IN RE SMITH FARM ENTERPRISES, LLC

CWA Appeal No. 08-02

FINAL DECISION AND ORDER

Decided March 16, 2011

Syllabus

Appellant Smith Farm Enterprises, LLC ("Smith Farm") appeals from a Decision Upon Remand issued by Administrative Law Judge ("ALJ") William B. Moran. In his decision, ALJ Moran applied the Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006) ("*Rapanos*"), and held that the United States Environmental Protection Agency ("EPA") had properly asserted Clean Water Act ("CWA") jurisdiction over the Smith Farm wetlands. ALJ Moran also incorporated findings and conclusions from the Initial Decision issued by ALJ Carl C. Charneski and held Smith Farm liable for discharges into the wetlands without appropriate permits in violation of CWA sections 301, 402, and 404, 33 U.S.C. §§ 1311, 1342, 1344.

In this appeal, the Environmental Appeals Board ("Board") resolves the following questions: (1) Did ALJ Moran err in determining that EPA has CWA jurisdiction over the Smith Farm wetlands? (2) Did ALJ Charneski err in finding that the wood chips Smith Farm deposited into wetlands without a Section 404 permit constituted "fill material" and therefore their placement in the wetlands constituted a violation of CWA section 301? (3) Did ALJ Charneski err in concluding that Smith Farm had violated CWA section 301 based on his finding that the ditches were a "point source," where the Amended Complaint did not explicitly identify the ditches as a "point source"? (4) Did ALJ Charneski err in evaluating the nature and extent of the violations or Smith Farm's culpability, such that the assessed penalty was excessive?

With respect to jurisdiction: The Board first considers which jurisdictional test (or tests) from the fractured Supreme Court decision in *Rapanos* applies. In that decision, Justice Scalia, writing for a plurality of the Supreme Court ("the Plurality"), and Justice Kennedy, concurring in the result of remand only, each articulated a new and distinct test for determining CWA jurisdiction over wetlands. Following the advice in Justice Stevens' dissent in *Rapanos*, the decisions of the U.S. Circuit Courts of Appeal for the First and Eighth Circuits, and the position of the United States in post-*Rapanos* appeals, the Board determines that CWA jurisdiction lies with EPA if either the Plurality's or Justice Kennedy's test is met. *See Rapanos,* 547 U.S. at 810 (J. Stevens, dissenting); *see also United States v. Johnson,* 467 F.3d 56, 64 (1st Cir. 2006) (explaining that the "either test" approach is "a simple and pragmatic way to assess what grounds would command a majority of the Court").

The Board next considers whether the Smith Farm wetlands fall within EPA's CWA jurisdiction under Justice Kennedy's test. Justice Kennedy opined that when wetlands are adjacent to a non-navigable tributary, a "significant nexus" must be demonstrated between

the subject wetlands and the downstream navigable-in-fact waters in order for those wetlands to be considered "waters of the United States" under the CWA. That "significant nexus" standard is met if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable."

The Board concludes that ALJ Moran correctly determined that the Smith Farm wetlands perform various ecological functions including: (1) temporary and long term water storage (i.e., flood control or desynchronization); (2) water pollutant filtration (denitrification); and (3) biological production for plants and wildlife. Moreover, the evidence in the record demonstrates that these functions and the proximity of the wetlands to the downstream navigable waters, both alone and in combination with other similarly situated lands, significantly affect the chemical, physical and biological integrity of the downstream navigable-in-fact receiving waters (i.e., the Nansemond River and the Western Branch of the Elizabeth River, each of which flow into the Chesapeake Bay) by preventing flooding and erosion (flood storage/flood control/desynchronization), reducing the quantity of nitrates in the water (denitrification), and by producing food for downstream organisms. Additionally, contrary to Smith Farm's assertions, ALJ Moran's assessment of the credibility of the witnesses, and the appropriate weight to be afforded the witnesses' testimony, is supported by the record. The Board also disagrees with the level of evidence Smith Farm suggests is required to prove a "significant nexus" under Justice Kennedy's test and determines that the evidence in this case is sufficient. Accordingly, the Board concludes the ALJ Moran appropriately determined that there is a significant nexus, as intended by Justice Kennedy in *Rapanos,* between the Smith Farm wetlands and the downstream navigable-in-fact waters. As such, the Smith Farm wetlands fall within EPA's CWA jurisdiction.

Because the Board determines that EPA has jurisdiction over the Smith Farm wetlands under Justice Kennedy's test, the Board need not analyze whether the EPA *also* has jurisdiction under the Plurality's test.

With respect to liability: The Board first considers ALJ Charneski's determination that the substantial amount of wood chips Smith Farm deposited into the wetlands constituted "fill material." The Board finds no error in ALJ Charneski's determination and concludes that the wood chips constituted "fill material" under either the Corps of Engineer's or the EPA's definition as that term was defined at the time of the violation.

The Board next examines ALJ Charneski's determination that Smith Farm violated CWA section 301, 33 U.S.C. § 1311, by discharging pollutants in storm water without having obtained an appropriate permit pursuant to CWA section 402 and, more specifically, whether ALJ Charneski erred in basing that decision, in part, on his finding that the ditches at Smith Farm were a "point source." Smith Farm essentially argues that the ALJ erred in making that finding because the Amended Complaint did not identify the ditches as a "point source." The Board concludes that the storm water discharges that occurred at Smith Farm in connection with Smith Farm's construction activities, into and through ditches and into waters of the United States without a CWA section 402 permit, constituted a violation of CWA § 301, 33 U.S.C. § 1311. Moreover, the Board concludes that the Amended Complaint does sufficiently identify the ditches as a point source and, even if it did not, the ALJ and the Board have the discretion to conform the pleadings to the evidence.

With respect to the penalty: The Board examines whether the penalty was excessive based on ALJ Charneski's evaluation of the seriousness of the violation and the ALJ's determination that Smith Farm's actions were "highly negligent." The Board interprets Smith Farm's arguments on these points to be challenges to ALJ Charneski's consideration of the

nature, circumstances, extent and gravity of the violation, as well as the ALJ's consideration of Smith's Farm's culpability. The Board notes that Smith Farm is a sophisticated landowner that embarked on an inherently risky course of action when it sought to drain its wetlands without obtaining permits and, in doing so, was fully aware of the potential legal consequences of its actions. The penalty assessed was well-supported by the economic benefit accruing to Smith Farm by bypassing the regulatory process, as well as the nature, circumstances, extent and gravity of discharging fill material and construction-related storm water into waters of the United States without first obtaining the required permits under CWA sections 402 and 404. As such, the Board concludes that ALJ Charneski did not clearly err in his consideration of penalty for either violation and, thus, no further mitigation of the penalty is warranted.

Held: ALJ Moran did not err in determining that EPA has CWA jurisdiction over the wetlands at Smith Farm. Moreover, ALJ Charneski did not err in determining that Smith Farm violated CWA section 301(a), 33 U.S.C. § 1311(a), by (1) discharging fill material into waters of the United States without first obtaining a permit under CWA section 404, 33 U.S.C. § 1344; or (2) discharging pollutants in storm water, in connection with its construction activities, into and through ditches at Smith Farm and into waters of the United States, without first obtaining a permit under CWA section 402, 33 U.S.C. § 1342. Finally, the Board finds no error in ALJ Charneski's penalty assessment. Accordingly, the Board affirms the Remand Decision of ALJ Moran (which incorporates the liability and penalty determinations of ALJ Charneski) and orders Smith Farm to pay a total civil penalty of $34,000.

Before Environmental Appeals Judges Anna L. Wolgast, Charles J. Sheehan, and Kathie A. Stein.

Opinion of the Board by Judge Wolgast:

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I. *STATEMENT OF THE CASE*

Appellant Smith Farm Enterprises, LLC ("Smith Farm") appeals to the Environmental Appeals Board ("EAB" or "Board") from the Decision Upon Remand that Administrative Law Judge ("ALJ") William B. Moran issued on March 7, 2008 ("Remand Dec.").[1] In the Remand Decision, ALJ Moran found that the United States Environmental Protection Agency ("EPA" or "Agency") Region 3 had properly asserted Clean Water Act ("CWA") jurisdiction over the wetlands into which Smith Farm had discharged fill material, as well as pollutants in storm water, without having obtained appropriate permits in violation of CWA sections 301(a), 402, and 404, 33 U.S.C. §§ 1311(a), 1342, 1344. ALJ Moran ultimately imposed a penalty of $34,000.[2]

II. *ISSUES RESOLVED IN THIS APPEAL*

In its brief in this appeal, Smith Farm asserts only that ALJ Moran "erred in finding Clean Water Act jurisdiction over the wetlands at issue in this case when he found jurisdiction" based on both the plurality opinion authored by Justice Scalia and the concurring opinion authored by Justice Kennedy in the Supreme Court decision in *Rapanos v. United States*, 547 U.S. 715 (2006). Respondent's

[1] Administrative Law Judge Carl C. Charneski was assigned to this case prior to the remand and issued the Initial Decision, but subsequently took a judicial position with a different federal agency. This case was then reassigned, on remand, to ALJ Moran.

[2] ALJ Moran originally imposed an $84,000 penalty, which he reduced from the original $94,000 penalty that ALJ Charneski had previously imposed. This penalty reduction was intended to account for the government's failure to provide a competent court reporter when the case was initially heard, which resulted in a second hearing. In a Supplement to the Decision Upon Remand, ALJ Moran further reduced the penalty to $34,000 in accordance with the parties' stipulations regarding the court reporter issue. *See In re Smith Farm Enterprises, LLC*, Docket No. CWA-03-2001-0022 (ALJ June 27, 2008) (Supplement to Decision on Remand) [hereinafter "Supplement to Decision on Remand"].

Appeal Brief ("Smith Farm Br.") at 4. The Complainant/Appellee, EPA Region 3 ("Region") disagrees. Accordingly, this appeal presents the following issue for resolution:

> *Did ALJ Moran err in determining that EPA has CWA jurisdiction over the Smith Farm wetlands?*[3]

In its appeal to the Board prior to remand, Smith Farm raised additional issues that were fully briefed and argued and were pending before the Board at the time of the remand. Although Smith Farm waived these issues by failing to re-raise them in its appeal brief, the Board is exercising its discretion to consider these previously briefed and argued issues pursuant to its authority under 40 C.F.R. § 22.30. *See* Order Granting Partial Reconsideration at 12-14 (Mar. 16, 2011) (explaining that the Board's decision to grant reconsideration in this case is based on its exercise of discretion given the extraordinary circumstances of this case); *see also* Procedural History in Part V.A, below. Thus, the Board resolves the following additional issues in this appeal:

> *Did ALJ Charneski err in finding that the wood chips Smith Farm discharged into wetlands without a Section 404 permit constituted "fill material" and therefore their placement into the wetlands constituted a violation of CWA section 301?*
>
> *Did ALJ Charneski err in concluding that Smith Farm had violated CWA section 301 based on his finding that the ditches were a "point source," where the Amended Complaint did not explicitly identify the ditches as a "point source?"*
>
> *Did ALJ Charneski err in evaluating the nature and extent of the violations or Smith Farm's culpability, such that the assessed penalty was excessive?*[4]

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[3] The term "jurisdiction," as used in this context and throughout this decision, refers to the scope of the regulatory authority authorized by the CWA, not the ALJ's or the Board's authority to decide this matter.

[4] In its prior appeal, Smith Farm also argued that relief from the penalty was appropriate because Smith Farm was required to undergo a second trial, at great expense, after the EPA-provided court reporter failed to prepare a transcript of the first trial. Respondent's Appeal Brief filed in CWA Appeal 05-05 at 27-30 (Jun. 3, 2005) at 40-41. This issue was resolved in part, on remand, by ALJ Moran's reduction of the penalty by $10,000, and was fully resolved by subsequent settlement negotiations, which resulted in an agreed-upon total reduction of $60,000, to arrive at a total imposed penalty of $34,000. *See* Remand Dec. at 58 (reducing the penalty by $10,000 due to necessity of re-hearing

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III. *STANDARDS OF REVIEW*

A. *Findings of Fact and Conclusions of Law*

In enforcement proceedings, such as this one, the Board generally reviews both the factual and legal conclusions of the presiding officer, in this case the ALJ, *de novo*. *See* 40 C.F.R. § 22.30(f) (providing that, in an enforcement proceeding, "[the Board] shall adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed"); *see also* Administrative Procedure Act, 5 U.S.C. § 557(b) ("On appeal from the review of [an] initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see In re Friedman*, 11 E.A.D. 302, 314 (EAB 2004) (explaining, in an enforcement proceeding, that the Board reviews "the ALJ's factual and legal conclusions on a *de novo* basis"), *aff'd,* No. 2:04-CV-00517-WBS-DAD (E.D. Cal. Feb. 25, 2005), *aff'd,* No. 05-15664, 2007 WL 528073 (9th Cir. Feb. 15, 2007).

In reviewing *de novo* an initial decision in an administrative penalty proceeding, the Board applies the "preponderance of the evidence" standard established by 40 C.F.R. § 22.24(b). *See In re Bullen Cos., Inc.,* 9 E.A.D. 620, 632 (EAB 2001) (defining standard). Also pursuant to section 22.24, the Region bears the burden of demonstrating that the alleged violation occurred. 40 C.F.R. § 22.24(a). That is, the Region must show, by a preponderance of the evidence, that the factual prerequisites exist for finding a violation of the applicable regulatory requirements. *See In re Bricks, Inc.,* 11 E.A.D. 224, 233 (EAB 2003) (rejecting an ALJ's findings of fact because the Region had failed to demonstrate that the facts were supported by a preponderance of the evidence); *see also In re Julie's Limousine & Coachworks, Inc.,* 11 E.A.D. 498, 507 (EAB 2004); *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998). A factual determination meets the preponderance of the evidence standard if the fact finder concludes that it is more likely true than not. *See Julie's Limousine,* 11 E.A.D. at 507 n.20; *In re Lyon Cnty. Landfill*, 10 E.A.D. 416, 427 n.10 (EAB 2002), *aff'd*,

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(continued)
and inviting further reduction based on proof of costs); *see also* Supplement to Decision Upon Remand at 1 (reducing further the penalty to a total of $34,000 per stipulation of the parties and incorporating the "Stipulation of the Parties Concerning Penalty" into the Decision Upon Remand). Accordingly, the Board does not consider this issue.

No. Civ-02-907, 2004 WL 1278523 (D. Minn. June 7, 2004), *aff'd,* 406 F.3d 981 (8th Cir. 2005); *Bullen*, 9 E.A.D. at 632.

B. *Witness Credibility Determinations*

Although findings of fact are reviewed *de novo,* the Board generally defers to an ALJ's factual findings when those findings rely on witness testimony and when the credibility of the witnesses is a factor in the ALJ's decisionmaking. *See Ocean State*, 7 E.A.D. at 530 (explaining that the appellant failed to demonstrate that any of the ALJ factual findings were unsupported by a preponderance of the evidence after giving due deference to the ALJ's observation of witnesses). This approach recognizes that the ALJ observes first-hand a witness's demeanor during testimony and therefore is best suited to evaluate his or her credibility. *Id.; Julie's Limousine*, 11 E.A.D. at 507 n.19; *In re Echevarria*, 5 E.A.D. 626, 639 (EAB 1994) (explaining that when a presiding officer has "the opportunity to observe the witnesses testify and to evaluate their credibility, his factual findings are entitled to considerable deference"); *In re Port of Oakland*, 4 E.A.D. 170, 193 n.59 (EAB 1992) (stating that "[T]he presiding officer's findings are entitled to weight because he has 'lived with the case'" (quoting *Universal Camera v. NLRB*, 340 U.S. 474, 496-97 (1951))); *accord NLRB v. Transpersonnel, Inc.*, 349 F.3d 175, 184 (4th Cir. 2003) ("The balancing of the credibility of witnesses is at the heart of the fact-finding process, and it is normally not the role of reviewing courts to second-guess a fact-finder's determinations about who was the more truthful witness."). When an ALJ's credibility determinations are unsupported by the record, however, the Board will not defer to the ALJ and is not bound by any findings of fact derivatively made. *See Bricks,* 11 E.A.D. at 233, 236-39 (EAB 2003) (identifying unexplained ambiguities in testimony and rejecting, as unsupported in the record, an ALJ's rationale for crediting that testimony); *see also W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 872 (6th Cir. 1995) ("[A]n administrative law judge's opportunity to observe a witness's demeanor does not, by itself, require deference with regard to his or her derivative inferences." (quoting *Penasquitos Vill., Inc. v. NLRB*, 565 F.2d 1074, 1079 (9th Cir. 1977)).

IV. *SUMMARY OF DECISION*

For reasons explained below, the Board concludes that EPA has CWA jurisdiction over the wetlands at Smith Farm and, therefore, affirms the jurisdictional determination of ALJ Moran. Additionally, the Board concludes ALJ Charneski properly determined that Smith Farm violated CWA section 301 by discharging "fill material," in the form of substantial amounts of wood chips, into waters of the United States without a CWA section 404 permit. The Board also concludes that ALJ Charneski properly determined that Smith Farm's discharge of pollutants in storm water into and through ditches and into waters of the United States without a CWA section 402 permit violates CWA section 301. Finally, the Board con-

cludes ALJ Charneski did not err in evaluating the seriousness of the violations or Smith Farm's culpability. As such, the Board affirms the liability and penalty determinations of ALJ Charneski (which were incorporated into the Remand Decision by ALJ Moran) and imposes a penalty of $34,000.

V. *PROCEDURAL AND FACTUAL HISTORY*

A. *Procedural History*

This matter returns to the Board following the Board's 2006 remand for further fact finding as a result of the Supreme Court decision in *Rapanos*, 547 U.S. 715 (2006). At the time *Rapanos* was issued, the Board was preparing to issue a decision in this matter. In response to *Rapanos,* the Board directed the Region and Smith Farm to submit a statement explaining what, if any, next steps they believed the Board should take with respect to the jurisdictional issues raised by *Rapanos*. The Region recommended a remand for the limited purpose of reopening the record to take additional evidence as to CWA jurisdiction in light of *Rapanos*; Smith Farm argued that the facts were sufficiently developed in the record to make a jurisdictional determination. After weighing the arguments from both sides, the Board found that the facts required to make a jurisdictional determination were either not present or not fully developed in the record and remanded the matter to the ALJ for additional fact finding as to CWA jurisdiction in light of *Rapanos.* In so remanding the Board stated that, on remand, the ALJ will render a "new initial decision" from which either party could appeal, and that "all documents filed in the [first] appeal * * * will be deemed a part of the record of any new appeal." *In re Smith Farm Enterprises, LLC,* CWA Appeal No. 05-05, at 6 & n.7 (EAB Oct. 6, 2006) (Remand Order).

ALJ Moran held a remand hearing from May 14 to May 23, 2007, and issued his Remand Decision on June 27, 2008. On July 14, 2008, Smith Farm appealed. The matter was stayed for nine months, pending ultimately unsuccessful settlement discussions, and Smith Farm submitted its brief on April 17, 2009. The Region filed its response brief on June 2, 2009, which was followed by Smith Farm's reply brief on July 6, 2009, and the Region's surreply brief on July 20, 2009. The Board heard oral argument on July 20, 2010.

On September 30, 2010, the Board issued a decision in this appeal in which the Board determined, among other things, that Smith Farm had waived all issues raised in its 2005 appeal (prior to remand) that were not re-raised in the current appeal. *See* Order Granting Partial Reconsideration (Mar. 16, 2010). Subsequently, Smith Farm filed a Motion for Partial Reconsideration of the Final Decision on October 13, 2010, seeking to have the Board consider outstanding issues from the 2005 appeal. Although the Board determined those issues were effectively waived, for the reasons stated in the Order Granting Partial Reconsidera-

tion, the Board has determined that, based on the unique circumstances of this case, it will exercise its discretion to consider the outstanding issues from the 2005 appeal. *See* Order Granting Partial Reconsideration at 14 (Mar. 16, 2010).

Additionally, on February 7, 2011, the Region notified the Board of a Fourth Circuit decision relevant to the jurisdictional question at issue in this case. *See* Notice of Related Case Law, Docket No. 81 (Feb. 7, 2011) (bringing to the attention of the Board the Fourth Circuit decision in *Precon Development Corporation., Inc. v. U.S. Army Corps of Engineers*, 633 F.3d 278 (4th Cir. 2011). In this Final Decision and Order, the Board considers the application of the Fourth Circuit's jurisdictional analysis in *Precon* to the facts of this case.

This Final Decision and Order supersedes the Board's September 30, 2010 opinion, and the September 30, 2010 decision is vacated. In Part VI of this decision, the Board considers the EPA's jurisdiction as determined by ALJ Moran in the Remand Decision. In Parts VII and VIII, the Board considers the outstanding liability and penalty issues from the prior appeal, respectively, as determined originally by ALJ Charneski in the Initial Decision (which was incorporated by ALJ Moran into the Remand Decision). The Board's consideration of the outstanding issues is based on the briefs and arguments made in the original appeal, CWA Appeal No. 05-05, as well as the administrative records from both appeals.

B. *Facts*

1. *Physical Description of Smith Farm*

The property at issue in this case is known as Smith Farm and it is owned by Smith Farm Enterprises, LLC, a family-owned Virginia company created to oversee the property. ALJ Charneski's Initial Decision at 3 ("Init. Dec."). Smith Farm consists of approximately 300 acres of undeveloped land, approximately 100 acres of which is crop land, and the remainder of which is forested or wooded. Remand Dec. at 1 n.2; Init. Dec. at 2-3. Much of the forested land on the property is wetlands or swamp. Remand Dec. at 5, 24 n.40; Init. Dec. at 20-21. The property straddles portions of both Chesapeake and Suffolk, Virginia, and sits on a drainage divide. Remand Dec. at 1; ALJ Remand Hearing Transcript at 317 (May 2007) ("ALJ Remand Tr."). This means that precipitation that falls on the property flows in opposite directions depending on where it lands. Remand Dec. at 1.

Water flows westerly from the western portion of Smith Farm through a number of tributary drainages known collectively as Quaker Neck Creek. Remand Dec. at 6-7; Init. Dec. at 26, 29. The distance along the drainage from Smith Farm to the portion of Quaker Neck Creek that becomes tidally influenced is approxi-

mately 2,600 feet.[5] Remand Dec. at 7 (citing Init. Dec. at 28); *see also* ALJ Hearing Transcript, vol. II, at 31-32 (Oct. 2003) ("2003 ALJ Tr.")[6] ; Init. Dec. at 29 (accepting testimony regarding the characterization of the water bodies on, and flowing from, Smith Farm); 2003 ALJ Hearing, Complainant's Exhibit ("EPA Ex.") CX-SF-102. From Quaker Neck Creek, water flows to Bennett's Creek and then to the Nansemond River. Remand Dec. at 6-7. Portions of Quaker Neck Creek and Bennett's Creek are tidally influenced. *Id.* The U.S. Army Corps of Engineers ("Corps") maintains navigation channels on the Nansemond River. *Id.* The Nansemond eventually flows to the James River and on to the Chesapeake Bay. *Id.*

Water on the eastern and southern side of the property flows east and south into tributaries of Bailey's Creek, which in turn discharges into the Western Branch of the Elizabeth River. *Id.* The Corps has issued permits for docks and marinas on portions of Bailey's Creek and the Western Branch of the Elizabeth, and they are both tidally influenced. *Id.* The Corps also maintains a navigation channel on the Western Branch of the Elizabeth. *See* 2003 ALJ Tr., vol. II., at 25. The distance along the drainage from Smith Farm to the portion of Bailey's Creek that becomes tidally influenced is approximately 4,200 feet. Remand Dec. at 7 (citing Init. Dec. at 28 (citing 2003 ALJ Tr., vol. II, at 31-32 and EPA Ex. CX-SF-102o); *see also* Init. Dec. at 29. Like the Nansemond River to the west of Smith Farm, the Western Branch of the Elizabeth River flows into the James River and then on to the Chesapeake Bay. Remand Dec. at 7 (citing Init. Dec. at 28; *see also*, *generally,* EPA Ex. CX-SF-111 (containing 1994 USGS map of area); EPA Ex. CX-SF-87 at 1070-73 (maps of Smith Farms site).

2. *History of Tulloch Ditching*

Some time after Smith Farm acquired its property in 1985, the rural character of the surrounding region began to change. Init. Dec. at 3. An interstate highway was constructed (I-664) and a large residential community was proposed for development adjacent to the property. *Id.*; 2003 ALJ Tr., vol. I, at 49, vol. III, at 207, 248-54. Robert and James Boyd, father and son managers of Smith Farm at the time the violations in this case took place, each testified that after the construction of the interstate, the property became wetter. 2003 ALJ Tr., vol. III,

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[5] As stated below, wetland regulations provide that "waters of the United States" include "[a]ll waters [that] are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters [that] are subject to the ebb and flow of the tide[.]" 40 C.F.R. § 122.2; *accord* 33 C.F.R. § 328.3(a)(1).

