IN RE J. PHILLIP ADAMS

CWA Appeal No. 06-06

REMAND ORDER

Decided June 29, 2007

Syllabus

The United States Environmental Protection Agency, Region 10 ("Region"), appeals an October 19, 2006 Initial Decision issued by Administrative Law Judge William B. Moran ("ALJ") dismissing an administrative enforcement action the Region initiated against J. Phillip Adams ("Adams") for alleged violations of the Clean Water Act ("CWA" or "Act"). In the proceedings below, the Region alleged that Adams violated sections 301(a) and 404 of the Act, 33 U.S.C. §§ 1311(a) and 1344, in the fall of 2001, when he did not obtain a permit issued pursuant to section 404 before using heavy equipment to place dredged and/or fill material into wetlands while constructing a road crossing over Potter Creek in Bannock County, Idaho. In his Initial Decision, the ALJ found that the "farm road" exemption set forth in CWA section 404(f)(1)(E), 33 U.S.C. § 1344(f)(1)(E), which Adams invoked for the first time six business days prior to the evidentiary hearing in the case, was a jurisdictional defense that applied to the road crossing project and exempted the activity from the section 404 permit requirement.

The Region contends that the ALJ's finding of no liability was in error and challenges the finding on both procedural and substantive grounds. The Region argues that Adams did not timely raise the farm road exemption, that the ALJ impermissibly permitted Adams to raise the issue at hearing, and that the Region was materially prejudiced by the late introduction of the issue. The Region also asserts that the ALJ erroneously shifted the burden of proof associated with the exemption from Adams to the Region. The Region further challenges the ALJ's findings that Adams constructed only a road crossing and not a dam as well, and that Adams adequately implemented the best management practices that the applicable regulations require. Finally, the Region contends that the ALJ failed to fully consider the implications of section 404(f) and to make a finding regarding the "recapture" provision in section 404(f)(2).

Held: The Board reverses the ALJ's decision and remands the matter to the ALJ for further proceedings consistent with the Board's ruling. Contrary to the ALJ's decision, the farm road exemption found in CWA section 404(f) is not a jurisdictional defense. Rather, the exemption is an affirmative defense to an allegation of a section 404 violation. As an affirmative defense, the burden of proving the application of the farm road exemption lies with its proponent. To establish the defense under the exemption, a proponent must establish that: (1) the project is the construction or maintenance of a farm road; (2) the project is in compliance with each of the fifteen baseline best management practices in 33 C.F.R. § 323.4(a)(6); (3) the discharge of dredged or fill material resulting from the project does not contain a toxic pollutant listed in CWA section 307; and (4) the purpose of the activity in question is not to convert an area of water of the United States into a use to which it was

not previously subject, such that the flow or circulation of affected waters may be impaired or the reach of such waters reduced. The Board finds that it is unclear from the record whether the ALJ properly applied the burden of proof and whether Adams satisfied that burden.

With respect to the timeliness of Adams's assertion of the exemption, an ALJ has broad discretion when conducting an administrative proceeding and may deem an untimely-raised defense as waived after considering the reasons for the delay and whether inclusion of the defense will cause prejudice to the parties. Because the ALJ erroneously construed the farm road exemption as a jurisdictional claim that can be raised at any time, rather than as an affirmative defense, he did not evaluate whether Adams's late assertion of the farm road exemption prejudiced the Region's ability to prepare a rebuttal to the defense. The Board finds that the ALJ erred when he failed to consider the Region's claims of prejudice. The Board further finds that Adams's late assertion of the farm road exemption did, in fact, prejudice the Region's ability to prepare its rebuttal to the defense, and that the ALJ's decision to allow the assertion of the defense without delaying the hearing to allow the Region the time necessary to elicit and adduce the pertinent facts to support its rebuttal was an abuse of discretion. Accordingly, the Board remands the case to the ALJ for further proceedings consistent with this opinion.

Before Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein.

Opinion of the Board by Judge Fulton:

On January 17, 2007, the United States Environmental Protection Agency ("EPA"), Region 10 ("Region"), filed an appeal from an Initial Decision by Administrative Law Judge William B. Moran ("ALJ") dated October 19, 2006. The Region alleged that J. Phillip Adams ("Adams") violated sections 301(a) and 404 of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. §§ 1311(a) and 1344. More particularly, the Region alleged that in the fall of 2001, Adams did not obtain a permit required by section 404 of the Act, 33 U.S.C. § 1344, before using heavy equipment to place dredged and/or fill material into wetlands and below the ordinary high water mark while constructing a road crossing over Potter Creek in Bannock County, Idaho. Administrative Complaint ("Compl.") ¶¶ 5, 7, 10. The ALJ determined that Adams did not violate the Act. Specifically, the ALJ found that the "farm road" exemption in CWA section 404(f)(1)(E), 33 U.S.C. § 1344(f)(1)(E), applied to Adams's construction of the road crossing, and thus exempts the activity from the Act's permit requirement.

In this appeal, the Region contends that the ALJ's finding of no liability was in error. The Region challenges on both procedural and substantive grounds the finding that the farm road provision exempts Adams's road crossing construction activity from the section 404 permit requirement. The Region contends that Adams did not timely raise his section 404(f) argument, and that the ALJ impermissibly allowed Adams to present the argument at hearing. Moreover, according to the Region, the ALJ erroneously shifted the burden of demonstrating the application of the farm road exemption from Adams to the Region. The Region also

argues that the ALJ's findings that Adams (1) constructed only a road crossing and not a dam as well, and (2) adequately implemented the best management practices required by the applicable regulations were in error. Finally, the Region contends that the ALJ failed to fully consider the implications of section 404(f) and to make a finding regarding the "recapture" provision in section 404(f)(2).

For the reasons set forth below, the Environmental Appeals Board ("Board") finds that the ALJ committed procedural error and remands this case to the ALJ for further proceedings consistent with this opinion.

I. *BACKGROUND*

A. *Statutory and Regulatory Background*

The Act makes it unlawful for any person to discharge dredged or fill material into waters of the United States without first obtaining an appropriate permit issued by the United States Army Corps of Engineers ("Corps") pursuant to CWA section 404. CWA §§ 301(a), 404(a), 33 U.S.C. §§ 1311(a), 1344(a). Under the section 404 program, the permitting process serves as the primary vehicle for ensuring that wetlands-affecting projects are undertaken in a manner that is protective of wetlands functioning and characteristics. Typically, the permitting process begins with the submission of a permit application by the party intending to undertake the project,[1] followed by the Corps' evaluation of the proposed project and the issuance of a section 404 permit decision,[2] which is often the issuance of a permit with protective conditions. *See* 33 C.F.R.§ 325.2(a)(6). Because the permit process begins with the submission of an application, protection of wetlands through the permit program depends in large measure on voluntary compliance in

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[1] There is also typically an opportunity for pre-application consultation. Each district of the Corps is required to "establish local procedures and policies including appropriate publicity programs which will allow potential applicants to contact the [Corps] to request pre-application consultation" for major projects. 33 C.F.R. § 325.1(b). Such pre-application consultations occur among the applicant; Corps district staff; interested resource agencies at the Federal, state, and local levels; and the interested public, in an effort to discuss the proposal prior to an applicant's irreversible commitment of resources. *Id.* "This early process should be brief but thorough so that the potential applicant may begin to assess the viability of some of the more obvious potential alternatives in the application." *Id.*

