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UNITED STATES OF AMERICA
ENVIRONMENTAL PROTECTION AGENCY
ENVIRONMENTAL APPEALS BOARD

In The Matter of	
Smith Farm Enterprises, LLC.	CWA Appeal No. 05-05
Respondent	
Initial Decision May 5, 2005 Docket No. CWA-3-2001-0022 Presiding Officer: Administrative Law Judge Carl C. Charneski	

COMPLAINANTS' APPELLATE BRIEF AS TO ISSUES OTHER THAN LIABILITY

Dated July 22, 2005

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Complainants, through counsel, respectfully submit this brief on issues other than Respondent's liability. Pursuant to the Board's Order dated June 14, 2005, Complainants submitted their brief on Respondent's liability on June 30, 2005, and hereby submit this brief on all remaining issues, specifically, ALJ Charneski's decision to order a retrial after the court reporter failed to produce a transcript of the hearing, and the penalty assessed by ALJ Charneski.

I. ALJ CHARNESKI CORRECTLY ORDERED A RETRIAL AFTER THE COURT REPORTER FAILED TO PRODUCE A TRANSCRIPT

The administrative complaint in this matter was filed in May 2001, and the First Amended Complaint was filed in November 2001. Pursuant to 40 C.F.R. § 22.25, the Administrative Law Judge instructed the Regional Hearing Clerk for the U.S. Environmental Protection Agency Region III ("Region III") to locate a hearing room and to retain the services of a court reporter. A court reporter was retained pursuant to the Federal Acquisition Regulations set forth in 48 C.F.R. Part 13 (Simplified Acquisition Procedures). A six-day hearing was conducted before ALJ Charneski on June 18-21 and 26-27, 2002. The court reporter appeared in court on time each day and after each break. Following the hearing, the court reporter failed to produce a transcript. Despite extensive efforts by Region III counsel for Complainants, ALJ Charneski, and even the local U.S. Attorney's Office, the court reporter produced only approximately 250 pages of transcript, a fraction of the total. Efforts of a substitute court reporter to produce a transcript from Ms. Nettingham's materials also failed. Complainants then moved for a retrial, and Respondent cross-moved for dismissal. In an Order dated April 30, 2003, ALJ Charneski denied Respondent's motion for dismissal and granted Complainants' motion for a retrial, which was conducted on October 6-9 and October 28-29, 2003.

ALJ Charneski correctly denied Respondent's motion to dismiss and granted Complainants' motion for retrial because: (1) A transcript was necessary to decide the merits of this matter; (2) No fault can be assigned to Complainants or their counsel from the court reporter's failure to perform, (3) No action or inaction by those who procured the court reporting services had any nexus to the court reporter's failure to perform. The Purchasing Officer complied with the Simplified Acquisition Regulations and the standard procedures employed by Region III for the past eighteen years for obtaining court reporting services; (4) Both Region III and counsel for Complainants diligently attempted to obtain a transcript.

A. Legal Standard

The ALJ has broad discretion in the conduct of the hearing. 40 C.F.R. § 22.4(c), *In re Lazarus, Inc.*, 7 E.A.D. 318, 334 (EAB 1997). ALJ Charneski did not abuse his discretion in ordering a retrial when the court reporter failed to produce a transcript.

This matter appears to present a unique situation in the annals of EPA administrative practice. The *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits* ("*Rules of Practice*"), 40 C.F.R. Part 22, do not address this particular situation. Section 22.25 of Part 22 states only that:

> The hearing shall be transcribed verbatim. Promptly following the taking of the last evidence, the reporter shall transmit to the Regional Hearing Clerk the original and as many copies of the transcript of testimony as are called for in the reporter's contract with the Agency, and also shall transmit to the Presiding Officer a copy of the transcript.

In the absence of specific direction from the *Rules of Practice*, the Board has consulted the practice under the Federal Rules of Civil Procedure. *See, e.g., In re Lazarus, Inc.*, 7 E.A.D.

318, 330 (1997); *In re Asbestos Specialties*, 4 F.A.D. 819, 827 n.20 (1993). In this instance, the Federal Rules of Civil Procedure provide little guidance. The Federal Rules of Appellate Procedure, in conjunction with the Court Reporter's Act, 28 U.S.C. § 753, provide some guidance. The Court Reporters Act requires that,

> Each session of the court and every other proceeding designated by rule or order of the court or by one of the judges shall be recorded verbatim by shorthand, mechanical means, electronic sound recording, or any other method, subject to regulations promulgated by the Judicial Conference and subject to the discretion and approval of the judge. . .