[6] This decision cites to transcripts from both ALJ Charneski's hearing in 2003 and the remand hearing before ALJ Moran in 2007. The transcripts from the 2003 hearing are cited by volume as well as page number because those transcripts are not consecutively paginated. The remand hearing transcripts on the other hand are consecutively numbered, so no volume number is provided.

at 208, 256. After learning that nearby property owners planned to dig special "Tulloch"-style ditches to remove the wetlands from their properties, Smith Farm began to explore the idea as well. Init. Dec. at 3; 2003 ALJ Tr., vol. III, at 222-23.

Tulloch ditches are V-shaped ditches that are constructed in the wetlands themselves and are generally used to drain the wetlands to convert them to uplands. Init. Dec. at 4. In 1998, the U.S. Circuit Court of Appeals for the District of Columbia upheld the legality of digging Tulloch ditches without a CWA section 404 permit, provided that no more than "incidental fallback" of dredged material is added to the wetlands. *See Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1410 (D.C. Cir. 1998) (overturning what was known as the "Tulloch Rule" – which had expanded the Corps' definition of discharge of dredged material to include all redeposits of dredged material – by finding, in the context of a petition for review, that the CWA does not authorize regulation of "incidental fallback" as a "discharge of dredged material" under section 404).[7]

3. *Ditch Construction at Smith Farm*

Availing itself of the *National Mining* ruling, Smith Farm, like other property owners in the region, contacted Mr. Robert Needham,[8] an environmental consultant, to explore the possibility of constructing "Tulloch" ditches.[9] Init. Dec. at 3; 2003 ALJ Tr., vol. III, at 222-23. Mr. Needham describes himself as having "expertise [] in section 404 of the Clean Water Act," after having worked for the Corps for nine years. 2003 ALJ Tr., vol. V, at 159. Smith Farm also engaged Vico

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[7] "Incidental fallback" refers to the unintentional and unavoidable deposition of small quantities of material during dredging or digging that "fall back" from the dredging or digging equipment onto the disturbed area. *See Nat'l Mining*, 145 F.3d at 1403. Prior to the *National Mining* decision, all redeposits of dredged material were considered to be discharges of dredged material subject to regulation. The Board notes that *National Mining* addressed only dredged, not fill, material.

[8] During this general time period, Mr. Needham also served as a consultant to a number of other property owners in the region who engaged in Tulloch ditching on their properties. These properties included the Lewis Farm (which was the subject of the Board's decision in *In re Vico*, 12 E.A.D. 298 (EAB 2005)), and the Southern Pines site (which is approximately three to four miles from the Smith Farm site), among others. *Vico,* 12 E.A.D. at 306-07; 2003 ALJ Tr., vol. V, at 172-74.

[9] Witnesses for both parties testified that the wetlands on the property are adjacent and contiguous to water bodies that flow away from the property. 2003 ALJ Tr., vol. II, at 24-30, 134-35; *id.*, vol. V, at 116-17. Steve Martin, the Corps' environmental scientist assigned to the Smith Farm case, testified that the Corps determined that much of the forested land on the property consisted of wetlands. In 1991, the previous property owners had requested that the Corps make a jurisdictional wetlands determination (Robert Boyd was one of these owners, although Smith Farm did not acquire the property until 1998). The former property owners withdrew their request, however, before the Corps could conduct or confirm a delineation. 2003 ALJ Tr., vol. I, at 267; EPA Ex. CX-SF-27. Robert Boyd explained that they withdrew the request after learning the cost, because they believed it would be too expensive. 2003 ALJ Tr., vol. III, at 228-29.

Construction Corporation ("Vico Construction")[10] to construct 12,350 linear feet of Tulloch ditches on the property.[11] *See* Init. Dec. at 6-7; 2003 ALJ Tr., vol. IV, at 79-80; 2003 ALJ Hearing, Respondent's Exhibits ("SF Exs.") 12 & 13. James Boyd explained that "it was an opportunity that * * * admittedly people realized that if you were working in a wetland * * * may not be around forever. * * * [T]hey would probably pass some additional regulations and so forth." 2003 ALJ Tr., vol. III, at 256; *see also* Init. Dec. at 3-4.

The first step in the ditch excavation project was to clear pathways in the forested area, which would allow the ditch excavation equipment to enter the site.[12] To this end, Smith Farm hired contractors to log approximately 11.34 acres in the forested areas on Smith Farm and to clear pathways. Init. Dec. at 8, 2003 ALJ Tr., vol. III, at 268; Stipulation 8 (June 13, 2002). In accordance with the contract, in approximately mid-December of 1998, Old Mill Land & Timber Company ("Old Mill") began to clear pathways ranging from 35 to 50 feet wide using a "Fellerbuncher," which cuts down trees using a rotating circular saw and leaves behind wood chips that are approximately one-half to three-quarter inch square and one-quarter inch thick. Init. Dec. at 8; 2003 ALJ Tr., vol. II, at 156; 2003 ALJ Tr., vol. V, at 196-97, 202. In the process, Old Mill also left behind saplings, branches, treetops, small trees, branches, underbrush, and other woody debris, known as "slash." *See* Init. Dec. at 9; 2003 ALJ Tr., vol. I, at 229, 231-32.

The second step was to "prep the paths" Old Mill created to allow the ditch excavation equipment onto them. "Prepping the paths" involved removing the

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[10] The Region named Vico Construction as a co-respondent in the original complaint. Prior to the start of the hearing before ALJ Charneski, however, the Region and Vico Construction settled their dispute and entered into a consent agreement and final order. Accordingly, Vico Construction is no longer a party to this action. *See* Init. Dec. at 1 n.1.

[11] The construction contract also called for the construction of 20,000 linear feet of "Kershaw Well Transect Lines." *See* Init. Dec. at 6-7; 2003 ALJ Tr., vol. IV, at 78-80; SF Exs. 12 & 13. Well Transect Lines allow for the placement of monitoring wells used to determine the effectiveness of the Tulloch ditches in removing the wetland hydrology. *See* Init. Dec. at 7 n.6; 2003 ALJ Tr., vol. I, at 248-49.

[12] In anticipation of the project, Vico Construction obtained a land disturbing permit from the city of Chesapeake for the purpose of "clearing, filling, excavating, grading or transporting or any combination thereof[.]" Init. Dec. at 7; SF Ex. 17; EPA Ex. CX-SF-19. Vico Construction also hired an engineering firm to prepare Erosion and Sediment Control Plans ("E&S Plans") for the construction of the Tulloch ditches, which were required to be submitted to the cities of Chesapeake and Suffolk. *See* Init. Dec. at 7; EPA. Exs. CX-SF-44, CX-SF-109. According to the E&S Plans, Vico Construction proposed to disturb a total of 10.709 acres: 3.562 acres on the Chesapeake side and 7.147 acres on the Suffolk side. *Id.* The E&S Plan for the Chesapeake side identified the location of two proposed stockpiles where Vico Construction would deposit material excavated from the ditches, along with the location and specifications for a construction entrance to the site. The parties did not propose stockpiles or construction entrances for the Suffolk side. *See* Init. Dec. at 7; 2003 ALJ Tr., vol. II, at 214-15; 2003 ALJ Tr., vol. IV, at 165, 170; EPA Exs. CX-SF-44, CX-SF-109.

slash and other woody debris that had been left behind. To accomplish this, contractors used a "Kershaw," a four-wheeled, rubber-tired machine with a rotary drum, which ground the woody slash into chips. A machine called a "Mountain Goat" then blew and scattered the chips across the corridors.[13] Init. Dec. at 6, 9; 2003 ALJ Tr., vol. I, at 229-30, 268; 2003 ALJ Tr., vol. V, at 190-92; 2003 ALJ Tr., vol. VI, at 71-73, 105. The depositing of these wood chips across the corridors formed the primary basis for the Region's CWA 404 claim and ALJ Charneski's conclusion that Smith Farm discharged "fill material" into its wetlands. Init. Dec. at 9.

After "prepping" the paths, contractors used an excavator to dig the V-shaped Tulloch ditches. Init. Dec. at 9; 2003 ALJ Tr., vol. VI, at 74. The resulting ditches were approximately four feet deep, had a two-foot flat bottom and measured 12 feet or less across. Init. Dec. at 10; 2003 ALJ Tr., vol. VI, at 76, 81. The ditches were sloped to drain toward collector ditches or other receiving waters that either preexisted or were constructed by Smith Farm, and were intended to drain water from the property. Init. Dec. at 10; 2003 ALJ Tr., vol. VI, at 125, 131-33.

4. *Wetland Enforcement Investigation*

As noted above, Tulloch ditching became prevalent in the Tidewater region following the 1998 *National Mining* decision. 2003 ALJ Tr., vol. I, at 224-25; *see also* Init. Dec. at 4. All over the region, people were moving to construct Tulloch ditches and were consulting with the Corps in how to construct the ditches in a manner that would avoid the need for a permit. Init. Dec. at 4, 6. Smith Farm and its contractors were no exception. *Id.* at 3-4.

In October, 1998, Mr. Needham contacted the Corps regarding the excavation of Tulloch ditches on the Smith Farm site.[14] Init. Dec. at 6; 2003 ALJ Tr.,

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[13] The Board notes that although the activities at issue in the *Vico* case also involved a "Kershaw" and a "Fellerbuncher," they did not involve a "Mountain Goat" which, as noted above, scattered the wood chips. The parties do not argue, nor does the Board find, that this distinction alters its analysis of whether the wood chips constituted "fill material."

[14] Prior to that time, before Mr. Needham was involved with the Smith Farm site, Mr. Needham had sent the Corps a letter in connection with a separate site – the Southern Pines site – in which he was proposed "a series of 'vee' ditches" to be dug. Mr. Needham sought clarification of the Corps' position regarding Tulloch ditching in light of the recent *National Mining* decision. Init. Dec. at 4-5; SF Ex. 10. The Corps responded on September 11, 1998, clarifying the information that Mr. Needham had provided and determining that the activities described would not require a permit "as long as [the] project *does not include a more substantial discharge* that would trigger 404 regulation." SF Ex. 11 (emphasis added) (hereinafter "Southern Pines letter"); *see also* Init. Dec. at 5-6. The Corps emphasized that the determination in the letter with respect to the proposed activities at the Southern Pines site was a "*case specific determination and does not apply to any other site*." *Id.*

vol. III, at 173. On October 30, 1998, the Smith Farm owners and Mr. Needham met with representatives of the Corps to discuss the potential construction activities on the Smith Farm property. Init. Dec. at 6; 2003 ALJ Tr., vol. V, at 177; SF Ex. 14. Following the meeting, on November 6, 1998, Mr. Needham sent a letter (the "November 6 letter") to the Corps again advising of Smith Farm's intent to dig "vee" ditches on the property in light of the *National Mining* ruling and setting forth his understanding that the excavations would be non-regulated so long as they conformed with certain conditions listed in the letter. *See* Init. Dec. at 6; SF Ex. 14. Mr. Needham testified that the November 6 letter simply confirmed the previous October 30 discussion with the Corps. 2003 ALJ Tr., vol. V, at 182. The November 6 letter was nearly identical to Mr. Needham's proposal for the Southern Pines Site.[15] *Compare* SF Ex. 14 to SF Ex. 10. In the November 6 letter, Mr. Needham also advised that Smith Farm planned to begin excavation on or after November 16 and asked the Corps to provide a response by November 13. 2003 ALJ Tr., vol. V, at 179; SF Ex. 14.

On November 12, a representative from the Corps called Mr. Needham to discuss the planned activities.[16] Init. Dec. at 10; 2003 ALJ Tr., vol. I, at 226-27; EPA Ex. CX-SF-70. Work began on the property in November 1998. *Id.* at 6. On January 6, 1999, a representative from the Corps, Mr. Martin, visited the property and expressed surprise at what he found.[17] Init. Dec. at 10, 11; 2003 ALJ Tr., vol. I, at 229. By this time, Smith Farm had begun the Tulloch ditching activities. Init. Dec. at 10.

In addition to observing cleared corridors and Tulloch ditches, Mr. Martin observed what he identified as "finger ditches," small lateral ditches excavated through wetlands to drain "little wet pockets" that the Tulloch ditches had not drained. 2003 ALJ Tr., vol. I, at 256; EPA Ex. CX-SF-96. Mr. Martin completed "wetland data sheets" for two areas of the property, which he identified as "Plot

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[15] The one difference between the proposals for the Smith Farm and Southern Pines sites was that for Southern Pines, Mr. Needham proposed the "[p]lacement of removed material onto non-wetland areas confirmed by previous wetland survey," SF Ex. 10, whereas for Smith Farm he proposed "[p]lacement of removed material onto agricultural areas * * *," SF Ex. 14. Because these terms address material placed in non-wetland areas, the Board does not deem this difference to be relevant to our analysis.

[16] Mr. Needham testified that he could not recall this conversation. 2003 ALJ Tr., vol. VI, at 38; Respondent's Appeal Brief filed in CWA Appeal 05-05 at 27-30 (June 3, 2005) [hereinafter Smith Farm Br. (2005)] at 10 n.2. Because Mr. Martin's notes of the conversation are in evidence and because ALJ Charneski observed both Mr. Martin and Mr. Needham testify and found that the conversation did take place, the Board defers to the ALJ's finding that the conversation did, in fact, occur. Init. Dec. at 6; EPA Ex. CX-SF-70; *see In re Ocean State Asbestos Removal, Inc*., 7 E.A.D. 522, 530 (EAB 1998)).

[17] Mr. Martin testified that he also visited the property on March 16, March 31, April 5, April 8, and September 10, 1999. 2003 ALJ Tr., vol. II, at 64-68; *see also* Init. Dec. at 11.

ID 1" and "Plot ID 3," and concluded that both areas were situated in wetlands.[18] Init. Dec. at 11; 2003 ALJ Tr., vol. I, at 235-37; EPA Ex. CX-SF-26. Mr. Martin testified that he used a soil auger to measure a layer of wood chips, ranging from one-half inch to five inches in the cleared areas. 2003 ALJ Tr., vol. I, at 237. The chips ranged from chips the size of quarter or a half-dollar to shards of wood six to ten inches long and one-half to two inches wide. Mr. Martin observed these chips only in the portions of the property that had been cleared; he did not observe them in the forested areas that had not been disturbed by Smith Farm's land-clearing and ditch-digging activities. Init. Dec. at 11; 2003 ALJ Tr., vol. I, at 257-58.

Mr. Martin testified that the main purpose of his site visit was to determine if Smith Farm was conducting activities that would require Corps authorization. Init. Dec. at 11; 2003 ALJ Tr., vol. I, at 269. Mr. Martin was uncertain whether the dispersal of wood chips through the cleared wetland area would be considered a deposit of fill material and whether the rutting, soil compaction, and moving of soil within the wetlands due to equipment operation would fall under the Corps' jurisdiction. Init. Dec. at 12; 2003 ALJ Tr., vol. I, at 270. He testified that what he observed during the site visit was not what he had expected to see based on Mr. Needham's earlier November 6 letter; he had expected to see a much smaller operation and did not anticipate there would be such a wide corridor or such large equipment. Mr. Martin testified that when he left the site on January 6, he told Mr. Needham that the activity he observed "wasn't what [he] envisioned" and that he "wasn't quite sure" regarding the regulatory acceptability of the activity, presumably referring to whether the wood chips constituted fill material. 2003 ALJ Tr., vol.1, at 271; *see also* Init. Dec. at 11-12.

Mr. Martin testified that, following the January 6, 1999 site visit, he had a number of questions about the legality of the construction activities. Init. Dec. at 10, 11. A discussion with Corps headquarters ensued. *Id.* at 12-13.

In June 1999, EPA obtained lead enforcement status over the Smith Farm site.[19] *Id.* at 13; 2003 ALJ Tr., vol. II, at 16. At the time EPA assumed the lead enforcement role, the Corps still had not determined whether Smith Farm's activities violated the Clean Water Act. 2003 ALJ Tr., vol. I, at 92. After conducting its own investigation, the Region determined that, by scattering substantial amounts of wood chips across the wetlands, Smith Farm had violated CWA section 301(a)

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[18] Mr. Martin testified that he also identified wetlands on the Suffolk side of the property during a March 16, 1999 site visit. Init. Dec. at 11; 2003 ALJ Tr., vol.1, at 250-51.

[19] The Corps and EPA share enforcement authority for the CWA section 404. *See* 33 U.S.C. §§ 1319, 1344; *see also Memorandum of Agreement Between the Dept. of the Army and the EPA Concerning Federal Enforcement for the Section 404 Program of the Clean Water Act* (Jan. 19, 1989) (provided in EPA Ex. CX-SF-59).

by discharging fill material into wetlands that are waters of the United States without a permit issued under CWA section 404. The Region filed an administrative complaint on May 21, 2001, which was superceded by a First Amended Complaint ("Amended Complaint") filed on November 19, 2001. The Region alternatively alleged that Smith Farm had violated CWA section 301(a) by discharging pollutants into wetlands that are waters of the United States without a section 402 NPDES permit. Amended Complaint ¶¶ 22-23, 25, at 3-4 (Nov. 19, 2001) (Docket No. CWA-3-2002-022). In a second count, the Region charged Smith Farm with violating CWA section 301(a) by discharging storm water associated with construction activity without a section 402 NPDES permit. *Id.* ¶¶ 26-35 at 5-6.

VI. *JURISDICTIONAL ANALYSIS*

As stated above, the first question the Board resolves in this appeal is: Did ALJ Moran err in determining that EPA has CWA jurisdiction over the Smith Farm wetlands? Resolution of this issue requires the examination of additional questions. The first question is which jurisdictional test (or tests) applies in light of the Supreme Court decision in *Rapanos.* The second question is, applying the appropriate test (or tests) to the facts of this case, whether EPA properly asserted jurisdiction over the wetlands.

A. *Which Jurisdictional Test Applies from Rapanos: the Plurality's, Justice Kennedy's, or Both?*

For the reasons articulated below, the Board concludes that EPA may assert CWA jurisdiction over wetlands if either the Plurality's test or Justice Kennedy's test from *Rapanos* is met. To begin, the Board briefly summarizes the statutory and regulatory framework governing wetlands and examines relevant judicial decisions interpreting that framework.

1. *Relevant Statutory and Regulatory Framework and Related Judicial Decisions*

a. *CWA*

Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a). Section 301(a) of the CWA makes it unlawful for any person to discharge pollutants from any point source into navigable waters without first obtaining an appropriate CWA permit. CWA §§ 301(a), 502(12), 33 U.S.C. §§ 1311(a), 1362(12).

As relevant here, the "discharge of a pollutant" means "any addition of any pollutant, to navigable waters from any point source."[20] CWA § 502(12), 33 U.S.C. § 1362(12). "Navigable water" is a defined term in the CWA that expressly includes all "*waters of the United States*." CWA § 502(7), 33 U.S.C. § 1362(7) (emphasis added). While the CWA does not define "waters of the United States," federal regulations promulgated under the authority of the CWA contain detailed definitions of this phrase. *See* 40 C.F.R. §§ 122.2, 232.2; *see also* 33 C.F.R. § 328.3(a).[21]

b. *Regulatory Provisions*

Agency regulations define "waters of the United States" as encompassing not only traditional navigable waters of the kind susceptible to use in interstate commerce (navigable-in-fact waters), but also waters that are subject to the ebb and flow of the tide as well as tributaries of traditional navigable waters and wetlands adjacent to covered waters. *See* 40 C.F.R. §§ 122.2, 232.2; 33 C.F.R. § 328.3(a). Wetlands are further defined as "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." 40 C.F.R. § 122.2; *accord* 40 C.F.R. § 232.2; 33 C.F.R. § 328.3(b). The crux of this primary issue before the Board is whether the wetlands on Smith Farm, into which fill material was deposited, are "waters of the United States," rendering them subject to CWA jurisdiction and its permitting requirements.

c. *Relevant Judicial Interpretations*

The Supreme Court has on several occasions addressed the proper interpretation of the phrase "waters of the United States," as applied to wetlands. The Supreme Court upheld the EPA's jurisdiction (as well as the relevant regulations) over wetlands adjacent to navigable-in-fact waterways in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985). That case concerned a wetland that "was adjacent to a body of navigable water," because "the area characterized by saturated soil conditions and wetland vegetation extended beyond the

[20] The Board has previously noted that the definition of "pollutant" includes dredge and fill material. See *In re Phoenix Constr. Servs., Inc.*, 11 E.A.D. 379, 383 n.5 (EAB 2004) and cases cited therein.

[21] As noted above, the Corps and the EPA share enforcement authority for CWA section 404. *See* note 19, above. Each of these agencies had promulgated regulations that are similar, if not identical to the other's. For ease of discussion, the term "Agency" as used in this discussion refers to the applicable enforcing agency, whether the Corps or the EPA. "Agencies" refers to both agencies. For the particular violations at issue in this case, the Region was the lead enforcing agency.

boundary of respondent's property to * * * a navigable waterway." *Id.* at 131. The Court deferred to the Agency's judgment that wetlands perform important functions such as filtering and purifying water draining into adjacent water bodies, 33 C.F.R. § 320.4(b)(2)(vii), slowing runoff into lakes, rivers, and streams to prevent flooding and erosion, *id.* § 320.4(b)(2)(iv), (v), and providing critical habitat for aquatic animal species, *id.* § 320.4(b)(2)(i). 474 U.S. at 134-35. In doing so, the Court recognized that "the [Agency's] ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the [CWA]," *id.* at 134, but reserved judgment on the question of whether the federal government had authority under the CWA to regulate wetlands other than those adjacent to open waters, 474 U.S. at 131.

Following *Riverside Bayview*, both the EPA and the Corps "clarified" the reach of their jurisdiction by promulgating the Migratory Bird Rule, which extended federal jurisdiction to solely intrastate waters that are or would be used as habitat by migratory birds. *Final Rule for Regulatory Programs of the Corps of Engineers*, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986). The Supreme Court considered the Corps' application of the Migratory Bird Rule to an abandoned sand and gravel pit that was isolated in the sense that it was unconnected to other waters covered by the CWA. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs* (*SWANCC*), 531 U.S. 159, 167, 171 (2001). The sand and gravel pit had evolved into a scattering of permanent and seasonal ponds that the Corps sought to regulate because they were used as habitat by migratory birds. *Id.* at 164-65. In *SWANCC*, the Court determined that the Corps' jurisdiction did not extend to (and the statutory phrase "waters of the United States" did not include) "nonnavigable, isolated, intrastate waters" that, unlike the wetlands in *Riverside Bayview*, did not "actually abu[t] * * * a navigable waterway." *Id.* at 165-66, 167. In so holding, the Court observed that it was the "significant nexus" between the wetlands and the navigable waters in *Riverside Bayview* that had informed its reading of the CWA, *id.* at 167, and because such a nexus was lacking with respect to the isolated ponds in *SWANCC*, the Agency regulations were overreaching as clarified and applied to those ponds in *SWANCC*. *Id.* at 167-74. Although the Supreme Court invalidated the Migratory Bird Rule, the relevant regulations remained unaltered in response to this ruling.

In 2006, while this case initially was pending before the Board, the Supreme Court considered yet again what is meant by "waters of the United States." *Rapanos*, 547 U.S. 715. In two consolidated cases, *Rapanos* and *Carabell,* the Supreme Court considered whether four wetlands lying near ditches or manmade drains that eventually emptied into traditional navigable waters were covered by the CWA. *Id.* at 729. The federal district courts and appellate courts in these cases had found CWA jurisdiction over the subject wetlands based on "adjacency" and "hydrological connections" between the subject wetlands and nonnavigable tributaries. *Id.* at 728. The result was a 4-1-4 decision, in which a plurality of the

Supreme Court, in an opinion authored by Justice Scalia and joined by Chief Justice Roberts and Justices Alito and Thomas ("Plurality"), concluded that the term "navigable waters" under the CWA means only "relatively permanent, standing or continuously flowing bodies of water," not "intermittent[] or ephemeral[]" flows of water (although in a footnote, the Plurality stated that "by describing waters as relatively permanent," it "[did] not necessarily exclude" seasonal waters or waters that dry up under extraordinary circumstances, such as drought). 547 U.S. at 732 & n.5, 739. Further, according to the Plurality, only those wetlands with a continuous surface connection to the bodies of water that are waters of the United States in their own right are properly categorized as "adjacent" to such waters and are covered by the CWA. *Id.* at 742. Because, in the Plurality's view, the facts in the record were not developed sufficiently to apply this test, the Plurality concluded the case warranted remand. *Id.* at 757.