[2] Upon receipt of a complete permit application, the Corps begins the formal review process. 33 C.F.R.§ 325.2(a)(2). The Corps prepares a public notice and reviews the comments received as a result of the public notice. *Id.* § 325.2(a)(1)-(2). If necessary, the Corps will obtain the applicant's views on issues raised in the comments. *Id.* § 325.2(a)(3). The Corps then evaluates the application pursuant to the CWA section 404(b)(1) guidelines, 40 C.F.R. pt. 230, and makes a determination to either deny or grant the permit. *Id.* §§ 320.4(a)(2), 325.2(a)(6)-(7).

the first instance.[3]

In some circumstances, the goal of protecting wetlands is achieved through a conditional exemption to the permit requirement – with the conditions themselves serving as the vehicle for preventing unnecessary wetlands damage. Such is the case with CWA section 404(f) and its implementing regulations. Under that provision, a multi-part test determines whether a discharge of dredged or fill material is exempt from the permit requirement. First, the discharge must be for the purpose of an activity listed in section 404(f)(1). CWA § 404(f)(1), 33 U.S.C. § 1344(f)(1). The relevant activity for purposes of this case is described in section 404(f)(1)(E) and referred to as the "farm road" exemption. Section 404(f)(1)(E) exempts from the permit requirement discharges made:

> [F]or the purpose of construction or maintenance of farm roads * * * , where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on aquatic environment will be otherwise minimized.

33 U.S.C. § 1344(f)(1)(E).

Second, to qualify for this exemption, the farm road project in question must comply with the requirements of the Corps' regulations implementing the exemption. These regulations, found at 33 C.F.R. § 323.4, establish a number of conditions. In particular, the activity must be conducted in accordance with fifteen baseline best management practices ("BMPs"). 33 C.F.R. § 323.4(a)(6).

Even if the requirements of CWA section 404(f)(1)(E) and 33 C.F.R. § 323.4(a)(6) are met, the governing statute and regulation contain additional provisions designed to "recapture" otherwise excepted discharges within section 404's purview, in which case a permit is required notwithstanding the exemption. Specifically, "[i]f any discharge of dredged or fill material resulting from the [farm road construction or maintenance] contains any toxic pollutant listed under section 307 of the CWA such discharge shall * * * require a Section 404 permit." 33 C.F.R. § 323.4(b). Recapture also occurs if the activity is intended to introduce a new use to an "area of the navigable waters" of the United States that impairs the flow or circulation of the navigable waters or reduces the navigable waters' reach.

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[3] Otherwise, wetlands projects are brought into the permitting process only when they are discovered by inspectors in the field, which is ordinarily possible only after potentially damaging fill activities have been initiated. Such was the case in the matter before us.

CWA § 404(f)(2), 40 U.S.C. § 1344(f)(2); 33 C.F.R. § 323.4(c). Therefore, to establish a defense pursuant to the farm road exemption, a proponent must establish the following: (1) the project is the construction or maintenance of a farm road; (2) the project is in compliance with each of the fifteen baseline BMPs in 33 C.F.R. § 323.4(a)(6); (3) the discharge of dredged or fill material resulting from the project does not contain a toxic pollutant listed in CWA section 307; and (4) the purpose of the activity in question is not to convert an area of water of the United States into a use to which it was not previously subject, such that the flow or circulation of affected waters may be impaired or the reach of such waters reduced. 33 U.S.C. § 1344(f)(1)(E); 33 C.F.R. § 323.4(a)(6), (b), (c).

B. *Factual and Procedural Background*

J. Phillip Adams is the managing member of Diamond T Ranch, LLC, which has owned real property in the vicinity of Potter Creek in Bannock County, Idaho, since 1998. ALJ Hearing Transcript ("ALJ Tr.") at 672-73. Diamond T Ranch conducts farming and ranching activities. *Id.* at 672. In the summer of 2001, Adams authorized a project to improve an existing road crossing over Potter Creek to facilitate the transportation of farm equipment between fields. *Id.* at 703-08, 936. Diamond T Ranch had not used the old, existing road crossing to transport farm equipment. *Id.* at 703-04.[4] Adams also considered creating an impoundment as part of the road crossing project. *Id.* at 716. The road crossing/impoundment project is hereafter referred to as the "Potter Creek Project."

In November 2001, the Corps learned from the Idaho Department of Water Resources ("IDWR") of a potential Clean Water Act violation at Potter Creek. *Id.* at 91-92. Neither Diamond T Ranch nor Adams had obtained a permit from the Corps in connection with the proposed road crossing/impoundment project; however, land movement activities within the stream channel and adjacent areas had nonetheless begun.[5] *Id.* at 96-97. Adams also had not obtained a permit from the

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[4]

Q And what use has been made by you of that road prior to the time you constructed the crossing?

A Other than riding a four-wheeler and riding trucks down to that point, riding four-wheelers or horses or cattle across it, I've never been across it.

ALJ Tr. at 704.

[5] There are several places in the Initial Decision where the ALJ cites court cases construing the legislative history behind section 404(f)(1)(E) regarding the need for farmers to be able to undertake exempted projects without the attendant delays to cultivation and harvesting activities that might accompany permit proceedings, *see* Init. Dec. at 3-4, yet there is nothing in this record that suggests any exigencies for this particular project. Apparently, the fields in question had been cultivated for years, and the preexisting crossing, while less than ideal, had been present for years before Diamond T Ranch's farm manager recommended its improvement in approximately 2000. ALJ Tr. at 936. Why, in these circumstances, Adams could not have engaged the relevant officials before taking action is less

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IDWR pursuant to the Stream Channel Protection Act, Idaho Code Ann. §§ 42-3801 to -3812. As a result, IDWR issued to Adams a Notice of Violation ("NOV") and a fine. *Id.* at 98.

Upon receipt of the state-issued NOV, Diamond T Ranch, through Adams, submitted to IDWR a "Joint Application for Permits" dated November 13, 2001, to obtain an "after-the-fact" stream channel alteration permit for work commenced in and proposed for Potter Creek. ALJ Tr. at 102; EPA Ex. 7. The "Joint Application for Permits" allows applicants to use one form to apply for permits issued by the Corps, IDWR, and Idaho Department of Lands. ALJ Tr. at 101; EPA Ex. 7. The agency receiving the joint application forwards it to the other two agencies as necessary. In this case, IDWR received Adams's application and forwarded a copy to the Corps for consideration for a permit under CWA section 404. ALJ Tr. at 101-02. Diamond T Ranch's joint application for permits described the project as an "impoundment for road crossing." EPA Ex. 7.