28 U.S.C. § 753(b) (footnote omitted)

The Federal Rules of Appellate Procedures instruct that, in the absence of a transcript, the appellant should prepare a statement of the evidence or proceedings using the best available means. Fed. R. App. P. 10(c). Where a transcript is necessary for appellate review and a statement of the evidence cannot be prepared or would be inadequate, the federal courts have held the appropriate remedy is retrial.[2] *See Bergerco, USA v. The Shipping Corp. of India, Ltd.*, 896 F.2d 1210 (9th Cir. 1990) (retrial of factual issues germane to appeal ordered after the court reporter lost her notes)[3]; *United States v. Knox*, 456 F.2d 1024, 1025 (8th Cir. 1972) (per curiam) (new trial ordered where transcript unavailable and would be essential to appellate review);

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[2] A number of state courts also have addressed an unavailable transcript. *See, e.g., Furkett v. Rauch*, 31 Cal. 2d 110, 187 P.2d 402 (1947) (trial court's denial of a motion for retrial due to the absence of a transcript was an abuse of discretion), *Reynolds v. Romano*, 96 Vt. 222, 118 A. 810 (1922) (remand for new trial where court reporter's employment was terminated prior to completion of transcript and court reporter failed to complete transcript); *see also* 58 *Am. Jur. 2d New Trial* Section 120 (2002), 5 *Am. Jur. 2d Appellate Review* Section 502 (2002); 2 *Am. Jur. 2d Administrative Law* Section 631 (2002).

[3] Respondent's brief notes that the court in *Bergerco* stated no federal appellate court had remanded a civil case for new trial due to a missing transcript (Respondent's brief at 41), but fails to inform the Board that *Bergerco* itself is a civil matter in which a federal appellate court remanded for retrial when the court reporter lost her notes.

United States v. Workcuff, 422 F.2d 700 (D.C. Cir. 1970) (remand for new trial because court reporter was absent and failed to record a supplemental jury instruction); *Parrott v. United States*, 314 F.2d 46, 47 (10th Cir. 1963) (transcript unavailable due to failure of court reporter). *Cf., United States v. James*, 440 F. Supp. 1137 (D. Md. 1977) (remand for new trial where tape recording of proceeding before magistrate was inaudible).[4]

Applying the reasoning underlying these cases, ALJ Charneski did not abuse his discretion by ordering a retrial. In this instance, a transcript was necessary to determine the merits of this matter. The June 2002 hearing included the testimony of approximately twenty witnesses. Many exhibits consisted of photographs, maps and diagrams, and much of the testimony explained these exhibits and their relationship to the factual and legal matters at issue. It was doubtful at the time (and remains doubtful) that the parties could have agreed to a statement of the evidence presented at the hearing without the assistance of a transcript.

B. The Court Reporter's failure to produce a transcript cannot be attributed to any action or inaction by Region III, Complainants or counsel for Complainants

Notwithstanding Respondent's efforts to cast blame on Complainants, their counsel, or Region III, the court reporter's failure to produce a transcript was the default of a third party and does not justify dismissal. The selection and procurement of the court reporter by Region III was reasonable. First, the terms of the contract provided that the court reporter, Ms. Nettingham of Net Reporting Service, would be paid only after she delivered the finished transcript and

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[4] In other cases, the courts have held that an unavailable transcript is not *per se* cause for a retrial, but should be granted in appropriate circumstances. *See, e.g., United States v. Kelly*, 167 F.3d 436 (8th Cir. 1999); *Harp v. Department of the Army*, 791 F.2d 161 (Fed. Cir. 1986); *Herndon v. City of Massillon*, 638 F.2d 963 (6th Cir. 1981) (per curiam); *Black v. O'Haver*, 567 F.2d 361, 371 (10th Cir. 1977), cert. *denied*, 435 U.S. 969 (1978) ("In some circumstances, we are sure, the lack of a complete transcript of trial would call the fairness of the proceedings into question").

Complainants' counsel indicated that the transcript was acceptable. Thus, the very terms of the contract provided a reasonable level assurance that an acceptable transcript would be delivered. Second, the Purchasing Officer followed procedures that have been utilized by Region III for eighteen years. In that eighteen year period, Region III had never had a court reporter fail to perform, nor encountered any significant difficulties with court reporters. Third, both the Purchasing Officer and the Contract Officer spoke with Ms. Nettingham, informed her that the hearing was scheduled for four days, and indicated that the hearing was for EPA. Ms. Nettingham accepted the work, thus inferring that she believed herself capable of transcribing the four-day hearing for EPA. Because Respondent's brief obfuscates the facts, a description of the procedures to retain the court reporter and efforts to obtain a transcript from her follows.

Because the Regional Hearing Clerk lacks authority to commit Agency funds, the Purchasing Officer in the Office of Regional Counsel was responsible for carrying out the ALJ's direction to secure the services of a court reporter. Deposition of Pamela McCray at p. 9 & 22 & Exhibit 4 (attached to Complainants' Motion for Retrial as Exhibit A) (hereafter "McCray dep. at __"); Declaration of Suzanne Canning Paragraph 4 (Complainants' Motion for Retrial, Exhibit C) (hereafter "Canning Decl. Para. __").

The court reporter was retained pursuant to the Federal Acquisition Regulations set forth in 48 C.F.R. Part 13 (Simplified Acquisition Procedures), which provide procedures for procurements less than the simplified acquisition threshold defined in 48 C.F.R. § 2.101 (currently $100,000). The original estimated value of the Purchase Order was $5,670, well within the threshold for the simplified acquisition procedures. McCray dep. Exhs. 6 & 7; Deposition of Denise T. Jones, Exhs. 5 & 6 (Complainants' Motion for Retrial, Exhibit B).