Justice Kennedy, concurring in the result of remand only, authored a separate opinion espousing his own test, which requires that, when adjacency is not present, a "significant nexus" must be demonstrated between the subject wetlands and the downstream "navigable-in-fact" waters. That "significant nexus" is established if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." *Id.* at 759, 780.[22]

Consequently, the Supreme Court decision in *Rapanos* articulates two new and distinct tests for determining CWA jurisdiction over wetlands such as those that are the subject of this appeal. Much debate and confusion has ensued over which of these tests should be applied in subsequent jurisdictional determinations. The United States Circuit Courts of Appeal are currently divided on the subject. The First and Eighth Circuits have concluded that jurisdiction may be established using either the Plurality's test or Justice Kennedy's. The Eleventh and Seventh Circuits have determined that Justice Kennedy's test, alone, controls. The remaining circuit courts, including the Fourth Circuit, have yet to make a decision in this regard.[23] The issue of which test (or tests) applies is the first question the Board

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[22] Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented and would have deferred to the Corps' reasonable interpretation of the CWA and affirmed the judgments below. *Rapanos*, 547 U.S. at 787-810.

[23] The Fourth Circuit, in a recently issued decision in *Precon Development Corp., Inc. v. U.S. Army Corps of Engineers*, 633 F.3d 278, 288 (4th Cir. 2011), determined that it was unnecessary to address the issue of whether the plurality's "continuous surface test" may provide an alternate ground upon which CWA jurisdiction can be established, because all parties agreed that Justice Kennedy's test governed the jurisdictional determination in *Precon.* The Sixth Circuit Court of Appeals also considered which test applies, but ultimately determined it was unnecessary to decide based on the facts of the case before it. *See United States v. Cundiff*, 555 F.3d 200, 210 (6th Cir. 2009), *cert. denied,* 130 S. Ct. 74 (Oct. 5, 2009); *see also United States v. Lucas*, 516 F.3d 316, 327 (5th Cir. 2008),
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must decide.

2. *The Parties' Contentions Regarding Which Test from Rapanos Applies*

Smith Farm acknowledges that some federal appellate courts have held that jurisdiction may be established if either the Plurality's or Justice Kennedy's test is satisfied. *See* Smith Farm Br. at 49, 50; EAB Oral Arg. Tr. (Jul. 20, 2010) at 10:12-14. Smith Farm then interprets this to mean that "the Board has the discretion" to apply either test and urges the Board to use the Plurality's test in this case because it: (1) "represents the opinions of four Justices of the Supreme Court"; and (2) "encompasses a two-part definable test for jurisdiction" that is "simple and easily applied to the case, while the Kennedy opinion provides a test which is murky and ill-defined." Smith Farm Br. at 49-50; Reply at 8.

The Region posits that neither the Plurality's nor Justice Kennedy's test controls. Rather, CWA jurisdiction may be found whenever either the Plurality's standard or Justice Kennedy's standard is satisfied. Response Br. at 8. To answer the question posed – which test from *Rapanos* applies – the Board must first examine the principles of law governing the application of plurality decisions.

3. *Relevant Principles of Law Governing the Application of Plurality Decisions*

As stated above, the Circuit Courts of Appeal are divided over the issue of which test from *Rapanos* applies. The principles for each view are set forth below.

a. *Some Courts View Neither Test as Controlling*

Justice Stevens spoke directly to this issue in his *Rapanos* dissent:

> [W]hile both the plurality and Justice Kennedy agree that there must be a remand for further proceedings, their respective opinions define different tests to be applied on remand. Given that all four Justices who have joined [the dissent] would uphold the Corps' jurisdiction * * * in all

(continued)
cert. denied, 129 S. Ct. 116 (Oct. 6, 2008) (concluding that jurisdiction was established under any test espoused in *Rapanos*). The Ninth Circuit recently indicated that, although in *Northern California River Watch v. Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007), "the [C]ourt found that Justice Kennedy's concurrence in *Rapanos* 'provides the controlling rule of law for our case,'" the Court did not "foreclose the argument that [CWA] jurisdiction may also be established under the plurality's standard." *N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 781 (9th Cir. 2011).

> [] cases in which either the plurality's or Justice Kennedy's test is satisfied[, jurisdiction may be established] if *either* of those tests is met.

547 U.S. at 810 (Stevens, J., dissenting). Justice Stevens further indicated that he assumed that Justice Kennedy's approach would be controlling in most cases because "it treats more of the Nation's waters as within the Corps' jurisdiction, but in the unlikely event that the Plurality's test is met but Justice Kennedy's is not, courts should also uphold the Corps' jurisdiction. *In sum, in * * * future cases, the United States may elect to prove jurisdiction under either test.*" *Id.* at 810 n.14 (emphasis added). None of the other opinions authored in *Rapanos* expressed disagreement on this point.

In post-*Rapanos* cases, the First and Eighth Circuit Courts of Appeal have concluded that jurisdiction under the CWA may be established using either Justice Kennedy's standard or the Plurality's standard. *See United States v. Johnson*, 467 F.3d 56, 64-66 (1st Cir. 2006), *cert. denied*, 552 U.S. 948 (2007); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009). In *Johnson*, the First Circuit found Justice Stevens' instruction that jurisdiction may be established if either test is satisfied as "a simple and pragmatic way to assess what grounds would command a majority of the Court." 467 F.3d at 64. In so holding, the First Circuit rejected arguments against combining dissenting Justices with a concurrence to find a ground embraced by a majority of the Supreme Court, *id.* (*referring to King v. Palmer,* 950 F.2d 771 (D.C. Cir. 1991)), and also rejected any application of *Marks v. United States*, 430 U.S. 188 (1977) (see discussion in Part VI.A.3.b, below). *Johnson*, 467 F.3d at 62-63. The Eighth Circuit agreed with the reasoning from the First Circuit. *Bailey,* 571 F.3d at 799.

b. *Other Courts View Justice Kennedy's Test as Controlling*

In contrast, several courts have construed the Supreme Court's decision in *Marks*, 430 U.S. 188, to require that Justice Kennedy's "significant nexus" standard be treated as "the governing definition of 'navigable waters' under *Rapanos*." *See, e.g., United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007), *cert. denied sub nom. United States v. McWane, Inc.*, 129 S. Ct. 627 & 129 S. Ct. 630 (2008); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006), *cert. denied,* 128 U.S. 45 (2007); *see also N. Cal. River Watch v. Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007) (relying on the Seventh Circuit in *Gerke* and the *Marks* decision), *cert. denied*, 552 U.S. 1180 (2008); *but see N. Cal. River Watch v. Wilcox, 633 F.3d 766, 769-70, 781 (9th Cir. 2011) (clarifying in an amended decision that the holding in Healdsburg* was case-specific and that the Court had not foreclosed an argument that CWA jurisdiction may also be established under the plurality's standard).

In *Marks*, the Supreme Court stated that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[] on the *narrowest grounds*." 430 U.S. at 193 (internal quotation marks omitted) (emphasis added). In some (if not most) fractured decisions, the narrowest rationale adopted by one or more Justices who concur in the judgment will be the only controlling principle on which a majority of the Court's members agree. For example, in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) – a case considered by the Supreme Court in *Marks* – a three-Justice plurality concluded that under the First Amendment a state could not ban sexually explicit books "unless [a book] is found to be *utterly* without redeeming social value," 383 U.S. at 419 (emphasis added), while a two-Justice concurrence wrote that, under the First Amendment, a state could not suppress obscenity at all, 383 U.S. at 421, 424. *See Marks*, 430 U.S. at 193-94 (discussing *Memoirs*). Under the "narrowest grounds" approach, where one ground for a decision offered in a fractured ruling is a logical subset of another broader ground, applying the narrower test will, as a practical matter, garner the support of a majority of Justices. *See id.* at 193. So, in the case of *Memoirs*, the three-Justice opinion that would only have allowed the government to suppress obscenity under limited circumstances would also garner the support of the two-Justice concurrence who would have held that the First Amendment would not have allowed the suppression of obscenity at all. *Id.* at 193-94.

The Eleventh Circuit relied on *Marks* and determined that Justice Kennedy's test is the narrower of the two competing rationales based solely on the conclusion that Justice Kennedy's test, at least in wetlands cases, will classify a water as "navigable" more frequently than the Plurality's test. *Robison,* 505 F.3d at 1221. The Eleventh Circuit did not explain how the broader application of jurisdiction equated to a "narrower" rationale, but presumably this is because it least altered the status quo (which was the Agency's more expansive view of jurisdiction).

The Seventh Circuit also relied on *Marks* to determine that Justice Kennedy's test controls the jurisdictional question, after concluding that Justice Kennedy's test is narrower because it will "rein in" federal authority the least (i.e., have the smallest effect on the status quo) and in *most* cases will command the support of five Justices (Justice Kennedy plus the four dissenting Justices). *Gerke Excavating,* 464 F.3d at 724-25. The Seventh Circuit also acknowledged that in cases in which Justice Kennedy would vote against federal authority, he could be outvoted 8 to 1.[24] *Id.* at 725.

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[24] In Healdsburg, the Ninth Circuit, citing *Gerke*, determined that the Kennedy test was controlling, stating: "[h]is concurrence is the narrowest ground to which a majority of the Justices would
Continued

4. *The Board Concludes Jurisdiction Is Established If Either the Plurality's or Justice Kennedy's Test Is Met*

For the reasons articulated below, the Board concludes that jurisdiction may be demonstrated if either the Plurality's or Justice Kennedy's test is met. First, Smith Farm provides no valid support or legal authority for its suggestion that the Board may opt to apply only the Plurality's test in this case. Indeed, no court that has examined this issue has determined that the Plurality's test alone controls the jurisdictional question, and there is no support for such a reading of the law. *See Precon*, 633 F.3d at 288 (applying the Kennedy test to the facts to determine jurisdiction in the Fourth Circuit). In urging this option (while also urging the Board to adopt the First Circuit holding),[25] Smith Farm appears to be misreading circuit court precedent and equating Agency discretion to establish jurisdiction using either test to Board discretion to determine which test applies in an appeal. Smith Farm Br. at 49-50. As such, the Board concludes that the Plurality's test, alone, cannot control this case.

Second, notwithstanding the views of the Seventh and Eleventh Circuits, there are strong arguments against using *Marks* to determine the controlling law in *Rapanos.* In particular, the approach described in *Marks* will only reliably effectuate the views of the majority of the Supreme Court when one ground of decision offered in a fractured opinion is a logical subset of another, broader, opinion. Several courts have recognized that neither Justice Kennedy's nor the Plurality's basis for ruling in *Rapanos* is a logical subset of the other and, thus, neither can constitute a ruling on "narrower grounds." As explained by the First Circuit in *Johnson,* "[t]he cases in which Justice Kennedy would limit federal jurisdiction are not a subset of the cases in which the [P]lurality would limit jurisdiction," because Justice Kennedy's standard will exclude at least some waters that the Plurality would find to be covered. 467 F.3d at 64 (observing that "a small surface water connection to a stream or brook" would satisfy the Plurality's standard for CWA jurisdiction but might not constitute a "significant nexus" to traditional nav-

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(continued)
assent if forced to choose in almost all cases." 496 F.3d at 999-1000. The Ninth Circuit concluded: "[t]hus, as the Seventh Circuit extensively explained in *Gerke,* 464 F.3d at 724, Justice Kennedy's concurrence provides the controlling rule of law for our case." *Id.* (also citing *Marks*). Nevertheless, in a more recent decision, the Ninth Circuit explained that, in *Healdsburg*, "the [C]ourt found that Justice Kennedy's concurrence in *Rapanos*, 'provides the controlling rule of law for our [c]ase,'" but did not "foreclose the argument that [CWA] jurisdiction may also be established under the plurality's standard." *Wilcox*, 633 F.3d at 781.

[25] Smith Farm also urges the Board to adopt the Sixth Circuit holding and describes the Sixth Circuit in *Cundiff* as concluding that "the [CWA] confers jurisdiction whenever either Justice Kennedy's or the [P]lurality's test is met." Smith Farm Br. at 49, 50. As explained in note 23, above, however, the Sixth Circuit specifically declined to rule on the issue of which test from *Rapanos* controls the jurisdictional question. *See Cundiff*, 555 F.3d at 210. Thus, Smith Farm misreads the holding in that case.

igable waters under Justice Kennedy's standard). The United States has argued that "the *Marks* test is designed to identify a legal principle that enjoys the support of a majority of the Court in a fragmented decision," and that "[n]either precedent nor logic supports the * * * conclusion that Justice Kennedy's 'significant nexus' standard must be treated as the controlling rule of law even when it yields an outcome inconsistent with a controlling legal principle endorsed by eight members of the Supreme Court." Petition for Writ of Certiorari at 23 & n.8, *United States v. McWane, Inc.*, 129 S. Ct. 627 (2008) (No. 08-223), *available at* 2008 WL 3884295. The Supreme Court, itself, has acknowledged that "[i]t does not seem 'useful to pursue the *Marks* inquiry to the utmost logical possibility'" in every case. *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (quoting *Nichols v. United States*, 511 U.S. 738, 745 (1994)); *cf. Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring) (citing *Grutter* and *Marks* and noting that "[l]ower courts and regulated entities will now have to feel their way on a case-by-case basis" in determining whether particular waters are covered by the CWA under the fractured decision in *Rapanos*); *see also* Complainant's Response Br. ("EPA Br.") at 8-9.

Finally, for all of the reasons articulated by Justice Stevens and the First and Eighth Circuit Courts of Appeal, the United States (arguing on behalf of EPA and the Corps) has consistently taken the position that CWA jurisdiction may be found whenever either the standard described in the Plurality opinion or the standard described by Justice Kennedy is satisfied. This position is consistent with guidance issued jointly by EPA and the Corps subsequent to the *Rapanos* decision. *See generally* U.S. EPA & U.S. Army Corps of Engineers, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008). The Board sees no reason to determine otherwise.

Based on the foregoing, the Board concludes that CWA jurisdiction lies with EPA if either the Plurality's test or Justice Kennedy's test is met.

B. *Do the Smith Farm Wetlands Fall Within EPA's CWA Jurisdiction under Justice Kennedy's Test?*

Smith Farm argues that the Region failed to demonstrate that the Smith Farm wetlands meet Justice Kennedy's standard for jurisdiction. More specifically, Smith Farm argues that: (1) the Region failed to demonstrate that the Smith Farm wetlands *affect* the physical, chemical, and biological integrity of the receiving navigable-in-fact waters; and (2) for any effects the Region did demonstrate, the Region failed to demonstrate the *significance* of such effects on the water quality of the navigable water. Smith Farm Br. at 40. In support of these arguments, Smith Farm also asserts that ALJ Moran afforded excessive weight to the testimony of EPA witnesses and inappropriately rejected the testimony of its own witnesses.

The Region argues that ALJ Moran appropriately determined that the Smith Farm wetlands fall within EPA's CWA jurisdiction under Justice Kennedy's test. More specifically, the Region argues that it demonstrated through field observation and documentation of field indicators that the Smith Farm wetlands perform and deliver certain ecological functions that contribute to the physical, chemical, and biological integrity of the Nansemond River and the Western Branch of the Elizabeth River and, therefore, constitute a "significant nexus" as defined by Justice Kennedy.

Thus, the Board must decide whether the Smith Farm wetlands fall within EPA's jurisdiction under Justice Kennedy's test. To make that determination, the Board must first examine in greater detail the principles of law espoused by Justice Kennedy in *Rapanos* on the subject of CWA jurisdiction over wetlands. The Board must then apply these principles to the facts of this case.

1. *Justice Kennedy's Test*

As explained in Part VI.A.1.a, above, EPA has jurisdiction over wetlands that fall within the scope of "waters of the United States." According to Justice Kennedy, "waters of the United States" covers wetlands that "possess a 'significant nexus' to waters that are or were navigable-in-fact or that could reasonably be so made." *Rapanos*, 547 U.S. at 759, 779-82 (citing *SWANCC*, 531 U.S. at 167, 172; *Riverside Bayview*, 474 U.S. at 133).[26] "The required nexus must be assessed in terms of the statute's goals and purposes," which are to "'restore and maintain the chemical, physical and biological integrity of the Nation's waters.'" *Id.* at 779 (quoting CWA § 101(a), 33 U.S.C. § 1251(a)). A significant nexus exists "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' When in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'"[27] *Id.* at 780.

Justice Kennedy explained that where wetlands are *adjacent* to navigable-in-fact waters, a reasonable inference of ecological interconnection between

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[26] As noted previously, the Supreme Court in *SWANCC* determined that the Corps exceeded its authority under the CWA by defining "navigable waters" to include intrastate waters used as habitat by migratory birds. In that decision, the Court noted that, in *Riverside Bayview,* "[i]t was the *significant nexus* between the wetlands and 'navigable waters' that informed [the Court's] reading of the CWA." *SWANCC*, 531 U.S. at 167. The Supreme Court also explained that navigable waters include "waters that were or had been navigable in fact or [that] could reasonably be so made." *Id.* at 172.

[27] As does Justice Kennedy in his concurring opinion, the Board uses the terms "navigable-in-fact waters" and "downstream navigable waters" interchangeably to mean "covered waters more readily understood to be 'navigable,'" as intended by Justice Kennedy. *See, e.g., Rapanos*, 547 U.S. at 779-80.

the wetlands and the navigable-in-fact waters could be made, and jurisdiction could be presumed. *Id.* at 780, 782; *see also Precon*, 633 F.3d at 288. But where wetlands are not adjacent to navigable-in-fact waters, instead feeding into non-navigable tributaries of those waters, then agencies cannot assume that wetlands have ecological effects on the downstream navigable-in-fact waters. This is in part because, in Justice Kennedy's view, the definition of "tributary" is overbroad. *Rapanos*, 547 U.S. at 781-82. Importantly, Justice Kennedy acknowledged that for many nonnavigable tributaries, the "volume of flow," "proximity to navigable waters," or other relevant considerations would likely be significant enough to presume that adjacent wetlands would perform important functions for an aquatic system incorporating the navigable waters. *Id.* at 780-81. Nevertheless, Justice Kennedy expressed concern that the existing definition of "tributary" in Agency regulations also leaves room for regulation of tributaries "little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the [CWA's] scope in *SWANCC*." *Id.* at 782. Thus, Justice Kennedy concluded that, until Agency regulations more clearly define the term "tributary," agencies seeking to invoke jurisdiction over wetlands that feed into nonnavigable tributaries must establish the requisite nexus between the wetlands and the navigable-in-fact waters on a case-by-case basis. *Id.; see also Precon*, 633 F.3d at 288.

Justice Kennedy specifically identified the following "critical" functions that wetlands can provide as potentially affecting the "integrity" of downstream navigable-in-fact waters: pollutant trapping, flood control, and runoff storage. *Rapanos*, 547 U.S. at 779-80 (citing 33 C.F.R. § 320.4(b)(2)). In addition to these functions, Agency regulations identify food chain production and habitat provision as important wetland functions as well, among others. 33 C.F.R. § 320.4(b)(2); *see also* Remand Dec. at 14, 15.

2. *Application of Justice Kennedy's Test to the Facts of this Case*

ALJ Moran found that the Smith Farm wetlands perform various ecological functions: namely, temporary and long-term water storage (desynchronization), pollutant filtration (denitrification), and biological productivity for plants and wildlife. Remand Dec. at 46-48, 55-57. As explained below, these functions significantly affect the chemical, physical and biological integrity of the downstream navigable-in-fact waters. Also, as discussed below, these functions are precisely the kind of critical functions that Justice Kennedy contemplated as satisfying his "significant nexus" test. Moreover, the record indicates that Smith Farm's wetlands function in concert with similarly situated lands in the area, and the effects of those wetlands are not minimal or insubstantial. *See, e.g., id.* at 54, 57-58. None of the arguments offered by Smith Farm in this appeal persuade the Board to determine otherwise. Contrary to Smith Farm's assertions, and as explained more fully in Part VI.B.2.c, below, the ALJ's assessment of the credibility of the witnesses, and the appropriate weight to be afforded the witnesses' testimony, is supported by the record. Additionally, as discussed in Part VI.B.2.d, below, the

Board disagrees with the level of evidence Smith Farm suggests is required to prove a significant nexus under Justice Kennedy's test. As such, and for all of the reasons articulated below, the Board concludes that ALJ Moran correctly found that Justice Kennedy's significant nexus test was met.

a. *The Smith Farm Wetlands Perform Various Ecological Functions Affecting Downstream Navigable Waters*

ALJ Moran relied heavily on the testimony of Charles Rhodes, the Region's expert witness on wetlands ecology. *See* Remand Dec. at 46-47, 55-57. Mr. Rhodes was tasked with determining if ecological functions were being performed by the wetlands on Smith Farm and if the benefits of such functions were being delivered to the navigable waters. *Id*. at 46 (citing ALJ Remand Tr. at 664-69); *see also* ALJ Remand Tr. at 659, 667, 674. He stated unequivocally that, in his opinion, the Smith Farm wetlands perform ecological functions that are delivered from those wetlands to traditionally navigable waters, including flood flow storage and flow moderation, denitrification, and biological productivity. *Remand* at 46-47 (citing ALJ Remand Tr. at 669, 670, 674). Each of these functions is discussed further below.

(i) *Water Storage (Desynchronization)*

Wetlands function like natural tubs or sponges by storing water and slowly releasing it. This process slows the water's momentum and erosive potential, reduces flood heights, and allows for ground water recharge, which affects the flow of surface water. Ecologists use several terms to describe these effects: e.g., desynchronization, flow moderation, flow retention, flood flow reduction, temporary and long-term storage of water. Remand Dec. at 48 n.81 (citing ALJ Remand Tr. at 674). All of these terms essentially mean that wetlands can slow the flow of water from precipitation events into downstream navigable-in-fact waters. *See* Remand Dec. at 26, 46-48; ALJ Remand Tr. at 498, 677-79, 686; *see also* Office of Water, U.S. EPA, EPA 843-F-01-002c, *Functions and Values of Wetlands* at 1-2 (Sept. 2001) [hereinafter *Wetland Functions and Values*].

Mr. Rhodes testified that the Smith Farm wetlands perform the function of desynchronization. Remand Dec. at 46-47. During his two visits to Smith Farm, Mr. Rhodes – who was qualified as an expert in the field of wetland ecology and has visited approximately one hundred thousand acres of wetlands during his career – observed that the Smith Farm wetlands appeared similar to other forested wetlands on mineral flats. *Id.* at 26 (citing ALJ Remand Tr. at 669). He also noted the basic structure of the Smith Farm wetlands, including the hummocky

microtopography[28] and the hydric soils. *Id.* at 26, 46-48, 57; *see also* ALJ Remand Tr. at 674-80. Mr. Rhodes used several analogies to explain how these features serve to perform the function of desynchronization. For example, he explained that the soils act as a "sponge" to soak up the water and hold it, and then let it dribble out into the ditches and on to the receiving waters. Remand Dec. at 48; ALJ Remand Tr. at 675 (cited in Remand Dec. at 47 n.80). He also analogized the vegetation to a "shock absorber" because precipitation that falls onto the horizontal leaves and branches of the forested wetland (which consists of a tree canopy, sub-canopy, a shrub layer, and a base layer) is slowed considerably before it reaches the hydric soils. Remand Dec. at 26 (citing ALJ Remand Tr. at 677-79); *see also* ALJ Remand Tr. at 676. Mr. Rhodes also described the highs and lows of the hummocky topography at Smith Farm as providing short-term storage in the low spots. Remand Dec. at 26; *see also* ALJ Remand Tr. at 677.

Testimony from the Region's witness Steve Martin, an environmental scientist with significant training and experience in wetlands delineation in the area of Smith Farm, supported Mr. Rhodes' observations. ALJ Remand Tr. at 370, 418-19, 496-98 (scattered depressions at Smith Farm serve to store rainwater). Both Mr. Rhodes and Mr. Martin testified that physical characteristics of the Smith Farm wetlands serve to moderate the volume, velocity, and kinetic energy of water that is delivered downstream and that moderation, in turn, serves to reduce flooding, erosion, and sedimentation downstream. Remand Dec. at 48 (citing, *inter alia,* ALJ Remand Tr. at 639, 675-76); *see also* ALJ Remand Tr. at 678-80. Specific evidence of these characteristics also included photographs depicting areas of ponding, *see* EPA Ex. CX-SF-280 to 283, 291, 303, 305, 307, 348, 479, 783, and microtopography measurements, *see* EPA Ex. CX-SF-24, 310; *see also* Remand Dec. at 48 n.83. The above-described evidence in the record, relied upon by the ALJ, amply supports ALJ Moran's determination that the Smith Farm wetlands are performing the functions of flood control and runoff storage which serve to slow the flow of water from precipitation events into downstream navigable-in-fact waters.