Between November 2001 and May 2002, the Corps contacted Adams by phone and letter to obtain additional information not available on the permit application regarding the Potter Creek Project. ALJ Tr. at 181-83, 192-95. After determining that "additional work" had been done on the Potter Creek Project without the appropriate section 404 permit, the Corps contacted Diamond T Ranch, through Adams, by letter dated May 10, 2002. ALJ Tr. at 193-94, 198, 730-32. Specifically, the Corps issued a Notice of Violation, Cease and Desist Order, and Order for Initial Corrective Measures in connection with the road construction activities at Potter Creek. EPA Ex. 11. The Corps directed Adams to complete initial corrective measures, which were distinct from a permanent restoration plan, by June 1, 2002. *Id.*; ALJ Tr. at 225. Diamond T Ranch provided the Corps with a "Crossing and Restoration Plan" on approximately September 16, 2002. ALJ Tr. at 238. By letter dated September 20, 2002, the Corps informed Adams that the "plan as submitted is incomplete" but that "in the interest of stabilizing and restoring the area prior to snowfall, [Adams] should proceed with implementation of [the] plan while the following changes and additions are made to the plan." EPA Ex. 17. The Corps listed seven modifications and additions to the plan and requested Adams to provide additional information by October 4, 2002. *Id.* Adams did not respond to this request. ALJ Tr. at 242-43. It appears instead that Adams took this letter as approval to proceed with the Potter Creek Project, which Dia-

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than clear. Had he done so, one of two things would have likely occurred – either he would have been required to seek a permit, or he would have been alerted to the BMP and recapture requirements for farm roads, in which case he could have undertaken the activity with the deliberate intention of complying with his permit or satisfying the BMPs, instead of attempting to rationalize after the fact that the work was actually undertaken in compliance with the BMP requirements. *See* EAB Oral Arg. Tr. ("EAB Tr.") at 43 ("It just so happened that the construction of [Adams's] road nevertheless complied with those Best Management Practices.").

mond T Ranch completed shortly thereafter. ALJ Tr. at 732, 742 ("And there was definitely no work done after May of '02 until I received a letter telling me to go ahead on September 20th of '02."); *see also* Respondent's Appellate Brief ("Adams Reply Br.") at 5 ("Respondent has regularly used the farm road to move farm equipment across the ravine ever since its completion in 2002.").

Neither Diamond T Ranch nor Adams would ultimately receive a section 404 permit from the Corps for the Potter Creek Project.[6] The Corps referred the case to EPA in November or December 2002. ALJ Tr. at 256-57, 517-18. EPA initially issued a compliance order to Adams in June 2003, EPA Ex. 34, and in November 2003, Adams submitted to EPA a "Proposed Restoration Plan for Potter Creek." Adams Ex. 8. After EPA and Adams failed to resolve the CWA issues associated with the Potter Creek Project, the Region issued an administrative complaint on June 16, 2005, alleging that Adams had violated sections 301(a) and 404 of the CWA, 33 U.S.C. §§ 1311(a) and 1344, by failing to obtain a permit under section 404 of the Act, 33 U.S.C. § 1344, before engaging in fill activities in a wetlands area. Compl. ¶¶ 5, 7, 10. Pursuant to CWA section 309(g)(2)(B), 33 U.S.C. § 1319(g)(2)(B), the Region sought an administrative penalty of $25,000. Compl. ¶¶ 2, 14. On July 6, 2004, Adams filed an answer to the administrative complaint, raising the following defenses: (1) that the complaint failed to state a cause of action against Adams upon which relief could be granted; (2) that the real party in interest was Diamond T Ranch, and that Adams's acts and conduct were performed as manager and member of Diamond T Ranch; (3) that EPA and the Corps lacked jurisdiction because Potter Creek and any adjacent wetlands were neither "'navigable waters' nor tributar[ies] to navigable waters of the United States"; and (4) that Adams did not at any time discharge pollutants into waters of the United States. *See* Answer at 1-2.

On August 9, 2004, the ALJ issued an order directing the parties to complete their pre-hearing exchanges by October 12, 2004.[7] In his Notice of Hearing filed May 20, 2005, the ALJ directed the parties to file all motions no later than June 3, 2005, and scheduled an evidentiary hearing for July 26, 2005, and continuing as necessary through July 28, 2005.[8]

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[6] There is likewise no indication in the record that IDWR issued a section 404-like permit under the Idaho Stream Channel Protection Act, Idaho Code Ann. §§ 42-3801 to -3812, or any other provision of State law.

[7] The Region filed its prehearing exchange on October 15, 2004, followed by a supplemental prehearing exchange on July 1, 2005. Adams filed his prehearing exchange on October 28, 2004, and three supplemental prehearing exchanges on June 24, June 29, and July 8, 2005.

[8] A Notice of Hearing Site issued June 14, 2005, rescheduled the hearing for July 27 through 29, 2005.

Six business days prior to the hearing, on July 19, 2005, Adams moved to dismiss the administrative complaint on two grounds: (1) Adams was not the real party in interest and (2) EPA lacked jurisdiction because section 404(f)(1)(E) of the CWA, which exempts discharges for the purpose of construction or maintenance of farm roads, applied to Adams's activities. Motion to Dismiss and Prehearing Brief at 1, 3. The latter of these issues had not been identified in Adams's answer or during the prehearing exchange. On July 21, 2005, the Region opposed and moved to strike Adams's Motion to Dismiss and Prehearing Brief. Motion to Strike Respondent's Motion to Dismiss and Prehearing Brief ("Motion to Strike") at 1. In particular, the Region sought to prohibit Adams from raising the section 404(f)(1)(E) argument because the Region claimed it had been given inadequate notice of Adams's intent to assert the defense, which in turn affected the Region's ability to prepare its rebuttal for the evidentiary hearing. Motion to Strike at 3-4. The ALJ did not address either motion prior to the hearing and proceeded to hold the evidentiary hearing as scheduled. The ALJ presided over a four-day administrative hearing on July 27 thru 29, 2005, and August 1, 2005, in Pocatello, Idaho. At the hearing, he acknowledged the Region's Motion to Strike and stated:

> [W]hile I'm not considering the motion, that doesn't mean that I won't consider the issue of the applicability of F(1). * * * [I]t seems to me that this is jurisdictional, and if the respondent is able to demonstrate that this exemption for this farming activity road construction exemption applies, then it seems to me that the Clean Water Act permit provision would not apply.[9]

ALJ Tr. at 17.

The ALJ issued his Initial Decision on October 18, 2006, finding that the primary purpose of the project in question was to move farm equipment from one field to another. Init. Dec. at 14. Turning to the implementing regulations at 33 C.F.R. § 323.4(a)(6), the ALJ further found that EPA had failed to identify the best management practices Adams allegedly violated. *Id.* at 17. In particular, the ALJ observed, "Most of these 15 provisions have not been asserted by EPA or the Corps as having been violated. In fact, EPA does not *cite* to a *specific* provision, among the 15, as violated during Adams's activity in modifying the existing crossing." *Id.* The ALJ determined, with limited discussion, that nine of the best management practices did not apply to Adams's activity; therefore, the Initial De-

[9] Counsel for the Region characterizes this statement as the ALJ's ruling against the Motion to Strike. EAB Tr. at 11; Reg. Br. at 5. One of the byproducts of the ALJ's conclusion that the defense is jurisdictional, and can thus be raised at any time, is that this appears to have short-circuited his consideration of the Region's allegations of prejudice. As discussed below, we conclude that the ALJ erred in concluding that the defense is jurisdictional and in failing to consider and mitigate the prejudice to the Region flowing from the late assertion of the defense.

cision addressed only six best management practices. *Id.* at 17-19. In doing so, the ALJ found that "EPA's evidence that the road in issue was not constructed in accordance with best management practices * * * was wanting" and concluded that "none of the 15 baseline provisions were violated." *Id.* at 15 n.39, 17.

Finally, the ALJ determined that Adams's discharge did not involve a toxic pollutant and that the Region did not allege that Adams "was converting an area of the waters to a use to which it was not previously subject." *Id.* at 20. Absent a basis for recapture, the ALJ concluded that CWA section 404(f)(1)(E) served to exempt Adams's activity from the permit requirement and dismissed the proceeding.

The Region filed this appeal on January 17, 2007. Adams filed a reply to the appeal on March 6, 2007. The Board subsequently heard oral argument in the case on May 3, 2007. The case now stands ready for decision by the Board.

