer states:

> The regulation goes on to list fifteen (15) "baseline" provisions which must be applied to satisfy the exemption. Most of these 15 provisions have not been asserted by EPA or the Corps as having been violated. In fact, EPA does not *cite* to a *specific* provision, among the 15, as violated during Adams' activity in modifying the existing crossing.[29]

It was not Complainant's burden to "assert [the BMPs] as having been violated." In order for the Respondent to prevail on his farm road exemption defense, *he* must show, by a preponderance of the evidence, that he met all of the 15 requirements of the exemptions, plus the recapture provisions. The Presiding Officer did not hold Respondent to that standard. The Presiding Officer's ruling was legally incorrect, and it sets a dangerous standard under which EPA must first disprove the exemption from the statute in order to enforce the law.

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[28]*See infra* n.16.

[29]Initial Decision at 17 (footnote omitted); *see also, e.g., Id.* at 5 n. 9 ("the Court finds that not one [of Complainant's BMP arguments] was factually established by EPA."), 5 n.11 ("EPA's support for [Respondent's failure to minimize disturbance] is thin."), 15 ("*On this record*, the evidence is that such best management practices were followed. Among EPA's witnesses, none offered probative evidence on these issues." (emphasis in original, citations omitted)).

The Presiding Officer's error manifests itself throughout the Initial Decision. As set forth in more detail below, Respondent did not prove that he complied with the § 404(f)(1) BMP requirements and the § 404(f)(2) recapture requirements. Yet the Presiding Officer repeatedly chastised Complainant for failure to come forward with evidence to prove Respondent did not comply with the BMP provisions. The Presiding Officer went so far as to accuse the Corps of "keeping secret" the possible application of the § 404(f) defense.[30] Given that Respondent bears the burden of proving the § 404(f) defense, the Presiding Officer's conclusion that the Corps "hid" the defense from Respondent is misguided.[31] The Presiding Officer required Complainant to prove by a preponderance of the evidence that Respondent did not meet the conditions of the § 404(f) exemption. This is contrary to the law. Respondent bears the burden of proof, and he did not meet that burden.

B. Respondent Did Not Show that He Qualified for the Farm Road Exemption.

The CWA requires a discharger seeking a farm road exemption from the § 404 permit requirements to satisfy the BMP requirements set out in § 404(f)(1)(E) and the recapture restrictions in § 404(f)(2).[32] As noted above, all § 404(f) exemptions are to be narrowly

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[30]*See* Initial Decision at 6 ("Offering no apology . . ."); 12 ("While Joyner and the Corps kept the Respondent in the dark . . ."); 14 n.38 ("Keeping the potential applicability of the farm road exemption secret from Respondent . . ."). It worth noting that Respondent is not an unsophisticated party with no access to legal counsel. He is a CEO of a large, heavily regulated corporation, who is no stranger to federal environmental regulations. *See* Tr. 760:8-61:20.

[31]The record shows 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. Tr. 182:19-184:7; 185:15-186:14. The Corps moved forward with its effort to have Respondent apply for an after-the-fact permit. *See* Tr. 233:8-18. Respondent did not complete the application until the eve of hearing. *See* Ex. R12.

[32]33 U.S.C. §§ 1344(f)(1)(E), 1344(f)(2).

construed, and the narrowness of the exemptions is reflected in the Corps' regulations. The regulatory standards for meeting the farm road exemption are set out in 33 C.F.R. § 323.4(a)(6). Those regulations require the discharger to satisfy at least fifteen specific BMP requirements *in addition to* the recapture provisions of 33 C.F.R. § 323.4(c). If Respondent fails to show that he has met all of them, he fails to meet the requirements for the exemption. The record shows that Respondent did not satisfy the burden of proof on his exemption defense. In fact, Respondent put forth no argument in his Post-Hearing Brief regarding most of the BMP requirements for which he carried the burden of proving. As the following discussion shows, the Presiding Officer erred in concluding that Respondent complied with at least five of the more significant BMPs required to qualify for the farm road exemption.

1. Respondent's Structure Was Larger than Necessary for a Road.

Respondent's structure, as it sits today, is a dam with a road on top. Dams do not qualify for the farm road exemption. The Presiding Officer concluded that the structure is only a road crossing,[33] but the record contradicts this finding. For example, in Respondent's November 14, 2001, letter to Idaho Department of Water Resources ("IDWR"), he refers to his "impoundment structure."[34] In the § 404 after-the-fact permit application[35] Respondent submitted to the Corps in November, 2001, he describes the structure as an "impoundment for road crossing."[36] In his

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[33]Initial Decision at notes 36 and 37 (last sentence of each, respectively).

[34]Ex. C7 at 1 (3rd par., first sentence).

