IN RE DONALD CUTLER

CWA Appeal No. 03-01

FINAL DECISION AND ORDER

Decided September 2, 2004

Syllabus

On August 24, 2000, Region X of the United States Environmental Protection Agency ("EPA" or "Agency") filed an administrative complaint against Mr. Donald Cutler of Stanley, Idaho, charging him with unlawfully discharging dredged or fill material into waters of the United States in violation of sections 301(a) and 404 of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1311(a), 1344. Region X alleged that Mr. Cutler, an excavation contractor, used heavy equipment to place dredged or fill material into wetlands between his home in Stanley and Meadow Creek, a tributary of Goat Creek, which leads through Valley Creek into the Salmon River, the Snake River, the Columbia River, and then to the Pacific Ocean. On March 20-21, 2001, Administrative Law Judge Spencer T. Nissen held an administrative hearing in Boise, Idaho, to gather evidence and hear testimony in this case. On December 31, 2002, Judge Nissen issued an Initial Decision finding Mr. Cutler liable for discharging dredged or fill material into wetlands without a CWA section 404 permit and assessing an administrative penalty of $1,250.

On February 28, 2003, Region X filed an appeal of the Initial Decision, contesting both the scope of Judge Nissen's liability determination and the amount of the assessed penalty. With respect to liability, the Region asks the Board to reverse Judge Nissen's decision regarding Mr. Cutler's liability for fill placed along his northern property line, adjacent to Goat Creek. With respect to the penalty, Region X seeks an increase in the $1,250 penalty assessed for the violations, on four separate grounds. First, the Region argues that Mr. Cutler has the ability to pay the $25,000 penalty it proposed for these violations, contrary to Judge Nissen's finding otherwise. Second, the Region contends that Judge Nissen improperly excluded evidence of Mr. Cutler's prior wetlands violations, which could provide a basis for increasing the penalty, because those violations occurred more than five years prior to the fill activities in this case. Third, Region X argues that Judge Nissen erred in holding that Meadow Creek is not critical habitat for endangered salmon. Fourth, the Region claims that Mr. Cutler's culpability was more significant than Judge Nissen acknowledged in the Initial Decision. Appellee filed a reply to the appeal on March 24, 2003, countering these various arguments. The Environmental Appeals Board ("Board") subsequently heard oral argument in the case on January 22, 2004.

Held: The Initial Decision is affirmed in part and reversed in part. The Board holds that, as to the penalty, Judge Nissen properly determined that Mr. Cutler lacks the ability to pay the entire proposed penalty of $25,000. In the Board's view, Region X came forward with a prima facie case of ability to pay, but Mr. Cutler successfully rebutted the Region's case by means of his own testimony, which Judge Nissen found to be credible and which the Region's cross-examination failed to diminish. Accordingly, the Board affirms Judge

Nissen's ruling on this element of the case, finding that Region X failed to meet its ultimate burden under the Consolidated Rules of Practice, 40 C.F.R. § 22.24(a), of demonstrating that Mr. Cutler has the ability to pay the proposed penalty.

The Board finds further, however, that, as to several key predicates of the penalty calculus, Judge Nissen's findings must be reversed. Those predicates include the prior history of violations penalty factor, which Judge Nissen held is restricted, under general EPA policy, to violations occurring within five years of the filing of the complaint in the instant case. The Board is unwilling, as a policy matter, to follow Judge Nissen in drawing a bright-line rule that automatically excludes certain prior violations from the penalty calculus simply by virtue of their age, particularly in view of the Agency's CWA section 404 settlement policy, which, by its terms, does not limit prior history evidence and is authorized for use in litigated cases as well as for settlements.

Another predicate of the penalty analysis is the gravity of the violation. In this regard, Judge Nissen held that Meadow Creek and adjacent wetlands next to Mr. Cutler's home were not designated critical habitat for federally protected salmon species, and thus Mr. Cutler's filling activities in those areas were not particularly grave. The Board finds otherwise, holding that a preponderance of evidence in the record indicates that Meadow, Goat, and Valley Creeks are critical habitat for Snake River spring/summer chinook salmon, a threatened species. The Board therefore concludes that the sensitivity of the environment affected by Mr. Cutler's unlawful fill is extremely high and the gravity of the violations correspondingly high.

A third predicate of the penalty analysis is a violator's culpability. Judge Nissen accepted Mr. Cutler's argument that he lacked culpability because he believed the areas filled were not wetlands and because he had attempted after-the-fact to restore at least some of the filled areas. The Board disagrees, observing that Mr. Cutler had numerous prior contacts with regulatory authorities pertaining to filling of wetlands around his Stanley home, and thus Mr. Cutler knew or should have known the areas filled were federally protected wetlands.

The Board then proceeds to calculate the penalty anew, as it believes Judge Nissen's errors with respect to prior history, gravity, and culpability caused him to understate the significance of Mr. Cutler's violations. The Board accepts Judge Nissen's conclusion that Mr. Cutler is unable to pay a $25,000 penalty but finds evidence in the record that Mr. Cutler may be able to pay a penalty more substantial than the $1,250 initially assessed. The Board observes, however, that there is no clear indication in the record regarding the upper limits of Mr. Cutler's ability to pay. In this regard, the Board finds instructive Agency policy from two other statutory contexts, which provides that in circumstances in which the extent of a violator's inability to pay is not altogether clear, it is appropriate to assume that an entity can, at a minimum, afford to pay a penalty equivalent to four percent of gross receipts averaged over four years. Employing this method, the Board calculates a penalty of $5,548 for Mr. Cutler's wetlands violations. The Board finds that this penalty better reflects the seriousness of Mr. Cutler's violations and does not appear to be beyond his ability to pay.

Finally, because the Board holds that the amount of the penalty in this case is governed by Mr. Cutler's ability to pay, the Board declines to reach Region X's appeal of Judge Nissen's conclusions regarding the extent of wetlands filled by Mr. Cutler. The Board notes that Region X conceded at oral argument that the only significance of this issue would be to increase the amount of the penalty because, if the Region's arguments were to be accepted, a larger area of wetlands would be regarded as affected by Mr. Cut-

ler's actions. The Board declines consideration in light of its finding that the penalty is already constrained by Mr. Cutler's ability to pay.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Fulton:

On February 28, 2003, Region X of the U.S. Environmental Protection Agency ("Appellant") filed an appeal of an Initial Decision entered against Mr. Donald Cutler ("Appellee") on December 31, 2002, by Administrative Law Judge ("ALJ") Spencer T. Nissen. In a lengthy opinion, the ALJ determined that Appellee violated sections 301(a) and 404 of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1311(a), 1344, by discharging dredged or fill material into federally protected wetlands without a CWA permit authorizing him to do so. Pursuant to CWA section 309(g)(2)(B), 33 U.S.C. § 1319(g)(2)(B), the ALJ assessed a Class II administrative penalty of $1,250 against Appellee for the discharges. In so doing, the ALJ rejected Appellant's proposal of a $25,000 penalty for Appellee's unlawful filling activities.

In its appeal, Appellant contends on a number of grounds that the ALJ erred and/or abused his discretion in analyzing Appellee's liability for violating the CWA and in determining an appropriate penalty therefor. For the reasons set forth below, we affirm the ALJ's Initial Decision in part, reverse it in part, and assess a penalty against Appellee of $5,548.

I. *BACKGROUND*

A. *Statutory and Regulatory Background*

Under the CWA, it is unlawful for any person to discharge dredged or fill material into the waters of the United States unless that person obtains a permit authorizing the discharge. CWA §§ 301(a), 404(a), 33 U.S.C. §§ 1311(a), 1344(a); *see In re Slinger Drainage, Inc.*, 8 E.A.D. 644, 647-48 (EAB 1999) (section 404 "operates under the umbrella of section 301(a)," which prohibits the discharge of any pollutant (including dredged or fill material) except in accordance with, inter alia, the permitting provisions of section 404), *appeal dismissed for lack of jurisdiction*, 237 F.3d 681 (D.C. Cir.), *cert. denied*, 534 U.S. 972 (2001). The "waters of the United States" include rivers, streams, and, among other things, "wetlands," 40 C.F.R. § 230.3(s); 33 C.F.R. § 328.3(a), which are "areas that are inundated or saturated by surface or ground water 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." 40 C.F.R. § 230.3(t); 33 C.F.R. § 328.3(b).

The existence of wetlands is generally determined, and their boundaries delineated, through use of a guidance manual prepared in 1987 by the U.S. Army Corps of Engineers. *See* U.S. Army Corps of Engineers, Wetlands Research Program, Tech. Rep. No. Y-87-1, *Corps of Engineers Wetlands Delineation Manual* (Jan. 1987) ("1987 Manual"). This manual sets forth detailed methodologies for analyzing three parameters that indicate the presence of wetlands: (1) hydric soil;[1] (2) hydrophytic vegetation;[2] and (3) wetland hydrology.[3] *See*, *e.g.*, *id.* ¶¶ 29-49, at 16-41. In most cases, "evidence of a minimum of one positive wetland indicator from each parameter (hydrology, soil, and vegetation) must be found in order to make a positive wetland determination." *Id.* ¶ 26(c), at 14.

One of the methodologies set forth in the 1987 Manual is intended for use specifically in "atypical situations" where one or more of the three wetlands parameters is deliberately or accidentally disturbed prior to performance of a wetlands analysis. According to the Manual, certain discharges that occur without benefit of a CWA section 404 permit "may result in removal or covering of indicators of one or more wetland parameters. Examples include, but are not limited to: (1) alteration or removal of vegetation; (2) placement of dredged or fill material over hydric soils; and/or (3) construction of levees, drainage systems, or dams that significantly alter the area hydrology." *Id.* ¶ 71(a), at 83. In such cases, a standard delineation conducted after the unpermitted discharge, or "after the fact," would likely indicate that the area in question is not a wetland because it lacks one or more of the three wetland parameters. Such a result would undercut Congress' goal in enacting the CWA (i.e., "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," CWA § 101(a), 33 U.S.C. § 1251(a)) by precluding the application to disturbed resources of otherwise forthcoming regulatory protections. To prevent this outcome, the 1987 Manual establishes mechanisms by which wetlands can be delineated even after they have been disturbed.