II. *DISCUSSION*

A. *Standard of Review*

In an enforcement proceeding, the Board conducts a *de novo* review of an administrative law judge's factual findings and legal conclusions. 40 C.F.R. § 22.30(f) (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, and shall set forth in the final order the reasons for its actions"); *see, e.g.*, Administrative Procedure Act, 5 U.S.C. § 557(b) ("On appeal from or review of the 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."); *In re Vico Constr. Corp.*, 12 E.A.D. 298, 313 (EAB 2005); *In re Mayes*, 12 E.A.D. 62 (EAB 2005), *appeal docketed*, No. 3:05-CV-478 (E.D. Tenn. Oct. 14, 2005); *In re Bricks, Inc.*, 11 E.A.D. 224, 226 (EAB 2003), *aff'd*, 426 F.3d 918 (7th Cir. 2005). In so doing, the Board will typically grant deference to an administrative law judge's determinations regarding witness credibility and the factual findings based thereon. *See, e.g., Vico Constr. Corp.*, 12 E.A.D. at 313 (EAB 2005) (explaining that the approach "recognizes that the ALJ is able to observe first-hand a witness's demeanor during testimony and is therefore in the best position to evaluate his or her credibility").

We begin our analysis with consideration of whether the farm road exemption is a jurisdictional defense, as this issue has potential implications for both the ordering of the burden of proof and the question of the timeliness of the assertion of the defense. We then turn to the issue of burden of proof. Finally, with the burden of proof and the parties' respective responsibilities relative to the farm

road exemption fully in view, we turn to the question of whether the Region was materially prejudiced by the late assertion of the defense.

B. *The Farm Road Exemption: Jurisdictional or an Affirmative Defense?*

Section 404(f)(1)(E) of the CWA is a statutorily-created exemption to the otherwise mandatory section 404 permit. *See* discussion at Part I.A, *supra*. The Board and its predecessors have commonly viewed statutory exceptions to a requirement as affirmative defenses. *In re Rybond, Inc*., 6 E.A.D. 614, 637 n.33 (EAB 1996); *In re Standard Scrap Metal Co.*, 3 E.A.D. 267, 272 n.9 (CJO 1990) ("Generally, a statutory exception (or exemption) must be raised as an affirmative defense * * * ."), citing *United States v. First City Nat'l Bank of Houston*, 386 U.S. 361, 366 (1967) (holding that a "party that 'claims the benefits of an exception to the prohibition of a statute' carries the burden of proving that it falls within the exception"). In light of the foregoing, we question the ALJ's characterization of the section 404(f) argument as a "jurisdictional" claim.

The federal government plainly has jurisdiction under CWA section 404 to regulate activities that will lead to discharges of dredged or fill material into the waters of the United States, 33 U.S.C. § 1344(a), and here, the ALJ concluded both that Potter Creek is a water of the United States and that Adams was engaged in fill activities. Init. Dec. at 10, 25. CWA section 404(f) simply provides a narrow exception to the Corps' plenary permitting authority for a certain range of otherwise regulated activity. However, the authority to regulate under the CWA is distinct from the subject matter jurisdiction that defines a tribunal's authority to adjudicate a claim.[10]

The Supreme Court recently opined in *Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235 (2006), on the difference between a tribunal's subject matter jurisdiction to adjudicate a claim and the issue of whether a statutory requirement constitutes an element of a claim for relief. The *Arbaugh* Court first observed that there has been little clarity "[o]n the subject-matter jurisdiction/ingredient-of-claim-for-relief dichotomy." *Id.* at 1242. The Court considered this dichotomy and reasoned that Congress dictates the authority of the federal courts to adjudicate claims, and 28 U.S.C. §§ 1331 (federal question jurisdiction) and 1332 (diversity jurisdiction) provide the basic statutory grants for a federal court's subject matter jurisdiction and authority to adjudicate claims. The Court then established the bright-line rule that "when Congress does not rank a statutory limitation on coverage as jurisdic-

[10] At oral argument, counsel for Adams reiterated that the section 404(f) exemption was jurisdictional because "[t]he effect of the exemption is to take away from Clean Water Act jurisdiction certain activities * * * ." EAB Tr. at 49. However, he acknowledged that the exemption's application did not implicate the Board's power to adjudicate this controversy. *Id.* at 49-50, 51 ("We are not necessarily trying to lump it in with subject [matter] or personal [ ] jurisdiction.").

tional, courts should treat the restriction as nonjurisdictional in character." *Arbaugh*, 126 S. Ct. at 1245. Accordingly, the Court held that the "numerosity requirement" of Title VII of the Civil Rights Act is an element of a plaintiff's claim for relief under Title VII rather than a jurisdictional requirement.[11]

The subject matter jurisdiction of the ALJ and the Board for this proceeding is provided by CWA section 309(g)(1), 33 U.S.C. § 1319(g)(1), which establishes administrative penalty assessment authority for, among other things, violations of the section 404 permitting requirements, and by the Consolidated Rules of Practice, promulgated at 40 C.F.R. part 22, which in relevant part specify the administrative adjudicatory process for the assessment of any Class II penalty under CWA section 309(g). 40 C.F.R. §§ 22.1(a)(6), 22.4(c)(1). These jurisdictional provisions neither mention exemptions nor refer to the relevant statutory or regulatory passages that provide for exemptions. Moreover, the section 404(f) exemptions appear in regulatory and statutory provisions that themselves are silent as to subject matter jurisdiction, CWA section 404(f), 33 U.S.C. § 1344(f), and 33 C.F.R. § 323, and separate from the above-referenced provisions conveying subject matter jurisdiction.

Accordingly, we conclude, consistent with the Supreme Court's guidance in *Arbaugh*, that the farm road defense does not implicate the ALJ or the Board's subject matter jurisdiction to adjudicate administrative penalty assessments and thus should not be regarded as jurisdictional in nature.[12] This conclusion is consistent with the holding of the only lower court we have found that has considered the nature of a CWA section 404(f) defense. In *United States v. Sea Bay Dev. Corp.*, No. 2:06cv624, 2007 WL 1169188 (E.D. Va. April 18, 2007), the district court relied on *Arbaugh* to determine, with limited discussion, that an activity's potential exemption from the permit requirement under CWA section 404(f) is not

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[11] Title VII, which protects individuals against employment discrimination on the bases of race, color, national origin, sex, and religion, applies to the actions of employers with fifteen or more employees. 42 U.S.C. §§ 2000e(b), 2000e-2(a). This fifteen-employee threshold for the Act's applicability is known as the "numerosity requirement." *Arbaugh*, 126 S. Ct. at 1245.

[12] Courts that have considered whether statutory exemptions constitute limitations on subject matter jurisdiction or are affirmative defenses have also evaluated the consequences of characterizing the exemption as a jurisdictional question, in particular the fact that the court is obliged to raise the issue *sua sponte* when it appears that subject matter jurisdiction is lacking. *E.g.*, *Arbaugh*, 126 S. Ct. at 1244; *United States v. Space Hunters, Inc.*, 429 F.3d 416, 422, 426 (2d Cir. 2005) (construing provision in the Fair Housing Act that exempts from portions of its purview "housing that is occupied by four or less families and in which the owner lives"). From this vantage point, a potential consequence of characterizing the section 404(f) defenses as sounding in subject matter jurisdiction would be the imputation to the reviewing tribunal of the duty to conduct time-consuming and fact-intensive inquiries to evaluate *sua sponte* each of the six exemptions set forth in 404(f)(1) to eliminate the possibility that one does not divest the tribunal of subject matter jurisdiction. This task would impede the efficiency of adjudications, and "requiring such an exercise makes little sense, especially since the record may be silent on the issue." *Space Hunters*, 429 F.3d at 426.

jurisdictional, but rather "involves the application of facts to an appropriate construction of the exemption. Whether Defendant's exemption argument succeeds or fails goes to the viability of Plaintiff's cause of action, and not to the power of this Court to adjudicate this case." *Id.* at *6.