(hereafter "Jones dep. at __"). Using the simplified acquisition procedures, the Purchasing Officer solicited price quotations from at least three sources located within the local trade area, i.e., near the Virginia Beach, Virginia courthouse where the hearing would take place. McCray dep. at pp. 22-24, 60-62 & Exhs. 4 & 7. See 48 C.F.R. § 13.104(b) & 13.105-1.

Based on the price quotations she had solicited, the Purchasing Officer identified a recommended source, Net Reporting Services, and two alternate sources. McCray dep. at 10-11, 14-19 & 45 & Exh. 6 & 7. In soliciting price quotations and determining the low cost bid, the Purchasing Officer utilized procedures and a price formula consistent with the procedures followed by the Office of Regional Counsel for eighteen years. In those eighteen years, Region III had never experienced a failure by a court reporter to perform. Canning Decl. Paras. 3 & 15.

The Purchasing Officer's identification of a preferred provider and two alternate sources was memorialized in a Procurement Request, forwarded to Region III's Finance Office, funded, and then forwarded to the Contracts Office. McCray dep. at Exh. 6-7; Jones dep. Exh. 5-6. The Contracting Officer telephoned Net Reporting Services to confirm availability and the price quotations, performed a number of other tasks (such as checking that neither Net Reporting Services nor Cheryl Nettingham were debarred from government contracts), and developed a purchase order. Jones dep. at 11-25, 27-31 & Exh. 7, 8 & 9. See 48 C.F.R. § 13.302-1. The original purchase order for the transcript (EPA Purchase Order 2P-0169-NFSA) was issued on May 28, 2002 to Ms. Cheryl Nettingham to provide Court Reporting Services and to produce a transcript by July 5, 2002, ten business days after the scheduled close of the hearing. Jones dep. at Exh. 9. Under the terms of the Purchase Order, Ms. Nettingham would not be paid until the transcript was completed, delivered, and accepted. Jones dep. at 52-53 & Exh. 9.

Testimony was taken June 18-21, 2002. Ms. Nettingham appeared on time each day, and after each break. When the hearing was continued to June 26-27, 2002, the Court asked Ms. Nettingham's availability and she replied she was available. Counsel for Respondent voiced no concerns or objections about the continued use of the same court reporter to transcribe a multiple day hearing. Declaration of Jan Nation at Para. 3-7 (Exhibit P to Complainants Motion for Retrial) (hereafter "Nation Decl. Para. ___").

The purchase order was modified for the additional hearing dates and a new transcript delivery date of July 15, 2002, ten business days after conclusion of the hearing (Modification # 1). Jones dep. Exh. 2. When the court reporter failed to produce a transcript by July 15, 2002, Region III and later Complainants' counsel (with consent of the ALJ and Respondent's counsel) undertook extensive efforts to extract a transcript from the court reporter. Repeated calls to the court reporter went unreturned, or yielded excuses regarding the court reporter's computer or repeated broken promises by the court reporter that a transcript would be forthcoming. Jones dep. Exhs. 10, 11, 12; Canning Decl. Para. 20.

On October 10, 2002, a letter from the Regional Counsel of EPA Region III was hand-delivered to the court reporter, directing her to deliver a transcript within ten business days. (Exhibit F to Complainants' Motion for Retrial). That letter described the various attempts by Region III to obtain the transcript and steps that could be taken in the event the transcript was not forthcoming. The Contract Officer telephoned the court reporter to ascertain whether the court reporter would meet the deadline. The court reporter informed her that the transcript would not be completed by October 25, but would be completed by the end of that week. Jones dep. Exh 11; *see also* Exh. H to Complainants' Motion for Retrial.

When the transcript was not received by November 1, 2002, EPA Region III demanded proof that (a) a transcript existed, and (b) that the court reporter was working on. Canning Decl. Para. 25. Ten pages were. (Exh. I of Motion for Retrial). Eventually, Region III received a copy of 168 pages of transcription (Exhibit L to Motion for Retrial). Two additional sets of pages were received. (See Exhs. J, K, M, and O to Motion for Retrial). At one point, the court reporter provided a doctor's note. (Exhibit N to Motion for Retrial).

Counsel for Complainants consulted with an Assistant U.S. Attorney for the Eastern District of Virginia, Norfolk Division. Numerous conversations between the Assistant U.S. Attorney and the court reporter resulted in a series of broken promises by the court reporter. Eventually, counsel for Complainants arranged for a courier to pick up materials from the court reporter. Canning Decl. Para. 26. On January 21, 2003, counsel for Complainants received the original exhibits and paper stenographic notes for all six days of the hearing. Shortly thereafter, counsel for Complainants obtained computer disks containing Ms. Nettingham's notes.

Region III requested another court reporter, Cathy Aiello of Yost Associates, to create a transcript of the hearing utilizing the paper notes, computer disks, exhibits, and partial transcript. Ms. Aiello's attempt to transcribe the Smith Farms hearing using Ms. Nettingham's materials failed. According to Ms. Aiello, the notes and computer disks contained gaps in the testimony and non-standard stenography, which caused Ms. Aiello to conclude that an accurate transcript could not be produced. Declaration of Cathy Aiello (Exh D to Motion for Retrial).

While Respondent offers much criticism of the foregoing, Respondent does not argue that Region III's Purchasing Officer and Contract Officer failed to comply with the Federal Acquisition Regulations (since those regulations were complied with). Nor does Respondent

argue that Region III, Complainants or their counsel were less than diligent in attempting to obtain the transcript. Respondent also does not cite to a single action or inaction by Region III personnel that in any way caused the court reporter's failure to produce a transcript.