An "atypical" or "after-the-fact" wetlands delineation consists of the examination of a combination of direct and indirect evidence, such as: (1) aerial photography, which can be used to document previous vegetation types and soil inundation levels; (2) evidence relating to adjacent areas with similar topography, soils,

---

[1] "Hydric soil" is soil "that is saturated, flooded, or ponded long enough during the growing season to develop anaerobic conditions that favor the growth and regeneration of hydrophytic vegetation." 1987 Manual ¶ 36, at 26.

[2] "Hydrophytic vegetation" is "plant life that occurs in areas where the frequency and duration of inundation or soil saturation produce permanently or periodically saturated soils of sufficient duration to exert a controlling influence on the plant species present." 1987 Manual ¶ 29, at 16.

[3] "The term 'wetland hydrology' encompasses all hydrologic characteristics of areas that are periodically inundated or have soils saturated to the surface at some time during the growing season." 1987 Manual ¶ 46, at 34.

and hydrology, which can indicate plant community types that likely grew in the disturbed area; (3) past soil surveys; and (4) flood plain management maps. 1987 Manual ¶¶ 73-75, at 84-91; *see In re Veldhuis*, 11 E.A.D. 194, 205-12 (EAB 2003), *appeal dismissed upon stipulation of parties*, No. 03-74235 (9th Cir. Mar. 8, 2004) (upholding ALJ's determination, on basis of atypical delineation evidence, that wetlands existed on farmland prior to its deep plowing). If fill material has been placed over the original soil without physically disturbing that soil, a wetland scientist can sometimes dig down through the fill material to determine whether the original soil underneath qualifies as hydric. 1987 Manual ¶ 74, at 87-88. Other evidence such as stream gauge data, historical records of various kinds, conversations with local government officials or citizens familiar with the site, previous site inspections, and related materials can also be useful in determining the location of former wetlands in an altered landscape. *See id.* ¶¶ 73-75, at 84-91; *see*, *e.g.*, *Veldhuis*, 11 E.A.D. at 205 (considering testimony of previous landowner).

B. *Factual Background*

Appellee Donald Cutler is the sole proprietor of an excavation contracting business in Stanley, Idaho. For the past thirty-plus years, Appellee has worked approximately six months of the year, from May through October, using front-end loaders, backhoes, dump trucks, and other heavy equipment to move sand, gravel, rock, and other materials in the course of his daily activities in and around Stanley. Tr. at 23. The rest of the year, November through April or so, the ground is frozen and unworkable by excavation equipment, so Appellee spends that time fixing snowmobiles and plowing snow on an occasional basis. Tr. at 415, 418-29, 462-63.

Many years ago, Appellee purchased a parcel of land situated partly in Custer County and partly in Stanley, Idaho, which he used as home base for his excavation business. The property was bounded (approximately) to the south by State Highway 21, which runs in an easterly-westerly direction; to the east by Meadow Creek, a small perennial stream that flows in a northerly direction; and to the north by Goat Creek, a larger perennial stream that flows east and meets Meadow Creek, one of its tributaries, a short distance from the northeast corner of Appellee's property. Goat Creek in turn flows east into Valley Creek, an even larger perennial stream, which flows into the Salmon River approximately one-half mile downstream of its confluence with Goat Creek. Tr. at 252. The Salmon River then flows into the Snake River, which flows into the Columbia River, which ultimately reaches the Pacific Ocean 900 miles away. Tr. at 35, 252-54.

In 1990, Appellee sold off the southern portion of his property adjacent to Highway 21, retaining only a 2.6-acre parcel on the northern side along Goat Creek. About that same time, Appellee decided to construct a new home on the

northeast corner of his property, near another building he used for business purposes and close to the areas where he parked his heavy equipment and stored sand, gravel, and other materials used in excavation work. Initially, Appellee accessed the property by means of a driveway off Highway 21, as he had done for many years. This ended shortly after his sale of the southern parcel, however, when the new owner denied Appellee permission to drive vehicles and equipment across his land, which left Appellee with no means of access to his remaining property. Tr. at 94, 462.

Appellee proceeded to discharge dredged or fill material into Meadow Creek and wetlands adjacent to the creek, and he installed a thirty-foot-long culvert in a channel excavated through the wetlands in preparation for constructing a bridge across Meadow Creek and driveway to his new home. Tr. at 31-39. On May 12, 1992, the U.S. Army Corps of Engineers issued a Notice of Violation to Appellee for these activities, as Appellee had undertaken them without the authorization of a CWA section 404 permit. Tr. at 39-41; EPA Ex. 3. Appellee subsequently applied for an "after-the-fact" permit to construct a bridge crossing and driveway over Meadow Creek for the purpose of providing access to his property from the east. Tr. at 58. The Corps and several natural resource agencies evaluated Appellee's application and determined that the proposed fill activities would result in more than minimal impacts to the Meadow Creek ecosystem. This meant that the general permit typically used for minor road crossings (i.e., Nationwide Permit 14) could not be used in this instance, and, instead, an individual CWA section 404 permit would be required. The State of Idaho informed the Corps, however, that it would not certify that the proposed project would not adversely affect water quality in the area. Tr. at 58-59; EPA Ex. 12, at 2-3. At that point, Appellee hired a consultant to help him modify his project to address the State's concerns, and, on July 7, 1993, the Corps finally issued Appellee a section 404 permit for the bridge crossing/driveway project, as revised. Tr. at 60; Cutler Ex. D. The permit contained a number of special conditions that were intended to minimize the impacts of the project on anadromous fish species in the area. Tr. at 63, 276-77; Cutler Ex. D at 4-5.

A few months later, on September 29, 1993, the Corps issued a second Notice of Violation to Appellee for violating Special Condition #11 of his permit to construct the bridge crossing/driveway. Tr. at 99-101; EPA Ex. 12, at 3. That condition directed Appellee to install sediment control devices such as hay bales or silt fencing in Meadow Creek and a channel Appellee had previously excavated in wetlands. Cutler Ex. D at 4. Appellee had initially placed hay bales in the channel but removed them after completing the bridge and driveway. Tr. at 379. The Corps subsequently agreed to allow Appellee to substitute, for the hay bales and silt fencing, filter fabric and crushed rock over exposed fill faces where erosion would otherwise occur. Tr. at 100-01; EPA Ex. 12, at 3.

Nine months later, on June 27, 1994, the Corps issued a Cease and Desist Order to Appellee, this time for filling wetlands in a triangular area next to the western bridge abutment, between the house and the bridge. Tr. at 101-10; EPA Exs. 4-7. This area, which Appellee called a "mosquito pond," was purportedly part of a larger area Appellee wanted to use to install a lawn around his home. Tr. at 105-06; EPA Ex. 4. The Corps' Order directed Appellee to cease and desist unauthorized work in waters of the United States and ordered him to remove all fill material discharged into the wetland area down to the original ground surface elevation.[4] EPA Exs. 5, 7. On September 16, 1994, when no action had yet been taken by Appellee to comply with the Cease and Desist Order, the Corps sent him a follow-up letter stating that the fill had to be removed or legal action would ensue, at which point Appellee removed the fill. Tr. at 114-15; EPA Exs. 8-9. Appellee later requested a modification of his bridge crossing/driveway permit, which the Corps granted on April 13, 1995. Cutler Ex. E. The modified permit authorized the discharge of fill material into approximately 0.009 acre of wetlands next to the bridge abutment and 156 linear feet of "open trench in wetlands" on the west side of Meadow Creek, in the channel Appellee had previously dredged, with the purpose of returning those areas to a wetlands condition.[5] Tr. at 142-43, 146; Cutler Exs. A, E.

Four-and-a-half years elapsed. On September 20, 1999, a Corps employee driving past Appellee's property on Highway 21 observed that a pile of fill had been placed on uplands next to wetlands near Appellee's residence. EPA Ex. 12, at 3. On November 30, 1999, an employee of the National Marine Fisheries Service, also driving past on Highway 21, witnessed a dump truck and backhoe being used to place fill material from a nearby stock pile into wetlands to the east/southeast of Appellee's house, adjacent to Meadow Creek. The employee stopped and took photographs of the filling activities. Tr. at 69-70, 116-17; EPA Ex. 11. These photographs and subsequent on-site inspections by Corps and EPA employees led the Corps to issue to Appellee, on February 1, 2000, another Notice of Violation, Cease and Desist Order, and Request for Information. *See* EPA Ex. 14. This document identified the violation as the "[d]ischarge of dirt and rock fill material in wetlands adjacent to Meadow Creek" and ordered Appellee to stop filling wetlands around his Stanley home without a permit. *Id*. Appellee did not contact the Corps or otherwise respond to the Notice of Violation, Cease and Desist Order, and Request for Information document. Tr. at 123-24.

---

[4] The Corps originally sent this Order to Appellee via certified mail, *see* EPA Ex. 5, but Appellee's wife refused to accept it and it was returned as "unclaimed." Tr. at 111-13; EPA Ex. 6. The Corps therefore found it necessary to hire the local sheriff to serve the document on Appellee. Tr. at 111, 114; *see* EPA Ex. 7.

[5] While, as discussed in Part II.B below, these activities in the early 1990s hold some relevance in the penalty context, they are not included in the list of alleged violations in the case before us. Rather, the complaint concerns fill activities that took place several years later.

C. *Procedural Background*

On August 24, 2000, Appellant filed an administrative complaint against Appellee pursuant to CWA section 309(g), 33 U.S.C. 1319(g), charging him with unlawfully discharging dredged or fill material into approximately 0.1 acre of federally protected waters of the United States around his Stanley home, from "at least 1995 to the present."[6] Compl. ¶¶ 6, 15. On March 20-21, 2001, the ALJ held an administrative hearing in Boise, Idaho, to gather evidence and hear testimony in this case. *See generally* Transcript of Hearing vols. I-II. At the hearing, the ALJ granted Appellant permission to amend the complaint to conform it to the evidence presented, which resulted in an increase in the size of the alleged unlawful fill area from 0.1 acre to 0.3-to-0.5 acre of waters of the United States adjacent to Meadow and Goat Creeks. Tr. at 221-23; *see* Init. Dec. at 21 n.17. In the course of amending the complaint in this way, Appellant did not seek an increase in the proposed $25,000 penalty, which it had recommended on the basis of Appellee's culpability, history of prior violations, and the harm to the environment caused by the illegal fill. Tr. at 222; Compl. ¶¶ 15-18. The ALJ later reopened the hearing, on October 11, 2001, at the request of Appellant, for the purpose of collecting evidence pertaining to Appellee's alleged failure to perform wetlands restoration work required by a Compliance Order issued August 15, 2000, which Appellant believed refuted Appellee's contention at the original hearing that he was acting in good faith to remedy the violations. *See generally* Transcript of Reopened Hearing.