(ii) *Water Filtration (Denitrification)*

In addition to slowing the velocity of water, wetlands can also serve to filter water that passes through. Nutrients may be absorbed by plant roots or microorganisms in the soil. Other pollutants may adhere to soil particles. In many cases, this filtration process removes much of the water's nutrient and pollutant load by the time it leaves a wetland. *See Wetland Functions and Values* at 1; *see also* Remand

[28] As expressed by Mr. Rhodes, "hummocky topography" describes land having variable topography, with high spots and low spots scattered across the area. Remand Dec. at 26 (citing ALJ Remand Tr. at 677-79).

Dec. at 48-49 & n.85 (describing how wetlands, such as Smith Farm, can filter nitrates).

Remand testimony established that the Smith Farm wetlands were functioning to filter nitrates from precipitation (i.e., denitrification). *See* Remand Dec. at 26, 46-49, 57; ALJ Remand Tr. at 681-83, 641. Denitrification essentially refers to a process whereby bacteria in the soils break down nitrates as a source of energy into a form that is then released into the atmosphere. Remand Dec. at 26. Mr. Rhodes stated that he observed "mottling" at the site and that this was an indicator of denitrification occurring. *Id.* at 48 n.84 (citing ALJ Remand Tr. at 681-82). "[A] mottle is a contrasting spot of color, and in the case of denitrification, the contrast is usually a brighter, notably more orange or red color than the surrounding gray soil matrix." *Id.* at 49 n.86. Mr. Rhodes further explained that bacteria first consume nitrates and then iron; the presence of mottled soil shows that bacteria are in this second stage and are using iron as an energy source. *Id.* The water that flows downstream is thus "denitrified," such that fewer nitrates reach the receiving waters. *Id.* at 26, 49, 57; *see also* EPA Ex. CX-SF-313 (Mr. Rhodes' Expert Report); ALJ Remand Tr. at 496, 498-500, 680-85 (describing the process of denitrification as it is occurring at Smith Farm). Mr. Martin also observed the presence of mottling at Smith Farm. ALJ Remand Tr. at 411, 498.

Additionally, Mr. Rhodes testified that rainfall in the area of the Smith Farm site is known to contain nitrogen, and that nitrates are problematic to forest estuaries in general, and to the Chesapeake Bay in particular. ALJ Remand Tr. at 682-83. Similarly, Mr. Martin testified that nitrogen is a problematic pollutant for the Chesapeake Bay watershed, in which the Smith Farm wetlands are located, because in excess it can stimulate growth of phytoplankton algae that can stimulate the growth of algae blooms, which can create dead zones in the Bay. *Id.* at 640-41. Mr. Martin testified that one source of nitrogen to the Chesapeake Bay is atmospheric deposition. *Id.* at 641; *see also* Remand Dec. at 49.[29]

The above-described evidence in the record, relied upon by ALJ Moran, amply supports the ALJ's determination that the Smith Farm wetlands serve to denitrify, or reduce the quantity of nitrates that travel in, the drainage from Smith Farm to the Chesapeake Bay, where nitrate pollution has been linked to formation of phytoplankton algae that contributes to the impairment of the Bay. Remand

[29] The Board notes that the evidence in this case is distinguishable from the evidence in *Precon* where the Fourth Circuit noted the lack of evidence as to whether the level of nitrogen in the navigable-in-fact waters was a problem. *See Precon*, 633 F.3d at 294; *see also* Part VI.B.2.d, below.

Dec. at 46-49, 55-56, 57 (citing ALJ Remand Tr. at 428-430, 498, 499-500, 641, 681, 682-83, 686-87).

(iii) *Biological Productivity for Plants and Wildlife*

Wetlands are also known for their biological productivity. Their physical characteristics provide diverse and nutrient-rich habitats for aquatic plants, fish and wildlife. Energy converted by low level organisms is passed up the food chain to fish, waterfowl, and other wildlife and humans as well. *See Wetland Functions and Values* at 2.

Mr. Rhodes testified that the Smith Farm wetlands serve the ecological function of primary production, an activity performed by plants using photosynthesis, which essentially converts carbon dioxide from the atmosphere into plant biomass. ALJ Remand Tr. at 674, 686 (cited in Remand Dec. at 26, 48-49, 57). That biomass is then used by the wetlands, but a portion leaves the site and goes (in several forms) to the receiving waters as well. *Id.* at 688. Mr. Rhodes testified that there are three forms of biomass: coarse particulate organic matter (e.g., leaves), fine particulate organic matter (e.g., decomposed leaves), and dissolved organic matter (e.g., stained water). *Id.* at 689-90. All three form the base of the food chain for both the wetlands and for downstream receiving waters. *Id.* Certain organisms use the coarse material and continue to break it down. *Id.* Other plants and animals use the finer material for their ecological needs. *Id.* Primary production creates the physical structure for food material and shelter that in turn supports various wildlife species (i.e., habitat). *Id.* at 695. Mr. Rhodes used field indicators (tannic or tea-colored water, observation of debris in water, and the presence of foam in the water) to conclude that the physical structure (microtopography) of the Smith Farm wetland area would be highly likely to support a variety of plant species and a whole range of animals, primarily insects and other less complex organisms first, but other higher organisms as well, both in the wetland and downstream. Remand Dec. at 46-49 (citing ALJ Remand Tr. at 686-700); *see also* ALJ Remand Tr. at 397-98 (discussing foam in water flowing from site), 481 (testifying about water flowing from site conveying tea-colored water), 496, 500-02 (testifying that Smith Farm wetlands hold carbon on-site for decomposition, which converts into dissolved carbon – one of the first links in the food chain for higher tropic species – which in turn is delivered to the receiving waters; also, the scattered depressions present serve to provide breeding habitat for a number of amphibians and salamanders, and the woods themselves provide breeding habitat for bird and mammal species as well).

The above-described evidence in the record, relied upon by ALJ Moran, amply supports the determination that the Smith Farm wetlands function to provide primary production for living organisms that form the basis of the food chain for both the wetlands and for downstream navigable-in-fact waters. *See* Remand Dec. at 49 & n.87 (citing ALJ Remand Tr. 686, 687-90).

b. *Smith Farm Wetlands, Alone and in Combination with Other Similarly Situated Lands, Cumulatively and Significantly Affect the Integrity of the Chesapeake Bay Watershed*

In addition to finding that the Smith Farm wetlands perform the above ecological functions, ALJ Moran also determined that these ecological functions "impact the integrity" of the downstream navigable waters. *See, e.g.,* Remand Dec. at 57, 58. As discussed above, the desynchronization at Smith Farm affects the integrity of downstream navigable waters by reducing flooding, erosion, and movement of sediment in the downstream receiving waters. *See, e.g.,* Remand Dec. at 48 (citing ALJ Remand Tr. at 498, 675-76, 678-79); *see also United States v. Cundiff*, 480 F. Supp. 2d 940, 945 (W.D. Ky. 2007), *aff'd,* 555 F.3d 200 (6th Cir. 2009), *cert. denied,* 130 S. Ct. 74 (Oct. 5, 2009). The denitrification occurring at Smith Farm affects the integrity of downstream navigable waters by reducing the number of nitrates that reach the Chesapeake Bay, where nitrate pollution is known to be problematic. Remand Dec. at 49 (citing ALJ Remand Tr. at 428-30, 498, 499-500, 641, 681, 682-83, 686-87). And, finally, the biological productivity in the wetlands contributes to biological productivity in the downstream waters, which clearly affects the overall integrity of those waters. *See* ALJ Remand Tr. at 688-90; Remand Dec. at 49 & n.87. The Board agrees with ALJ Moran that these ecological functions being performed by the Smith Farm wetlands and being delivered to the downstream navigable waters affect the integrity of those connected waters. Additionally, the record supports the conclusion that these effects are chemical (e.g., fewer nitrates), physical (e.g., reduction in velocity and kinetic energy of flow), and biological (e.g., increase in biological production, decrease in phytoplankton algae). *Cf. Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring).

Desynchronization and denitrification are precisely the kind of critical functions that Justice Kennedy explained would satisfy the requisite nexus to navigable waters. *Id.* at 779-80 (citing 33 C.F.R. § 320.4(b)(2) (describing desynchronization and pollutant trapping as important functions of wetlands, as well as food chain production)); *see also* Remand Dec. at 48 (citing, *inter alia*, *Cundiff*, 480 F. Supp. 2d at 945 (holding that a wetlands' capacity to store water is a significant nexus to traditionally navigable waters downstream)). Moreover, as stated in Part VI.B.1, above, Justice Kennedy acknowledged that, for many nonnavigable tributaries, one could presume that adjacent wetlands would perform important functions for an aquatic system incorporating the downstream navigable waters based on the "proximity" of the navigable waters alone. *Rapanos*, 547 U.S. at 780-81. As stated in Part V.B.1, above, the wetlands in this case are adjacent to nonnavigable tributaries and are no more than 4,200 feet upstream from naviga-

ble-in-fact waters.[30] The Board concludes that this distance falls within Justice Kennedy's category of wetlands where the "proximity" to navigable-in-fact waters is sufficient to presume that adjacent wetlands would perform important functions for an aquatic system incorporating the downstream navigable waters. *See Rapanos*, 547 U.S. at 780-81.[31]

ALJ Moran also recognized that the Smith Farm wetlands play a role in the overall Chesapeake Bay watershed. Remand Dec. at 57. With respect to that role, ALJ Moran cited the following testimony from Mr. Rhodes:

> There are two ultimate receiving water bodies, the Nansemond and the Western Branch of the Elizabeth. Each wetland tract contributes to the ecology and the well-being of the downstream receiving waters. It's almost like each one is a piling on a pier and if you remove one piling, the pier might stand, but the integrity is compromised. And if you keep removing piling after piling, eventually the pier is going to collapse. By the same token I've taken training in the use of cumulative environmental

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[30] As explained in Part V.B.1, above, the distance along the drainage from Smith Farm to Bailey's Creek is approximately 4,200 feet, and the Corps has issued permits for docks and marinas on portions of Bailey's creek. Although to the west, the Smith Farm wetlands are only 2,600 feet from the portion of Quaker Neck Creek that is tidally influenced, the record is not clear as to precisely where the water becomes navigable-in-fact. Certainly, the obviously nearby Nansemond River is navigable-in-fact, but the record is not clear whether any portion of Quaker Neck Creek or Bennett's Creek is also navigable-in-fact or precisely what the distance is to the Nansemond River. *See* Part V.B.1, above; *see also* EPA Exs. CX-SF-87, -102, -111.

[31] Justice Kennedy also suggested that, in some circumstances, evidence regarding the significance (quantity and regularity of flow) of the tributaries to which the wetlands are connected may be important in assessing the nexus. 547 U.S. at 786. On the other hand, Justice Kennedy noted that, "[g]iven the role wetlands play in pollutant filtering, flood control, and runoff storage, it may well be the absence of a hydrological connection (in the sense of interchange of waters) that shows the wetlands' significance to the aquatic system." *Id.* at 786. Smith Farm has not argued that quantity or regularity of flow are at issue with respect to the Justice Kennedy analysis in this case, instead focusing on whether Smith Farm actually contains wetlands, whether the functions performed by the wetlands are also being performed elsewhere, and whether the functions performed are significant. Smith Farm Br. at 40-45. Nevertheless, the Board notes that ALJ Moran concluded that the drainages from Smith Farm are tributaries to traditionally navigable waters and that they are relatively permanent waters forming geographic features. Remand Dec. at 41-42, 43. Moreover, aerial photographs and maps depicting the conveyance of water via these tributaries to navigable-in-fact waters over time, and from as early as 1920, document a quantity and regularity of flow that cannot be said to have been "remote," "irregular," insignificant or "minor" as reflected by Justice Kennedy. *See Rapanos*, 547 U.S. at 781-82, 786; *see also* Remand Dec. at 44, 45, 60-62; EPA Br. at 31-32 (providing record citations for various maps and photos of each tributary). In any case, the Board is satisfied that the proximity of the Smith Farm wetlands to the downstream navigable waters, in conjunction with the functions being performed as well as the relative significance and permanence of the tributaries, is sufficient to establish a significant nexus under Justice Kennedy's analysis.

> impacts and basically what we have here is each individual wetland contributes in total to the overall health of the ecology of the downstream receiving waters.

ALJ Remand Tr. at 708; *see also* Remand Dec. at 46-47, 57; Init. Dec. at 41-43 (quoting 2003 ALJ Tr., vol. V, at 138-40, vol. I, at 76-77); EPA Br. at 42-48.[32] Based on the foregoing, the Board agrees that the Smith Farm wetlands act, not only alone, but also in combination with other lands in the watershed and, as stated by ALJ Moran, should not be evaluated "myopically." Remand Dec. at 57. Moreover, the Board rejects Smith Farm's argument that the functions performed by the Smith Farm wetlands are insignificant because those functions are also being performed elsewhere in the watershed. *See* Smith Farm Br. at 46. Rather, the entirety of the record supports the determination that the wetlands' effects are neither speculative nor insubstantial. *See* Remand Dec. at 54, 56, 58; *see also Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring).

In sum, the ecological functions that these wetlands provide and their proximity to the downstream navigable-in-fact waters fully support ALJ Moran's determinations that the Smith Farm wetlands function both alone and in combination with other similarly situated lands in the area, and that they impact the integrity of the downstream navigable-in-fact waters in a way that is not minimal or insignificant. Moreover, the record further supports the conclusion that the impact on the connected waters is chemical, physical, and biological, and that there exists precisely the kind of significant nexus that Justice Kennedy intended would render the wetlands covered under the CWA. *See Rapanos,* 547 U.S. at 779-80; *see also* discussion in Part VI.B.1, above. As discussed in the following two sections, nothing presented by Smith Farm on appeal persuades the Board to determine otherwise.

c. *Where Factual Determinations Turn on the Credibility of a Witness, the Board Generally Defers to the ALJ*

Smith Farm argues that the ALJ afforded too much credibility to EPA witnesses, and not enough to Smith Farm's experts. *See* Smith Farm Br. at 41, 42 (complaining that ALJ Moran failed to take into consideration Mr. Rhodes' responses on cross examination and failed to consider discrepancies in Mr. Rhodes' testimony), Smith Farm Br. at 43 ("Judge Moran completely dismissed the testimony of Dr. Pierce and Dr. Straw" when he called Dr. Pierce "agenda driven" and

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[32] Dr. Dennis Whigham (Senior Scientist with the Smithsonian Environmental Research Center, called as a rebuttal witness for EPA) largely confirmed that Smith Farm contained wetlands that flowed via ditches off-site to downstream waters, that the wetlands contained mottling, tea-colored water, and foam – all indicators of the connectivity between the wetlands and the downstream waters. ALJ Remand Tr. at 1675, 1680-84, 1689-90, 1699, 1702, 1708-10, 1712-13, 1716.

Dr. Straw "honest, though incorrect"), Smith Farm Br. at 44 ("Judge Moran does not make these same criticisms of the EPA's 'late in the game' witnesses with arguably less knowledge of the Site. In fact, Judge Moran places great weight on the testimony of Dr. Dennis Francis Whigham * * * who went to the Site only one time in April of 2007"; and "[t]here is simply is no explanation on the record for this disparaging treatment of the Respondent's[] witnesses in this case."); *see also id.* at 45 ("Judge Moran completely failed to consider [Mr.] Martin's testimony on cross examination"; and "Respondent offered an abundance of evidence on the denitrification issue which Judge Moran dismissed without consideration"; and "Judge Moran [] erred in failing to consider the discrepancies in [Mr.] Martin's testimony"). Thus, Smith Farm raises questions regarding witness credibility and whether ALJ Moran appropriately relied on EPA witness testimony and appropriately disregarded Smith Farm witness testimony.

As explained in Part III.B, above, the Board generally defers to an ALJ's factual findings when those findings rely on witness testimony and when the credibility of the witnesses is a factor in the ALJ's decisionmaking. *See In re Ocean State Asbestos Removal, Inc*., 7 E.A.D. 522, 530 (EAB 1998). Only when an ALJ's credibility determinations are unsupported in the record will the Board second-guess those determinations. *See* Part III.B, above; *see also, e.g., In re Bricks, Inc.,* 11 E.A.D. 224, 233, 236-39 (EAB 2003) (rejecting the ALJ's credibility determination as not sufficiently supported by a preponderance of evidence).

In this case, the record reveals that ALJ Moran gave appropriate consideration to all of the testimony, made clear credibility determinations, and provided a rational basis in the record for each of the factual findings made. With respect to Smith Farm's witnesses, for example, ALJ Moran meticulously went through Dr. William Thomas Straw's testimony and concluded that he was an "honest, though mistaken, witness." *See* Remand Dec. at 26-31. Among other things, ALJ Moran found that Dr. Straw's testimony at trial often conflicted with the expert report he co-authored with other expert witnesses of Smith Farm. *See*, *e.g., id.* at 30 (citing Respondent's Remand Exs. 74 & 75). When asked why the report was not corrected to reflect inaccuracies discovered, Dr. Straw's excuse (which ALJ Moran determined was insufficient) was that the team "had committed [them]selves to the prose in the report." *Id.* (citing ALJ Remand Tr. at 1006). ALJ Moran concluded that such inaccuracies rendered the entire report "suspect." *Id.* at 30. ALJ Moran also found Dr. Straw to have "limited knowledge of the Site" and noted that Dr. Straw's testimony was at times helpful to Region's case. *Id.* at 29, 30.

ALJ Moran also dismissed the views of Dr. Robert Pierce, Smith Farm's wetlands expert on remand. Dr. Pierce first visited the site in January 2007 and formed the opinion that the Smith Farm wetlands were isolated, disconnected from other wetlands and navigable waters, and provided little direct function to navigable waters. *Id.* at 32-36. When asked about prior testimony and National

Wetlands Inventory mapping that contradicted his point of view, Dr. Pierce indicated that any mapping or prior testimony that was contrary to his opinion was simply false or wrong. *Id.* at 33 (citing ALJ Remand Tr. at 1238), 36 (citing ALJ Remand Tr. at 1594). In the Remand Decision, ALJ Moran described Dr. Pierce's testimony as lacking in objectivity, biased, and not credible. *Id.* at 32-36. ALJ Moran found it particularly telling that while surveying Smith Farm for the purpose of analyzing the location of wetlands there, Dr. Pierce conceded that there were times when he found hydric soils, but did not record them, or "'click' on his GPS unit to record [them]." *Id.* at 35 (citing ALJ Remand Tr. at 1620). ALJ Moran found this failure to accurately record his findings to be reflective of "[some]one intent on reaching a particular result," rather than "[some]one making factual determinations." *Id.* ALJ Moran also indicated that Dr. Pierce's "attempt[] to find any way to diminish the role of the Site's forested wetlands" as "illustrative of Dr. Pierce's bias." *Id.* at 35 n.60.

ALJ Moran similarly dismissed the opinion of William Blake Parker, Smith Farm's expert in soil science. In doing so, ALJ Moran was unmoved by Mr. Parker's success in finding mostly nonhydric soils during his second visit to Smith Farm, in 2007, given that his "predetermined purpose" was to find nonhydric soil samples on the property. *Id.* at 31-32 (citing ALJ Remand Tr. at 1121). Judge Moran noted that when Mr. Parker took samples in 2002, he employed transects[33] and took 55 samples, of which 53 were hydric. *Id.* at 32. In contrast, when he visited the site in 2007, Mr. Parker did not employ transects, which he acknowledged eliminate bias, because they were too time-consuming. *Id.* During the 2007 visit, 15 of 17 samples taken were nonhydric. *Id.* Again, ALJ Moran clearly explained that he found Dr. Parker's reason for not using transects as "suspect," and the results upon which his opinion was based to be predetermined. *Id.*

Finally, ALJ Moran found the testimony of James Boyd, the owner of Smith Farm, to be "simply not credible at all." *Id.* at 39. After testifying at length on direct examination regarding all he had done to be sure his activity would be lawful, on the important issue of whether the Corps' representative he was working with had told Mr. Boyd that there were wetlands on his property, Mr. Boyd was only able to muster the response "I don't recall." *Id.* at 39 (citing ALJ Remand Tr. at 1835).

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[33] Transects are straight lines across an area to be sampled, along which samples are taken at regular intervals. Scientists typically use these to ensure that the data they collect is representative of the area. *See, e.g.,* 2003 ALJ Tr., vol. III, at 166, 168; EPA Br. at 17. When Mr. Parker visited Smith Farm in 2002, he sampled along transects spaced approximately every 200 feet and described two to three soil samples along each transect. 2003 ALJ Tr., vol. III, at 166; ALJ Remand Tr. at 1161-62; *see also* SF Ex. 32.

Given the wealth of justification that ALJ Moran provides for why he found Smith Farm's witnesses to lack credibility, the Board cannot agree with Smith Farm that there is no persuasive explanation in the record for ALJ Moran's credibility determinations with respect to Smith Farm's witnesses in this case.

Moreover, the Board simply disagrees that ALJ Moran failed to consider portions of EPA witness testimony or that the testimony of EPA witnesses cited by Smith Farm amounts to contradictions or discrepancies. *See* Smith Farm Br. at 41, 42 (asserting that ALJ Moran failed to consider Mr. Rhodes' reluctant responses on cross-examination and failed to consider "discrepancies" in Mr. Rhodes' testimony), 45 (asserting that ALJ Moran failed to consider "discrepancies" in Mr. Martin's testimony). Rather, Smith Farm's views with respect to the testimony of EPA witnesses reflect not so much "discrepancies" as a difference in view regarding what the testimony means and what is legally required to prove CWA jurisdiction.

For example, Smith Farm's argument concerning Mr. Rhodes' testimony on cross-examination – that the functions performed by Smith Farm wetlands may also occur in non-wetlands, albeit at different rates – does not undermine the veracity of Mr. Rhodes' testimony on direct examination. *See* Smith Farm's Br. at 41 (citing ALJ Remand Tr. at 753, 756). Instead, these attempts simply reflect Smith Farm's belief in the flawed theory that, if a function may be performed by non-wetlands, then if that function is also performed by wetlands, such as Smith Farm's, it cannot have a "significant" effect on downstream navigable waters as required by Justice Kennedy. *See* Smith Farm Br. at 41, 42, 46; *see also* Part VI.B.2.b, above (rejecting Smith Farm's argument that functions performed by the Smith Farm wetlands are insignificant because those functions are performed elsewhere in the watershed). Thus, Mr. Rhodes' testimony during direct examination, that the Smith Farm wetlands perform certain functions that affect the watershed, is not discrepant from testimony during cross-examination, that those same functions may be being performed elsewhere, although likely at different rates. *Compare, e.g.*, ALJ Remand Tr. at 674-80 *with* ALJ Remand Tr. at 753-56. The same is true of Mr. Martin's testimony. Accordingly, ALJ Moran carefully evaluated the testimony in the record and provided rational bases for why he found the Region's witnesses to be credible and found Smith Farm's witnesses lacking in credibility. Based on the foregoing, the Board declines to second-guess ALJ Moran's credibility determinations and instead defers to the ALJ's well-supported judgments.

d. *EPA Was Not Required to Demonstrate How the Activities of Smith Farm Affected or Impaired Downstream Navigable Waters to Establish Jurisdiction*

Smith Farm also argues that the evidence proffered by the Region was insufficient to demonstrate a "significant nexus" between the Smith Farm wetlands

and the downstream navigable waters. *See* Smith Farm Br. at 46 (arguing that the Region failed to show the "significance" of the effects Smith Farm wetlands have on water quality, and arguing that because non-wetlands can perform the same functions as the Smith Farm wetlands, the functions identified – flood flow alteration, desynchronization, denitrification, primary production and habitat – are not significant in and of themselves), 47 (arguing that any evidence adduced was speculative or insubstantial at best), 47-48 (arguing that no evidence was adduced regarding volume of water, water storage capacity, amount of dissolved carbon leaving the site, contaminants in the water, or effects of any of the wetlands functions identified); *see also* Smith Farm Br. at 20 (listing data and information that Smith Farm views as "not collected by EPA" but "necessary to meet [EPA's] burden of proof"). By these challenges, Smith Farm raises the question of whether laboratory analysis of soil samples, water samples, or other such tests are required to demonstrate a significant nexus between the Smith Farm wetlands and the downstream navigable-in-fact waters.