[35]An after-the-fact permit application is submitted after the work or a portion of the work in waters of the United States is already complete. Tr. 102:21-103:4.

[36]Ex. C7 (attached application at 2).

2005 application, he notably describes the structure as an "*existing earthen filled dam*" with a proposed use as "recreation, fish pond. (Road across dam also used by farm machinery.)"[37] Erv Balou, of the IDWR, testified that the structure was a dam.[38] Respondent's expert, Chuck Brockway, admitted on cross examination that the structure is a dam with the stand pipes, but would become a road crossing with a simple culvert.[39]

The vertical stand pipes that Respondent installed were designed to back up water to form a pond.[40] James Joyner, the Corps permit writer who inspected the site, testified that the size of the structure and the presence of stand pipes indicated it was more than just a farm road crossing.[41] The Presiding Officer wrongly concluded that Respondent "installed two pipes, or 'culverts,' under the Road. Later, standpipes, that is, vertical extensions, were added to the pipes."[42] This is factually incorrect. The record shows that Respondent initially installed the stand pipes to impound water, and more than a year later capped them with perforated pipes at

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[37]Ex. R12 at 1 (emphasis added).

[38]Tr. 494:16-18. *See also* Ex. C29 (letter from IDWR to Respondent, dated April 9, 2004: "The 28 ft high fill now in place, with standpipes, has the potential to be an intermediate size dam and, in fact, is referred to as being a dam by your agents. As an intermediate size dam, the State of Idaho requires that before construction begins, a professional engineer must submit plans to IDWR for approval. . . .").

[39]Tr. 899:23-900:4. He also testified that the Corps would require a permit for the work Respondent was doing in Potter Creek. Tr. 885:23-887:17.

[40]*See* Exs. R12 at 1 ("Existing earthen filled dam . . . 20' H with vertical spill pipe to control water height."), C7 (last page with diagram showing stand pipes), C12 (photos on page one showing installed standpipes backing up water), C13 (same).

[41]Tr. 185:19-22.

[42]Initial Decision at 6 n.12.

the request of the IDWR to prevent them from clogging and causing a dam failure.[43]

As designed and built, Respondent's structure fails to comply with 33 C.F.R. § 323.4(a)(6)(i), which requires that the road crossing be the "minimal width . . . with the purpose of specific farming . . . operations." Respondent built a structure was wider than necessary to carry his farm equipment. Joyner testified that part of Potter Creek downstream of the crossing was buried, and was not part of the crossing.[44] The structure also does not comply with § 323.4(a)(6)(i), because it was not specifically built for farming. It serves a dual use as a fish pond. Thus, the structure does not qualify as exempt under § 323.4(a)(6)(i).

2. The Dam Interferes with the Movement of Aquatic Life.

By building a road that also serves as a dam, Respondent failed to comply with 33 C.F.R. § 323.4(a)(6)(vii), which requires that "the design, construction and maintenance of the road crossing shall not disrupt the migration or other movement of those species of aquatic life inhabiting the water body." Respondent offered no proof that his pond would not interfere with the movement of aquatic species in Potter Creek. The stand pipes he installed are designed to back up water to form a pond. While they allow water to flow past the dam, they prevent the free-flow of Potter Creek underneath the crossing, thus preventing the migration of aquatic organisms that live in Potter Creek. Fromm testified that various aquatic organisms such as

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[43]Respondent's original proposal for the structure, shows stand pipes. Ex. C7 (last page). In Ex. C12, one see the stand pipes are clearly visible in place on June 13, 2002. The meeting at which IDWR requested the caps be installed occurred a year later, on June 20, 2003. Tr. 491:4-493:7, 494:5-15. *See also* Ex. C29 at 1 (second paragraph - IDWR letter re caps). It is worth noting that Respondent proposed the perforated caps in 2001. Ex. C7 at 1 (3rd par., last sentence).

[44]Tr. 249:16-251:22. Note that EPA's § 309(a) Order required Respondent to remove that fill. Ex. C34, Attachment 1 at II.A.3).

mayflies, stoneflies, beetles, crane flies, midges and bivalves inhabit Potter Creek.[45] Although no fish study has been conducted, it is possible that minnows, dace or sculpin are present as well.[46] These species migrate as part of their life cycles.[47]

The Presiding Officer erred in disregarding Fromm's testimony. First, as noted above, it was Respondent's burden, not Complainant's, to show that he complied with 33 C.F.R. § 323.4(a)(6)(vii). Respondent provided no testimony or documents regarding the presence or absence of aquatic life in Potter Creek. In addressing subsection (6)(vii), the Presiding Officer stated that "EPA presented no knowledgeable witness concerning species of aquatic life in the water body."[48] Again, it was Respondent's burden to show that he did not impact aquatic life, not Complainant's burden to disprove it. Respondent did not prove this element of the exemption.