On December 31, 2002, the ALJ issued an Initial Decision in this case, finding Appellee liable for discharging dredged or fill material into wetlands without a CWA section 404 permit and assessing an administrative penalty of $1,250. Init. Dec. at 43-55. Appellant EPA Region X filed an appeal of the ALJ's Initial Decision on February 28, 2003, contesting both the scope of the ALJ's liability determination and the amount of the assessed penalty. *See* Complainant's Appellate Brief ("Appeal Br."). Appellee filed a reply to the appeal on March 24, 2003.

---

[6] The Corps and EPA are jointly charged with the administration of CWA § 404. The Corps is responsible for issuing § 404 permits, while EPA may veto Corps permits in certain circumstances. CWA § 404(a), (c), 33 U.S.C. § 1344(a), (c). Both agencies have authority to enforce the Act, and they do so pursuant to an agreement that allocates enforcement responsibilities between the two agencies. *See Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning Federal Enforcement for the Section 404 Program of the Clean Water Act* (Jan. 19, 1989) ("MOA"); *see also In re Britton Constr. Co.*, 8 E.A.D. 261, 264-65 & n.2 (EAB 1999) (discussing MOA).

In general, the Corps acts as the lead enforcement agency for all violations of Corps-issued permits and for unpermitted discharges. EPA takes the lead over unpermitted discharges involving repeat or flagrant violators and over any other cases or classes of cases it requests. MOA at 3-4. Appellant EPA Region X became involved in this case upon referral from the Corps, in light of Appellee[1]s status as a repeat violator of the CWA.

See Appellee's Brief on Appeal ("Reply Br."). The Environmental Appeals Board subsequently heard oral argument in the case on January 22, 2004. *See generally* Oral Argument Transcript ("OA Tr."). The case now stands ready for decision by the Board.

II. *DISCUSSION*

The Board reviews an administrative law judge's factual and legal conclusions on a de novo basis. 40 C.F.R. § 22.30(f) (the Board shall "adopt, modify, or set aside" the ALJ's findings of fact and conclusions of law or exercise of discretion); *see* Administrative Procedure Act § 8(b), 5 U.S.C. § 557(b) ("[o]n appeal from or review of the initial decision, the agency has all the powers [that] it would have in making the initial decision except as it may limit the issues on notice or by rule"). In so doing, the Board will typically grant deference to an administrative law judge's determinations regarding witness credibility and the judge's factual findings based thereon. *See In re City of Salisbury*, 10 E.A.D. 263, 276, 293-96 (EAB 2002); *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998); *In re Echevarria*, 5 E.A.D. 626, 639 (EAB 1994). All matters in controversy must be established by a preponderance of the evidence. 40 C.F.R. § 22.24(b); *Salisbury*, 10 E.A.D. at 289-91; *In re Britton Constr. Co.*, 8 E.A.D. 261, 274 (EAB 1999).

In filing this appeal, Appellant seeks to overturn two central outcomes of the ALJ's Initial Decision. First, Appellant asks the Board to reverse the ALJ's decision regarding Appellee's liability for fill placed along his northern property line, adjacent to Goat Creek. Second, Appellant seeks an increase in the $1,250 penalty assessed for the violations. To achieve these ends, Appellant presents five issues for the Board's consideration. Four of the issues consist of challenges to various components of the ALJ's penalty analysis, while the fifth issue challenges the ALJ's findings pertaining to the extent of wetlands filled without a permit.

In Part II.A below, we begin with the parties' arguments pertaining to Appellee's ability to pay the proposed penalty, as that issue is pivotal — and indeed dispositive — in this case. In Parts II.B and II.C, we turn to arguments regarding the ALJ's treatment, for penalty purposes, of Appellee's prior history of violations and the property's status as critical habitat for salmon under the Endangered Species Act, respectively. In Part II.D, we address the issue of Appellee's culpability for the alleged violations. Because we find the ALJ committed legal errors with respect to several key predicates of the penalty analysis, we decline to accord deference to the penalty assessment and proceed to calculate the penalty anew in Part II.E below. Finally, in Part II.F, we briefly touch on, and find we need not reach, the liability issue Appellant raises by way of a challenge to the ALJ's assignment of substantial weight to testimony given by a witness who purportedly was unqualified to delineate wetlands.

A. "*Ability to Pay*" *Penalty Factor*

1. *Overview*

We begin with a brief overview of the administrative penalty provisions of the CWA, which contain the requirement that a respondent's "ability to pay" a proposed penalty be considered in the course of assessing a civil administrative penalty for a CWA violation. The Board has had frequent cause to address ability-to-pay questions in its jurisprudence, so the law pertaining to the burdens of proof and other matters pertaining to this penalty factor is well-settled. *E.g.*, *In re CDT Landfill Corp.*, 11 E.A.D. 88, 120-25 (EAB 2004); *In re Wallin*, 10 E.A.D. 18, 34-38 (EAB 2001); *In re Spitzer Great Lakes Ltd.*, 9 E.A.D. 302, 319-21 (EAB 2000); *In re Chempace Corp.*, 9 E.A.D. 119, 132-37 (EAB 2000); *In re Britton Constr. Co.*, 8 E.A.D. 261, 290-92 (EAB 1999); *In re Lin*, 5 E.A.D. 595, 599-602 (EAB 1994); *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 536-50 (EAB 1994).

The CWA provides:

> In determining the amount of any penalty assessed under [CWA § 309(g)], [EPA] * * * shall take into account 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) (emphasis added). Inability to pay a penalty can, if successfully proved, act as a downward adjustment or mitigating factor on a penalty that is otherwise calculated to reflect the gravity of the violation. *E.g.*, *CDT Landfill*, 11 E.A.D. at 121; *see Wallin*, 10 E.A.D. at 38; *Britton*, 8 E.A.D. at 290-92; EPA General Enforcement Policy #GM-22, *A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties* 17, 23-24 (Feb. 16, 1984). Otherwise, the effect of ability-to-pay evidence is neutral (i.e., it is never used to increase a proposed penalty).

Under the Consolidated Rules of Practice that govern these enforcement proceedings, the complainant has the initial burden of production, as well as the burden of persuasion, to establish that the penalty sought for an alleged violation is "appropriate," in this instance in light of the penalty factors of CWA section 309(g)(3). 40 C.F.R. § 22.24(a); *accord CDT Landfill*, 11 E.A.D. at 122-24; *Wallin*, 10 E.A.D. at 35 & n.14; *Chempace*, 9 E.A.D. at 132-33. As a general matter, a complainant can make a prima facie case of appropriateness by demonstrating that it considered each of the statutory penalty factors and that the recommended

penalty is supported by analyses of those factors. *CDT Landfill*, 11 E.A.D. at 121-22; *Spitzer*, 9 E.A.D. at 320; *New Waterbury*, 5 E.A.D. at 538-39. With respect to ability to pay in particular, we have recognized that a complainant may have difficulty obtaining financial information about a respondent at the outset of a case, as tax returns, balance sheets, and other data relevant to this issue may not be publicly available at that time. *Spitzer*, 9 E.A.D. at 321; *Chempace*, 9 E.A.D. at 132-33; *New Waterbury*, 5 E.A.D. at 541. As a consequence, we have held that a respondent's ability to pay may be presumed until it is put at issue by the respondent. *CDT Landfill*, 11 E.A.D. at 121-22; *Wallin*, 10 E.A.D. at 36; *Spitzer*, 9 E.A.D. at 321; *New Waterbury*, 5 E.A.D. at 541.

If ability to pay is contested, a complainant must establish a prima facie case that a proposed penalty is nonetheless "appropriate" by presenting, as just mentioned, "some evidence to show that it considered the respondent's ability to pay a penalty." *New Waterbury*, 5 E.A.D. at 542; *accord Britton*, 8 E.A.D. at 290. The complainant "need not present any *specific* evidence to show that the respondent *can pay* or obtain funds to pay the assessed penalty, but can simply rely on some *general* financial information regarding the respondent's financial status [that] can support the *inference* that the penalty assessment need not be reduced." *New Waterbury*, 5 E.A.D. at 542-43; *accord CDT Landfill*, 11 E.A.D. at 122; *Wallin*, 10 E.A.D. at 36; *Britton*, 8 E.A.D. at 290-91. Once this is done, the burden of production shifts to the respondent to rebut the complainant's evidence with specific information of its own that, "despite its sales volume or apparent solvency, it cannot pay any penalty." *New Waterbury*, 5 E.A.D. at 543; *accord Wallin*, 10 E.A.D. at 36; *Spitzer*, 9 E.A.D. at 320; 40 C.F.R. § 22.24(a). The complainant bears the ultimate burden of persuasion as to penalty appropriateness, so, if the respondent satisfies its burden of production, that burden shifts back to the complainant again, in this instance to "rebut [the] respondent's contentions through rigorous cross-examination or through the introduction of additional information." *Chempace*, 9 E.A.D. at 133; *accord CDT Landfill*, 11 E.A.D. at 121-22; *Wallin*, 10 E.A.D. at 36; *New Waterbury*, 5 E.A.D. at 543.