The "fabled twenty-twenty vision of hindsight" is not the standard for determining the appropriate course of action in this circumstance. *Cf. Campbell v. Wood*, 18 F.3d 662, 673 (9th Cir.), *cert. denied*, 511 U.S. 1119 (1994) (standard for determining ineffective assistance of counsel); *Tyler v. RE/MAX Mountain States, Inc* , 232 F.3d 808, 813-14 (10th Cir. 2000) (standard for reviewing whether an action was pretext in a discrimination claim brought pursuant to Section 1981). Respondent should not be allowed to use the default of the court reporter – a third party – to obtain an order of dismissal that it could not achieve on the merits. Despite a fusillade of second-guessing by Respondent as to how the procurement of court reporting services *in retrospect* "could" have been done differently, the fact remains that the court reporter's failure was an unforeseeable and unfortunate third party default. No act or omission by Complainants, their counsel or Region III caused the court reporter's default.

To the extent the adequacy of the selection process is at all relevant, it should be viewed not in hindsight, but from the perspective of reasonableness at the time the selection occurred. *Cf. Campbell*, 18 F.3d at 673 (citing *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). From that perspective, it is clear nothing about EPA's procurement warrants dismissal of this matter.

For example, Respondent states that the Purchasing Officer had received "only" two thirty-minute informal training sessions on procurement generally and that she had no prior experience with government contracting prior to January 2002. However, the Purchasing Officer had received a one-day training for bank card purchases and she had undertaken procurement of

reporting services for another matter under the supervision of her predecessor. McCray dep. at pp. 5 & 56. Respondent nowhere describes how the Purchasing Officer's level of training caused the court reporter's failure to deliver a transcript.

Respondent also criticizes the Purchasing Officer's use of the electronic yellow pages and decision to limit her search to Virginia Beach -- one of the largest cities in Virginia and the location of the hearing. Under the Simplified Acquisition Procedures, EPA must obtain price quotations from at least three sources in the local trade area. 48 C.F.R. § 13.104(b). The Purchasing Officer contacted at least seven sources in the Virginia Beach area, at least three of which were available on the hearing dates. McCray dep. Exh. 4. Respondent fails to provide any reason why sources outside the Virginia Beach (the hearing location) should have been contacted, let alone why limiting the search the Virginia Beach area is grounds for dismissal.

Respondent questions whether Net Reporting Services was the low bid based solely on the cost per page for an original and two copies of transcript. However, other standard cost factors included the court reporter's appearance fee and estimated charge for copying exhibits. See McCray dep. at p. 23-30, Exh. B; Canning Decl. Para. 8.[4] Net Reporting Services was the low bid as to the appearance fee and the cost of copying because Net Reporting Services did not charge anything for copying exhibits, while the other two court reporter services had a per page charge for copying. McCray dep. at Exh. 4 & 5. The Purchasing Officer testified that she was aware there were numerous exhibits based on the fact that she and other secretaries were

[4]In hindsight, the parties supplied sufficient numbers of copies of the exhibits. The Purchasing Officer's actions, however, must be viewed from her perspective prior to the hearing. Her training with Ms. Canning told her that it had been necessary for court reporters to copy exhibits in other cases. Indeed, in the past few years, court reporters have copied exhibits in about half the administrative hearings conducted by Region III. Canning Decl. Para. 9.

"pitching in" to copy exhibits for use during the hearing. McCray dep. at page 42-44 & 62. Even accepting Respondent's argument, Respondent at most argues that the Purchasing Officer made an error which led to the retention of the high cost bid, rather than the low cost bid. Even if that were true -- and Complainants do not concede that it is -- Respondent fails to say how retention of the high cost bid has any nexus to the court reporter's failure to produce a transcript. Nothing about using the high cost bidder correlates to potential for default.

Respondent asserts that Net Reporting Services should not have been retained for the fifth and sixth days of the hearing after it was extended past the original hearing dates. At the time the hearing was extended, the Administrative Law Judge inquired about the court reporter's availability for those days. Nation Decl. Para. 7. Thus, counsel for Respondent was on notice that Ms. Nettingham would be used for the final two days of the hearing, but did not raise any question about the ability of a single court reporter to handle the workload. Nation Decl. Para. 7. From the perspective of events at the time they happened, continuation of services is permissible under the FAR. 48 C.F.R. § 52.243-1; Jones dep. at p. 39-40. Ms. Nettingham was familiar with the names of the parties, attorneys and witnesses and various terms used in the proceeding. In addition, there was very little time for re-bidding the court reporting contract for the last two days. The hearing was extended on Friday, June 21, 2002, and scheduled for June 26, 2002, leaving only two work days to re-bid the work.