Second, the Presiding Officer wrongly concluded that Fromm's testimony regarding telephone conversations with Idaho DEQ was not credible.[49] As discussed above, Complainant learned only six business days prior to hearing that Respondent intended to pursue the § 404(f) defense. Because of the extremely short amount of time available to develop an entirely new aspect of the case, Fromm's failure to further document the presence of aquatic life should not be interpreted as undermining the credibility of his testimony on this issue. Fromm's testimony

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[45]Tr. 586:13-23.

[46]Tr. 587:14-588:17.

[47]Tr. 587:2-13.

[48]Initial Decision at 19.

[49]Initial Decision at 16.

regarding the presence of aquatic life in Potter Creek, albeit hearsay, was more than Respondent offered, which was nothing.

3. Respondent's Structure Does Not Satisfy 33 C.F.R. § 323.4(a)(6)(iii).

Respondent failed to comply with 33 C.F.R. § 323.4(a)(6)(iii), which states that "road fill shall be bridged, culverted or otherwise designed to prevent the restriction of expected flood flows." The road also serves as a dam, and thus does not allow for the free passage of flows. Erv Balou of IDWR was concerned that if the stand pipes plugged, the dam would overtop and fail.[50] IDWR has pointed out that the structure does not meet the Idaho dam safety requirements to allow for passage of flood flows.[51]

4. Respondent Did Not Prevent Erosion.

Section 323.4(a)(6)(iv) of the BMP regulations requires that the fill for a farm road must be properly stabilized and maintained during and following construction to prevent erosion. The Presiding Officer concluded that Complainant offered no proof of lack of BMPs to control sedimentation.[52] To the contrary, the record is replete with evidence of lack of erosion control at the construction site. When Respondent was first inspected in November 2001, he had no erosion control in place.[53] He later installed silt fences, but they were poorly maintained and ineffective.[54] The Corps ultimately concluded that the § 404(f) exemption was inapplicable to

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[50]Tr. 494:5-15, 494:5-16.

[51]*See* Ex. C29.

[52]Initial Decision at 18.

[53] *See* Exs. C3 (p.2 "high erosion potential"), C4 (photos - no silt fences or other BMPs).

[54]Tr. 223:8-15, 229:14-230:12, 254:7-12, 513:11-20; Exs.C12, C13.

Respondent's project on the grounds that Respondent failed to install adequate erosion controls.[55]

The Presiding Officer erred in finding that Respondent met his burden of showing compliance with the erosion control requirements. Interestingly, the Presiding Officer cited the "dam" aspect of the structure as something that would mitigate soil loss downstream.[56] If it is a dam, it is not an exempt farm road. If it is an exempt farm road, it should not dam the creek and hold sediment. Respondent cannot have it both ways.

5. Respondent Did Not Minimize Vegetative Disturbance.

Finally, the Presiding Officer erred in finding that vegetative disturbance in the waters of the United States was kept to a minimum.[57] To the contrary, the record shows that Respondent did not meet the requirements of 33 C.F.R. § 23.4(a)(6)(v) and (vi), which require minimization of impacts by heavy equipment. The photos of the initial construction work in November 2001 show that Respondent obliterated the existing Potter Creek channel where he intended to build his dam and impoundment, and this earth work extended some substantial distance up and downstream of the structure.[58] The initial inspection reports shows "approx. 1000' of stream impacts."[59] Photographs taken of the initial work show extensive earth work in Potter Creek for

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[55]Ex. C10 (last par.).

[56]Initial Decision at 18 ("Joyner agreed that the dam, unless it failed, would hold any sedimentation.").

[57]Initial Decision at 19.

[58]*See* Ex. C4 at 2; Tr. 249:16-251:22 (Joyner testimony regarding excessive downstream pipe extension and fill)

[59]Ex. C3 at 1; *see also* Tr. 97:12-19. While the total acreage of fill was disputed at hearing, *see* Initial Decision at 10, it was not disputed that Respondent filled approximately 1000 feet of Potter Creek.

some distance up and downstream of the proposed structure.[60] Removal all of the riparian vegetation of Potter so far upstream of the crossing cannot rationally be construed as a "minimal impact," or otherwise necessary for the construction of a simple farm road. The Presiding Officer erred by concluding that only six feet of waters of the United States were impacted.[61]

C. Respondent Failed to Meet the Recapture Provision of 33 U.S.C. § 1342(f)(2).

There are two elements to any § 404(f) exemption analysis: (1) the specific exemption requirements (discussed above) and (2) the recapture provision.[62] Complainant argued in its Post Hearing briefs that Respondent failed to show how his impoundment of Potter Creek avoided recapture. The Presiding Officer noted these arguments in his Initial Decision, but never ruled on them. The Presiding Officer committed clear error by failing to address both the (f)(1) and the (f)(2) elements of the § 404(f) exemption.