2. *Ability to Pay Evidence and Analysis in the Proceedings Below*

a. *Appellant's Evidence*

In the case at bar, Appellant introduced an expert witness at the hearing to provide testimony regarding Appellee's financial status. The witness, Ms. Beatrice Carpenter, a former Internal Revenue Service auditor and certified public accountant with more than thirty-five years of experience as a financial analyst, reviewed publicly available property records from Custer and Blaine counties in Idaho, as well as tax returns, deeds, court records, and other financial information provided by Appellee. Tr. at 279-82, 285, 298; EPA Ex. 25. These materials indicated that Appellee and his wife Sharon owned three properties in the late 1990s: (1) the Stanley/Custer County property, consisting of 2.6 acres of land, a home,

and several outbuildings, valued in May 2000 at approximately $150,000 and owned free and clear; (2) a Bellevue, Idaho, property (near Sun Valley), consisting of land and a home, valued at approximately $200,000, and in which Appellee and his wife had $50,000 of equity; and (3) another Stanley property, consisting of the Meadow Creek Motel, a home, and some land, which Appellee and his wife sold for a loss of $316 in 1999, although they also obtained in that transaction the repayment of $109,685 in loans they had made to their son Patrick Cutler and daughter-in-law Dawn Cutler, whom they had initially helped to purchase the property in 1993.[7] Tr. at 290-96; EPA Ex. 25, at 1-3; EPA Exs. 20, 22-24, 27; *see* Tr. at 351-54, 366-68, 414. According to Ms. Carpenter, "[t]here is more than enough equity in the [Stanley and Bellevue] homes to pay for the proposed fine." EPA Ex. 25, at 3.

Ms. Carpenter also determined from the materials in her possession that Appellee reported gross business receipts of $132,915, $140,638, $63,241, and $142,550 on his federal income tax returns for 1997-2000, respectively. EPA Ex. 25 (business income information tables); Cutler Exs. G-J (tax returns). After deducting business expenses incurred and the cost of goods expended in earning those receipts, and after adding accelerated depreciation for various heavy equipment assets[8] and any net gain on sales of business property, Ms. Carpenter determined that the cash flow from Appellee's business totaled $59,967, $72,561, $8,209, and $58,910 for the years 1997-2000. Tr. at 305-09; EPA Ex. 25 (business income information tables). The income figures for 1999 are lower than the

---

[7] Appellee and his wife were co-signers on Patrick and Dawn Cutler's loan for the property. Tr. at 366. After Patrick and Dawn divorced, the judge ordered Dawn Cutler to operate the motel, but she failed to stay current on the bills and the property went into foreclosure. *Id.* Appellee and his wife stepped in to take over the motel to save their credit. *Id.* at 366-67.

[8] In Ms. Carpenter's opinion, it is appropriate to include accelerated depreciation, which is deducted from income on federal tax returns, in the computation of cash flow available to a business for use. She testified as follows at the hearing:

> [D]epreciation is not truly a cash out-of-pocket type of item. It's a method of allowing [] business equipment purchased over a period of time to be placed against the business income of each year.
>
> * * *
>
> [D]epreciation allows for the recapture of amounts expended for business equipment or property over a period of time of the useful life. Now for income tax purposes they allow a shortened life, as opposed to the actual useful life. In addition, they provide for an accelerated method of depreciating these assets over a shorter period of time than what their actual useful life would be. So, therefore, depreciation is normally much heavier in the first years and the useful life may extend beyond the depreciation period.

Tr. at 307, 309-10. For a further discussion of this issue and the ALJ's and our analysis thereof, see *infra* notes 13, 18 and accompanying text.

other years' figures because, Appellant learned at the hearing, Appellee had informally "sold" his excavation business to Patrick and Dawn Cutler in 1999 for $340,000 and then resumed operations three or four months later when his children decided they did not want the responsibility of running the business. Tr. at 352-54, 364-65, 416-18.

Once she had examined the materials related to Appellee's property holdings and business receipts, Ms. Carpenter reviewed the tax returns for evidence of other types of income. She found that from 1997 through 2000, Appellee reported interest income of $1,885, $1,269, $2,061, and $3,345, respectively, as well as stock dividend income. Tr. at 299-305; EPA Ex. 25, at 3; Cutler Exs. G-J. The materials reviewed by Ms. Carpenter contained no information regarding the existence or amounts of specific underlying principal in savings or investment accounts or stock or bond funds to correlate to these figures, so Ms. Carpenter could only speculate as to what amounts of principal at various interest rates might account for these levels of interest and dividend income.[9] Tr. at 299-305; EPA Ex. 25, at 3.

Finally, Ms. Carpenter discovered from the materials she reviewed that Appellee had obtained a $150,000 mortgage on the Bellevue property in July 1999, as well as a $100,000 loan on a new John Deere loader and an $8,000 loan on a Caterpillar skid steer in early 2000. Tr. at 296-99; EPA Ex. 25, at 2-3. She stated that "[t]he ability to borrow funds and the ability to repay loans is an indication of ability to pay." EPA Ex. 25, at 2; *accord* Tr. at 297-99.

Notably, Ms. Carpenter testified that tax returns do not tell the complete story of an individual's financial situation, as assets and investments such as savings and retirement accounts, stocks, bonds, collectibles, life insurance, personal loans, property not used for a business purpose, and the like are not listed on such returns. Tr. at 316. Moreover, tax returns do not report the value of equipment owned by a business or the value of the business itself. *Id.* Accordingly, more than two months prior to the hearing, Appellant had filed a motion for additional discovery with the goal of collecting further salient facts about Appellee's financial status. Motion for Additional Discovery (Jan. 11, 2001). On March 6, 2001, the ALJ denied Appellant's motion "because Appellee had previously supplied a great deal of information concerning his finances" and because the ALJ regarded Appellant's questions as to Appellee's living expenses to be "obnoxious and bur-

[9] Ms. Carpenter noted that the principal underlying these levels of annual interest would have been, assuming simple interest of 5% per year, $37,700 for 1997, $25,380 for 1998, $41,220 for 1999, and $66,000 for 2000. Tr. at 301-02; EPA Ex. 25, at 3. At 3% simple interest, the principal earning $3,325 in interest in the year 2000 would have been $110,000. Tr. at 304.

densome."[10] Init. Dec. at 50 n.40; *accord* Memorandum (ALJ Mar. 7, 2001). However, the ALJ did direct Appellee to provide Region X with a copy of his federal tax return for 2000, no later than one week before the hearing. Order Denying Motion for Additional Discovery (ALJ Mar. 6, 2001).

In summary, therefore, Ms. Carpenter concluded, on the basis of the materials she was able to review, that "it appears * * * [Appellee] would be able to pay the [proposed $25,000] penalty by current business earnings, obtaining a loan, withdrawing savings, sale of assets or payment over a couple of years from income," or some combination of these sources. EPA Ex. 25, at 1, 4. Appellant relied on Ms. Carpenter's financial expertise in presenting its ability-to-pay case against Appellee.

b. *Appellee's Rebuttal Evidence*

In response to Appellant's financial evidence, Appellee testified at the hearing that he had no savings accounts, no formal retirement plan other than Social Security, no Individual Retirement Accounts, and no Keogh plans. Tr. at 350-51, 360. Appellee indicated that he had planned to fund his retirement by selling his excavation business, Tr. at 351, and that he and his wife Sharon intended to move to the Bellevue property upon retirement because they were both originally from that area. Tr. at 352. Appellee explained that because of the seasonal nature of excavation work in Idaho, he and his wife live over the course of the winter (November through April/May) primarily on income from the excavation business, as the snowmobile repair and snow plowing activities he performs during the winter bring in only nominal income. Tr. at 305, 415-16, 418-20; *see* Motion for Additional Discovery Ex. A. Accordingly, while Appellee had over $23,000 in a checking account in November 2000, Tr. at 305, by March 21, 2001, he had less than $1,000 in his two checking accounts combined. Tr. at 350.

In addition, Appellee testified that at the time of the hearing, he had monthly payments of $1,411.92 on the Bellevue mortgage, $1,864 on the new John Deere loader, and $524 on the Caterpillar skid steer. Tr. at 354-59; *see* Tr. at 329-31. Appellee explained that he had assumed these substantial new debts so

---

[10] Appellant sought answers to all questions on its Financial Data Request Form, which asks for information on bank accounts, investments, retirement funds and accounts, real estate, other assets, credit cards/lines of credit, and other debts. *See* Motion for Additional Discovery attach. Appellee had previously submitted a partial set of answers to the Financial Data Request Form. *Id*. Appellant also requested financial statements for Appellee's business for calendar year 2000, including an income statement, balance sheet, statement of cash flow, schedule of accounts receivable, and outstanding contracts (if any), as well as a copy of Appellee's John Deere loan financing package. *Id*. at 3. While, in view of the fact that the information sought might well have proved helpful in assessing Appellee's ability to pay, and thus there is room to question the ALJ's characterization of the request as "obnoxious," the Region did not appeal the ALJ's denial of its motion for additional discovery.

that he could place a retirement home on the Bellevue property, replace an old, uninsured loader that had been destroyed in early 1999 when it "rolled down a hill," and replace an old skid steer that had stopped running. Tr. at 352-55, 358. Appellee testified that in 2000, he sold two trailers for $34,000 so that he could meet his payments on these three loans.[11] Tr. at 361. Now, in late March 2001, Appellee indicated that he hoped to borrow money to make payments in April-May on the three loans, presumably until his excavation business resumed operation and provided Appellee's usual stream of income with which to pay his living expenses and debts. Tr. at 357, 360. Appellee stated that he needed all his other equipment to operate his business, Tr. at 361, although he had one truck, worth approximately $15,000, that he could sell because he could no longer afford to license it in the State of Idaho.[12] Tr. at 362-64. He indicated that he would probably use any proceeds from such a sale to make payments on his loans. Tr. at 364.

With respect to the Meadow Creek Motel sales transaction, Appellee testified that by the time he paid off all outstanding bills and obligations, he ended up with approximately $30,000 from the sale, which he and his wife had since spent on living expenses. Tr. at 367, 414-15; EPA Ex. 27. With respect to the interest and dividends reported on his 2000 income tax return, Appellee testified that both resulted from $27,000-$28,000 Sharon Cutler had inherited upon the death of her mother, Molly Fender. Tr. at 368-69; *see* Tr. at 303-05; Cutler Ex. J. Appellee stated that that principal had gone "into the business." Tr. at 369.