Finally, Respondent engages in a series of "would have," "could have," and "should have" statements. In hindsight, Respondent suggests that Ms. McCray could have asked about Ms. Nettingham's experience, her licensing, her accreditation, and capacity to transcribe multi-day and technical testimony. Respondent, however, fails to point to any applicable Virginia

requirement that court reporters be licensed or accredited. Regardless, it is not clear that Respondent's suggested questions would have yielded meaningful information. If asked about her education or experience, Ms. Nettingham likely would have replied that had attended the Virginia School of Technology and that she had been a teacher at the same school. *See* Second Declaration of Suzanne Canning Para. 3 & 4 (attached to Complainants' Response to Respondents' Brief Requesting Dismissal Due to Lack of Transcript and Complainants' Reply in Support of Complainants' Motion for Retrial as Exhibit 1).

With the benefit of hindsight, Respondent suggests the Purchasing Officer could have requested references or could have called attorneys in the Virginia Beach area (including Respondent's counsel) for the names of court reporters. Respondent, however, provides absolutely no evidence that it is standard practice for the government or the private sector to call opposing counsel for the names of court reporters.

In sum, this is not analogous to cases in which a party fails to request preparation of a transcript following a trial or requests the transcript from the wrong person, such as a judge, instead of a court reporter. In such cases, the party's own actions caused the failure of the court reporter to prepare a transcript.[5] Rather, in this case, Region III used procedures that had identified court reporters without a problem for eighteen years and employed a contract that was

[5]Neither Complainants nor their counsel had any role in the selection and procurement of the court reporter for the Smith Farms matter. Basic tenets of administrative law require separation of the prosecutorial and adjudicative functions of administrative agencies, including EPA. In this instance, the process used for selecting a court reporter is analogous to the federal courts, which pursuant to the Court Reporters Act, 28 U.S.C. § 753, maintain a staff of court reporters to transcribe all proceedings. It makes no more sense to assert that Complainants, who implement EPA's prosecutorial function, should be penalized for the selection of the court reporter than it would be to dismiss a federal court prosecution simply because the U.S. Attorneys Office and the court reporter both work for the federal government, albeit different branches.

designed to provide assurance of delivery of a final transcript. There is no nexus between any act or omission by Region III personnel and the failure of the court reporter to deliver a transcript, and the ALJ did not abuse his discretion in ordering a retrial and denying Respondent's motion to dismiss. To the extent the Board is inclined to consider the additional cost that the court reporter's default imposed on Respondent – and Complainants do not think the Board need consider this at all – that may relate to the penalty, but it certainly does not warrant dismissal.

Finally, Complainants address Respondent's statement in footnote 23 of its brief accusing Complainants of using the first hearing "as a 'dress rehearsal,'" and "massaging" the testimony, specifically that of the Corps inspector Mr. Martin. That allegation is flatly denied. ALJ Charneski heard Mr. Martin's testimony in both hearings, found no inconsistency in Mr. Martin's testimony, and found Mr. Martin credible. Indeed, Mr. Martin's testimony was consistent with his contemporaneous writings at the time of his initial inspection (*see* CX 27). Though tempted, Complainants will refrain from pointing out to the Board the numerous instances in which Respondent's trial tactics and witness testimony changed from the first hearing to the second.

II. THE PENALTY ASSESSED BY ALJ CHARNESKI WAS CONSISTENT WITH THE STATUTORY FACTORS AND SUPPORTED BY THE RECORD

The Clean Water Act requires that the following factors be considered in assessing a penalty: the nature, circumstances, extent and gravity of the violation, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings resulting from the violation, and such other matters as justice may require. 33 U.S.C. § 1319(g). The amount of the penalty in a Class II penalty case, such as this one, for violations occurring before March 15, 2004, cannot exceed $11,000 per day for each day the violation continues and the total cannot

exceed $137,500. 33 U.S.C. § 1319(g)(2)(B) (as modified by the Civil Monetary Penalty Inflation Adjustments, 40 C.F.R. § 19.4).

In this case, the administrative complaint originally named Vico Construction Corporation ("Vico") and Smith Farm Enterprises, L.L.C., as jointly and severally liable respondents. Prior to the hearing, Vico entered into a settlement with Complainants that involved the payment of a $2,000 penalty and the performance of certain actions. For purposes of this matter, Complainants assigned a cash value to the overall settlement with Vico of $32,000, which ALJ Charneski accepted and Respondent does not challenge. Accordingly, Complainants sought $105,500 from Respondent ($84,500 for Count I, $21,000 for Count II). *See In re Corporacion para el Desarrollo Economico y Futuro de la Isla Nena*, Dkt. NO. CWA-II-97-61 (July 10, 1998) (Bifo. Chief ALJ). ALJ Charneski assessed a penalty of $94,000 ($80,000 for Count I, $14,000 for Count II).

The Board "generally will not substitute its judgment for that of the presiding officer absent a showing that the presiding officer committed clear error or an abuse of discretion in assessing the penalty." *In re Mayes*, 12 E.A.D. ___, RCRA (9006) App. No. 04-01, slip op. at 58 (EAB March 3, 2005) (citation omitted); *In re Chem Lab Products, Inc.*, 10 E.A.D. 711, 725 (EAB 2002); *In re Johnson Pac. Inc.*, 5 E.A.D 696, 702 (EAB 1995)). ALJ Charneski provided a reasoned explanation for his penalty assessment, which was well supported in the record, and there is no basis for the Board to depart from ALJ Charneski's assessment.