In short, after considering the relevant case law distinguishing between subject matter jurisdiction defenses and affirmative defenses, and our earlier decisions characterizing statutory exemptions as affirmative defenses, we see no cause to view the section 404(f)(1)(E) argument in any different light and thus conclude that the farm road exemption in section 404(f)(1)(E) is not jurisdictional but rather an affirmative defense to an allegation of a section 404 violation. Having determined that the exemption in question is an affirmative defense, we now consider the proper allocation of the burden of proving the affirmative defense.

C. *Burdens of Presentation and Persuasion*

In circumstances of competing evidence, our decision is informed by burdens of proof. In an administrative penalty proceeding, the Region bears the burden of demonstrating that the alleged violation occurred "as set forth in the complaint and that the relief sought is appropriate." 40 C.F.R. § 22.24(a); *In re Vico Constr. Corp.*, 12 E.A.D. at 298. This prima facie showing of a violation is established upon the Region's production of "evidence of sufficient quality and quantity on each of the [ ] elements such that, if not rebutted, the trier of fact would 'infer the fact at issue and rule in [complainant's] favor.'" *In re City of Salisbury*, 10 E.A.D. 263, 283 (EAB 2002) (quoting Black's Law Dictionary 1209 (7th ed. 1999)); *see United States v. RGM Corp.*, 222 F. Supp. 780, 786 (E.D. Va. 2002); *United States v. Lambert*, 915 F. Supp. 797, 802 (S.D.W. Va. 1996). Once the Region establishes its prima facie case, "the respondent must come forward with evidence to support any defenses it has that will rebut the allegations in the complaint." *Salisbury*, 10 E.A.D. at 289; *see* 40 C.F.R. § 22.24(a); *In re Richner*, 10 E.A.D. 617, 620 (EAB 2002). One who asserts an affirmative defense bears the burdens of producing evidence as to the defense and demonstrating, by a preponderance of the evidence, that the defense applies. 40 C.F.R. § 22.24(a); *In re Friedman*, 11 E.A.D. 302, 315 (EAB 2004), *aff'd*, No. 2:04-CV-517-WBS-DAD (E.D. Ca. Feb. 25, 2005), *aff'd*, No. 05-15664, 2007 WL 528073 (9th Cir. Feb. 15, 2007).

In this case, once the Region presented a prima facie case that Adams violated the section 404 permit requirement, the burden to present any defenses to liability should have shifted to Adams. Because the farm road exemption is an affirmative defense, Adams should have been assigned the burden of proving that the exemption applies, satisfying each of the elements of proof noted above. 40 C.F.R. § 22.24(a). During the oral argument, Adams agreed that he bore this burden of proof. EAB Tr. at 40; *see also* Adams Reply Br. at 14-15 ("[T]he Presiding Officer properly placed the burden on Respondent to make a prima facie

showing that the farm road exemption applied. Only after finding that Respondent met its burden did the Presiding Officer consider rebuttal evidence offered by EPA.") (footnote omitted).

Notably, the Initial Decision does not directly address whether the Region established its prima facie case that Adams discharged dredged or fill material into the waters of the United States without a section 404 permit. Rather, the ALJ moved immediately to the farm road exemption and discussed the parties' arguments concerning Adams's compliance with the BMPs. The Region argued that Adams intended to and did construct both a dam and a road crossing, and that because of this dual purpose of the project, Adams did not satisfy the requirements for the exemption. The ALJ rejected this argument and, as noted, proceeded to determine that the farm road exemption applied and find that Adams did not violate the CWA because his activity was exempt from the permit requirement.[13]

It is unclear from the ALJ's articulation of his findings whether he properly allocated the burden of proof with respect to the farm road exemption. While the ALJ appears to accept that the burden is Adams's to bear, Init. Dec. at 4 ("EPA also reminds that it is the Respondent's burden to establish both that it qualifies for the exemption and that it does not come within that section's recapture provision * * * ."), it is not clear that he held Adams to this burden. Much of the ALJ's analysis of the defense centered on his perception that the regulating agency had an obligation to "inform [Adams] of the existence of a farm road exception [,]" *id.* at 6, and on what the Region allegedly failed to adduce, rather than on Adams's proof. *See also id.* at 14 n.38 (characterizing the government as keeping the farm road exemption "secret" from Adams).

The Region identifies several passages in the Initial Decision that reflect what the Region believes to be the ALJ's misallocation of the burden of proof: (1) the ALJ stated that "[m]ost of these 15 BMP baseline provisions have not been

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[13] We do not regard the Region's theory of the case as specious, as the ALJ's decision might be read to suggest. The Region's theory was that, although this project was intended to provide a better road, it was also intended, at least initially, to build a dam and a pond. Due to our remand on procedural grounds, we do not decide whether we agree with the ALJ that a project need not be singularly for the purpose of a road to be a "farm road" within the meaning of section 404(f)(1)(E). However, even if the ALJ is correct on this point, the secondary objective of pooling or impounding water has major implications in terms of the capacity of a farmer to satisfy the BMP requirements and to survive the recapture provision. Indeed, at oral argument, counsel for the Region argued, with some force, that a project that includes an impoundment will, because it necessarily alters the flow or circulation of the waterway in question, by definition always be subject to recapture. EAB Tr. at 28 ("[T]he question here is whether [a project that has damming as part of its objective] is exempt from the requirements. Could it be exempted? [I]t is not possible * * * ."). In any case, the exemption was plainly not intended to allow projects that fundamentally affect wetlands to be characterized as mere road projects and thereby evade permit review.

asserted by EPA or the Corps as having been violated. In fact, EPA does not *cite* to a *specific* provision, among the 15, as violated during Adams's activity in modifying the existing crossing[,]" Complainant's Notice of Appeal and Supporting Brief ("Reg. App. Br.") at 11(citation omitted); (2) "the Court finds that not one of [Complainant's BMP arguments] was factually established by EPA[,]" *id.* at 11 n.29 (first alteration in original) (citation omitted); (3) "EPA's support for [Respondent's failure to minimize disturbance] is thin[,]" *id.* (alteration in original) (citation omitted); and (4) "*On this record*, the evidence is that the best management practices were followed. Among EPA's witnesses, none offered probative evidence on these issues." *Id.* (citation omitted). Adams, on the other hand, asserts that the ALJ did find that Adams met his burden, and Adams characterizes these passages as the ALJ's "critique of EPA for failing to provide any compelling rebuttal evidence." Adams Reply Br. at 15.