Finally, Appellee testified that he had paid over $5,000 (actually $5,344.48) for health insurance for himself and his wife Sharon in the year 2000. Tr. at 370; *see* Tr. at 331. As of the date of the hearing, Appellee was 69 years old and Sharon was 63, Tr. at 348, and Appellee stated that they would have to continue purchasing health insurance until Sharon reached retirement age and could qualify for Medicare. Tr. at 370.

c. *ALJ's Analysis*

Presented with the foregoing evidence and accompanying arguments, the ALJ concluded that Appellee's business is "only modestly profitable at best," as his 1997 through 2000 income tax returns showed adjusted gross incomes of -$2,870, $6,636, -$24,360, and $12,682, respectively. Init. Dec. at 50; *see* Cutler Exs. G-J. To reach this conclusion, the ALJ rejected Beatrice Carpenter's calcula-

---

[11] Appellee explained that he had used one of the trailers with a low-boy hitch to move equipment and that he would now use a small pull trailer to perform that task. Tr. at 362. The other trailer was an end-dump unit he did not use very frequently any longer. *Id.*

[12] The State of Idaho had recently increased the truck licensing fee from approximately $200 to $1,940 per year. Tr. at 362-63.

tion of Appellee's income levels, in which she had included accelerated depreciation as part of total cash flow from business activity. Ms. Carpenter had explained that "depreciation is not truly a cash out-of-pocket type of item" but rather is a method of allowing for "the recapture of amounts expended for business equipment or property over a period of time of the useful life" of the asset;[13] therefore, depreciation figures deducted on a business's tax returns should be included in that business's total cash flow. Tr. at 307, 310; EPA Ex. 25. The ALJ held this analysis to be erroneous "for at least two reasons." Init. Dec. at 43 n.32. The ALJ noted:

> Firstly, the Internal Revenue Code specifically allows a reasonable deduction for depreciation and obsolescence (26 U.S.C. § 167) and there can be no doubt that depreciation is a legitimate expense of doing business. Secondly, "cash flow" is not the same as available cash. While depreciation may shield income from taxation, if that money is used for other purposes, it is not available for the payment of penalties, and, of course, the equipment which earned the depreciation will eventually need to be replaced.

Id. Accordingly, the ALJ held that it is improper to add reported depreciation when calculating cash flow, concluding, "[Appellee] could not pay the penalty out of current income or make substantial payments thereon and have any money for personal living expenses." *Id.* at 50.

In addition to rejecting Ms. Carpenter's analysis of Appellee's cash flow, the ALJ also discounted her opinion that Appellee's loan history provided evidence of his creditworthiness. Init. Dec. at 42. He reasoned that the Bellevue, loader, and skid steer loans are secured by the home and equipment they are taken out on, and thus cannot be analogized to a "dead expenditure like the payment of a penalty upon which no security is possible and which has no possibility of a return." *Id.* The ALJ also found that Appellee had no savings and was unlikely to be able to borrow money to pay the penalty, as he was already "leveraged to the hilt." *Id.* at 50. With respect to proceeds Appellee could potentially earn from selling his unlicensed truck, the ALJ observed that he would need those monies for living expenses and loan payments, and that all other equipment is essential to Appellee's excavation business. *Id.* As for the value of that business, the ALJ discounted testimony that it was worth approximately $340,000, finding that the value of the business was "seemingly" the value of the equipment. *Id.* The ALJ

[13] Ms. Carpenter noted further, "Now for income tax purposes they allow a shortened life, as opposed to the actual useful life. In addition, they provide for an accelerated method of depreciating these assets over a shorter period of time than what their actual useful life would be." Tr. at 310.

concluded that in light of all the facts in the record, Appellee had provided sufficient specific information, within the meaning of *In re Wallin*, 10 E.A.D. 18, 34-38 (EAB 2001), to rebut Appellant's prima facie case of ability to pay.[14] *Id*. at 50-51.

3. *Arguments on Appeal*

On appeal, Appellant raises a series of challenges to the ALJ's decision. First, Appellant argues that the ALJ erred and abused his discretion in rejecting the unopposed, unrebutted expert testimony of Ms. Carpenter that Appellee has the ability to pay the proposed penalty. Appeal Br. at 20. This is not, Appellant asserts, "a case of assessing the credibility of dueling expert witnesses." *Id*. Rather, Appellant contends, the ALJ drew technical conclusions about Appellee's cash flow and finances on the basis of his own opinion rather than on the expert opinion in the record. *Id*. at 20-22. Appellant concludes that the ALJ substituted "his own inaccurate understanding of complex financial matters for that of the qualified expert. In so doing, he erred." *Id*. at 22.

Second, Appellant argues that the ALJ abused his discretion by ignoring Appellee's ownership of substantial assets, namely two homes worth at least $350,000 and a business worth $340,000. According to the ALJ, Appellee could not afford to pay the $25,000 penalty and remain in business, Init. Dec. at 51, but, Appellant contends, the ALJ did not explain how, for example, the sale, rental, or mortgage of Appellee's second home in Bellevue would interfere with his business. Appeal Br. at 23 & n.16 (citing *In re Britton Constr. Co.,* 8 E.A.D. 261, 291 (EAB 1999)). Appellant also argues that there is no evidence in the record that the value of Appellee's excavation business is the value of the equipment, as the ALJ appeared to find; moreover, Appellee proffered no evidence to establish that the business is not worth the $340,000 Patrick and Dawn Cutler agreed to pay for it. *Id*. at 23.

Third, Appellant argues that the ALJ abused his discretion by discounting Ms. Carpenter's testimony as to Appellee's creditworthiness. *Id*. at 24. Appellant does not believe the ALJ's distinction between secured loans versus a loan to pay a penalty is relevant, stating that Ms. Carpenter's unrebutted opinion that Appellee has good credit is still valid. *Id*. Fourth, Appellant objects to the ALJ's observation that Idaho is a community property state and thus half the assets and income belong to Appellee's wife, who is not a party to this proceeding. Init. Dec. at 50. Appellant points out that while Idaho is in fact a community property state, the marital estate (i.e., community property) is nonetheless liable for acts commit-

[14] Also, with respect to the possible income-producing potential of the Bellevue property, the ALJ stated, "While it seems unlikely that the house would remain vacant, there is no evidence that the Bellevue property was rented or attempted to be rented so as to produce any income." Init. Dec. at 40.

ted by one spouse in the course of managing the community business with the intent of protecting community property. Appeal Br. at 24-25 (citing *Hansen v. Blevins*, 367 P.2d 758, 762 (Idaho 1962)). Appellant concludes by contending that Appellee did not meet his burden of producing evidence to show he could not pay the proposed penalty. *Id.* at 25-26.

For his part, Appellee argues the following in response. First, Appellee engages in a mathematical exercise, adding all the monthly loan payments he made in 2000, plus his medical insurance premium for that year, which yields a sum of $50,943.52.[15] Reply Br. at 16. Then, assuming for the sake of argument that Ms. Carpenter's calculation of approximately $55,000[16] as Appellee's net cash flow from his business in 2000 is correct (which he does not concede, believing it to be much less), Appellee points out that he and his wife would be left with "virtually nothing" — i.e., about $4,000 — to pay their living expenses for that year. *Id.* Given this precarious position, Appellee claims, he has been meeting his financial obligations by "cannibalizing" his assets (i.e., selling the two trailers in 2000; potentially selling the unlicensed truck) and by directing all possible income streams into the business, including his wife's inheritance from her mother. *Id.* at 16, 20.

Second, Appellee criticizes the robustness of Ms. Carpenter's analysis, arguing that she failed to consider Appellee's retirement or health insurance needs in analyzing his ability to pay, despite the fact that she had information that Appellee had been in the excavation business for more than thirty years and consequently was likely approaching retirement age. Resp. Br. at 18-19. Appellee points out that at the hearing, Ms. Carpenter conceded that EPA had not taken Appellee's retirement or health insurance needs into account in evaluating ability to pay. *Id.* at 18 (citing Tr. at 322-24, 332).

Finally, Appellee claims that there is no evidence in the record to establish the value of the business as $340,000, despite Appellant's frequent assertions to that effect. He contends that the record is not clear as to whether the $340,000 figure included the value of the real property at Stanley. *Id.* at 21. Appellee also contends that the figure was reached prior to the front-end loader accident and subsequent replacement, which involved his incurring a significant new debt; that

---

[15] This sum is reached by adding twelve Bellevue mortgage payments at $1,411.92 each, twelve John Deere loader payments at $1,864 each, twelve Caterpillar skid steer payments at $564 each, and one health insurance annual premium payment of $5,344.48. Reply Br. at 16.

[16] Ms. Carpenter calculated Appellee's business cash flow for the year 2000 as $58,910. EPA Ex. 25. To obtain a net cash flow for that year of approximately $55,000, Ms. Carpenter observed that Appellee had reported $111,616 on his 2000 tax returns as additional assets purchased in that year. Tr. at 310-11; Cutler Ex. J. After subtracting the $100,000 loader and $8,000 skid steer from that total, Ms. Carpenter was left with "approximately $3,000" (actually $3,616) in other unidentified assets purchased, which she then subtracted from the $58,910 business cash flow for 2000 to derive a net cash flow of approximately $55,000 (or $55,294). Tr. at 310-11.

the transaction was not arm's length and thus did not involve interest paid to the seller on the unpaid balance; and that the two trailers belonging to the business were subsequently sold. *Id.* at 21-22. As a result of these developments, Appellee argues, the $340,000 figure "must be whittled down by a substantial amount." *Id.* at 22. Appellee concludes that "regardless of how one manipulates the figures, the Cutlers are living on the ragged edge." *Id.* at 24.

4. *Analysis*

We uphold the ALJ's determination that Appellant failed to meet its burden of demonstrating that Appellee had the ability to pay a $25,000 penalty. For us, the issue turns in large measure on the testimony of witnesses at the evidentiary hearing, as the Board typically grants deference to ALJ assessments of witness credibility. *E.g.*, *In re City of Salisbury*, 10 E.A.D. 263, 276, 293-96 (EAB 2002); *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998); *In re Echevarria*, 5 E.A.D. 626, 639 (EAB 1994). In this instance, Appellant met its prima facie burden of production through its introduction of Ms. Carpenter's ability-to-pay analysis and testimony. *See* Tr. at 279-318; EPA Ex. 25 (Carpenter report). Appellee successfully rebutted Appellant's prima facie case, however, through his own testimony, which the ALJ found to be credible and which Appellant's cross-examination failed to diminish. *See* Init. Dec. at 39-43, 50-51; Tr. at 350-76, 413-26, 442-45, 462-64; OA Tr. at 17-21, 29-32.