Respondent does not contest ALJ Charneski's finding with respect to economic benefit, which standing alone justifies the penalty that he assessed. *Initial Dec.* at 47 (accepting Complainants' economic expert's calculation that economic benefit ranged from $141,367 to

$304,482 for Count I and $6,594 for Count II).[6] The economic benefit range for Count I offered by Complainants' expert witness and accepted by the ALJ was extremely conservative in that Complainants' expert (1) used a lower cost of mitigation per acre ($11,900) than the mitigation cost per acre credited by ALJ Charneski ($45,000-$55,000 per acre) (*Initial Decision* at 47); (2) did not include mitigation for secondary impacts resulting from the drainage of approximately 167 acres of wetlands; (3) did not take into account the increased property value that Respondent would realize by converting wetlands to uplands (*see* Tr. IV-235 (Blevins) (all things being equal, an acre of uplands is more valuable than an acre of wetlands)); and (4) assumed a mitigation ratio of one acre mitigation for one acre of wetland, whereas the Corps would require two acres of mitigation for every acre of wetlands impacts for this type of wetland system (*see Initial Decision* at 47 n. 42).

Respondent also does not challenge ALJ Charneski's holding that Respondent failed properly to assert inability to pay. *See Initial Decision* at 43-44. To the extent Respondent maintains an assertion of inability to pay, Complainants note that Respondent paid at least $158,842.25 to Vico for work performed at the Site (CX 7 (EPA 0096 & 0120) as well as paying their consultant at a rate of $75 per hour (Tr. VI-8-9 (Needham)), and that Respondent has proffered no financial evidence that it is unable to pay the assessed penalty. *See In re Ray and*

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[6] *See United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 529 (4th Cir. 1999), *cert. denied*, 531 U.S. 813 (2000)(the precise economic benefit gained by a polluter may be difficult to prove, so "[r]easonable approximations of economic benefit will suffice""); *Matter of Ray and Jeanette Veldhuis*, Dkt. No. 9-99-0008, slip op. at ___ (June 24, 2002) (Gunning, ALJ), *aff'd* 11 E.A.D. ___ (CWA App. No. 02-08) (Oct. 21, 2003) (Complainants provided a "'reasoned explanation' of how the 'reasonable approximation' of economic benefit was derived"), *appeal dismissed by stipulation of the parties*, No. 0374235 (9th Cir. Mar. 8, 2004); *Matter of Lawrence John Crescio, III*, Dkt. No. 5-CWA-98-004 (May 17, 2001) (Biro, Chief ALJ) (economic benefit is an appropriate starting point for calculating the penalty).

Jeanette Veldhuis, Dkt. No. 9-99-0008 (June 24, 2002) (Gunning, ALJ) (EPA met its burden on ability to pay by showing that respondent paid $1.4 million for property at issue and failed to proffer financial evidence of inability to pay), *aff'd* 11 E.A.D. __ (CWA App. No. 02-08) (Oct. 21, 2003), *appeal dismissed by stipulation of the parties*, No. 0374235 (9th Cir. Mar. 8, 2004).

A. Respondent's Culpability

Respondent is a sophisticated land owner fully aware of the requirements of the Clean Water Act and the presence of wetlands on its property. With respect to Count I, the discharge was substantial and involved placement of a layer of wood chips up to five inches thick over several acres. Respondent did not inform the Corps of Engineers of this discharge before commencing the work, did not halt work or follow up when the Corps inspector expressed concern, and rushed to complete the work before EPA could visit the Site. With respect to the discharge of storm water under Count II, Respondent was twice warned by the Virginia Department of Environmental Quality ("VDEQ") that an NPDES permit was required, yet failed to seek such a permit until after EPA visited the Site.

Under these circumstances, the fact that Respondent hired a consultant and met with the Corps does not mitigate its culpability. Respondent did not hire Mr. Needham to help it *comply* with the law, but rather to help Respondent drain the wetlands on the Smith Farm property to create developable land and evade the requirements of Section 404. Respondent's efforts were directed not at compliance, but rather at avoiding the costs and delays associated with obtaining a Section 404 permit. For example, on page 38 footnote 21 of its brief, Respondent expresses frustration that the storm water claim under Count II included failure adequately to stabilize the ditch banks to prevent erosion. Respondent complains that it could not have stabilized the ditch

banks "without being accused of filling in wetlands," i.e., without triggering Section 404. Respondent apparently perceives that circumstance as somehow unfair. Respondent's grievance that compliance with the storm water controls required by Section 402 would include a discharge that triggered Section 404 reveals Respondent's true mindset regarding compliance. Respondent is not merely an innocent land owner caught in a complicated regulatory system, but a frustrated land owner seeking to avoid regulations of which it and its consultants were fully aware.

Respondent's assertion (without citation) that, "If they had ever been advised any of their activities were violative, they would have ceased," is belied by the record. First, when the Corps inspector, Mr. Martin, advised Respondent's consultant that he had questions regarding the operations at the Site (Tr. I-271; II-6 (Martin), Respondent neither temporarily halted operations nor followed up with the Corps. Second, in July 1999, Complainants contacted Respondent to schedule a site visit in September 1999. Tr. I-108 (Lapp). Although work at the Site had ceased in February 1999, Respondent quickly geared up to resume and complete work at the Site in August 1999 (CX 7). Rather than awaiting Complainants' September inspection and feedback, Respondent hurried to finish the work before Complainants could inspect the Site. Third, Respondent twice failed to obtain an NPDES permit for the discharge of storm water associated with construction activity after being urged by the VDEQ to do so.