Assuming, *arguendo*, that structure Respondent built in Potter Creek was solely for the purpose of a farm road and was not intended as a fish pond, as he describes in his most recent permit application,[63] Respondent would still fail the recapture provision. If he recaptures, he does not qualify for the § 404(f) exemption. The applicable regulations require that any discharge of fill material incidental to an exempted activity "must have a permit if it is part of an

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[60]*See* Ex. C4 at 2; Tr. 114:8-117:4.

[61]*See* Initial Decision at 14. A relatively small area Potter Creek was *directly* filled by the structure. The evidence shows, however, that earth disturbance work in and around Potter Creek extended well up and downstream of the structure.

[62]*See* 33 U.S.C. § 1344(f)(1) and (f)(2).

[63]Ex. R12 ("Existing earthen filled dam" with proposed use for "recreation, fish pond (Road across dam also used by farm machinery.")).

activity whose purpose is to convert 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 . . ."[64]

Respondent built a dam with a road on top. The stand pipes he installed had the effect of creating an impoundment, which is exactly what he wanted.[65] By damming Potter Creek , obliterating its channel for 1000 feet, and placing "vertical spill pipe[s] to control water height,"[66] Respondent impaired the flow and circulation of waters of the United States. The dam also brings the area into a use to which it was not previously subject; Respondent has changed a free-flowing creek into a pond.[67]

The intent of the section 404(f) exemptions is to allow some necessary fills that have little or no impact on waters of the United States. By creating a dam out of his farm road, Respondent built a structure that impacted Potter Creek more than minimally necessary to create a road crossing. It also turned a free-flowing stream into a pond that inhibits the movement of aquatic

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[64]33 C.F.R. § 323.4(c).

[65]*See* Exs. C7 (item no. 6: "Describe project: impoundment for road crossing"); R12 (item no. 6: "Describe type and size of devices . . Existing earthen filled dam . . . with vertical spill pipe to control water height."; item no. 8.e: "recreation, fish pond.").

[66]Ex. R12 at 1.

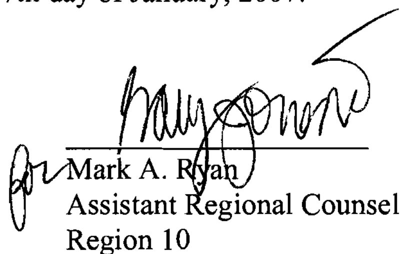
[67]*See Borden Ranch Partnership v. U.S. Army Corps. of Engineers*, 261 F.3d 810, 815-16 (9th Cir. 2001), *aff'd per curium*, 537 U.S. 99 (2002) (rejecting 404(f)(2) "normal farming" exemption on grounds that deep ripping operation violated recapture provision; "Converting ranch land to orchards and vineyards is clearly bringing the land 'into a use to which it was not previously subject,' and there is a clear basis in this record to conclude that the destruction of the soil layer at issue here constitutes an impairment of the flow of nearby navigable waters."); *United States v. Huebner*, 752 F.2d 1235, 1243 (7th Cir. 1985) (conversion of marsh to expand cranberry beds is new use).

organisms. His dam brings waters of the United States into a use to which they were not previously subject. The weakness of Respondent's position on recapture is reflected in his one-sentence discussion of the subject in his Post Hearing Brief, where he merely restates the law.[68] Respondent's crossing/dam does not avoid recapture as required by § 404(f)(2), and the Presiding Officer committed reversible error by not ruling on this issue.

CONCLUSION

The Presiding Officer erred first when he allowed Respondent to raise the § 404(f) at hearing after failing to assert it as a defense in his Answer to Complaint, and second for finding that Respondent's combination road/dam meet all of the requirements of § 404(f)(1) and (2) and 33 C.F.R. § 323.4(a)(6)(i) - (xv). For these and the reasons set forth above, the Presiding Officer's Initial Decision should be set aside, and the proposed penalty should be assessed.

RESPECTFULLY SUBMITTED this 17th day of January, 2007.



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[68]Respondent's Posthearing Brief at 15. Respondent's Reply Posthearing Brief is equally bereft of analysis: "The exemption applies because the evidence established that the activities had little or no adverse impact on waters of the United States and is not recaptured by (f)(2)." *Id.* at 6.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Complainant's Notice of Appeal and Supporting Brief in the matter of J. Phillip Adams, CWA Appeal No. 06-(06), were sent to the following persons in the manner indicated:

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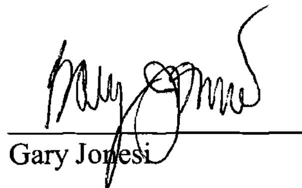

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