Significantly, the hearing brought to light the facts that Appellant had not considered Appellee's retirement or health insurance needs in analyzing ability to pay[17] and that, all things considered, Appellee's income is quite modest, regardless of whether one measures it using the annual cash flow figures computed by Ms. Carpenter or the adjusted gross income figures used by the ALJ.[18] *See*, *e.g.*, Tr. at 305-09, 322-24, 331-32, 370; EPA Ex. 25; Cutler Exs. G-J. In the former instance (i.e., using the larger quantity, cash flow, as the appropriate measure of

---

[17] At oral argument, Appellant conceded that it is appropriate in some cases to consider a respondent's retirement and medical insurance needs in evaluating ability to pay. OA Tr. at 25-28.

[18] In holding that it is inappropriate to include reported depreciation when calculating cash flow from a business, the ALJ rejected, without citation to any relevant authority or evidence in the record, Ms. Carpenter's expert opinion to the contrary. Init. Dec. at 42-43 n.32. We find no persuasive basis for the ALJ's conclusion in this regard and find that he erred in rejecting Ms. Carpenter's expert opinion regarding how to take accelerated depreciation into account in assessing ability to pay. *See*, *e.g.*, *In re Wallin*, 10 E.A.D. 18, 36-37 (EAB 2001) (ALJ erred in reducing penalty based on ability to pay where EPA's expert witness testified that respondent had sufficient cash flow to pay proposed penalty and respondent failed to rebut such evidence); *see also infra* Part II.C (citing federal cases for proposition that finders of fact may not substitute their own extra-record opinions for the opinions of qualified experts). Indeed, our issue with Appellant's arguments concerning ability to pay has less to do with Ms. Carpenter's analytical framework than it does with the fact that Appellee adduced certain evidence at trial that had not been fully factored into the somewhat theoretical analysis provided by Ms. Carpenter.

income or cash on hand), Appellee made clear that his payments on the Bellevue mortgage and loader and skid steer loans, as well as his health insurance premiums, consume the better part of his business cash flow, leaving him very little money for daily living expenses and other expenditures. Tr. at 350-60. As a consequence, Appellee has apparently had to sell business assets, such as the two trailers, to meet his loan obligations, and, according to his testimony, he has invested every extra dollar in the business, including monies from the sale of the motel property and his wife's $27,000-$28,000 inheritance. Tr. at 361, 364, 367, 414-15; EPA Ex. 27. Appellee testified that he has had to do this because he has no savings and virtually no earnings in the winter months. Tr. at 350, 415-16, 418-20. Once Appellee came forward with this kind of evidence, the burden shifted back to Appellant to overcome Appellee's testimony in order to satisfy its ultimate burden of proof. This Appellant failed to do.

While it may be true that Appellant's capacity to overcome Appellee's rebuttal was constrained by its inability to secure from Appellee all of the information that might be relevant to the inquiry, this is a limitation partly of Appellant's own making, in that Appellant did not choose to appeal the ALJ's decision denying Appellant's Motion for Additional Discovery.[19] OA Tr. at 60-61. Moreover, Appellant did not make maximum use of its cross-examination of Appellee at the hearing and thus failed to use the opportunity available to it possibly to develop a record more supportive of its arguments. *See* OA Tr. at 17-21, 29-32. Accordingly, we uphold the ALJ's decision regarding Appellee's inability to pay a $25,000 penalty.[20]

This being said, we nonetheless reject as insufficient the $1,250 penalty assessed by the ALJ. While the ALJ did find an inability to pay a $25,000 penalty, we do not read his decision as stating clearly that Appellee is unable to pay a penalty of more than $1,250. Rather, the $1,250 penalty appears to have been predicated on his assessment of the totality of the circumstances, turning not just on ability to pay but also on his determination regarding the gravity of the violation and his conclusions regarding the extent to which Appellee acted in good faith and whether Appellee's pre-1995 compliance history could be considered in

---

[19] It bears noting here that if Appellant had chosen to appeal the ALJ's denial of its Motion for Additional Discovery, we might very well have found that denial to be erroneous on the ground that the financial information requested by Appellant is exactly the kind of information a complainant needs to understand to properly analyze a respondent's future retirement needs. *See* OA Tr. at 37, 41-42.

[20] At oral argument before the Board, we learned that, adding to his financial woes, Appellee has incurred legal fees in this proceeding in the amount of $15,000-$18,000, as reflected in a claim for reimbursement of fees filed by Appellee under the Equal Access to Justice Act, 5 U.S.C. § 504. OA Tr. at 32-34, 53. The EAJA action has been stayed pending the completion of the instant case. *Id.* at 34. Notably, Appellant conceded at oral argument that attorney's fees can be considered in evaluating ability to pay. *Id.* at 59.

assessing a penalty. As stated below, we find the ALJ committed legal errors with respect to several factors in his totality-of-the-circumstances analysis. Therefore, we assess our own penalty, based on a proper consideration of the factors involved.

B. "*Prior History of Violations*" *Penalty Factor*

As mentioned at the beginning of our discussion in Part II.A.1 above, one of the many factors a complainant must consider in the course of quantifying an administrative penalty under CWA section 309(g) is whether the violator has a prior history of CWA violations. CWA § 309(g)(3), 33 U.S.C. § 1319(g)(3); *In re Advanced Elecs., Inc.*, 10 E.A.D. 385, 412 (EAB 2002), *appeal voluntarily dismissed*, No. 02-1868 (7th Cir. May 21, 2003). In this case, Appellant presented evidence that Appellee had previously broken the law protecting wetlands in this country on three separate occasions (summarized in Part I.B, *supra*). In brief, Appellant introduced documents (e.g., Notices of Violation; Cease and Desist Orders) and testimony indicating that in 1991, Appellee placed a large culvert and fill into Meadow Creek and adjacent wetlands without a section 404 permit; that in 1993, Appellee removed sediment-control devices required by an after-the-fact permit he had obtained for the 1991 fill; and that in 1994, Appellee discharged fill material into a triangular area of wetlands adjacent to Meadow Creek without a section 404 permit. *See supra* Part I.B.

The ALJ considered this past history in his Initial Decision but ultimately found it to be of no consequence to the penalty calculus for the pending violation, as none of Appellee's prior infractions had occurred within the five years before the filing of the complaint on August 24, 2000. Init. Dec. at 52-53. Instead, the ALJ held that, as a matter of policy, EPA does not consider violations older than five years when considering the "any prior history" factor. Init. Dec. at 44, 52-53.

To support this finding, the ALJ cited EPA's general enforcement penalty policy, which states that in evaluating history of noncompliance, a complainant should consider how recent any previous similar violations are. *Id.* at 52 (citing EPA General Enforcement Policy #GM-22, *A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties* 21 (Feb. 16, 1984)). The ALJ also cited several statute-specific penalty policies issued by EPA that define "prior violations" for purposes of considering compliance history as those occurring within five years or less of the violation at issue. *Id.* (citing Guidelines for the Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act, 45 Fed. Reg. 59,770, 59,774 (Sept. 10, 1980); U.S. EPA, *Polychlorinated Biphenyls (PCB) Penalty Policy* 16 (Apr. 9, 1990); Office of Compliance Monitoring & Office of Pesticides & Toxic Substances, U.S. EPA, *Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)* app. B footnotes ¶ 4(b) (July 2, 1990); U.S. EPA, *Final Penalty Policy for Sections 302, 303, 304, 311, and 312 of the Emergency*

Planning and Community Right-to-Know Act of 1986 and Section 103 of the Comprehensive Environmental Response, Compensation, and Liability Act 24 (1990); Office of Regulatory Enforcement, U.S. EPA, *Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act* 10, 14 (Aug. 1998)). Further, the ALJ cited a CWA settlement policy, which EPA developed primarily for use in CWA section 402 National Pollutant Discharge Elimination System ("NPDES") and CWA section 405 sludge cases, for the proposition that EPA "generally does not calculate economic benefit beginning more than five years prior to the time the complaint should have been filed." Init. Dec. at 52 (citing U.S. EPA, *Interim Clean Water Act Settlement Penalty Policy* 5 (Mar. 1, 1995) [hereinafter *CWA NPDES/Sludge Settlement Policy*]). The ALJ found that proposition to be relevant in this context and an additional reason for disregarding violations discovered and resolved more than five years prior to the issuance of the complaint. *Id.* at 53. Finally, the ALJ noted that "the fact that [Appellee's prior] violations were remedied, i.e., that the unauthorized fill was removed, operates to mitigate the seriousness of the violation in any event," citing the Board's decision in *In re Britton Construction Co.*, 8 E.A.D. 261 (EAB 1999). Init. Dec. at 53.

On appeal, Appellant argues that the ALJ erred in restricting the "any prior history" analysis to five years. Appellant begins by pointing to the Consolidated Rules of Practice that govern this proceeding, which specify that in determining the amount of a civil penalty, an administrative law judge must examine the evidence in the administrative record in conjunction with the penalty criteria (if any) set forth in the relevant statute. Appeal Br. at 4-5 (citing 40 C.F.R. § 22.27(b)). Appellant observes that in drafting the CWA penalty criteria, Congress employed the adjective "any" to describe the prior history it wanted considered in the penalty calculus, which Appellant believes provides evidence of congressional intent that *all* prior violations be considered, regardless of age. *Id.* at 5. Appellant also notes that the ALJ cited no case law to support his narrow reading of the statute, whereas federal district courts have found the term "*any* history of such violations" (which appears in CWA section 309(d), a similar provision to CWA section 309(g)(3)) to include violations more than five years old. *Id.* at 5-6 (citing *United States v. Allegheny Ludlum Steel Corp.*, 187 F. Supp. 2d 426, 433 (W.D. Pa. 2002), *aff'd in part, vacated in part & remanded on other grounds*, 366 F.3d 164 (3d Cir. 2004); *Atl. States Legal Found. v. Universal Tool & Stamping Co.*, 786 F. Supp. 743 (N.D. Ind. 1992); *PIRG of N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 720 F. Supp. 1158, 1163 (D.N.J. 1989), *aff'd in part & rev'd in part*, 913 F.2d 64 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991)).