In February 1999, Respondent received a letter from Ms. Putnam of VDEQ indicating a storm water permit would be necessary. RX 20; Tr. III-78. Rather than obtain the permit, Mr. James Boyd (who is an attorney) called Ms. Putnam and purported to memorialize their conversation in a letter dated February 10, 1999 (RX 20). That letter is, to say the least, confusing and misleading. Mr. Boyd limited his description of the total area to be disturbed to

the portion of the property in the city of Chesapeake, telling VDEQ that the total area disturbed was 3.6 acres, the work was completed, and the area was zoned for agriculture. Mr. Boyd did *not* inform Ms. Putnam – and VDEQ apparently was unaware – that the work on the Chesapenke side of the property was part of a larger project that included an additional 7.147 acres of land disturbing activity in Suffolk, where the land was zoned for residential and heavy manufacturing use. Nor did Mr. Boyd inform VDEQ that the total project would disturb more than ten acres, or that the work was not yet completed. RX 20; Tr. III-275-77 (J. Boyd); Tr. IV-89-90 (J. Boyd). Contrary to the self-portrait painted in the brief, when alerted that it needed an NPDES permit, Respondent did not acquiesce, but rather pushed back and apparently confused VDEQ.

Subsequent to Mr. Boyd's conversation with Ms. Putnam, Respondent's contractor, received a letter from Ms. Putnam and VDEQ in May 1999 indicating "it appears these projects [including Smith Farms] will need a general stormwater permit for the proposed construction activity ...." CX 97. Despite this second inquiry from VDEQ, however, Respondent did not seek an NPDES permit for the discharge of storm water until September 15, 1999 – one week after EPA visited the Site.

Respondent's efforts to portray the Corps of Engineers as acquiescing to the project are equally disingenuous. The record makes abundantly clear that Respondent either misled or failed to disclose to the Corps the types of discharges that would occur. The record shows that Respondent did not communicate to the Corps that they intended to remove all marketable trees from 35-50 foot wide swaths, leaving large amounts of treetops, branches, felled smaller trees and underbrush littering the areas. They did not tell the Corps that they intended to "prep the paths" for their excavation equipment by grinding up the slash and depositing in the swaths from

which marketable trees had been removed. *See* RX 10, 11, 14.

Moreover, the Corps never assented to the project. To the contrary, after Respondent requested that the Corps contact Respondent by November 13, 1998 if the Corps had any questions, Steve Martin contacted Mr. Needham on November 12 – a fact which Mr. Needham failed to acknowledge until confronted with Mr. Martin's notes of their conversation on cross-examination. Tr. VI-37-38 (Needham).

Respondent commenced the work in mid-December, weeks before Mr. Martin's inspection on January 6, 1999. Respondent therefore could not have relied on any assent by Mr. Martin, implied or otherwise, for work conducted prior to his inspection. During his Site visit, Mr. Martin told Mr. Needham that the project was not what Mr. Martin had anticipated based on Mr. Needham's pre-activity communications. Mr. Martin also indicated he had some questions. Tr. I-271, II-6 (Martin). Yet, Respondent did not stop work following Mr. Martin's initial visit or attempt to follow up with Mr. Martin regarding his concerns.

Respondent makes much of the fact that Mr. Martin visited the Site on several occasions and that the Corps was "invited" onto the property. Respondent fails to inform the Board that the site access granted by Respondent to Mr. Martin was not an open invitation and was limited to checking monitoring wells on the Site: "I understand from Mr. Robert Needham that you have requested authorization to visit our property for the purposes of inspecting the monitoring wells located thereon. We are pleased to grant you authorization to visit our property for these purposes and in your official capacity. However, I would request that no members of the media, environmental groups, or other private citizens accompany you, nor that the U.S. Army Corps of Engineers use or visit our property for any other purpose." CX 69. Mr. Martin's testimony that

he made no determination during those site visits regarding whether or not there were violations or a permit was required (Tr. II-105-06) was consistent with the limited scope of his access.

None of Respondent's communications with the Corps in any way mitigate its culpability.

B. Nature, circumstances, extent and gravity of the violation

The nature, circumstances, extent and gravity of the violation also amply support ALJ Charneski's penalty assessment. The circumstances of Respondent's unpermitted discharges are Respondent's deliberate efforts to remove the wetlands on the Smith Farm Site from the jurisdiction of the Clean Water Act without first obtaining permits pursuant to Sections 402 and 404 and to do so quickly before Virginia could enact its non-tidal wetlands law. *See* III-256 (Boyd); Tr. V-170-71, 228-29, VI-41-42 (Needham). The violations occurred in the context of Respondent's efforts to circumvent the Clean Water Act.