While there is some ambiguity in the Initial Decision, it does appear as though the ALJ may have misallocated the burden of proving the exemption's applicability. In addition to the passages referenced by the Region, we find telling a discussion by the ALJ treating the burden of proof on this issue as analogous to "EPA's burden in establishing a respondent's ability to pay a proposed penalty." Init. Dec. at 18 n.46. Having analogized the burden of demonstrating a respondent's ability to pay an administrative penalty with the burden of demonstrating the application of the farm road exemption, the ALJ described the parties' relative burdens of presentation as the following:

> [O]nce a respondent puts forth a modicum of evidence showing that it qualifies as a farm road * * * and that BMPs were applied, it is then up to EPA to present contrary evidence by showing how the road could have been constructed with less impact on waters of the United States, while still accomplishing its purpose of accommodating the farm equipment that will use it.

Id. We do not agree that the two situations are analogous. EPA has the ultimate burden of persuasion with respect to showing that a penalty is appropriate. 40 C.F.R. § 22.24(a). Therefore, when a respondent puts its ability to pay into issue, the Region must demonstrate as part of its prima facie case the appropriateness of the penalty. *In re CDT Landfill Corp.*, 11 E.A.D. 88, 122 (EAB 2003); *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 542 (EAB 1994). The respondent must then rebut with specific evidence as to why it is unable to pay the penalty. *CDT Landfill Corp.*, 11 E.A.D. at 122. In contrast, the farm road exemption is an affirmative defense, not an element of the complainant's affirmative case, and the respondent, not the Region, plainly bears the burden of proof. 40 C.F.R. § 22.24(a).

With the burden of proof properly allocated, Adams should have had the burden of presenting evidence regarding his compliance with the fifteen BMPs and the recapture provisions in 33 C.F.R. § 323.4 (b) and (c), with EPA having the opportunity for cross-examination and to offer rebuttal evidence.[14] Based on the evidence adduced, Adams would then have the burden of ultimately persuading the trier of fact that the farm road exemption applied. The ALJ's findings are in error to the extent that he may have assigned to the Region the burden of demonstrating that the farm road exemption did not apply. Having determined that addressing the farm road exemption was not part of the Region's affirmative case but rather was an issue with respect to which the Region was in a reactive mode, we now turn to the question of whether the Region was materially prejudiced by the late assertion of the defense.

D. *Timeliness of Adams's Assertion of the Farm Road Exemption and Waiver*

Adams's motion to dismiss filed six business days prior to hearing asserted, for the first time, that an exemption applied to his road crossing construction activity. After making no formal determination on the Region's Motion to Strike, the ALJ relied on the exemption in the Initial Decision. The Region now urges the Board to find that Adams was required to raise the section 404(f) argument as a defense in his answer to the administrative complaint in accordance with the Consolidated Rules of Practice, 40 C.F.R. part 22, that govern this proceeding. According to the Region, Adams waived, and the ALJ erred by considering, the section 404(f) argument because it was not timely raised. Reg. App. Br. at 5. Moreover, the Region states that it was unable to effectively rebut Adams's argument at the hearing because of the late assertion of the defense. *Id.* at 7. In response, Adams argues that he adequately provided the "circumstances or argu-

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[14] It appears that Adams may have relied on the testimony adduced through the cross-examination of the Region's witnesses to support his affirmative defense. While courts applying the Federal Rules of Evidence have been accepting of this approach, they have also recognized that the scope of cross-examination is limited to the subject matter of the direct examination, which does not necessarily anticipate an affirmative defense. *E.g.*, *United States v. Segal*, 534 F.2d 578 (3d Cir. 1976); *see also* Fed. R. Evid. 611(b) (providing scope of cross-examination). ALJs are not bound by the Federal Rules of Evidence, *In re Chippewa Hazardous Waste Remediation & Energy, Inc.*, 12 E.A.D. 346, 364 (EAB 2005), but generally "admit all evidence which is not irrelevant, immaterial, unduly repetitive, unreliable, or of little probative value * * * ." 40 C.F.R. § 22.22 (a)(1). Indeed, we see nothing in the Consolidated Rules of Practice, 40 C.F.R. part 22, that would serve to constrain a respondent's ability to establish an affirmative defense entirely through cross-examination, and thus conclude that the Consolidated Rules allow for this, provided, of course, that the testimony elicited through cross-examination is in fact sufficient to serve as proof on the relevant point. In this regard, we note that the ALJ rejected the testimony of one of EPA's key witnesses, Carla Fromm, as not credible. Init. Dec. at 15 n.40. Under these circumstances, it strikes us as problematic for Adams to rely solely on the cross-examination of Ms. Fromm to establish any of the substantive elements of his affirmative defense, a consideration that we trust the ALJ will take into account when considering on remand whether Adams has met his burden of proof.

ments which are alleged to constitute the grounds of any defense" in the answer to the administrative complaint. 40 C.F.R. § 22.15(b); Adams Reply Br. at 7. Specifically, Adams argues that his only obligation pursuant to the Consolidated Rules was to provide "notice of *circumstances* that may provide the grounds for a defense." Adams Reply Br. at 7. Moreover, Adams contends that he:

> [M]ade it specifically known from the beginning that the purpose of the road crossing was to move farm equipment between adjacent fields separated by Potter Creek * * *. Representatives of the Corps and EPA personally visited the crossing and witnessed its unmistakable farm use on numerous occasions * * * [, and] the Corps specifically considered the exemption's potential applicability for more than four months * * *.

Id. at 8.[15] According to Adams, this information was sufficient for the Region to anticipate and prepare a rebuttal to Adams's assertion in this proceeding that his road crossing construction activity fell within the purview of section 404(f)(1)(E).

The ALJ's sole discussion regarding the timeliness of Adams's assertion of the section 404(f) defense was at the evidentiary hearing, where the ALJ characterized – in our view erroneously – the argument as a jurisdictional claim that could be raised at any time. ALJ Tr. at 17.[16] The ALJ further acknowledged the Board's liberal orientation towards pleading and stated that "at the conclusion of a case, one party or the other may file a motion to conform the pleadings to the evidence." *Id.* at 18.[17] While the ALJ did not explicitly deny the Region's Motion to Strike, he appears to have done so implicitly, in that the Initial Decision relies on section 404(f) to exempt Adams from the permit requirement.

Adams points out, and we do not disagree, that a delayed assertion of a defense is not necessarily fatal to its application in the proceeding.[18] The Consoli-

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[15] After receiving Adams's after-the-fact permit, a Corps environmental resource specialist reviewed the information Adams provided and opined, in an internal memorandum dated March 13, 2002, that the farm road exemption did not apply. EPA Ex. 10.

[16] *See* discussion at Part II.B, *supra*.

[17] There was not, however, a formal amendment to the pleadings in this case.