To support its position, Smith Farm cites *United States v. Cundiff*, 555 F.3d 200 (6th Cir. 2009), as an example of the level of evidence required to demonstrate a significant nexus. In *Cundiff*, the Sixth Circuit examined whether a significant nexus existed between certain wetlands in Muhlenburg County, Kentucky, and the Green River, a navigable-in-fact water body. 555 F.3d at 204. The district court below had found that a nexus was established and in doing so, credited the government expert who testified that "the wetlands perform significant ecological functions in relation to the Green River * * * including: temporary and long-term storage, filtering of the acid runoff and sediment from the nearby mine, and providing an important habitat for plants and wildlife." *Id.* The district court also found that the respondent's alterations to the wetlands had interfered with the wetlands' performance of those functions. *Id.* The Sixth Circuit upheld these findings. In so concluding, the Sixth Circuit stated:

> For instance, if one dropped a poison into the Cundiff's wetlands, the record indicates that it would find its way to the * * * the Green River, therefore indicating a significant chemical, physical or biological connection between the wetlands and nearby navigable-in-fact waters.

Id. at 211 n.4. Thus, the Sixth Circuit found that the wetlands performed significant functions that significantly affected the chemical, physical and biological integrity of the Green River. In so finding, the Sixth Circuit specifically rejected *Cundiff's* asserted arguments that a "significant nexus" could *only* be proved by "laboratory analysis" of soil samples or water samples or through other tests, noting that nothing in *Rapanos* or elsewhere supported such a conclusion. *Id.* at 211. Thus, *Cundiff* provides no support for Smith Farm's contention that any particular laboratory analysis of soil samples, water samples, or other such tests are required to demonstrate a significant nexus between the Smith Farm wetlands and the

downstream navigable-in-fact waters. The Fourth Circuit recently determined the same. *See Precon Dev. Corp., Inc. v. U.S. Army Corps of Eng'rs.*, 633 F.3d 278, 294 (4th Cir. 2011) (agreeing "that the significant nexus test does not require laboratory tests or any particular quantitative measurements in order to establish a significant nexus").

Additionally, in *Cundiff,* some of the evidence relied upon in finding a "significant nexus" reflected that the Cundiffs' "dredging and filling of the wetlands at issue [had] 'undermined the wetlands' capacity to store water, which in turn, * * * affected the frequency and extent of flooding, and increased the flood peaks in the Green River,' and caused visible acid mine runoff previously stored in the wetlands to flow more directly to the Green River." *See Precon*, 633 F.3d at 293 (quoting *Cundiff*, 555 F.3d at 210-11); *see also id.* at 295 (noting the "stark contrast" between the evidence in *Cundiff* and the evidence in *Precon*). The Sixth Circuit's reliance on evidence of the actual impact from *Cundiff's* activities on the Green River, however, does not signify that this specific type of evidence is necessary to demonstrate a significant nexus under Justice Kennedy's jurisdictional test. While such evidence is certainly helpful in demonstrating a significant nexus, it may not exist in many cases where jurisdiction properly lies, particularly where the wetlands have not yet been disturbed, or where cumulative impact of "similarly situated lands" drive the significance.[34] *See Rapanos*, 547 U.S. at 780 (explaining that wetlands can possess the requisite nexus "if the wetlands, *either alone or in combination with other similarly situated lands in the region*, significantly affect the * * * integrity of waters more readily understood as 'navigable.'"). Such a requirement would place an unrealistic burden on the Agency and/or permit applicants to develop evidence that Justice Kennedy's test does not require. *See Precon*, 633 F.3d at 294, 297 (describing Justice Kennedy's test as "a flexible ecological inquiry into the relationship between the wetlands at issue and traditional navigable waters," and expressing the intent to not "place an unreasonable burden on the [Agency]"). Rather, a significant nexus requires "some evidence of both a nexus and its significance to be presented" persuasively, whether quantitatively or qualitatively, by evidence of direct impacts or extrapolation from field indicators. *See Precon*, 633 F.3d at 294. As discussed fully in Part VI.B.2.a and .b, above, the Board is satisfied that a significant nexus exists between the Smith Farm wetlands and the downstream navigable-in-fact waters.

Smith Farm also cites *Northern California River Watch v. Healdsburg,* 496 F.3d 993, 999-1000 (9th Cir. 2009), and *Environmental Protection Information Center v. Pacific Lumber Co.*, 469 F. Supp. 2d 803, 824 (N.D. Cal. 2007), in

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[34] In the permitting context, in particular, such a requirement would be unrealistic where a jurisdictional determination is made before any wetlands are disturbed. Neither Justice Kennedy's test nor the CWA require that an illegal activity occur, and a resultant adverse impact be documented, before any jurisdictional determination properly can be made.

arguing that ALJ Moran erred in analyzing the significance of Smith Farm's wetlands. *Healdsburg* involved the discharge of wastewater from a waste treatment plant into a pond that was part of a larger wetland and that was *adjacent to* a navigable-in-fact river. *Id.* at 1000. Thus, on that basis alone, under Justice Kennedy's test, a significant nexus could be presumed, and the facts of *Healdsburg* are not analogous to the facts of this case. Moreover, the fact that the Ninth Circuit determined that discharge of the chemical chloride from the wastewater was significantly affecting the receiving waters, *see id.* at 1001, does not mean that this type of evidence is required in all cases. In any event, it is not analogous to the type of effect that the alteration of the wetlands in this case would have on receiving waters. Thus, *Healdsburg* is inapposite.

Smith Farm cited *Pacific Lumber* as an example of a case where the evidence was insufficient to conclude that a significant nexus existed. That case did not involve wetlands, or a section 404 violation, but involved an alleged discharge of sediment via storm water runoff into nonnavigable streams that flowed into a navigable-in-fact river without an appropriate NPDES permit. 469 F. Supp. 2d at 809, 818-24. On the issue of whether the nonnavigable tributaries could be considered "waters of the United States," the district court found that the complainant had provided only evidence of a hydrological connection, but no evidence that the streams "significantly affect[ed] the chemical, physical and biological integrity of the other covered waters." *Id.* at 824 (citing *Rapanos*, 547 U.S. at 780). The district court stated:

> A hydrologic connection without more will not comport with the *Rapanos* standard in this case. Because the evidence indicates that certain of the [nonnavigable] streams are intermittent or ephemeral watercourses * * * [the complainant] must demonstrate that these streams have some sort of significance for the water quality of [the downstream navigable-in-fact waters]. None of the evidence offered by [complainant] – field observation, the GIS map, or expert testimony – address this part of the [significant] nexus standard.

Id. at 823. The court went on to describe evidence of "ecological connections" as the type of evidence that has been used to demonstrate a significant nexus, *id.* at 823-24 (citing *Northern California River Watch v. Healdsburg*, No. 01-04686, 2004 WL 201502 (N.D. Cal. Jan. 23, 2004), *aff'd*, 496 F.3d 993 (9th Cir. 2007)), but again the district court notes that the complainant has offered "no [such] evidence." *Id.* Unlike the substantial evidence the Region offered in this case, in *Pacific Lumber* there was no ecological evidence offered. Thus, *Pacific Lumber* also is inapposite.

Finally, the recently decided Fourth Circuit decision in *Precon* warrants further discussion here. In that case, the Fourth Circuit remanded a jurisdictional determination in a CWA § 404 case because the Court determined the record evidence was insufficient to demonstrate a significant nexus between the subject wetlands and the downstream navigable-in-fact river. *See* 633 F.3d at 281,295-96. Nevertheless, as the Fourth Circuit noted, Justice Kennedy intended that the existence of a significant nexus would have to be made on a case-by-case basis. *Id.* at 289 (citing *Rapanos*, 547 U.S. at 782). As such, the Board notes that the facts in *Precon* are distinguishable from the facts of this case in several important respects. First, the wetlands in *Precon* were separated by a berm from the nonnavigable tributary to which they were adjacent, *see id.* at 282; there was no such berm at Smith Farm. The wetlands in *Precon* were also located five to ten miles upstream from the navigable-in-fact waterbody into which they fed, *see id.* at 281, 295; Smith Farm's wetlands are no more than 4,200 feet from navigable-in-fact waters. The Fourth Circuit found both the separation of the wetlands from the nonnavigable tributaries and the distance to navigable-in-fact waters to be important in the significant nexus analysis. *See id.* at 293-96 (repeatedly noting the distance from the wetlands to the navigable river, as well as the berm). The Fourth Circuit explained that the more removed from traditional navigable waters the wetlands are, the more important it becomes for the Agency to fully document the significance of their effects on the navigable water. *Id.* The analysis in *Precon* was also largely centered around the joint guidance issued by EPA and the Corps in 2007, which was not in existence at the time of Smith Farm's violations. *See id.* at 283. Aside from these factual distinctions, the Fourth Circuit also found it significant that, "although [it knew] that the wetlands and their adjacent tributaries trap sediment and nitrogen and perform flood control functions, [it did] not even know if the [navigable-in-fact river] suffer[ed] from high levels of nitrogen or sedimentation, or if it was ever prone to flooding." *Id.* at295. Such was not the case with the record evidence in Smith Farm. For example, there was persuasive evidence that nitrates were being filtered by the Smith Farm wetlands, as well as evidence that nitrates are a significant problem in the Chesapeake Bay watershed. *See* Part VI.B.2.a.ii, above. Smith Farm's proximity to the Chesapeake and the direct connection from its wetlands to navigable tributaries that feed proximately into the Chesapeake demonstrate the relationship between the wetlands and the receiving waters. As explained more fully in Parts VI.B.2.a and .b, above, the record evidence in this case establishes a significant nexus between Smith Farm's wetlands and the downstream navigable-in-fact waters.

3. *The Board Concludes that the ALJ Appropriately Determined that Justice Kennedy's Significant Nexus Test Is Met*

Based on the foregoing, the Board concludes that a preponderance of the evidence in the record supports ALJ Moran's determination that the Smith Farm wetlands perform various ecological functions including: (1) temporary and long-term water storage (i.e., flood control or desynchronization); (2) water pollu-

tant filtration (denitrification); and (3) biological production for plants and wildlife. Moreover, a preponderance of the evidence in the record demonstrates that these functions, both alone and in combination with other similarly situated lands, significantly affect the chemical, physical, and biological integrity of the proximately located downstream navigable-in-fact receiving waters (i.e., the Nansemond River and the Western Branch of the Elizabeth River, each of which flows into the Chesapeake Bay) by preventing flooding and erosion, reducing the quantity of nitrates in the water, and producing food for downstream organisms. As such, the Board concludes that ALJ Moran appropriately determined that a significant nexus exists between the Smith Farm wetlands and the downstream navigable-in-fact waters, under the test set forth by Justice Kennedy in *Rapanos.* Accordingly, the Board affirms ALJ Moran's determination that the Smith Farm wetlands fall within EPA's CWA jurisdiction under the test set forth by Justice Kennedy.

C. *Additional Analysis Using Plurality Test Is Unnecessary*

As explained in Part VI.A, above, CWA jurisdiction may be established using either Justice Kennedy's or the Plurality's jurisdictional test. Therefore, having determined that the EPA properly has jurisdiction over the Smith Farm wetlands under Justice Kennedy's test, the Board need not analyze whether the EPA *also* has jurisdiction under the Plurality's test. *See, e.g., Precon*, 633 F.3d at 288 (determining it was not necessary to address the issue of whether the plurality's "continuous surface test," may provide an alternate ground upon which CWA jurisdiction can be established because all parties agreed that Justice Kennedy's test governed the jurisdictional determination in that case); *see also United States v Bailey*, 571 F.3d 791, 799 (8th Cir. 2009) (determining that jurisdiction over wetlands may be established if either the Plurality's or Justice Kennedy's test is satisfied, and then holding that jurisdiction over the wetlands in *Bailey* was proper based on application of Justice Kennedy's jurisdictional test alone). The Board's decision to refrain from analyzing the facts of this case under the Plurality's test should not be read as either agreement with ALJ Moran's decision on this issue, or the lack thereof. Rather, the Board's decision represents the Board's exercise of judicial restraint while taking into account the benefits of judicial economy.

VII. *LIABILITY ANALYSIS*

Having determined that the wetlands at Smith Farm are "navigable waters" over which the EPA may assert jurisdiction under the CWA, the Board next considers whether ALJ Charneski properly determined that Smith Farm's activities constituted violations of the CWA. ALJ Charneski found Smith Farm liable for two separate violations under CWA section 301(a). Specifically, Judge Charneski found Smith Farm had discharged fill material, in the form of wood chips, into wetlands that were waters of the United States without a permit as required under

CWA section 404 ("404 Violation"). Init. Dec. at 29, 48. Judge Charneski also found that Smith Farm had discharged pollutants in storm water in connection with construction activities without first obtaining an NPDES permit as required under CWA section 402 ("402 Violation"). *Id.* at 36, 48. Smith Farm previously challenged the liability determination with respect to each of these violations. These challenges are analyzed in turn below.

A. *The 404 Violation: Discharge of Fill Material into Waters of the United States Without a Section 404 Permit*

1. *Summary of Issue for the 404 Violation*

In its prior appeal brief, Smith Farm presented two primary arguments with respect to the 404 Violation. The first argument was that the wood chips Smith Farm deposited into wetlands did not constitute "fill material" under the Corps' definition of that term because the wood chips were "randomly dispersed" for the purpose of disposal, and were not deposited for the "primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of [a] waterbody" as meant by Corps regulations. *See* 33 C.F.R. § 323.2(d) (1998); Respondent's Appeal Brief filed in CWA Appeal 05-05 at 27-30 (June 3, 2005) [hereinafter "Smith Farm Br. (2005)"]. The second argument Smith Farm made was that the amount of wood chips present on the property was not "substantial," and, therefore, ALJ Charneski's reliance on his finding of "substantial amounts" of wood chips to find Smith Farm in violation of the CWA was in error. Smith Farm Br. (2005) at 31-33.[35]

Although Smith Farm bifurcates its arguments with respect to the 404 Violation, the Board concludes that the question of whether the discharge was "substantial" is subsumed in, and not separate from, the analysis of whether the wood chips deposited constituted "fill material," and therefore the Board considers these

[35] The Region disagreed, contending that the wood chips were "fill material" under either definition. *See* Complainant's Appellate Br. as to Liability for Violation of Section 301 of the Clean Water Act at 3 ("Region's Liability Br. (2005)"). The Region argues that Smith Farm misconstrues the importance of the "purpose" in the Corps' definition and points out that the Corps' definition sought to distinguish between discharges that would be regulated under section 404 as opposed to section 402, not to exempt certain discharges from CWA regulation altogether. *See id.* at 2-3, 15, 28-33 (relying in part on *Kentuckians for the Commonwealth Inc. v. Rivenburgh*, 317 F.3d 425, 447-48 (4th Cir. 2003)). The Region also argues that the evidence in the record demonstrated that the wood chips Smith Farm discharged in fact changed the elevation of the wetlands and was done in connection with the construction of access paths and "was a [necessary] part of an overall activity designed to turn wetlands into dry land." *Id.* at 16, 21.

two arguments together.[36] Thus, the question the Board must decide with respect to the 404 Violation is: Did ALJ Charneski err in finding that the wood chips Smith Farm deposited into wetlands without a Section 404 permit constitute "fill material" and, thus, their placement in the wetlands constituted a violation of CWA section 301?

2. *Relevant Principles of Law*

As explained above, CWA section 301 prohibits the discharge of pollutants from any point source into navigable waters without first obtaining an appropriate CWA permit. CWA §§ 301(a), 502(12), 33 U.S.C. §§ 1311, 1362(12). CWA section 404 specifically requires a permit for the "discharge of * * * fill material into * * * navigable waters [that is] incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was previously not subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters [may] be reduced." CWA § 404(f)(2), 33 U.S.C. § 1344(f)(2).[37]

Although the CWA does not define the term "fill material," both Corps and EPA regulations do. At the time of the alleged violations, the definition of "fill material" in EPA's regulations differed from the definition that appeared in the Corps' regulations.[38] EPA defined "fill material" as "any 'pollutant' which replaces

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[36] ALJ Charneski's conclusion that the wood chips constituted "fill material" was likewise premised upon his determination that the amount of wood chips deposited on the Smith Farm wetlands was "substantial." *See* Init. Dec. at 30-32.

[37] The Board, in Part VI of this decision (entitled "Jurisdictional Analysis"), determined that the wetlands into which Smith Farm is alleged to have discharged fill material are navigable waters as meant by the CWA. Additionally, the term "pollutant" includes "fill material." *See In re Phoenix Constr. Servs., Inc.*, 11 E.A.D. 379, 383 n.5 (EAB 2005) (and cases cited therein); *see also United States v. Pozsgai*, 999 F.2d 719, 725 (3d Cir. 1993) (identifying fill material as a pollutant), *cert. denied*, 510 U.S. 1110 (1994); *United States v. Banks*, 873 F. Supp. 650, 657 (S.D. Fla. 1995) (identifying fill material and dredged soil as pollutants), *aff'd*, 115 F.3d 916 (11th Cir. 1997), *cert. denied*, 522 U.S. 1075 (1999). The focus of this part of the Board's analysis is the meaning of the term "fill material" in the CWA and implementing regulations.

[38] In 2002, subsequent to the activities from which this case arises, the Corps and EPA through a joint rulemaking process harmonized their respective definitions of "fill material." Init. Dec. at 30 n.27 (citing 67 Fed. Reg. 31, 129 (May 9, 2002)); *see also In re Vico Constr. Co.*, 12 E.A.D. 298, 324 n.56 (EAB 2005). The current definition of "fill material" is identical in both Corps and EPA regulations, and provides:

> (e)(1) Except as specified in paragraph (e)(3) of this section, the term fill material means material placed in waters of the United States where the material has the effect of:
>
> (i) Replacing any portion of a water of the United States with dry land; or

Continued

portions of the 'waters of the United States' with dry land or which changes the bottom elevation of a water body for any purpose." 40 C.F.R. § 232.2 (1998). The Corps' regulations defined "fill material" as "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of an [sic] waterbody." 33 C.F.R. § 323.2(e) (1998). The Corps' regulations further provided that "the term ["fill material"] does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under section 402 of the [CWA]." *Id.* The main difference between the two regulations is the Corps' focus on the "primary purpose" of the discharge.[39]

Again, the issue before the Board is whether the wood chips deposited by Smith Farm constituted "fill material" such that Smith Farm's discharge of the fill material into wetlands without a Section 404 permit constituted a violation of CWA § 301. The Board encountered and resolved this question on nearly identical facts in *In re Vico Construction Corp.*, 12 E.A.D. 298 (EAB 2005). That case involved Tulloch ditching operations at a different site in the same geographical area, during the same time period, and by some of the same contractors. *See Vico,* 12 E.A.D. at 303-06 (describing similar facts), 309 n.26 (referencing this Smith Farm case as also pending), 312 n.38 (explaining that oral argument on liability in *Smith Farm* and *Vico* were held simultaneously), and 306-08, 334 (referencing Mr. Needham as a consultant in both ditching projects). The appellants in *Vico*

(continued)

> (ii) Changing the bottom elevation of any portion of a water of the United States.
>
> (2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.
>
> (3) The term fill material does not include trash or garbage.

33 C.F.R. § 323.2(e); *see also* 40 C.F.R. § 232.2.

[39] The Corps and the EPA also define the term "discharge of fill material," but do so identically:

> The term *discharge of fill material* means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary to the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt or other materials for its construction; site-development fills for recreational, industrial, commercial, residential and other uses; causeways or road fills; dams and dikes; artificial islands * * * .

33 C.F.R. § 323.2(f); 40 C.F.R. § 232.2. In this case, it is the deposit of wood chips into the wetlands by Smith Farm that has been found to constitute the "discharge of fill material."

also argued, as Smith Farm does here, that the wood chips placed in wetlands in connection with forest clearing activities did not constitute "fill material" because the discharge was not "intended for the primary purpose of replacing an aquatic area with dry land or changing the bottom elevation of the waterbody." *Id.* at 298. The Board disagreed. In doing so, the Board explained that:

> Wetlands are a vital component of an overall watershed, and their preservation is an important element of the Act's protection of our national waters. The CWA's permitting programs provide the basis for the preservation of wetlands, in particular through the requirements of section 404. Because of the importance of wetlands as natural resources, it is vital that construction activities carried out on wetlands either fall clearly outside the scope of the permit requirements or are evaluated and undertaken within the context of the permitting program – a program that intends both the proper stewardship of wetland resources and the thoughtful reconciliation of competition between wetlands protection and developmental land use. Indeed, * * * the permit process triggers an important evaluation of the direct impacts of a project as well as its broader implications for local resources. This kind of evaluation is particularly important where, as here, the activity is part of a broader pattern of development that will have a cumulative impacts on the local watershed.

Id. at 315-16 (citations and footnotes omitted). With these principles in mind, the Board considers the facts and arguments made in this case.

3. *Analysis of Whether the Wood Chips were "Fill Material" as Meant by Implementing Regulations*

Smith Farm essentially contends that its activities fell outside the scope of the section 404 permitting regime because they did not discharge "fill material" under either the Corps' or the EPA's definition of the term. Smith Farm Br. (2005) at 27-31. According to Smith Farm, the purpose of the discharge is central to the analysis. *Id.* at 29. Smith Farm argues that the Corps' definition is controlling because the Corps was acting as the permitting and regulatory authority with respect to the construction activities taking place on the property. *Id.* at 30-31. Smith Farm also contends that, to the extent differing definitions would impact the result, the Board should apply a rule of lenity, citing *United States v. Granderson*, 511 U.S. 39, 54 (1994), and *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643 (2d Cir. 1993).

Notwithstanding Smith Farm's contentions, the Board finds, as it did in *Vico*, that it is unnecessary to decide which Agency's definition applies to the activities at Smith Farm, because the Board concludes that, under either definition, the wood chips Smith Farm deposited constituted fill material. *See Vico*, 12 E.A.D. at 318-19. The Board therefore analyzes Smith Farm's activity under both definitions.

i. *The Wood Chips Deposited by Smith Farm Constituted Fill Material Under the EPA Definition*

To determine whether the wood chips deposited into the Smith Farm wetlands constituted fill material under EPA's definition of the term, the Board first examines whether the wood chips were present in sufficiently substantial quantities to have replaced the wetlands with dry land or to have changed the bottom elevation of the wetland. *See* 40 C.F.R. § 232.2 (1998). This question is essentially factual.

Smith Farm maintains that the wood chips were not fill material because the "chipping of wood * * * did not make the wetlands dry," Smith Farm Br. (2005) at 28, or change the bottom elevation of the wetlands. *Id.* at 30-31. Judge Charneski, however, credited the Region's evidence with respect to the amount of wood chips present in the Smith Farm wetlands. *See* Init. Dec. at 31. Specifically, Judge Charneski found, based on witness testimony and photographic evidence, that after clearing timber for pathways or corridors ranging from 25-50 feet wide, Smith Farm ground saplings and other woody debris left behind into wood chips and distributed them along the corridors. *Id.* at 9, 31, 32. In particular, Judge Charneski cited Mr. Martin's observation of a layer of wood chips in the wetlands, ranging from one-half inch to five inches deep. *Id.* at 11, 31; 2003 ALJ Tr., vol. I, at 237. Some of these wood chips were as small as a quarter, while others were up to ten inches long and two inches wide. Init. Dec. at 11; 2003 ALJ Tr., vol. I, at 257. ALJ Charneski also found that EPA's inspectors measured a layer of wood chip and soil mixture that was up to six and one-half inches deep. Init. Dec. at 16, 31; 2003 ALJ Tr., vol. I, at 131-34, 148-49, 237, 257-58; *see also* EPA Ex. 40 (photos 0793 & 0794); EPA Ex. 26 (photos 9 & 10). These wood chips were present only in the cleared wetland areas, not in the undisturbed, forested areas. Init. Dec. at 11, 31; 2003 ALJ Tr., vol. I, at 258. Based on all of the evidence, Judge Charneski concluded that Smith Farm intentionally discharged substantial amounts of wood chips onto the wetlands, which had the "inevitabl[e] result[] of replac[ing] an aquatic area with dry land or chang[ing] the elevation of a water body," thereby satisfying EPA's then-applicable definition of "fill material." *See* Init. Dec. at 30, 32. Thus, ALJ Charneski ruled that the discharge of the wood chips constituted an "unlawful discharge of a pollutant" in violation of CWA § 301(a). *Id.* at 31, 32, 48.