As for the various penalty policies relied upon by the ALJ, Appellant argues that the ALJ raised them sua sponte, without benefit of briefing by the parties, and that the policies are inapposite or inapplicable to the instant case, for several reasons. First, Appellant contends that the general penalty policy cited by the ALJ contains, at most, a description of how much weight prior violations should be assigned, not whether they should be considered in the penalty analysis. Appeal

Br. at 8. Second, with respect to the statute-specific policies cited by the ALJ, Appellant argues that they demonstrate only that EPA "knows how to limit consideration of the 'prior history' factor when it deems appropriate," and EPA has not done so for wetlands litigation cases, for which no specific penalty policy exists. *Id.* at 7-8. Third, Appellant observes that the economic benefit guidelines of the *CWA NPDES/Sludge Settlement Policy* cited by the ALJ are inapplicable here because, by its terms, that policy applies only to settlement cases, not litigated cases such as this one, and also because that policy specifically indicates that it does not apply to CWA section 404 wetlands cases. *Id.* at 8-9; *see CWA NPDES/Sludge Settlement Policy* at 4 ("This Policy does not apply to actions brought exclusively under CWA § 311 (oil and hazardous substance spills) nor for violations of requirements in § 404 ('wetlands' cases involving disposal of dredged or fill material). Separate penalty policies apply to these two types of cases.").

Appellant notes in this regard that the ALJ did not mention in his Initial Decision the relevant CWA settlement policy for wetlands cases. Appeal Br. at 9 (citing U.S. EPA, *Clean Water Act Section 404 Settlement Penalty Policy* (Dec. 21, 2001) [hereinafter *CWA § 404 Settlement Policy*]). Appellant points out that unlike the *CWA NPDES/Sludge Settlement Policy* cited by the ALJ, which is not intended for use in litigated cases or in wetlands cases, the *CWA § 404 Settlement Policy* provides that it may be used to calculate penalties in administrative litigation proceedings, as well as settlement proceedings, under CWA section 309(g). *See CWA § 404 Settlement Policy* at 7 (stating that settlement penalty calculation methodology can be "adapted" to establish a penalty request in an administrative complaint, provided adjustments are made to ensure the penalty request is higher than the bottom-line settlement penalty amount calculated under the policy) (cited in Appeal Br. at 9). That policy, as Appellant contends, places no time restrictions on the prior violations that may be considered in evaluating compliance history, stating:

> The case development team should consider whether the defendant has a history of prior Section 404 violations including unpermitted discharge violations, permit violations, or a previous violation of an EPA administrative order. The greater the number of past violations and the more significant the violations were, the higher the value that should be assigned to this factor. The earlier violations need not relate to the same site as the present action. Prior history information may be obtained not only from EPA experience with the violator, but also from appropriate Corps Districts, other federal agencies' knowledge and

> records, and the violator's responses to [CWA] Section 308 requests for information.

CWA § 404 Settlement Policy at 14 (quoted in Appeal Br. at 9).

In addition, Appellant argues that the ALJ's holding creates a conflict between the *CWA § 404 Settlement Policy*, which places no time restrictions on what prior violations may be considered, and the statute, which Appellant claims the ALJ has construed as limiting consideration of prior violations to those no older than five years. Appellant observes that, as a result, "bottom-line settlement amounts could be larger than what the Agency reasonably could expect to obtain at a hearing." Appeal Br. at 9-10.

Finally, with respect to the ALJ's citation of *Britton Construction* to support the proposition that prior history evidence can be downplayed in the penalty calculus if the violator remedied or mitigated the prior violations, Appellant points out that *Britton* did not, in fact, deal with mitigation of prior violations, but rather with mitigation of violations that were alleged in the complaint in the case under review. *Id.* at 10; *see Britton*, 8 E.A.D. at 280-84. Appellant therefore argues that the ALJ misapplied the holding in *Britton* in this context. Appeal Br. at 10 (arguing that if the ALJ's reasoning regarding *Britton* were correct, "any prior violations that had been mitigated could never be used to increase [a] penalty," which, Appellant claims, is not a supportable result under the existing statute, regulations, or EPA policy).

In his response to the appeal, Appellee does not address the issue of a five-year limit on "any prior history" and makes no attempt to defend the ALJ's reasoning on this topic. *See* Reply Br. at 4-10. Further, Appellee does not discuss the EPA penalty policies examined by the ALJ or provide any analysis or rationale whatsoever for limiting the prior history examination to five years. *Id.* Instead, Appellee merely describes his property, argues that Appellant has not clearly indicated what areas it believes are filled wetlands, and defends his prior wetlands activities. *Id.* Appellee's arguments are inapposite in this context.

In parsing through the foregoing arguments, we are mindful of the well-established principle that, when assessing penalties in specific cases, administrative law judges must consider, but need not necessarily follow, EPA penalty policies issued under the relevant statutes. *See, e.g.*, *In re Chem Lab Prods., Inc.*, 10 E.A.D. 711, 725, 735-37 (EAB 2002); *In re Carroll Oil Co.*, 10 E.A.D. 635, 653-61 (EAB 2002); *In re Wallin*, 10 E.A.D. 18, 25 n.9 (EAB 2001); *Britton*, 8 E.A.D. at 282 n.9. Instead, judges may exercise discretion in calculating appropriate penalties and may depart from a proposed penalty based on an Agency policy if they explain their reasons for the departure. *E.g.*, *In re CDT Landfill Corp.*, 11 E.A.D. 116-20 (EAB 2003); *In re Capozzi*, 11 E.A.D. 10, 32-39 (EAB 2003); *In re B & R Oil Co.*, 8 E.A.D. 39, 63-64 (EAB 1998).

In the case at bar, it is undisputed that EPA has not issued a litigation-specific penalty policy for CWA section 404 wetlands cases. Appeal Br. at 7. Thus, on one hand, it is understandable that the ALJ considered for possible relevance and instruction a cross-section of EPA litigation penalty policies from other statutory contexts in his attempt to discern whether the Agency has followed a particular pattern or practice concerning prior violations. On the basis of that poll, the ALJ concluded that EPA has a general policy limiting prior history evidence to the five-year window preceding the filing of the complaint.[21] Init. Dec. at 52-53.

On the other hand, it is true, as Appellant suggests, that the single most relevant penalty policy is the *CWA § 404 Settlement Policy*, issued in December 2001. This policy not only relates most particularly to the subject matter of the case at hand, but, by its terms, is adaptable for use in litigated cases. *See CWA § 404 Settlement Policy* at 7, 14. As noted, this policy contains no limit on prior history evidence. The ALJ's failure to observe the different thrust of this penalty policy is understandable in view of the fact that this policy's predecessor, dated December 1990, which was in effect during the time frame of much of the briefing, hearings, and ALJ deliberation in this case (i.e., 2000-2001), did not purport to be adaptable to litigated matters.[22] It is likewise true that the ALJ was operating without the benefit of a coherent statement from EPA on this issue, which might, among other things, explain why it deems a five-year limit to be appropriate in some statutory contexts but not in others.

Nonetheless, as a matter of policy, we are unwilling to follow the ALJ in drawing a bright-line rule that automatically excludes certain prior violations from the penalty calculus simply by virtue of their age, particularly in the face of the most recent penalty policy that may be adapted for use in the litigation context (although styled as a settlement policy) but also does not restrict consideration of prior history evidence. Notably, the broad interpretation of the statutory "any prior history" language of CWA section 309(g)(3) reflected in this policy is consistent with federal case law construing the analogous "any history" penalty provision of CWA section 309(d), 33 U.S.C. § 1319(d). The federal courts have frequently held in this context that a defendant's "entire history of violations is relevant in determining the amount of the civil penalty to be assessed against it." *PIRG of N.J., Inc. v. Magnesium Elektron, Inc.*, 40 Env't Rep. Cas. (BNA) 1917, 1923 n.3,

---

[21] In our view, the ALJ did not conclude, as Appellant implies, that the statute itself bars consideration of violations to those no older than five years. *See* Appeal Br. at 9 (discussing purported conflict between *CWA § 404 Settlement Policy* and CWA § 309(g) penalty factors, as interpreted by ALJ).

[22] This Board has generally disfavored the use of settlement penalty guidance outside the settlement context. *See, e.g.*, *In re Phoenix Constr. Servs., Inc.*, 11 E.A.D. 379, 394 and n.37 (EAB 2004); *Britton*, 8 E.A.D. at 287 n.16; *In re Bollman Hat Co.*, 8 E.A.D. 177, 186-90 (EAB 1999).

1932 (D.N.J. 1995) (finding six years of CWA violations that occurred more than five years prior to initiation of action supportive of small increase in penalty).[23] Of course, these federal precedents do not affect EPA's enforcement discretion to restrict its consideration of prior history evidence if it so chooses in a particular case; rather, they simply establish the legality under the CWA of considering a longer-than-five-year history of violations without mandating the same.

Under these circumstances, we believe the appropriate course is to allow decisionmakers to examine each CWA case on an individual basis, with freedom to assign weight to prior violations on the basis of their age, their relation to the violations charged in the complaint, and other relevant factors. In our view, evidence of prior wetlands violations is noteworthy, whether the violations are two, five, eight, or more years old, because such evidence indicates in a uniquely powerful way that the violator has in the past been exposed to the basic requirements of the wetlands program and is or should be generally familiar with those requirements and the consequences of noncompliance. Further noncompliance, in light of the violator's prior experience with the regulatory program, then becomes particularly inexcusable. *See*, *e.g.*, *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 548-49 (EAD 1998) (noting that a primary purpose of civil penalties is deterrence and assessing an increased penalty against a violator who had received notice of prior alleged noncompliance and the penalties therefor and yet persisted in violating the law).