[18] Adams relies on *In re Veldhuis*, 11 E.A.D. 194 (EAB 2003), to support his argument that the section 404(f) exemption need not be raised in an answer. In *Veldhuis*, the ALJ considered the exemption after she determined that the respondent had implicitly raised the argument in its post-hearing reply brief. *Id.* at 202; *In re Veldhuis*, Docket No. CWA 9-99-0008, at 57 (ALJ June 24, 2002) (Initial Decision). At issue on appeal was whether the argument was properly before the Board, as the respondent had not explicitly raised, and neither party presented arguments concerning, section 404(f) prior

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dated Rules, while specifying when defenses must be asserted, do not specifically address waiver. *In re Lazarus*, 7 E.A.D. 318, 333-34 (EAB 1997). The ALJ's authority to treat defenses as waived inherently flows from the requirement in the rules that defenses be timely raised. 40 C.F.R. § 22.15(b) (contents of the answer). We have observed that an administrative law judge has broad discretion when conducting an administrative penalty hearing and may "determine timeliness on * * * the assertion of defenses." *Lazarus*, 7 E.A.D. at 333-34; *see also* 40 C.F.R. § 22.04(c) ("The [ALJ] may [r]ule upon motions, * * * dispose of procedural requests, * * * [h]ear and decide questions of facts, law or discretion * * * and [d]o all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by [40 C.F.R. Part 22]."). At oral argument, the Region conceded as much. *See* EAB Tr. at 9-10 (where the Region's counsel agreed that an ALJ's waiver of a defense is a matter of discretion, which the Board reviews under the abuse of discretion standard). Generally, in addressing timeliness questions, an ALJ "should make [such] determinations with due regard to issues of delay and prejudice to the [parties]." *Lazarus*, 7 E.A.D. at 334; *see generally id.* at 329-35 (discussing the Board's adoption of the Federal Rules of Civil Procedure's liberal stance towards amended pleadings and the application of potential reasons for declining to permit late assertion of a defense, identified in *Foman v. Davis*, 371 U.S. 178, 181-82 (1962)).[19]

As noted, in this case, because the ALJ construed the section 404(f) argument as a jurisdictional claim that could be raised at any time, rather than as an

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to the appeal. We determined that even though the parties may not have presented arguments related to section 404(f), the facts necessary to determine that the exemption did *not* apply were "in the quite extensive administrative record before the ALJ or were in the public domain[,]" and EPA did not specify "what factual considerations it believe[d] to be lacking from the record * * * ." *Veldhuis*, 11 E.A.D. at 204. This holding echos the Board's decisions concerning late assertions of defenses, in which we have suggested that a party's opportunity to elicit relevant facts at hearing is integral to conducting a prejudice-free proceeding to resolve fact-dependent issues. *In re Mayes*, 12 E.A.D. 54, 64 (EAB 2005), *appeal docketed*, No. 3:05-CV-478 (E.D. Tenn. Oct. 14, 2005); *In re Lazarus*, 7 E.A.D. 318, 335 (EAB 1997).

[19] The Federal Rules of Civil Procedure, from which we have drawn guidance in the past to interpret the Consolidated Rules, *see Lazarus*, 7 E.A.D. at 330 n.25, are similar to the Consolidated Rules in terms of how they each address a party's failure to assert an affirmative defense. Although the Federal Rules do not themselves clearly address the question of waiver, the courts have found that because the rules are clear in terms of when defenses must be asserted, courts have the authority to treat untimely defenses as waived. Fed. R. Civ. P. 8(c) (affirmative defenses). Federal Rule of Civil Procedure 12(h) bears note in that it addresses "Waiver or Preservation of Certain Defenses." While this provision treats *in personam* jurisdiction defenses as waived if not timely raised, it provides that "[w]henever it appears by suggestion of a party or otherwise that the court lacks jurisdiction over the subject matter, the court shall dismiss the action." Fed. R. Civ. P. 12(h). This is the source of legal tenet that a subject matter jurisdiction defense can be raised at any time. It also implies the converse – that defenses not grounded in subject matter jurisdiction are waivable if not timely raised.

affirmative defense, he did not evaluate the Region's claim that it suffered prejudice due to the timing of Adams's assertion of the defense. This oversight by itself constitutes reversible error, compounded by our finding below that the Region did, in fact, suffer material prejudice in terms of its ability to prepare a rebuttal to the farm road exemption.

The Region initially argued against the inclusion of the defense in its Motion to Strike. There, the Region suggested it may be unduly prejudiced if Adams were allowed to argue that the farm road exemption applied to his activities. Motion to Strike at 4 ("[The Region's] witness list, documents submitted in its prehearing exchange, and summary of proposed testimony may have been different if it had known that [Adams] was raising a CWA Section 404(f) defense."). Now, the Region alleges that the late assertion of the defense did adversely affect the "ability to effectively rebut [Adam's defense] at hearing."[20] Reg. App. Br. at 7. As an example of its inability to prepare its rebuttal to the farm road exemption and elicit the facts at the hearing, the Region describes the evidence it introduced regarding one of the best management practices required to satisfy section 404(f)(1). According to the Region, its "witness on this issue * * * testified regarding the presence of aquatic life based on phone calls with Idaho Department of Environmental Quality ('DEQ') and Idaho Department of Fish & Game. These phone calls were made in the last few days prior to hearing in a last-minute effort to mount a rebuttal to the § 404(f) defense." *Id.* at 8-9. Counsel for the Region elaborated at oral argument that had he been afforded adequate time to prepare the rebuttal to the defense, he would have called a fish biologist to testify as to these matters, rather than rely on telephone calls. EAB Tr. at 15 ("If I was to prepare that rebuttal, I would have brought in a fish biologist or someone similar.").

Although the Region argued the merits of the section 404(f) argument in its post-hearing brief and did not later renew its objection to the consideration of the defense, the Board finds compelling the contention that the Region was prejudiced in its ability to prepare its rebuttal to Adams's defense. We have previously determined that a late assertion of a defense is unlikely to prejudice an opposing party's ability to develop adequately the relevant facts at the evidentiary hearing when "the argument is wholly or primarily dependent on law rather than fact." *In re Mayes*, 12 E.A.D. 59, 64 (EAB 2005), *appeal docketed*, No. 3:05-CV-478 (E.D. Tenn. Oct. 14, 2005); *accord Lazarus*, 7 E.A.D. at 330 ("Prejudice is usually manifested by a lack of opportunity to respond or need for additional prehearing fact-finding and preparation that cannot be readily accommodated."). When the defense is fact-intensive, potential prejudice associated with a late-arriving defense is a fundamental concern. To determine whether a party

[20] Additionally, counsel for the Region asserted at oral argument that his preparation for the hearing was adversely affected by the very need to respond to Adams's dispositive motion filed over a month after the ALJ's deadline for filing such motions. EAB Tr. at 9.

has been prejudiced by a late assertion of a fact-intensive defense, we consider whether, despite initial surprise, the party claiming it was prejudiced subsequently had the opportunity to develop properly and prepare its response to the defense. *Mayes*, 12 E.A.D. at 64.

The section 404(f)(1)(E) defense is a fact-driven inquiry that requires its proponent to demonstrate, inter alia, that fifteen best management practices are applied. Because the "farm road" exemption is not part of a prima facie case of a Clean Water Act violation, even if the Corps and the Region had contemplated its potential applicability in response to Adams's application for a permit after-the-fact, *see* ALJ Tr. at 183-87, the Region could not have been expected to prepare a rebuttal for a section 404(f)(1)(E) defense unless the Region was aware that the defense would be an issue at the hearing. We observe that Adams's answer and pre-hearing exchanges, which included two supplemental exchanges filed within a month of the hearing, are devoid of any suggestion that he would be presenting evidence to support a claim that section 404(f)(1)(E) applied to the activity associated with his discharge.[21] By the time Adams asserted the defense, the Region had only six business days in which to secure and prepare witnesses to rebut Adams's claim that the farm road exemption applied.