The record establishes an inextricable relationship between Respondent's excavation and drainage activities and their unauthorized discharges. Respondent's witnesses concede and ALJ Charneski found that it was necessary to prepare pathways in order for their equipment to operate. *E.g.*, Tr. III-268 (J. Boyd); Tr. IV-253 (Blevins); Tr. VI-73 (Paxton); *Initial Decision* Finding Nos. 37, 38, 40. Respondent's witnesses testified that it was necessary to reduce treetops, branches and logging slash to wood chips to facilitate the operation of the excavation equipment. Tr. IV-251 (Blevins); Tr. VI-73, 80 (Paxton). In addition, Respondent's excavation and clearing activities are the land disturbing activities that form the basis of Count II. Accordingly, Respondent's unauthorized discharges made their excavation activities possible.[7]

[7]The text of both Section 404 and its implementing regulations indicates that a Section 404 permit would be required for all drainage activities that result in discharge of dredged or fill material, except for "minor drainage." Section 404(f)'s exemption for "minor" drainage does not

Respondent's unauthorized discharges were extensive. Respondent's E&S plans indicate that over ten acres of wetlands would be disturbed in connection with the construction of the "Tulloch" ditches and the cleared corridors alone. CX 44A; CX 109. EPA's aerial photograph interpretation expert estimated a far higher number of acres disturbed. CX 45.

The direct impacts from the discharges far exceeded the average impacts authorized by the Norfolk District of the Corps. Mr. Martin testified that, over the past four or five years, the individual permits issued by the Norfolk Corps have authorized on average just under one acre of discharge. Tr. I-218 (Martin). Mr. Lapp testified that the impacts at the Smith Farm Site were among the largest he had dealt with in his career. Tr. I-80-81, 169 (Lapp).

The intent of Respondent's actions was ultimately to destroy through drainage all 180 acres of the wetlands on the Smith Farm Site. The drainage of wetlands on the Smith Farm Site is a secondary impact made possible by Respondent's discharges and should be considered.

The impacts, both directly from the discharges and secondary impacts associated with drainage, were significant. The wetlands on the Smith Farm Site are seasonally saturated, inundated and high up in the landscape. They perform such functions as denitrification and flood storage and provide habitat for various species including salamanders, amphibians, some reptiles and ground nesting birds. Tr. V-138-39 (Martin). These functions benefit the public at large and have been compromised by Respondent's activities. *See United States v. Riverside Bayview*

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extend beyond minor drainage or to efforts to convert a wetland to a non-wetland. *See* 33 U.S.C. § 1344(f)(1)(A); 40 C.F.R. § 232.3(d)(3)(ii). *See* S. Rep. No. 95-370 at 76 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326. While the Section 404 of the CWA does not regulate excavation, discharges associated with excavation are regulated. *See In re Slinger Drainage, Inc.*, 8 E.A.D. 644, 654-55 (EAB 1999), *appeal dismissed on other grounds*, 237 F.3d 681 (D.C. Cir. 2001). In addition, excavation is a type of land disturbing activity that requires a permit for the discharge of storm water associated with construction activity. *See* 40 C.F.R. § 122.26(b)(14)(x).

Homes, Inc., 474 U.S. 121, 134 (1985).

With respect to Count II, the discharges of storm water associated with construction activity also were significant. There were rain events sufficient to cause the discharge of pollutants in storm water associated with construction activity from the disturbed portions of the Site on approximately 39 days between January 1, 1999 and September 15, 1999. CX 90. Respondent disturbed well over five acres of land, and Mr. Stokely estimated the post-construction disturbance of wetlands and uplands combined as approximately 50 acres. CX 45. Respondent failed to comply with its own E&S Plans in that Respondent had a construction entrance on the Suffolk side of the property that was not identified on the E&S Plan and did not comply with specifications; Respondent reconfigured the ditches and even added a ditch, thus substantially modifying the proposed activity depicted on the E&S Plan; Respondent constructed other, non-"Tulloch" ditches; Respondent added stock piles that were not proposed on the E&S Plans; Respondent failed to put silt fencing around the stockpiles; Respondent dug drainage swales from the stock piles to receiving waters; Respondent failed to use VDOT coarse aggregate no. 1 stone in its check dams; Respondent moved the location of the check dams.

Mr. Magerr characterized Respondent's failure to control discharges of storm water associated with construction activity from the Smith Farm Site as: "fairly severe ... There were essentially no controls on the soil stockpiles, there was no construction entrance to specs .... The ditches were not, there was scouring going on on top of the ditching, there was sloughing off of soil, bank erosion had taken place, there was evidence just downstream of the last check dam that there were sediments being deposited in existing waterways. So it was, it, there was no, no, essentially, controls except for the check dams." Tr. II-283 (Magerr).

In sum, the penalty assessed by ALJ Charneski is well supported by the economic benefit accruing to Respondent, Respondent's culpability, and the nature, circumstances, extent and gravity of the violations.

III. CONCLUSION

For all the reasons set forth herein, in Complainants' brief submitted June 30, 2005 and during oral argument, Complainants respectfully urge the Board to affirm ALJ Charneski's holding that Respondent violated Section 301 of the CWA as described in Counts I and II of the First Amended Complaint and affirm the assessed penalty.

Respectfully submitted,

Dated : 7/22/05

for Stefania D. Shamet
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CERTIFICATE OF SERVICE

I hereby certify that on this date I caused the foregoing Complainants' Appellate Brief as to Issues other than Liability in the Matter of Smith Farm Enterprises, LLC, CWA Appeal No. 05-05 to be served in the following manner:

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7/22/05
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