As discussed extensively above, the Board generally defers to an ALJ's factual findings when those findings are informed by witness testimony at an evidentiary hearing. *See* Part III.B, above (citing *In re Julie's Limousine & Coachworks, Inc.,* 11 E.A.D. 498, 507 (EAB 2004); *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998)). Nothing in Smith Farm's 2005 Appeal Brief provides any basis on which to question the credibility of the testimony ALJ Charneski relied upon.[40] Although the wood chips at Smith Farm *may* not have been quite as extensive as the 1 to 14 inch depth of wood chips found in the wetlands in *Vico*, the evidence in the record unquestionably supports the conclusion that there was a substantial amount of wood chips present in the Smith Farm wetlands. Thus, the Board finds no error in ALJ Charneski's determination that Smith Farm's discharge of wood chips had the practical effect of replacing an aquatic area with dry land or changing the bottom elevation of the wetland as meant by 40 C.F.R. § 232.2 (1998) and, as such, satisfied EPA's definition of the term "fill material."[41] Init. Dec. at 32; *accord Vico*, 12 E.A.D. at 323 n.54.

ii. *The Wood Chips Deposited by Smith Farm Also Constituted Fill Material Under the Corps' Definition*

Next, the Board analyzes whether the wood chips constituted "fill material" under the Corps' definition of that term. In doing so, the Board considers whether the wood chips were discharged for "the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of [a] waterbody." 33 C.F.R. § 323.2(e) (1998). Smith Farm argues that its primary purpose for mowing the slash and discharging the wood chips into the wetland was not to

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[40] ALJ Charneski also found that Smith Farm, by presenting only the testimony of a soil scientist who did not visit the site until 2000, or take any samples until 2002, well after the Tulloch ditching began, did not mount a serious challenge to the Region's evidence regarding the quantity of wood chips. Init. Dec. at 32.

On appeal, Smith Farm argues that the Board should not accept ALJ Charneski's evidentiary findings and, specifically, criticizes the EPA inspectors for "walk[ing] and sampl[ing] only along a sliver of the 300 acre extensive site." Smith Farm Br. (2005) at 33. As explained in *Vico*, however, the Board "need not find a change of elevation across the entire disturbed area." *Vico,* 12 E.A.D. at 322 n.53. Rather, it is enough for the Board to conclude that Smith Farm's activities resulted in the deposition of "an amount of wood chips sufficient to create localized changes in elevation." *Id.*

[41] As in *Vico,* the Board is not persuaded by Smith Farm's argument that the discharge of wood chips did not, in fact, change the bottom elevation of the wetlands. *See* Smith Farm Br. (2005) at 30. It is clear in this instance that there were significant deposits of wood chips that did change the elevation of the wetlands – that is, the elevation of areas within the wetland would be different were the wood chips not present. Indeed, Smith Farm's consultant, Mr. Needham, admitted that in a separate previous matter the Corps had warned him that significant accumulations of wood chips could be considered fill material. Init. Dec. at 35; 2003 ALJ Tr., vol. VI, at 11 (affirming that he had had communications with the Wilmington District of the Corps, during which he was warned that significant accumulations of wood chips could be considered to be fill material).

replace an aquatic area with dry land or change the bottom elevation of a waterbody, but instead was merely to dispose of the material by "randomly distribut[ing]" it behind the Kershaw. Smith Farm Br. (2005) at 27-29. Thus, Smith Farm argues, under the Corps' definition, the discharge of wood chips cannot be considered a discharge of "fill." *Id.* at 31.

Again, the Board considered this same argument under similar facts in *Vico.* There, the Board rejected the suggestion that the primary purpose element of the Corps' definition requires the Board to "look in isolation at the point at which the pollutant is released into the wetlands, ignoring the broader context of the activities leading to the discharge." *Vico*, 12 E.A.D. at 320. Rather, the Board explained that it looks at "the *effect* of the discharge as well as the ultimate purpose of the underlying activity" in considering whether a discharge constitutes fill material. *Id.* at 319. As the Board explained in *Vico*, this approach is consistent with federal Circuit Court precedent. *Id.* at 319, 323-26.

Specifically, Fourth Circuit precedent in *Kentuckians for the Commonwealth, Inc. v. Rivenburgh,* 317 F.3d 425 (4th Cir. 2003), supports the Board's rationale in this case. In *Kentuckians*, the Fourth Circuit considered the Corps' definition of the term "fill material." That case affirmed the Corps' issuance of a 404 permit for the deposit of mining overburden into nearby valleys that contained navigable waters where "the valley fills serve[d] no purpose other than to dispose of [mining waste]." *Id.* at 439. In affirming, the Fourth Circuit determined that the Corps' definition of "fill material" was consistent with the CWA, and that it was reasonable for the Corps' to take into account the effects of a discharge (i.e., whether the discharged material displaces water or changes the bottom elevation of a water body) in determining whether a discharge constitutes "fill material." *Id.* at 448.

The Fourth Circuit in *Kentuckians,* and this Board in *Vico*, each recognized that an analysis of the effects of the discharge is an appropriate consideration in determining whether the discharge is "fill material," in part because it is consistent with the stated objectives of the Corps' regulation. In particular, "the Corps views its definition of 'fill material' as creating a practical bifurcation of the regulatory framework, [addressing] those discharges that can be effectively regulated under the NPDES provisions in the section 402 permit program, and addressing under section 404 those discharges that primarily have the effect of changing the bottom elevation of a waterbody or replacing a waterbody with dry land." *Vico*, 12 E.A.D. at 320 (citing 42 Fed. Reg. 37,122, 37,130 (July 19, 1977) (explaining in this context that the exclusion of waste from the definition of "fill material" was meant to address "industrial and municipal discharges of solid waste materials * * * which technically fit within our definition of 'fill material' but which are intended to be regulated under the NPDES program * * * such as sludge, garbage, trash, and debris in water"); *see also Kentuckians*, 317 F.3d at 447. Thus, the Corps' definition was meant to differentiate section 404 violations from section 402 vio-

lations based on their "primary purpose," not to exempt certain activities from regulation.[42]

In the present case, the record clearly demonstrates, and Smith Farm does not dispute, that the first step in the Tulloch ditch project was to clear paths through the wetlands in which the ditches themselves would be constructed. *See* Init. Dec. at 9. Before the ditches could be dug, however, Smith Farm needed to clear the timbered paths of slash and stumps so that the excavation equipment could be brought in. *See id.* ("The purpose of th[e] second phase clearing operation was to allow * * * [c]ontractors to get [the] ditch digging equipment (i.e., the excavator and haul trucks) into the pathways."). Thus, the Kershaw ("a four-wheel, rubber-tired piece of equipment which has a rotary drum") was used to "prep[] the paths," by grinding the slash into wood chips that were then scattered along the tracts through the property's wetlands. *See id.*[43]

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[42] The Board notes that the Region argued, alternatively, that, if the wood chips were not "fill material," thus requiring a permit under CWA § 404, then the discharge would have required a permit under CWA § 402. Although the parties argued this alternative theory below, ALJ Charneski declined to rule on whether the discharge, if not regulated under section 404, would require a 402 permit. *See* Init. Dec. at 20 n.32; Transcript of Oral Argument before the Board in CWA Appeal 05-05, held on July 14, 2005 (incorrectly dated Jul. 14, 2004) ("EAB Tr. (2005)") at 33 (acknowledging this issue was argued before ALJ Charneski). Given the intent of Agency regulations to assign discharges into waters of the United States, as appropriate, to either the Section 402 permitting program or the section 404 permitting program, the Board observes that, as a matter of law, if a reviewing federal court were to overturn the EPA's interpretation of "fill material" as applied here and conclude that the wood chips deposited by Smith Farm fall outside of the definition of "fill material," then as a matter of law, all the elements of a 402 violation would have been met. In other words, Smith Farm discharged wood chips, which indisputably are pollutants under the CWA, 33 U.S.C. § 1362(6) (defining "pollutant" to include "biological materials * * * discharged into water"), from a point source (the Kershaw, *see* Init. Dec. at 9, 29-30), into waters of the United States (the wetlands, *see* Part VI, above), without a 402 permit. In other words, Smith Farm cannot have it both ways. The wood chips are either fill material, in which case they needed a 404 permit, or a pollutant discharged from a point source, in which case they needed a 402 permit.

[43] Smith Farm suggests that one of the reasons for grinding up the slash was to avoid constructing a "corduroy road," which would have triggered a section 404 permitting obligation. Smith Farm Br. (2005) at 13, 27; 2003 ALJ Tr., vol. V, at 187-89. As in *Vico*, however, the Board "fail[s] to see how the processing of the slash into wood chips, and the discharge of those wood chips on the soil surface in connection with the construction of pathways through the wetlands makes the resulting debris any less likely to constitute fill for the purposes of the CWA." *Vico*, 12 E.A.D. at 320 n.49. This is true regardless whether Smith Farm's stated intent was to build a roadbed. *See* 2003 ALJ Tr., vol. VI, at 74-75 (Mr. Paxton explained that the Kershaw mowed over the chips to shear them up, without blowing or directing them anywhere, but that no one at any time placed wood chips in the paths "as a roadbed."); *cf.* 2003 ALJ Tr., vol. I, at 230 (Mr. Martin testified that Mr. Needham and Mr. Blevins told him that a reason for grinding the logging slash was "to avoid sloppiness; that the equipment manipulating or operating over this uneven surface was more likely to spill material, and they were trying to avoid that."). The only question of import here is whether the deposit of wood chips was a part of a process that ultimately was intended to "replace[] an aquatic area with dry land or [] chang[e] the bottom elevation of [a] water body," which was precisely the intent of the activities at

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Fifth Circuit precedent addressing the Corps' 1977 definition of "fill material" also bolsters the Board's conclusion. In *Avoyelles Sportsman League, Inc. v. Marsh*, 715 F.2d 897, 924-26 (5th Cir. 1983), the Fifth Circuit recognized the significance of a project's overall objective in the context of evaluating whether a discharge constitutes "fill material" under the CWA. The court found that the effect of material filling in sloughs and leveling land, along with an overall intent to remove the area's wetland hydrology, constituted activities that were designed to "replace the aquatic area with dry land." *Id.* at 924-25 (analyzing whether the discing and burying of ashes and unburned vegetative material into pits dug into a wetland constituted "fill material" under the 1977 Corps' definition of that term). This reasoning also was affirmed by the Fifth Circuit in *Save Our Wetlands, Inc. v. Sands*, 711 F.2d 634, 647 (5th Cir. 1983) (relying on the rationale of the district court in *Avoyelles* to conclude that vegetation discharged into wetlands in conjunction with the conversion of wooded swampland to swampland with shrubs, grasses, and other low growth was not "fill material" because the objective was not to convert the swampland to dry land).

Based on the evidence in the record, the Board concludes that the processing and discharge of the wood chips into the property's wetlands was not merely a method of disposal of the woody debris remaining after the completion of the timbering operations, as Smith Farm claims, but rather an integral and inexorable step in the construction of a traversable pathway through the wooded wetlands, without which the conversion of the wetlands to dry lands would not have been possible.[44] *See Vico*, 12 E.A.D. at 321. As Judge Charneski stated, "[g]iven the intentional conduct of Smith Farm to discharge [the wood chips] onto the wetlands, and given the obvious and expected result that such a discharge, as had

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(continued)
Smith Farm. *See* 33 C.F.R. § 323.2(e) (1998); Init. Dec. at 4-9 (finding that Smith Farm's activities were intended to construct Tulloch style ditches which serve to drain wetlands).

[44] Smith Farm asserts that "[t]he Initial Decision recognized that the wood chips were spread only to get rid of the material (to 'clear the saplings and other woody debris (also called "slash") left behind in the paths,' * * *) and noted that the chips were just 'randomly distributed' out the rear, not directed to any particular area." Smith Farm Br. (2005) at 27-28 (quoting Init. Dec. at 9). The Appellants in *Vico* made a similar assertion. *See Vico*, 12 E.A.D. at 321 & n.51. However, the Board notes, as was the case in *Vico*, that ALJ Charneski did not conclude that the discharge of wood chips was for the primary purpose of disposal. In the portion of the Initial Decision quoted by Smith Farm, ALJ Charneski was merely describing the physical action of the equipment, unrelated to any discussion of "purpose" in the regulatory context. Indeed, ALJ Charneski explained that the purpose of getting rid of the material "was to allow Paxton Contractors to get its ditch digging equipment * * * into the pathways." Init. Dec. at 9. This description is consistent with the Board's conclusion that the grinding of slash was a necessary and integral step in the construction of a traversable pathway for equipment. Smith Farm's counsel affirmed this finding at oral argument. *See* EAB Tr. (2005) at 22 (Smith Farms' counsel explained that "Judge Charneski even found that * * * clearing the timber was only the first step. The second step was to clear the saplings and other woody debris. * * * [T]he purpose of the second phase of the operation was to allow Paxton to get the equipment in there.").

occurred in this case, would inevitably serve to replace an aquatic area with dry land or change the elevation of a waterbody," it would "def[y] logic to conclude that Corps' definition of 'discharge of fill material' was not met in this instance." Init. Dec. at 32; *accord Vico,* 12 E.A.D. at 322 (explaining on nearly identical facts that "[t]he trench digging and the land clearing, including the processing of slash into wood chips, did not occur in a vacuum, but rather were integral steps in furtherance of a project ultimately intended to remove the wetland characteristics of the * * * property").

Moreover, it would be contrary to the regulatory purpose of the CWA for the Board to ignore the fact that the overarching purpose of the construction project at the Smith Farm site was to replace the wetlands with dry land. *See* EAB Tr. (2005) at 10 (counsel for Smith Farm acknowledging that the primary goal of digging the ditches was to drain the wetlands). Thus, the Board concludes that the purpose for the discharge of the wood chips ultimately was to "replace the aquatic area with dry land" or change the bottom elevation of a water body and, thus, the discharge of wood chips meets the Corps' definition of "fill material."

4. *Conclusion: Smith Farm's Discharge of Wood Chips Constituted a Violation of CWA Section 301 by Discharging "Fill Material" into Navigable Waters Without a CWA Section 404 Permit*

Based on the foregoing, the Board concludes that Smith Farm's discharge of wood chips constituted "fill material" under either EPA's or the Corps' definition of that term. Accordingly, the Board affirms ALJ Charneski's determination that Smith Farm violated CWA section 301(a) by discharging fill material into waters of the United States without first obtaining a permit under CWA section 404.

B. *The 402 Violation: Storm Water Runoff Associated with Construction Activity into Waters of the United States Without a CWA § 402 Permit*

The second violation for which Smith Farm was found liable involved storm water discharges in violation of CWA Sections 301 and 402. Specifically, ALJ Charneski concluded that Smith Farm violated CWA section 301, 33 U.S.C. § 1311, by "discharging pollutants associated with storm water, without having obtained [an NPDES permit] pursuant to [CWA section 402]." Init. Dec. at 48. In so concluding, ALJ Charneski found, among other things, that the "Tulloch ditches constructed by Smith Farm precisely fit the definition of a point source as [did] the equipment used by Smith Farm's contractor to excavate the ditches." *Id.* at 39.

1. *Summary of Issue for the 402 Violation*

On appeal, Smith Farm challenges ALJ Charneski's legal conclusion based solely on a perceived inconsistency between the text of the Amended Complaint

("Amended Complaint") and the ALJ's factual premise to his liability conclusion. More specifically, Smith Farm argues that even if the ALJ's factual findings are accepted, ALJ Charneski's conclusion of liability was improper because he found the ditches to be the point sources from which the discharges occurred, but the Region did not specifically identify the ditches as a "point source" in the Amended Complaint.[45] Smith Farm Br. (2005) at 34 (citing paragraph 30 of the Amended Complaint, but quoting paragraph 29). Notably, Smith Farm does not question whether ditches can be a point source under the CWA or whether Smith Farm was required to obtain an NPDES permit for its storm water discharges in association with construction activity.[46] Given Smith Farm's contentions, and the findings and conclusions of the ALJ, the sole question the Board must decide with respect to the 402 Violation is:

> Did ALJ Charneski err in concluding that Smith Farm had violated CWA section 301 based, in part, on his finding that the ditches were a "point source," where the Amended Complaint did not explicitly identify the ditches as a "point source"?

2. *Relevant Principle of Law*

As a matter of procedural law, even if a pleading insufficiently sets forth all factual or legal elements of a violation (and in this matter, the Board disagrees that is the case), an ALJ has the discretion to conform the pleadings to the evidence where evidence establishing liability and related issues of law have been

[45] Smith Farm acknowledges that ALJ Charneski also identified the construction equipment to be a point source (as was alleged in the Amended Complaint); however, Smith Farm dismisses that finding, arguing that ALJ Charneski did not make any factual findings regarding how the equipment functioned as a point source for storm water. Smith Farm Br. (2005) at 35. For the reasons explained below, the Board concludes that ALJ Charneski's finding with respect to the ditches as a point source is not inconsistent with the Amended Complaint and, even if it were, the pleadings may be conformed to the evidence presented at the hearing. Thus, it is unnecessary to determine whether ALJ Charneski's finding that the equipment was a point source would, alone, have been sufficient to support the violation.

[46] Smith Farm did ultimately obtain an NPDES permit under CWA section 402 from the Virginia Department of Environmental Quality, which was effective on November 10, 1999. Init. Dec. at 36 n.31 (citing Stipulation of Facts ¶ 10 (June 13, 2002)). The violation at issue here is for Smith Farm's storm water discharges that occurred between November 1998 and November 10, 1999. Amended Compl. ¶ 25; *see also* Init. Dec. at 36.

fully presented before the administrative body, and there is no likelihood of material prejudice to the parties. *See Vico*, 12 E.A.D. at 331, 332.

3. *Analysis of the Point Source Issue*

The Board begins with an analysis of the 402 violation, as pled by the Region and found by ALJ Charneski. The Board then turns to Smith Farm's contentions.

The Amended Complaint in the present case included the following language regarding Appellant's failure to obtain a section 402 storm water permit:

> 26. Commencing in or about November 1998 and continuing through at least November 1999, [Smith Farm] or persons acting on behalf of [Smith Farm] *engaged in construction activity resulting in the discharge of pollutants in storm water to wetlands at the Site and through ditches at the Site to tributaries* to Bennets Creek, Goose Creek, and Baileys Creek, all waters of the United States. Ditches cut in wetlands which have not been stabilized have resulted in significant sloughing and erosion into ditches and streams. Eroded soils and sediments from the rills and fissures along the bank walls have been deposited in the ditches, which eventually flow into the unnamed tributaries. The site has not undergone final stabilization.
>
> 27. *The total area of land disturbance due to ditching, dredging, and placement of pollutants is greater than five acres.*
>
> 28. The clearing, excavating, spreading and related activities at the Site constitute "industrial activity" within the meaning of § 402(p) of the Act and 40 C.F.R. §§ 122.1 and 122.26(b)(14).
>
> 29. The equipment used at the Site is a "point source" which "discharges" "pollutants" contained in storm water runoff as those terms are defined at Sections 502(6), (14), and (16) of the Act, 33 U.S.C. §§ 1362(6), (14), and (16), and 40 C.F.R. § 122.2.
>
> 30. Respondents' *construction activities resulted in the discharge of pollutants to wetlands on the Site and into ditches which discharge into unnamed tributaries* of * * * "waters of the United States" within the meaning of 40 C.F.R. § 122.2.
>
> 31. Between November 1998 and November 19, 1999, Respondents discharged pollutants to "waters of the United States" within the meaning of 40 C.F.R. § 122.2 without an NPDES permit issued under Section 402 of the Act, 33 U.S.C. § 1342.

* * *

35. Respondents' discharge of pollutants without an NPDES permit between November 1998 and November 10, 1999, violates Section 301 of the Act, 33 U.S.C. § 1311.

Amended Complaint ¶¶ 26-31, 35 (emphases added).[47] Based on the allegations in the Amended Complaint, the Board concludes that the Region alleged that storm water was discharged to wetlands, and into and through ditches, into certain tributaries of (what the Board has determined were) waters of the United States. Further, the Board concludes that the Region alleged that these storm water discharges occurred in association with Smith Farm's "construction activity" involving the disturbance of more than five acres of land.[48] Finally, the Region alleged that the above activities constituted a violation of CWA section 301.

ALJ Charneski's findings and conclusion with respect to the 402 violation echo the Region's allegations. Specifically, ALJ Charneski determined, among other things, that Smith Farm's land-disturbing activities (which included excavating and "clearing" 13,550 linear feet of ditches dug in a "50-foot wide" "swath" and planned logging of approximately 11.34 acres) had "clearly satisfied" the five-acre threshold found in 40 C.F.R. § 122.26(b)(14)(x). Init. Dec. at 36-37. As such, Smith Farm's activities constituted "construction activity" subject to permitting requirements for a "discharge associated with industrial activity" under section 402(p)(2)(B), 33 U.S.C. § 1342(p)(2)(B). *Id.* ALJ Charneski also found that there was ample evidence of pollutants (including rock, sand, soil) being discharged via storm water into the Tulloch ditches on Smith Farm. *Id.* at 37-39. Finally, ALJ Charneski found that the ditches constructed by Smith Farm precisely fit the definition of point source – i.e., "any discernible, confined and discrete conveyance, including but not limited to any * * * ditch * * * from which pollutants are or may be discharged." *Id.* at 39 (quoting CWA § 502(14), 33 U.S.C. § 1362(14)).[49] From these findings, ALJ Charneski concluded that the

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[47] The language in the Amended Complaint is nearly identical to the language in the amended complaint in *Vico,* and the appellants in *Vico* raised an issue identical to the one Smith Farm raises here. *Vico*, 12 E.A.D. at 329-30. Thus, the Board relies heavily on *Vico* as precedent.

[48] In the Amended Complaint's statutory and regulatory provisions, the Region alleged that "Section 402(p) of the Act, 33 U.S.C. § 1342(p), and 40 C.F.R. §§ 122.1 and 122.26 provide that facilities with storm water discharges associated with industrial activity are 'point sources' subject to NPDES permitting requirements under § 402 of the Act, 33 U.S.C. § 1342(a)." Amended Compl. ¶ 13. "Industrial Activity" under the Act includes "[c]onstruction activity including clearing, grading, and excavation," that involves "the disturbance of [five acres or more] of total land area." Amended Compl. ¶ 11 (quoting 40 C.F.R. § 122.26(b)(14)(x)).

[49] Courts have previously held that ditches can be point sources for purposes of the CWA's storm water provisions. *See, e.g., N.C. Shellfish Growers Ass'n v. Holly Ridge Assocs., LLC*, 278 F. Supp. 2d 654, 679-81 (E.D.N.C. 2003); *see also Vico*, 12 E.A.D. at 330 n.64.

Region had "satisfied all the elements of proof to establish the alleged Section 301(a) violation for discharging storm water associated with construction activity without a Section 402 permit." *Id.*

Based on the foregoing, it is clear to the Board that the Region pled, and ALJ Charneski found, that Smith Farm violated CWA section 301 when storm water discharges occurred in connection with its construction activities (involving more than 5 acres of land) into and through the ditches it had constructed without an NPDES permit. Thus, the Board does not view the pleadings as discrepant from ALJ Charneski's decision with respect to the 402 violation. Having so concluded, the Board now more specifically addresses Smith Farm's contentions.

Smith Farm argues that the Amended Complaint states that the "equipment used at the Site [was] a point source" but does not specifically list the ditches themselves (or the rills and fissures along the bank walls) as "point sources." Smith Farm Br. (2005) at 34. As such, Smith Farm contends ALJ Charneski erred in basing the CWA section 402 violation on his finding that the ditches were a point source. *Id.* Smith Farm's contention is procedural in nature, in that the argument does not question the substance of ALJ Charneski's findings,[50] but rather questions only whether the Region met its regulatory burden to set forth in the Complaint the basis for the violation. *Id.*; *see also* EAB Tr. (2005) at 34-35 (responding to a question from the panel, Smith Farm's representative clarified that Smith Farm's argument was that "the ditches were not the point source alleged in the complaint," not that the ditches were not a point source).

First, the Board disagrees with the underlying basis of Smith Farm's contention – that ALJ Charneski's conclusion was based solely on his finding that the ditches at Smith Farm were *the* point source of the storm water discharge. In fact,

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[50] Smith Farm contends, in one sentence, that "[e]ven if the ditches had been named as point sources, they could not be qualifying point sources in this case because the EPA never even looked at the outfalls and thus never established that the ditches were discharging or could discharge any material." Smith Farm Br. (2005) at 35. To the extent that this statement is intended to be a separate argument that the Region had not met its burden in demonstrating that the ditches were point sources, the Board rejects it. As explained previously in this decision, the Board ordinarily will defer to the ALJ's judgment with respect to his factual findings based on witness testimony. ALJ Charneski found that "the banks of the ditches were not stabilized to minimize erosion and that the check dams that were placed in the upland area did not appear to be effective." Init. Dec. at 18. This finding, especially when considered together with testimony regarding observed drainage swales that allowed erosion from spoil piles to flow to the ditch network, satisfies the Board that there were discharges from ditches in violation of section 402. *See Vico*, 12 E.A.D. at 328 n.63 ("Assuming storm water-related erosion of the ditch banks did occur, causing the discharge of rainwater and sediment into the Tulloch ditches * * * , then there was a violation of the CWA storm-water related provisions, which require a section 402 permit for any discharge of rainwater from a covered construction site. * * * 40 C.F.R. pt. 122."); *see also* CWA § 402(p)(2)(B), 33 U.S.C. § 1342(p)(2)(B) (requiring 402 permits for storm water discharges associated with industrial activities).

although ALJ Charneski identified the ditches constructed by Smith Farm as *a* "point source," he also specifically identified the equipment used to excavate the ditches as point sources and also relied heavily on Smith Farm's construction activity, involving the disturbance of more than five acres of land. *See* Init. Dec. at 39.