Understandably in our view, the Region's hearing preparation centered on establishing its prima facie case and on rebutting the defenses set forth in the answer and anticipated in the prehearing exchanges, to wit, the Region's alleged failure to state a claim upon which relief could be granted, and Adams's assertions that Diamond T Ranch, rather than Adams, was the real party in interest; that Potter Creek and any adjacent wetlands were not "navigable waters" as defined in the Act; and that he did not discharge pollutants into any navigable waters. EAB Tr. at 9. The ALJ's criticism of the probative value of the Region's evidence presented to rebut allegations of the exemption's applicability highlights the problem the Region faced when the hearing proceeded as scheduled, notwithstanding the assertion of the farm road exemption. The ALJ noted that:

> The transcript and the exhibits of record demonstrate that nearly all of EPA's case proceeded from the assumption that the Respondent had to have a permit. Working from that erroneous starting point, the government's evidence at

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[21] Similarly, Adams's contention that his answer sufficiently alerted the Region that he would assert the farm road exemption because the answer need only contain "notice of circumstances that may provide the grounds for a defense" is unpersuasive. Adams Reply Br. at 7 (emphasis omitted). The Consolidated Rules provide that the "answer shall state [t]he circumstances * * * which are alleged to constitute the grounds for a defense," 40 C.F.R. § 22.15(b). The term "grounds for a defense" includes affirmative defenses. *Lazarus*, 7 E.A.D. at 333. Section 22.15(b) also requires the answer to state the "facts which respondent disputes." We see nothing in the answer before us that indicates that the road crossing at issue was a farm road within the meaning of the exemption.

> the hearing focused almost entirely on its theory that the Respondent obstinately continued to fall short in its restoration efforts. Consequently, *EPA's evidence that the road in issue was not constructed in accordance with best management practices to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters were not impaired, that the reach of the navigable waters was reduced, and that any adverse effect on the aquatic environment was not otherwise minimized, was wanting.*

Init. Dec. at 15 n.39 (emphasis added). We interpret this observation that EPA's rebuttal evidence was "wanting" as reflecting the ALJ's recognition that the record was underdeveloped on this point.

We acknowledge that administrative law judges have significant discretion in their administration of evidentiary hearings; however, we are persuaded that six business days was an insufficient amount of time for the Region to secure and prepare witnesses and otherwise prepare its rebuttal to an infrequently litigated and fact-intensive defense. In view of the prejudice to the Region that flowed from the late assertion of the farm road defense, the ALJ arguably could have found that Adams had waived the defense. We do not fault him for concluding otherwise, however, given the centrality of the defense to a fair disposition of Adams's CWA liability and our own prior recognition that the objective of the Agency's procedural rules "should be to get to the merits of the controversy." *Lazarus*, 7 E.A.D. at 333 (citation omitted). Nonetheless, having determined to allow the defense to proceed notwithstanding the material prejudice to the Region, the ALJ erred, in our view, in failing to use the tools available to him to mitigate that prejudice. In short, we conclude that the decision to allow the assertion of the defense without delaying the hearing to allow the Region the time necessary to elicit and adduce the pertinent facts to support its rebuttal was an abuse of discretion. Under these circumstances, proceeding with the hearing as scheduled frustrated, rather than enabled, a merits-based resolution.

III. *CONCLUSION*

The record before us indicates that the ALJ may have misallocated the burdens of presentation and persuasion as to the section 404(f)(1) defense. Moreover, we conclude that the defense is not jurisdictional and that the Region was materi-

ally prejudiced by the late assertion of the defense.[22] Because the Region was prejudiced in its ability to prepare a rebuttal to Adams's defense, and because the burdens of presentation and persuasion may have been misallocated, it is premature for the Board to determine whether Adams demonstrated by a preponderance of the evidence that the farm road exemption applied. Indeed, as the ALJ has himself observed, the record is underdeveloped on this front. Accordingly, the Board is unable to render a decision at this time as to the remaining issues the Region raises on appeal.[23]

This case is remanded so that the ALJ may, with the burdens of presentation and persuasion associated with the section 404(f) defense properly assigned

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[22] There are several passages in the Initial Decision that suggest that the Corps and EPA, by not pointing out the farm road exemption to Adams, acted in bad faith in their dealings with him. Indeed, there is some indication that this perspective influenced the ALJ's overall approach to the case. In order to inform further the ALJ's deliberations on remand, we feel compelled to observe that the ALJ overstates the government's obligation and the relevant law in describing the Region's burden to advise a respondent such as Adams of a potential defense. Contrary to the ALJ's suggestion in footnote 38 of the Initial Decision, the Ninth Circuit's decision in *United States v. Akers*, 785 F.3d 814 (9th Cir. 1986), does not stand for this proposition. While the Ninth Circuit did note that the litigation in that case arose from the parties' "inability to work cooperatively" and that both parties bore "some fault for the breakdown in communications," *id.* at 823, the Ninth Circuit fell far short of imposing the kind of notice burden contemplated by the ALJ's decision here. Where, as here, both the statute and the relevant regulation are clear on their face with respect to a particular defense, it is not unreasonable to charge a respondent with familiarity with such a defense. Any concerns that the ALJ may have regarding good faith in communications by the regulator could more appropriately be addressed in the penalty phase of a case – they should not intrude on the trier of fact's assessment of liability.

The ALJ's orientation also tends to understate, in our view, the affirmative obligation of regulated parties to self ensure compliance with section 404 requirements. Generally, like most regulatory programs, the section 404 permitting program depends on voluntary compliance to achieve its objectives. The program particularly intends that preventative measures be taken to ensure that wetlands-affecting projects be undertaken in a manner that is protective of wetlands functioning and characteristics. This preventative goal is accomplished principally through the requirement that projects go through the section 404 permit process, which frequently results in the issuance of a permit that includes protective measures. In some circumstances, as with the farm road exemption, the preventative goal is achieved through a conditional exemption – with the conditions themselves serving as the vehicle for preventing unnecessary wetlands damage. Where a party proceeds to fill a wetland without any effort to consult, or consciously adhere to, the relevant requirements, the process is poorly served, and the preventative objective frustrated.

[23] We note that both parties have suggested that the Board has the means to resolve this matter without a remand. For his part, Adams maintains that there is sufficient evidence in the record to allow for a conclusion that Adams sustained his burden of proof on the farm road exemption. EAB Tr. at 41-42. The Region argues that we can determine from that same record that Adams failed to meet his burden of proof relative to the exemption. EAB Tr. at 21. Based on our review of the record, we find it murky on the key points, possibly as a result of the previously discussed lack of clarity on the burden of proof issue. In any case, given that the case that remains after this opinion will be predominantly factual in nature, we think it would be advantageous for the ALJ who presided over the evidentiary hearing and thus had the opportunity to assess the credibility of the various witnesses to reassess the case in light of the guidance set forth in this opinion.

to Adams, determine whether Adams made a prima facie case for assertion of the defense.[24] If the ALJ determines that Adams made a prima facie showing for the defense, then, in order to remedy the prejudice to the Region associated with the late assertion of the defense, the ALJ must afford the Region an additional opportunity to present a rebuttal to the defense.

So ordered.

[24] As we have noted, a prima facie case for the farm road defense must include a preponderance showing of the following elements: (1) the project is the construction or maintenance of a farm road; (2) the farm road is constructed in accordance with the fifteen BMPs; (3) the discharge of dredged or fill material resulting from the project does not contain a toxic pollutant listed in CWA section 307; and (4) the purpose of the activity in question is not to convert an area of water of the United States into a use to which it was not previously subject, such that the flow or circulation of affected waters may be impaired or the reach of such waters reduced. We note that, with respect to recapture, there is a regulatory presumption that the flow or circulation of waters of the United States may be impaired "[w]here the proposed discharge will result in significant discernible alterations to flow or circulation." 33 C.F.R. § 323.6. The ALJ should address this provision in assessing Adams's proof under the farm road exemption.