As the Board indicated in *Vico*, some courts interpreting section 402 regulations have held that construction activity that disturbs more than five acres of land is by definition a "point source" under the CWA. *See Vico*, 12 E.A.D. at 302 n.7 (citing *N.C. Shellfish Growers*, 278 F. Supp. 2d at 680-81 (finding that a tract of land, upon which construction was occurring, was itself a qualifying "point source")); *see also Cal. Sportfishing Prot. Alliance v. Diablo Grande, Inc.*, 209 F. Supp. 2d 1059, 1077 (E.D. Cal 2002) (holding that a construction site "is itself a single point source," in addition to the other individual point sources within it). As such, it is arguably unnecessary to conclude the ditches themselves were adequately alleged and proven to be a point source because the construction site itself was the point source for the violation. The Board need not determine whether that would be sufficient in this case, however, because as explained further below, the Board concludes that the Region did plead, and ALJ Charneski properly found that the ditches, as well as the equipment (in connection with the construction activity) served as a point source for storm water discharges into navigable waters.

Next, and more important, the Board disagrees that the Amended Complaint did not adequately identify the ditches themselves as a point source. Based on the Board's review of the Amended Complaint, the Board finds that, as a whole, the Amended Complaint clearly identifies the ditches themselves as sources for storm water discharges. In particular, paragraph 26 of the Amended Complaint clearly states that Smith Farm "engaged in construction activity resulting in the *discharge of pollutants in storm water* to wetlands at the Site and *through ditches* at the Site to * * * waters of the United States." (Emphases added). That paragraph continues by describing "[d]itches cut in wetlands [that had] not been stabilized which resulted in significant sloughing and erosion into ditches and streams," and then describes "[e]roded soils and sediments from the rills and fissures along the bank walls [that] have been deposited in the ditches, which eventually flow into the unnamed tributaries." Amended Compl. ¶ 26. The Amended Complaint also provides that "point source" is defined to include "any discernible, confined and discrete conveyance * * * from which pollutants are or may be discharged." *Id.* ¶ 6 (quoting CWA § 502(14), 33 U.S.C. § 1362(14)). Thus, the Amended Complaint clearly identifies the ditches as a point source for storm water discharges.

While the specific identification, in the Amended Complaint, of the "equipment used at the site" as a point source may have detracted from the clarity of the complaint, it "does not alter the fact that the Region also alleged that the ditches were the source of the pollutant discharges, and does not preclude a finding by

ALJ Charneski that the ditches were point sources." *Vico*, 12 E.A.D. at 331. Thus, as was the case in *Vico*, it is clear to the Board that the Amended Complaint clearly identifies the ditches as *a* point source for storm water-related discharges, in addition to the equipment used and the construction activity in general. *See* Amended Compl. ¶¶ 26-31; Init. Dec. at 39, 40; *accord Vico*, 12 E.A.D. at 330.

Finally, even if the Board agreed, and it does not, that the Region failed to sufficiently identify the ditches as a point source in the Amended Complaint, the ALJ may (or the Board may if the ALJ does not) conform the pleadings to the evidence presented. *See Vico,* 12 E.A.D. at 331 (quoting *In re Mayes*, 12 E.A.D. at 54, 94 (EAB 2005); *see also In re H.E.L.P.E.R., Inc*., 8 E.A.D. 437, 449-51 (EAB 1999). As the Board has explained before, "[t]he critical question is whether such amendment would unduly prejudice the opposing party." *Mayes*, 12 E.A.D. at 94.[51]

In this case, the Region proceeded throughout the administrative proceeding as if the complaint had identified the ditches as a point source for storm water runoff. The evidence the Region presented at the hearing with respect to the 402 Violation focused on demonstrating that storm water had adversely affected the ditch banks and the spoil pile, resulting in "rills and fissures" that discharged pollutants into and through the wetlands. Init. Dec. at 37-39 (discussing evidence at trial of storm water runoff calculated based on soil and vegetation at the site and observations of evidence of erosion at the site). Thus, the factual questions relevant to ALJ Charneski's finding that the ditches themselves, as well as the equipment, were the source of storm water discharge into navigable waters were thoroughly examined during the administrative proceeding.[52] As such, Smith Farm would not be prejudiced whatsoever by any exercise of discretion to conform the pleadings to the evidence. *See Vico*, 12 E.A.D. at 332.

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[51] In *Mayes,* the Board held that the ALJ's exercise of discretion, finding a violation of RCRA regulations regarding the mandatory upgrade or closure of underground storage tanks (40 C.F.R. § 280.21), was appropriate even though the Region had alleged violation of a different regulatory provision addressing closure-and-assessment requirements (40 C.F.R. § 280.70(c)). 12 E.A.D. at 95.

[52] As paragraph 26, which introduces the "Storm Water Allegations" section of the Amended Complaint, suggests, the allegations focus on "construction activity resulting in the discharge of pollutants in storm water to wetlands at the Site and through ditches at the site to tributaries to Bennets Creek, Goose Creek, and Baileys Creek." Amended Complaint ¶ 25. The parties litigated precisely those facts relevant to whether pollutant discharges from the ditches themselves actually occurred. *See* Init. Dec. at 37-40; 2003 ALJ Tr., vol. II, at 191-291, 2003 ALJ Tr., vol. IV, at 5-68 (testimonies of Mr. Magerr and Dr. Cahoon); *accord Vico*, 12 E.A.D. at 331 n.66. Notably, Smith Farm did not raise the issue of whether the Amended Complaint identified an appropriate "point source" until its post-hearing brief. *See* Respondent's Post-Trial Brief at 58 (filed Jan. 21, 2004).

4. *Conclusion: Smith Farm's Discharge of Pollutants Via Storm Water Into Navigable Waters Without a 402 Permit Constituted a Violation of CWA Section 301*

For the reasons explained above, the Board concludes that the Amended Complaint alleges, and ALJ Charneski found, that Smith Farm engaged in construction activity as defined by 40 C.F.R. § 122.26(b)(14) that resulted in the discharge of storm water runoff from and through the ditch banks and spoil pile into waters of the United States without a section 402 permit, in violation of CWA section 301. As such, the Board concludes ALJ Charneski did not err in basing that determination, in part, on his finding that the ditches served as point sources under the CWA. *See Vico*, 12 E.A.D. at 332. Moreover, to the extent that the Complaint lacked clarity with respect to the point source(s) alleged, the Board exercises its discretion to conform the pleadings to the evidence presented.[53] Accordingly, ALJ Charneski did not err in concluding that Smith Farm violated CWA section 301 by discharging pollutants via storm water, in association with construction activity, into and through ditches that flowed into waters of the United States, without a permit under Section 402.

VIII. *PENALTY ASSESSMENT*

Having affirmed ALJ Charneski's determination that Smith Farm violated CWA section 301(a) by failing to obtain the required permits under sections 404 and 402, the Board next examines the issues that remain with respect to the assessed penalty.

A. *The Penalty Issues That Remain*

ALJ Charneski imposed a total penalty of $94,000, which was $11,500 less than that proposed by the Region.[54] That penalty was further reduced by ALJ Moran on Remand to $34,000. *See* note 2, above. Smith Farm contends the ALJ erred in assessing a penalty "just below the maximum amount" of $137,500, based on his erroneous finding that Smith Farm was "highly negligent" and the failure of EPA to establish any resultant environmental harm. *See* Smith Farm Br. (2005) at 36-40. These two challenges correspond to two of the statutory penalty factors considered by ALJ Charneski: (1) the nature, circumstances, extent and gravity of violation; and (2) Smith Farm's culpability. *See* Init. Dec. at 40-42, 44-45; *see also* CWA § 309(g)(3), 33 U.S.C. § 1319(g)(3). The Region argues that the pen-

[53] The Board notes that it does not believe that such an exercise of discretion is necessary here, but does so out of an abundance of caution, in the interest of bringing finality to this case.

[54] ALJ Charneski provides no explanation for why he imposed a penalty that was less than the Region proposed.

alty assessment was consistent with the statutory factors and that the ALJ's findings with respect to Smith Farm's culpability and as to the nature and extent of the violations are well supported by the record. *See* EPA Br. as to Penalty (2005) at 13-23.

On appeal, the Board is 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 was assessed by the ALJ). *See* 40 C.F.R. § 22.30(f). The Board will generally defer to the ALJ's judgment, however, unless an appellant can demonstrate that the ALJ's judgment is clearly erroneous or otherwise constitutes an abuse of discretion. *See Vico*, 12 E.A.D. at 333 (citations omitted); *see also United States v. Smithfield Foods, Inc.,* 191 F.3d 516, 526-27 (4th Cir. 1999) (reviewing factual findings that underlie a penalty calculation for clear error and giving "wide deference" to the factfinder's "highly discretionary calculations that take into account multiple factors" in assessing civil penalties under the CWA), *cert. denied,* 531 U.S. 813 (2000).

Thus, the primary question the Board must decide is:

> *Did ALJ Charneski clearly err in evaluating the nature and extent of the violations or Smith Farm's culpability, such that the assessed civil penalty was excessive?*

B. *Principles of Law Governing Penalty Assessments*

CWA section 309(g), 33 U.S.C. § 1319(g), authorizes EPA to assess civil penalties for violations of section 301. The statutory maximum civil penalty for violations occurring before March 15, 2004, cannot exceed $11,000 per day for each day the violation continues, and the total penalty amount cannot exceed $137,500. CWA § 309(g)(2)(B), 33 U.S.C. 1319(g)(2)(B) (as modified by the Civil Monetary Penalty Inflation Adjustments, 40 C.F.R. § 19.4, for penalties effective between January 30, 1997 and March 15, 2004).

In assessing a penalty, the statute requires the enforcing agency to take into account the following factors:

> the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

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

Under the Consolidated Rules of Practice, 40 C.F.R. Part 22, the ALJ assessing a civil penalty "shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act." 40 C.F.R. § 22.27(b). The ALJ is also required to provide a detailed rationale for the penalty assessment and a specific explanation for any increase or decrease in the penalty from that which is proposed by the Region. *Id.*

The Board often looks to the Agency's penalty policies for guidance on assessing the statutory factors. *See Vico*, 12 E.A.D. at 333; *see also In re Ram, Inc.*, 14 E.A.D. 357, 367 n.10 (EAB 2009) (explaining that the Agency's penalty policies provide guidance in determining an appropriate penalty assessment by providing a framework for translating statutory factors into numerical terms in a uniform manner). Because there is no specific penalty policy for use in CWA litigation, the Board looks to general penalty policies for guidance.[55] *Vico*, 12 E.A.D. at 333-34 & n.69 (citing EPA General Enforcement Policy #GM-22*, A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties* at 18 (Feb. 16, 1984) ("Penalty Framework"), and U.S. EPA, *Final Clean Water Act Section 404 Civil Administrative Penalty Settlement Guidance and Appendices* at 3 (Dec. 14, 1990) ("CWA 404 Penalty Settlement Guidance")); *In re Phoenix Constr. Servs., Inc.*, 11 E.A.D. 379, 395 (EAB 2004).

The Agency's general policy concerning civil penalties identifies three important goals for penalty assessment in EPA enforcement actions. EPA General Enforcement Policy # GM-1, *Policy on Civil Penalties* at 1 (Feb. 16. 1984) ("General Penalty Policy"). They are: deterrence, the fair and equitable treatment of the regulated community, and the swift resolution of environmental problems. *Id.* That policy also outlines a general process for assessing civil penalties that is aimed at achieving Agency goals while considering the applicable statutory factors appropriate for the statute being enforced. *Id.* at 1, 8. In general, it is Agency policy to first calculate "a preliminary deterrence amount" that consists of both an "economic benefit component" and a "gravity component." *Id.* at 3, 8. The economic benefit component is primarily intended to address deterrence. *Id.* at 3. For

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[55] The Board recognizes, of course, that Agency penalty policies do not bind the Board or the ALJs. Such guidance has not been subjected to the rulemaking procedures of the Administrative Procedure Act and, thus, lacks the force of law. *See Ram*, 14 E.A.D. at 367 n.10 (citing *In re Allegheny Power Serv. Corp.*, 9 E.A.D. 636, 658-59 (EAB 2001), *aff'd*, No. 6:01-cv-241 (S.D. W.Va. Apr. 5, 2002); *In re Emp'rs Ins. of Wausau*, 6 E.A.D. 735, 758 (EAB 1997)). Although the ALJ must and the Board may consider any civil penalty policies applicable to the matter, both the Board and the ALJ have discretion to assess a penalty that is not calculated pursuant to the particular penalty policy, so long as the penalty is consistent with the statute and the ALJ's supporting rationale is provided. 40 C.F.R. § 22.27(b); *see also Ram*, 14 E.A.D. at 367 n.10 (citing *In re Lyon Cnty. Landfill*, 10 E.A.D. 416, 450 (EAB 2002), *aff'd*, No. Civ. 02-907 JNE/JGL, 2004 WL 1278523 (D. Minn. June 7, 2004), *aff'd*, 406 F.3d 981 (8th Cir. 2005); *Allegheny Power*, 9 E.A.D. at 658-59; *Wausau*, 6 E.A.D. at 758)).

that reason, Agency policy provides that, *at a minimum*, the economic benefit component should remove any economic benefits resulting from failure to comply with the law. *Id.* (emphasis in original). The gravity component then adds an additional penalty amount, reflective of the seriousness of the violation, aimed at ensuring the violator is worse off than it would have been if it had obeyed the law. *Id.* at 4. Finally, Agency policy applies adjustment factors (such as degree of willfulness or negligence, history of noncompliance, and others) to increase or mitigate the gravity component and to arrive at a proposed penalty figure. *Id.* at 8, attach. A. These basic components of civil penalty assessment comprise the framework that is applied across Agency enforcement programs under various environmental statutes. *See, e.g.,* U.S. EPA, *Clean Air Act Stationary Source Civil Penalty Policy* (Oct. 25, 1991); U.S. EPA, Office of Enforcement and Compliance Assurance, *RCRA Civil Penalty Policy* (June 2003); *see also* U.S. EPA, *Clean Water Act Section 404 Settlement Penalty Policy* (Dec. 21, 2001) (superseding 1990 CWA 404 Penalty Settlement Guidance).

C. *Penalty Analysis*

Of the $94,000 civil penalty that ALJ Charneski imposed, $80,000 was assessed for the 404 Violation and $14,000 was assessed for the 402 violation. Init. Dec. at 48.[56] Although ALJ Charneski methodically considered each statutory penalty factor required to be considered and imposed a penalty that was less than that proposed, he did not provide a specific explanation for why the assessed penalty was lower. *Id.* at 40-48. ALJ Charneski also did not provide a precise calculation of the penalty; nor was he required to do so. *See In re Britton Constr. Co.,* 8 E.A.D. 261, 278, 282 (EAB 1999).

As stated above, in arguing that this penalty is excessive, Smith Farm disputes only ALJ Charneski's findings with respect to the extent and gravity of each violation and with respect to Smith Farm's culpability. Smith Farm Br. (2005) at 36-40; *see also* Init. Dec. at 40-43, 44-45. Accordingly, this decision focuses

[56] The Region originally sought a civil penalty of $137,500 for both violations. After the Region reached settlement with Vico Construction, originally a co-defendent, the Region reduced the amount sought against Smith Farm by the cash value amount of the settlement ($32,000). Thus, the Region sought a $105,500 penalty against Smith Farm ($84,500 for the 404 Violation and $21,000 for the 402 violation). *See* Complainant's Post-Hearing Brief at 87-88, 108 (Jan. 20, 2004).

next on the assessed penalties for each permit violation, considering the specific challenges Smith Farm raises as to each.

1. *The Penalty for the Section 404 Permit Violation*

For the 404 Violation, the Region sought a penalty of $84,000 and ALJ Charneski imposed a penalty of $80,000. ALJ Charneski arrived at the penalty amount after applying the statutory factors to the facts of this case.

At the outset, the Board notes that, when considering the Agency's interest in and emphasis on deterrence, the penalty amount for the 404 Violation in this case does not seem excessive. As explained above, deterrence is a primary goal of the EPA in assessing penalties. General Penalty Policy at 1, 3. It is long-standing Agency policy that to achieve deterrence any penalty must, *at a minimum* remove the economic benefit accrued by a violator by its failure to comply with the law. General Penalty Policy at 3. Allowing a violator to benefit from noncompliance creates a disincentive for compliance. *Id.; see also United States v. Allegheny Ludlum Corp.,* 187 F. Supp. 2d 426, 436 (W.D. Pa. 2002) ("A critical component of any penalty analysis under the Clean Water Act is the economic benefit enjoyed * * * as a result of violating the law. The goal of economic benefit analysis is to prevent a violator from profiting from its wrongdoing."), *aff'd in relevant part, and vacated in part*, 366 F.3d 164 (3rd Cir. 2004). A civil penalty below the economic benefit not only results in an ecomonic advantage for the violator, it may also encourage other potential violators to do the same.

In this case, ALJ Charneski accepted the economic benefit analysis provided by EPA's expert, Jonathan Sheffetz. Init. Dec. at 45-47. Mr. Sheffetz found Smith Farm's economic benefit to be $141,367 to $304,482 for the 404 Violation and $6,594 for the 402 violation. *Id.* at 47. Smth Farm does not contest the economic benefit finding on appeal. The Region argues that this amount alone justifies the penalty amount. Unfortunately, ALJ Charneski does not make clear what portion of his assessed penalty was attributable to the economic benefit factor. Nevertheless, even though the economic benefit may justify an even higher penalty amount, and the Board is authorized to impose one, the Board declines to do so given the circumstances and procedural history of this case and the lack of explanation in ALJ Charneski's decision of the significance of the economic benefit to his assessment. For these same reasons, the Board is also disinclined to hinge its review of the penalty assessment on the economic benefit component alone. However, it is with this economic benefit in mind that the Board next considers the specific contentions of Smith Farm.[57]

[57] The Board notes that ALJ Charneski also considered the statutory factors of ability to pay and Smith Farm's history of violations. Init. Dec. at 43-44. ALJ Charneski's findings with respect to
Continued

a. *Nature, Circumstances, Extent and Gravity of 404 Violation*

In considering the nature, circumstances, extent and gravity of the violation, ALJ Charneski first noted the nature of the violation was the discharge of substantial amounts of wood chips into jurisdictional wetlands without a permit.[58] ALJ Charneski next found the gravity of the 404 Violation in this case to be "serious." Init. Dec. at 41. In making that finding, ALJ Charneski relied on testimony by the EPA wetlands team leader, Jeffrey Lapp. Mr. Lapp explained that "a number of functions and values have been attributed to wetlands" within the tributary system, including water storage and flood flow reduction. Id. at 41-42 (quoting 2003 ALJ Tr., vol. I, at 76-77). ALJ Charneski also considered expert testimony from both sides as to the environmental value of the Smith Farm wetlands in particular. In this regard, ALJ Charneski specifically credited the testimony of the Corps' witness, Steve Martin, who testified as to the important functions performed by the Smith Farm wetlands and who credibly rebutted the testimony of Smith Farm's valuation expert that placed the value of Smith Farm's wetlands below nearby tidal wetlands.[59] *Id.* at 45-47. Thus, ALJ Charneski directly addressed the importance of wetlands generally, and the Smith Farm wetlands in particular, as well as the corresponding significance of their loss or impairment.

In support of its argument, Smith Farm contends that there is no evidence in the record establishing: "that the [Smith Farm wetlands] were diminished or even altered in their functioning or reach;" that any wetlands acreage was lost; "that the Tulloch ditches were effective in draining the wetlands;" that any "pollutant" ever "left the Smith Farm site;" that any "navigable-in-fact waters were compromised," or that "any plants or animal life were impacted." Smith Farm Br. (2005) at 38. Smith Farm concludes that "any violation did not result in any significant environmental impact," and therefore, the penalty should be reversed. *Id.* at 39, 40.

(continued)
these factors, like the economic benefit factor, were not challenged in this appeal, however. ALJ Charneski also noted that there were no considerations taken under the "other matters as justice may require" criterion for penalty determinations. *Id.* at 48.

[58] ALJ Charneski then determined that the extent of this violation was "considerable," involving between 10.79 and 24 acres. Init. Dec. at 40, 41. The Board notes that Mr. Lapp testified that the Smith Farm site was one of the largest sites with which he had dealt. 2003 ALJ Tr., vol. I, at 169. The Board finds this testimony to be consistent with ALJ Charneski's findings with respect to the extent and gravity of the violation.

[59] As explained in Part III.B, above, the Board "may defer to an ALJ's factual findings where credibility of witnesses is at issue 'because the presiding officer had the opportunity to observe the witnesses testify and to evaluate their credibility.'" *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998).

Smith Farm's arguments with respect to extent and gravity equate to a demand for quantifiable proof of harm to the immediate environment from its violation, and they are essentially the same as the arguments made by the appellant in *Vico*. *See Vico*, 12 E.A.D. at 340-41. In *Vico,* the Board rejected these arguments, agreeing instead with the ALJ that the placement of such substantial amounts of fill into a wetland is inherently significant in its potential impact. *Id.* at 342. The Board also emphasized the inherent significance of a violation involving the failure to obtain a required permit:

> [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, [the Board has] 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. (quoting *Phoenix Constr.*, 11 E.A.D. at 396-98 (citations and quotation marks omitted)); *see also In re Everwood Treatment Co.*, 6 E.A.D. 589, 602 (EAB 1996). As explained in *Phoenix Construction,* "[t]hese Board determinations are consonant with the Agency's general penalty framework guidance, which lists 'importance to the regulatory scheme' as one of the important factors to consider in quantifying the gravity of a violation." *Phoenix Constr.*, 11 E.A.D. at 397 (citing Penalty Framework at 14). Thus, by failing to disclose to the Corps the full extent of the project and by avoiding the permitting process, Smith Farm deprived the Corps of the opportunity to make an informed, up-front determination of whether such activities would require a section 404 permit and, if so, to determine what restrictions or mitigation would be appropriate. *See Vico*, 12 E.A.D. at 343.

Additionally, as the Board explained in *Vico*, the gravity of harm to the CWA regulatory program is manifest in a case such as this, "where the discharge was integrally related to a project whose ultimate objective was the elimination of the * * * wetlands, and where the permitting process may have significantly reduced the impact of the project, for example by leading to permit conditions that would 'prevent or reduce significant impacts on neighboring wetlands.'" *Id.* at 342-43 (quoting *Phoenix Constr.*, 11 E.A.D. at 399).

The Board has also emphasized the important impact of deterrence on the regulatory program. *Id.* at 343. Referring again to its decision in *Phoenix Construction,* the Board in *Vico* 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 *Phoenix Constr.*, 11 E.A.D. at 399). Indeed, in this case, it is clear that a broader pattern of similar projects did develop as knowledge spread through the local community about the occurrence of these kinds of land clearing and ditch digging activities.

Thus, as the Board said in *Vico*, "[b]y proceeding with the project even when questions were raised, [a]ppellants effectively substituted their own judgment for that of EPA and the Corps, thus frustrating the objectives of the wetlands program. Indeed, in circumstances such as these where the wetlands project was part of a regional pattern of projects, the overall impact on wetlands in the area could be very significant." *Id.* For all of these reasons, the Board finds no clear error in ALJ Charneski's findings with respect to the nature, circumstances, extent and gravity of Smith Farm's 404 Violation.

b. *Culpability*

Smith Farm also disagrees with ALJ Charneski's determination that Smith Farm was "highly negligent." Smith Farm Br. (2005) at 36. In doing so, Smith Farm challenges ALJ Charneski's determination with respect to its degree of culpability. Init. Dec. at 44-45; *see also* CWA § 309(g)(3), 33 U.S.C. § 1319(g)(3) (including the "degree of culpability" as one of the factors to be taken into account in assessing the penalty). Thus, the Board next considers whether ALJ Charneski clearly erred in assessing Smith Farm's culpability.

The CWA does not explain how a violator's degree of culpability should be considered or what effect culpability should have on the overall penalty assessment. Notwithstanding the fact that most environmental statutes are strict liability statutes, the EPA recognizes that the violator's level of culpability, or degree of willfulness or negligence is not irrelevant. Penalty Framework at 17-18. As such, Agency civil penalty policies consistently treat the degree of willfulness and/or negligence as an additional factor to be considered in adjusting the gravity component of a civil penalty upward or downward, once that component has been established. *Id.*[60] Agency policy has attributed such adjustment factors with pro-

[60] Although generally, the gravity component can be adjusted upward or downward, the Penalty Framework specifically provides that the lack of knowledge of the legal requirement should never be used as a basis to reduce a penalty because "[t]o do so would be to encourage ignorance of the law." Penalty Framework at 18. Thus, "knowledge of the law should serve only to enhance [a] penalty." *Id.*

viding flexibility in penalty assessments to account for the unique facts of each case, while still producing results that treat similarly situated violators consistently. The focus of such adjustment is on reaching the second goal of penalty policies: the equitable treatment of the regulated community.

When considering Smith Farm's degree of culpability, ALJ Charneski found that Smith Farm was "highly negligent" in discharging the wood chips into the wetlands without a 404 permit. Init. Dec. at 45. ALJ Charneski justified this finding by explaining that Smith Farm was aware that the site contained wetlands "well before it initiated the Tulloch ditching operation." *Id.* at 44. ALJ Charneski also noted Smith Farm's asserted, but mistaken, reliance on the "ground rules" set forth in the "Southern Pines" letter from the Army Corps of Engineers. *Id.* That letter specifically warned that it applied only to the Southern Pines site and no other and, as ALJ Charneski explained, "the deposit of wood chips in the substantial amounts that occurred [at Smith Farm was] inconsistent with the Southern Pines ground rules, even if they were [applicable to Smith Farm]." *Id.* at 45. The Board further notes that Smith Farm was a sophisticated landowner, well-aware of the CWA's permitting requirements, and was actively engaged in an attempt to drain its wetlands in a manner that avoided obtaining a permit. *See* Init. Dec. at 3-4 (finding that Smith Farm contacted an environmental consultant following the D.C. Circuit's *National Mining* case to discuss the prospect of digging Tulloch ditches in its property, while recognizing that "it was an opportunity that, you know, admittedly people realized that if you were working in a wetland that this opportunity might not be around forever."). ALJ Charneski found that, in spite of its knowledge, Smith Farm discharged a substantial amount of wood chips into its wetlands. *Id.* at 44. ALJ Charneski considered Smith Farm's decision to do so to be "highly negligent" and the Board finds no clear error in the ALJ's finding.

Smith Farm also asserts that, in considering culpability, ALJ Charneski failed to consider Smith Farm's good faith efforts to comply fully with the law. Smith Farm Br. (2005) at 36. In so arguing, Smith Farm essentially raises three points. The Board addresses each in turn.

First, Smith Farm points to the fact that it hired a wetlands consultant "to ensure * * * compliance."[61] Smith Farm Br. (2005) at 36. The Board disagrees that the hiring of a consultant, in this case, warrants mitigation of culpability. In

[61] Like the appellants in *Vico*, Smith Farm also claims that "[s]pecial equipment and more cumbersome and expensive procedures were employed so as to eliminate environmental impacts of the work." Smith Farm Br. (2005) at 37. Echoing the Board's position in *Vico,* 12 E.A.D. at 334 n.70, the Board finds Smith Farm's assertions disingenuous. On the record before the Board, it appears Smith Farm employed special equipment and procedures not to eliminate environmental impacts, but rather in an attempt to avoid the need for a CWA § 404 permit. Smith Farm's indisputable intention was to eliminate the existence of its wetlands, which creates – not eliminates – an adverse impact on the environment. *Id.*

Vico, where the appellants also hired Mr. Needham and argued that the use of a consultant should mitigate their culpability, the Board explained that hiring an experienced consultant does not "necessarily relieve [the appellant] of culpability," because the appellant was engaging the consultant to "assist * * * in mapping a relatively uncharted course," and that, "given the novelty of the situation," both the appellant and the consultant failed to exercise "the appropriate degree of care with regard to engaging the Corps early in the process, and ensuring that the Corps was fully apprised of both the *nature and extent* of the proposed construction activities (including the chipping of slash and grinding of stumps in the cleared pathways)." *Vico*, 12 E.A.D. at 338 (emphasis in original). In *Vico,* the Board distinguished the appellants use of a consultant from cases where reliance on the factual representations of a consultant has been held to justify mitigation of culpability. *Id.* (citing *In re City of Marshall,* 10 E.A.D. 173, 191 (EAB 2001)).[62]

While Smith Farm, unlike the appellants in *Vico,* did engage the Corps early in the process, any justifiable reliance earned from doing so was undermined by Smith Farm's failure to fully apprise the Corps of the full nature and extent of its proposed construction activities, especially with regard to the extent of the path clearing activities and the grinding up of the slash into wood chips.[63] Thus, again, although in some cases the Board has determined that reliance on the factual representations of a consultant may justify mitigation of culpability, such is not the case with Smith Farm.

Second, Smith Farm argues that "[t]he Corps *pre-approved* the activities that were conducted on Site both orally and in writing, a determination upon

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[62] In *City of Marshall,* the Board upheld the presiding officer's determination that the violator's "good faith reliance" on a consultant's factual determination was justifiable. 10 E.A.D. at 191. In that case, the municipal violator relied on the consultant's erroneous representation that the construction of additional pollution control technology would be necessary to bring the city's treatment works into compliance with new regulations for the disposal of sewage sludge. *Id.* at 181-82, 191. If new construction had been necessary, the city would be allowed an additional year to come into compliance with the new regulations. *Id.* at 181. Because the city invested a large sum of money in that construction, in reliance on the consultant's representation, the ALJ determined that the city was entitled to an extended compliance schedule under the applicable regulations and mitigated the penalty based on the city's lack of culpability accordingly. *Id.* at 191 (remanding the case for additional consideration of the penalty analysis on other grounds).

[63] Central to Smith Farm's arguments that ALJ Charneski erred in finding Smith Farm "highly negligent" are Smith Farm's early communications with the Corps. *See* Init. Dec. at 6 (describing these communications); Respondent's Post-Trial Brief at 4-5, 59-60 (citing 2003 ALJ Tr., vol. I, at 227; 2003 ALJ Tr., vol. III, at 225-27, 259; 2003 ALJ Tr., vol. V, at 175, 177-78; SF Ex. 14). While the Board acknowledges that these facts differ from the circumstances in *Vico*, where the appellants relied solely on the Southern Pines letter as Corps "approval" and neglected to make a site-specific inquiry regarding their proposed construction activities, the distinction is ultimately insignificant. As explained above, Smith Farm's efforts, if any, were completely undermined by Smith Farm's failure to fully apprise the Corps of the full nature and extent of its proposed construction activities.

which [Smith Farm] relied." Smith Farm Br. (2005) at 36 (citing SF Exs. 11 & 14) (emphasis added). This statement is simply not accurate. As ALJ Charneski noted, Smith Farm's reliance on the Southern Pines letter (SF Ex. 11) is misplaced. In that letter, the Corps responded to the proposed activities at the Southern Pines site and specifically stated that "[t]his is a case specific determination and does not apply to any other site." SF Ex. 11 (responding to SF Ex. 10). Moreover, the activities described in the Southern Pines letter are not comparable to those that occurred at Smith Farm. While the letter mentions the "mowing of shrubs and saplings," it does not at all describe the extent of the path-clearing activities that took place on the Smith Farm property, which included clearing 35- to 50-foot wide pathways and grinding up saplings, branches, treetops, small trees, branches, and underbrush, and scattering wood chips into the corridors.[64]

Likewise, Smith Farm's reliance on the November 6 letter that Smith Farm's consultant, Mr. Needham, wrote to the Corps outlining Smith Farm's proposal for Tulloch Ditching is equally unavailing. *See* Smith Farm Br. (2005) at 36 (citing SF Ex. 14). Mr. Needham's correspondence to the Corps cannot by itself indicate Corps approval of the Smith Farm construction.[65] Smith Farm has introduced no evidence to demonstrate that the Corps ever provided a written response to the November 6 letter, nor has it provided evidence that the Corps approved the work orally.

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[64] The fact that the Southern Pines letter does not specifically mention wood chips is particularly troubling given that Mr. Needham testified that he knew that, in certain circumstances, wood chips could be considered fill material. His knowledge was based on his previous experience working for the Corps and certain communications with the Wilmington District of the Corps. 2003 ALJ Tr., vol. VI, at 11. Smith Farm argues that wood chips were covered in the letter, however, because the Corps would understand that the "mowing of shrubs and saplings" meant grinding slash into wood chips and dispersing those wood chips on top of the soil. *See* EAB Tr. (2005) at 15. However, even to the extent that Smith Farm is correct that, based on the letters between Mr. Needham and the Corps relating to the Southern Pines site, the Corps might have anticipated the discharge of some wood chips into the wetlands, the record demonstrates that the amount of debris in the cleared paths exceeded the expectations of the Corps' inspectors and included trees and tree tops that went well beyond the saplings and shrubs contemplated in the letters. *See* Init. Dec. at 11, 45; 2003 ALJ Tr., vol. I, at 269-70 (Mr. Martin's testimony that "what I saw on site was not what I expected to see * * * . I was expecting a much smaller operation."). Thus, even if the correspondence could be interpreted to anticipate the presence of some wood chips, it is unreasonable to suggest that the Corps should have anticipated wood chips on the scale that were actually discharged.

[65] The November 6 letter to the Corps was nearly identical to the August 24 letter from Mr. Needham to the Corps (SF Ex. 10) relating to the Southern Pines site, with respect to the standards it articulated and the construction activities it proposed which, as explained above, did not accurately describe the far more substantial activities that actually took place at Smith Farm.

Smith Farm apparently believes that, by not responding in writing,[66] the Corps tacitly approved the activities described in the letter.[67] Smith Farm provides no basis from which to conclude that silence should constitute approval on the part of the Corps in the present case. Moreover, to the extent that Smith Farm might have had reason to believe that the Corps, through its silence, did implicitly approve the process outlined in the November 6 letter to the Corp, the Board notes that this letter fell far short of completely describing the actual construction that took place on the property.[68] Thus, the substance of any mistakenly perceived approval would not have encompassed all of the activities actually undertaken. In any case, because the Board does not find that the Corps ever approved the Tulloch ditching project that took place on the property, the Board does not consider Smith Farm's alleged "reliance" on such approval to be a mitigating factor in the consideration of its culpability.

Third, Smith Farm maintains that it performed the work "openly" and "invited the Corps to inspect the construction as it took place." *Id.* at 37. Smith Farm asserts, moreover, that "work would have stopped if they had been advised of any trouble," but that "[n]either the Corps nor the EPA ever advised that the work was problematic or that work should stop." *Id.* at 36.

The Board acknowledges that, had the Corps "taken more affirmative steps to alert Appellants or Mr. Needham to their concerns or remaining questions about the wood chipping activity, the Corps might have played a more meaningful role in the developing pattern of wetlands construction in the area, and seized the opportunity for an earlier intervention or warning that might have mitigated the extent of the harm by preventing some of the discharges from occurring." *Vico*, 12 E.A.D. at 339 (footnote omitted). Unlike the appellants in *Vico*, Smith Farm

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[66] Smith Farm fails to acknowledge in its appellate brief, however, that Mr. Martin actually did contact Smith Farm, by telephone, on November 12, to discuss the project. *See* 2003 ALJ Tr., vol. VI, at 37-38 (Mr. Needham acknowledging the conversation with Mr. Martin when confronted with Mr. Martin's notes). Smith Farm has never represented that the Corps provided oral approval during this telephone conversation, and Mr. Martin characterized the conversation as being merely informational. *See* 2003 ALJ Tr., vol. I, at 227 ("We discussed this pre-application request and the work that Mr. Needham's clients were planning to conduct on the Smith Farm property.").

[67] The November 6 letter to the Corps stated that the ditching activities were planned to begin excavation on or after November 16, and requested that the Corps contact them by November 13 if they had "any questions or input." Init. Dec. at 6; SF Ex. 14.

[68] Smith Farm cites footnote 8 on page 9 of the Initial Decision to assert that ALJ Charneski found Smith Farm had performed the work according to agreed upon conditions. Smith Farm Br. (2005) at 37. This footnote, however, states only that the conditions Smith Farm had followed (i.e., no side casting, no double handling, no digging of tree stumps with more than one pull of the excavator, and no building of corduroy roads) were "the ground rules agreed to by the [Corps] and the owners of the Southern Pines Site." Init. Dec. at 9 n.8. ALJ Charneski did not find, as Smith Farm implies, that the Corps agreed to these conditions with respect to the excavation activities at Smith Farm. *See id.* As explained above, these conditions do not capture the full extent of the activities at the Smith Farm site.

affirmatively sought out the Corps, thereby increasing the Corps' opportunity for intervention. Smith Farm notified the Corps of its planned activities, and there is no evidence that Smith Farm rushed or in any way altered its construction plans in anticipation of a cease-and-desist order from the Corps or any other government intervention.[69]

On the other hand, as the Board also explained in *Vico,*

> To some degree, this restraint on the Corps' part is understandable under the circumstances. [The Board] recognize[s], for example, that the full extent of the * * * project was not known until January 1999, when inspectors visited the Lewis and Smith Farm sites, and that inspectors in the field, as in this case, are not always authorized to make determinations of violations. Moreover, it is not surprising that a measure of restraint prevailed at the Corps in the wake of the *National Mining* decision.

Vico, 12 E.A.D. at 339.

In any case, as the Board has already stated, Smith Farm also could have sought formal approval from the Corps before embarking on its controversial and unchartered ditch construction. The information it provided to the Corps was inac-

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[69] The Board's finding in *Vico* that the appellants rushed to complete construction before possible government intervention was a significant factor in the Board's decision to affirm the ALJ's culpability findings in that case. *See Vico*, 12 E.A.D. at 340. The Board notes that the Region argues that the Board should make the same finding in the present case, alleging that "[a]lthough work at the Site had ceased in February 1999, [Smith Farm] quickly geared up to resume and complete work at the Site in August 1999," relying on EPA Exhibit CX-SF-7. EPA Br. as to Penalty (2005) at 17. EPA Exhibit 7, which consists of billing reports from Vico Construction and Paxton, shows that the Tulloch ditching primarily took place from December 1998 to February 1999, although approximately one additional week of Tulloch ditching occurred in August 1999. With the exception of the August 1999 work, construction at the Smith Farm site was substantially complete before Mr. Martin made his March and April inspections and before EPA assumed enforcement authority. The Region cites to no evidence to support the idea that Smith Farm rushed to conduct the one additional week of work in August in anticipation of the EPA site visit. Rather, witness testimony tends to support the conclusion that the one additional week of construction in August was merely the continuation of work that could not be completed in February because of wet weather conditions. More specifically, some of the ditches on the Suffolk side had to be dug in a two-stage process. *See* 2003 ALJ Tr., vol. III, at 262; *id.*, vol. V, at 253; *id.*, vol. VI, at 121-25; *see also* SF Ex. 9. Indeed, the Region's own Proposed Findings of Fact, submitted to the ALJ, support this view. *See* Complainants' Proposed Findings of Fact and Conclusions of Law #112 (Jan. 20, 2004) ("Because of significant rainfall during the winter of 1998-99, several ditches on the Suffolk side of the property were constructed in a two-stage process. * * * A shallower ditch was constructed in the winter of 1999, and in August 1999, Paxton Contractors returned to complete the ditch with a deeper ditch cut."); *see also* Complainants' Post-Hearing Brief at 23. Therefore, unlike in *Vico*, Smith Farm did not rush to complete the digging before being ordered to stop by a regulatory agency.

curate as to the scope and extent of the activities that took place. Any early communication Smith Farm had with the Corps is overshadowed by that fact. Additionally, Smith Farm's entire motivation for digging the ditches was to remove the wetlands in a manner that avoided the permitting process. The Board also observes that these were not unsophisticated landowners who did not fully understand the regulatory risk they were undertaking.[70]

The Board is also cognizant that, although "[t]he statute requires EPA to take into account a number of factors in assessing [civil] penalties," it prescribes no precise methodology for calculating such penalties. *See In re Britton Constr. Co.*, 8 E.A.D. 261, 278 (EAB 1999). Moreover, federal courts afford the fact finder "wide deference" in making these "highly discretionary calculations." *E.g., United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 526 (4th Cir. 1999), *cert. denied,* 531 U.S. 813 (2000).

Accordingly, upon thorough consideration, the Board concludes that ALJ Charneski committed no clear error in considering Smith Farm's culpability in committing the 404 Violation that warrants further mitigation or requires the Board to substitute its judgment for the ALJ's with respect to the penalty assessment.

2. *Penalty for Section 402 Permit Violation*

For the 402 violation, the Region proposed a penalty of $21,000, and ALJ Charneski assessed a penalty of $14,000. Smith Farm argues that the amount assessed is excessive, again based on the ALJ's conclusions as to the nature, circumstances, extent and gravity of the violation and Smith Farm's culpability. Smith Farm Br. (2005) at 37-39. The Board addresses each of these challenges in turn.[71]

a. *Nature, Circumstances, Extent and Gravity of the 402 Violation*

Smith Farm's arguments concerning the nature, circumstances, extent and gravity of the section 402 violation are substantially the same as the appellants'

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[70] Although settlement polices are generally not used outside of the settlement context, *see Phoenix Constr.*, 11 E.A.D. at 394 n.37, the Board has noted previously that the "settlement guidance for section 404 violations instructs Agency personnel to consider the violator's experience with the regulatory provisions and control over the events when assessing culpability." *Vico*, 12 E.A.D. at 334 n.69 (citing CWA 404 Penalty Settlement Guidance). This is consistent with the EPA's general enforcement policy as well. *See* General Penalty Policy at 18.

[71] Although ALJ Charneski considered the other statutory factors with respect to the 402 violation, the Board addresses only those aspects of the ALJ's findings that are challenged in this appeal. The Board notes, however, that the economic benefit component for the 402 violation was calculated to be $6,594 and was accepted by ALJ Charneski. Init. Dec. at 47.

arguments in *Vico*. *See Vico*, 12 E.A.D. at 343-44. Smith Farm states that the EPA storm water inspector did not testify as to the extensiveness of the violations, "the only water quality expert to testify found 'exceptionally clean particle-free water,'" and "[t]herefore, the EPA failed to establish that the Tulloch ditches increased any flow of material off the site." Smith Farm Br. (2005) at 39 (citing 2003 ALJ Tr., vol. VI, at 19). Accordingly, in Smith Farm's view, this evidence "at a minimum establish[es] that any violation was short-lived at best and not significant environmentally, further counseling against the hefty penalty imposed by the Initial Decision." *Id.* The Board is not persuaded by these arguments.[72]

Our reasoning with respect to Smith Farm's arguments again mirrors the Board's reasoning in *Vico*. *See* 12 E.A.D. at 343-45. First, as ALJ Charneski observed, Smith Farm's water quality expert visited the construction site more than six months after EPA's site visit, during which time the conditions on the property could have changed significantly, and as a result ALJ Charneski chose to credit the testimony of the EPA inspectors. *See* Init. Dec. at 40. Second, there is more than adequate evidence in the record to support a finding that storm water-related erosion from the ditch banks, spoil pile, or both made its way into the Tulloch ditches themselves, and that at least some of this material traveled through the ditches into the tributaries leading to waters of the United States. *Id.* at 43. As the Board explained above, ALJ Charneski reasonably concluded that Smith Farm violated CWA 301 by discharging pollutants in storm water through ditches into navigable waters without a 402 permit. *Id.* at 48. This type of release is exactly what the NPDES storm water permit program is designed to prevent. *Vico*, 12 E.A.D. at 344. Additionally, as the Board stated above, the failure to timely obtain a required permit does harm to the regulatory program. *See* Part VIII.C.1.a, above (discussing the nature, circumstances, and extent of the 404 Violation),.

In light of ALJ Charneski's findings and the evidence in the record, the Board concludes the ALJ did not clearly err in assessing the severity of the 402 violation.

b. *Culpability*

Finally, Smith Farm argues that it should not be found "culpable" for its failure to obtain an NPDES permit because it "tried mightily to comply with the bewildering array of multi-tiered and multi-agency administered regulations," Smith Farm Br. (2005) at 38, and "immediately" applied for a permit, as soon as it was notified that one was necessary in September 1999, *id.* at 37. Smith Farm further argues that the fact that it installed and maintained pollution control devices should also mitigate its culpability. *Id.* In support of both arguments, Smith

[72] Smith Farm does not contest ALJ Charneski's findings that there was sloughing, rilling, gullying, general bank failure, and sediment in the waterways. *See* Init. Dec. at 44.

Farm cites to witness testimony. *Id.* ALJ Charneski considered competing versions of Smith Farm's culpability and, despite Smith Farm's arguments to the contrary, found that VDEQ notified Smith Farm in a letter dated May 25, 1999, that a storm water permit was necessary and that Smith Farm failed to obtain a section 402 permit until after the EPA inspection in September of that year.[73] Init. Dec. at 45 (citing EPA Ex. 97). ALJ Charneski also found that Smith Farm did not take the appropriate measures to stabilize the ditch banks and that there was substantial bank failure. *Id.* at 45. As stated previously, the Board applies a deferential standard of review to an ALJ's assessment of witness credibility and, therefore, the Board declines to disturb ALJ Charneski's findings with respect to Smith Farm's culpability as to the 402 violation.[74] The Board also notes again that, despite Smith Farm's protests to the contrary, Smith Farm was not merely an innocent land owner caught in a complicated regulatory system. Rather, the complexity and frustration Smith Farm expresses was attributable to its own attempt to drain the wetlands from its property to allow for development in a manner that evaded the costs and delays associated with obtaining appropriate permits. *See, e.g.,* Smith Farm Appeal Br. at 38 n.21 (complaining that ALJ Charneski faulted Smith Farm for failing to stabilize the ditch banks without offering any steps Smith Farm could have taken without being accused of filling wetlands and, in so complaining, failing to consider that obtaining the proper permits was an option). Thus, the Board concludes ALJ Charneski did not clearly err in evaluating Smith Farm's culpability as to the 402 violation.

3. *Conclusion with Respect to the Penalty*

In sum, the Board concludes that Smith Farm embarked on an inherently risky course of action when it sought to drain its wetlands without obtaining a permit, and in doing so, was fully aware of the potential legal consequences of its actions. The penalty assessed by ALJ Charneski is well-supported by the economic benefit accruing to Smith Farm by bypassing the regulatory permitting process. The penalty is also well-supported by the nature, circumstance, extent and gravity of discharging fill material and construction-related storm water into waters of the United States without first obtaining the required permits under CWA sections 402 and 404. Finally, ALJ Charneski did not err in his consideration of Smith Farm's level of culpability with respect to each violation and, therefore, no

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[73] The Board notes that this letter was addressed to Vico Construction, but stated that it applied to the Smith Farm site.

[74] With respect to Smith Farm's position that VDEQ represented that an NPDES permit was not needed, the ALJ states that "[a] review of the cited testimony * * * is not sufficient to support Smith Farm's version of events that it was informed that a Section 402 permit was not needed. The testimony of James Boyd is, at best, inconclusive on this issue and, at worst, it suffers from a lack of detail and clarity." Init. Dec. at 39.

further mitigation of the penalty is warranted. Accordingly, the Board declines to further disturb the penalty imposed against Smith Farm.

IX. *CONCLUSION*

Based on the foregoing, the Board concludes that ALJ Moran did not err in determining that EPA has CWA jurisdiction over the wetlands at Smith Farm. Additionally, the Board concludes ALJ Charneski properly determined that Smith Farm violated CWA section 301 by discharging "fill material," in the form of substantial amounts of wood chips, into waters of the United States without a CWA section 404 permit. The Board also concludes that Smith Farm's discharge of pollutants in storm water into and through ditches and into waters of the United Sates without a CWA section 402 permit violates CWA section 301 as well. Finally, the Board concludes ALJ Charneski did not err in evaluating the seriousness of the violations or Smith Farm's culpability.

X. *ORDER*

The Board affirms the jurisdictional determination of ALJ Moran. The Board also affirms the liability determinations of ALJ Charneski (which was incorporated by ALJ Moran) as well as the penalty assessed by ALJ Moran. Smith Farm shall pay a total civil penalty of $34,000. Payment of the entire amount of the civil penalty shall be made within thirty (30) days of service of this Final Decision and Order, by certified or cashier's check payable to the Treasurer, United States of America, and forwarded to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

A transmittal letter identifying the case name and the EPA docket number, plus the Respondent's name and address, must accompany payment. 40 C.F.R. § 22.31(c). Respondent shall serve copies of the check or other instrument of payment on the Regional Hearing Clerk and on the Complainant. If appropriate, the Region may modify the above-described payment instructions to allow for alternative methods of payment, including electronic payment options. Failure to pay the penalty within the prescribed time may result in assessment of interest on the civil penalty. *See* 31 U.S.C. § 3717; 40 C.F.R. § 22.31(c).

So ordered.