Because we hold that in an adjudication such as this one, the statutory "any prior history" factor in the CWA is not limited to five years, the penalty in this case should take into account Appellee's prior compliance history. That history reflects a pattern of disregard for the regulatory requirements at issue in this case. It further suggests that Appellee should have been sufficiently aware that his ac-

---

[23] *Accord United States v. Allegheny Ludlum Corp.*, 187 F. Supp. 2d 426, 433, 445 (W.D. Pa. 2002) (history of violations stretches back at least fifteen years prior to filing of complaint), *aff'd in part, vacated in part & remanded on other grounds*, 366 F.3d 164 (3d Cir. 2004); *United States v. Gulf Park Water Co.*, 14 F. Supp. 2d 854, 864 (S.D. Miss. 1998) (defendant has long history of CWA violations that have continued uninterrupted for twelve years); *United States v. Smithfield Foods, Inc.*, 972 F. Supp. 338, 349, 354 (E.D. Va. 1997) (six-year history of CWA violations deemed "lengthy and persistent"), *aff'd in part & rev'd in part on other grounds*, 191 F.3d 516 (4th Cir. 1999), *cert. denied*, 531 U.S. 813 (2000); *United States v. Mun. Auth. of Union Township*, 929 F. Supp. 800, 803, 807 (M.D. Pa. 1996) (six-year history of violations may be weighed in assessing penalty); *PIRG of N.J., Inc. v. Hercules, Inc.*, 830 F. Supp. 1525, 1544-45 (D.N.J. 1993) (eight years of CWA violations at another facility that predate complaint in instant action may be considered in determining penalty), *aff'd in part, rev'd in part & remanded on other grounds*, 50 F.3d 1239 (3d Cir. 1995); *Atl. States Legal Found. v. Universal Tool & Stamping Co.*, 786 F. Supp. 743, 751 (N.D. Ind. 1992) (considering nine years of CWA violations preceding filing of instant suit, which covered another five years of violations); *PIRG of N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 720 F. Supp. 1158, 1163, 1166 (D.N.J. 1989) (finding eleven years of CWA violations and noting that defendant had "long history of violations [that] would also lead this Court to impose the statutory maximum"), *aff'd in part, rev'd in part & remanded on other grounds*, 913 F.2d 64 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991).

tivities might affect wetlands to have at the very least consulted with relevant officials prior to engaging in the violative activity. *See*, *e.g.*, *In re Advanced Elecs., Inc.*, 10 E.A.D. 385, 412 (EAB 2002) (prior history of CWA violations suggests company was aware of applicable regulatory requirements and sanctions for violating them), *appeal voluntarily dismissed*, No. 02-1868 (7th Cir. May 21, 2003); *Ocean State*, 7 E.A.D. at 548-49 (history of prior notices is evidence that Appellee was aware of required compliance and sanctions for noncompliance). Indeed, Appellee's choice to proceed without such consultation suggests a willful disregard for the law. This is a heavy equipment operator with both the ready means to engage in activity that is destructive to wetlands and a history of doing so. The ALJ's decision not to take these considerations into account caused him to understate the significance of the violation.

C. "*Gravity of the Violation*" *Penalty Factor: Harm to Critical Habitat*

Another of the factors that must be considered in the course of quantifying an administrative penalty under CWA section 309(g) is the "gravity" or seriousness of the violation. CWA § 309(g)(3), 33 U.S.C. § 1319(g)(3); *In re Phoenix Constr. Servs., Inc.*, 11 E.A.D. 379, 404 (EAB 2004). In this regard, the ALJ reviewed the expert testimony of Mr. John Olson, an EPA wetlands ecologist, and Mr. David Arthaud, a National Marine Fisheries Service ("NMFS") fisheries biologist, which Appellant proffered at the March 2001 hearing. Both expert witnesses testified that Appellee's filling activities had caused significant harm to wetlands and fisheries habitat around Appellee's home by destroying the functions and values (such as erosion control, water filtration, wildlife habitat) provided by the wetlands to the aquatic ecosystem as a whole. Tr. at 231-39, 262-64, 278. Mr. Arthaud testified that cutthroat trout and bull trout reside in Meadow Creek and that Meadow, Goat, and Valley Creeks are suitable habitat for Snake River spring/summer chinook salmon, Snake River steelhead, and Snake River sockeye salmon. Tr. at 254-59, 262-64, 265-67, 275-78. Notably, all of these species except the cutthroat trout are listed as threatened or endangered under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544. Tr. at 255; *see* 50 C.F.R. §§ 223.102(a)(1)-(2), (7), 224.101(a) (lists of threatened and endangered marine and anadromous species). Mr. Arthaud also testified that Meadow, Goat, and Valley Creeks (among others) have been formally designated as "critical habitat"[24] for salmon under the Endangered Species Act.[25] Tr. at 257, 275. Appel-

---

[24] "Critical habitat" consists of specific areas containing physical and biological features that are "essential to the conservation of the species" and that may require special management or protection. ESA § 3(5)(A), 16 U.S.C. § 1532(5)(A); *see* 50 C.F.R. § 402.02 (definition of "critical habitat"); 50 C.F.R. pts. 17, 226 (critical habitat lists).

[25] Mr. Arthaud testified that "Meadow Creek above, through, and downstream from [Appellee's property] is designated as critical habitat, as is Goat Creek and Valley Creek, the entire drainage and, in fact, all the waters of the upper Salmon [River], the head waters, are designated critical

Continued

lee did not introduce any expert testimony or other evidence to rebut the testimony of these two witnesses.

The ALJ evaluated the evidence presented on this issue and rejected Mr. Arthaud's testimony regarding critical habitat as "inaccurate." Init. Dec. at 37. He held instead, on the basis of his own reading of the *Federal Register* notice designating critical habitat for sockeye salmon and spring/summer chinook salmon, that the property in question is *not* critical habitat for those species. *Id.* at 37, 49; *see* 58 Fed. Reg. 68,543 (Dec. 28, 1993) (codified at 50 C.F.R. § 226.205) (critical habitat designation notice). In his view, the critical habitat designations for sockeye and chinook salmon do not include tributaries of Valley Creek, such as Meadow and Goat Creeks, and thus Appellant overestimated the value of the habitat affected by Appellee's unlawful fill. Init. Dec. at 37, 49. The ALJ also took note of an NMFS letter that stated the primary water body affected by Appellee's unlawful filling activities is Valley Creek.[26] *Id.* at 49; *see* EPA Ex. 11, at 1 (NMFS letter). The ALJ reasoned that fill placed in wetlands adjacent to Meadow Creek "has at most an indirect effect on Valley Creek, because Meadow Creek is a tributary of Goat Creek rather than of Valley Creek." Init. Dec. at 49. In addition, the ALJ found that Appellee's fill activities had little-or-no impact on the two miles of Meadow Creek fisheries habitat upstream from Appellee's property (i.e., south of Highway 21). *Id.* For all these reasons, the ALJ held that Appellant "exaggerated" the gravity of the violation. *Id.*

On appeal, Appellant argues that the ALJ clearly erred in substituting his own interpretation of the critical habitat designation notice for unrebutted expert testimony on this subject. Appeal Br. at 13. Appellant points out that the *Federal*

(continued)
habitat." Tr. at 257. He stated that Meadow Creek has "[a] production number of a few hundred smolts of steelhead and spring chinook of some kind." *Id.* Mr. Arthaud testified that while he had not personally observed fish in Meadow Creek, he had read survey reports from Idaho Fish & Game that indicate "handfuls" of anadromous fish have been seen in Meadow Creek within the last ten years. Tr. at 266-67. Mr. Arthaud later noted that Meadow Creek is designated habitat for "salmon." Tr. at 275.

[26] This letter notifies the Corps that an NMFS employee observed a dump truck and backhoe being used to place fill into wetlands on Appellee's property on November 30, 1999. The letter states, among other things:

> Valley Creek is the primary waterbody affected by this [unauthorized] project. Valley Creek is designated as critical habitat for Snake River spring/summer chinook salmon * * * and proposed critical habitat for Snake River steelhead * * * . * * *
>
> Valley Creek provides important spawning and rearing habitat for Snake River steelhead and spring/summer chinook salmon. Snake River spring/summer chinook salmon and steelhead juveniles rear in Valley Creek adjacent to and downstream of the subject action * * * .

EPA Ex. 11, at 1.

Register notice was neither referenced by the parties at hearing nor cited in any briefs, and yet the ALJ proceeded to consider it without benefit of testimony or briefing thereon. *Id.* Appellant contends that, in so doing, the ALJ misinterpreted the notice with respect to Valley Creek tributaries and thus clearly erred. *Id.* at 13-14. Appellant also argues that "the uncontroverted expert testimony presented at hearing suggested that Appellee's actions had a disproportionate negative impact on the total fisheries habitat of Meadow Creek," *id.* at 16, as Mr. Arthaud had testified that the filled areas were probably the most valuable habitat given their greater flow and closer proximity to Valley Creek. *Id.*; Tr. at 258.

For his part, Appellee takes the position that the ALJ properly judged Appellant's experts' testimony to be weak, as neither Mr. Arthaud nor Mr. Olson had conducted an on-site inspection of Appellee's property.[27] Reply Br. at 11. Appellee also highlights his own testimony at the hearing, in which he had stated that he had never seen salmon or steelhead in Meadow Creek since he moved to the area in 1973. *Id.* (citing Tr. at 400-01). Appellee also notes that he had observed a variety of wildlife in the area, such as deer, raccoon, beaver, otter, fox, and mice, who did not appear to have been affected by the placement of the "lawn fill." *Id.*

In our view, the ALJ did err, as Appellant contends, in choosing to credit his own layperson's interpretation of the critical habitat designation over the conflicting expert testimony of Mr. David Arthaud. We have reviewed the critical habitat designation in the *Federal Register* notice,[28] as it is in the public domain

---

[27] The ALJ appears to have found some significance in the fact that Mr. Arthaud never conducted an on-site inspection of the aquatic ecosystem affected by Appellee's fill, but rather formed his expert opinions on the basis of reports compiled by Idaho Fish & Game, the U.S. Army Corps of Engineers, and others. *See* Init. Dec. at 37 n.29, 49. As Appellant points out, however, Appellant proffered Mr. Arthaud as an expert witness, who is entitled to rely on and interpret the factual findings of others, not as a fact witness. Appeal Br. at 17 (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 (1993) (holding that "[u]nlike an ordinary witness * * * an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation")).

[28] The designation provides:

> [Critical habitat is designated as t]he following areas consisting of the water, waterway bottom, and adjacent riparian zone of specified lakes and river reaches in hydrologic units presently or historically accessible to listed Snake River salmon * * * . Adjacent riparian zones are defined as those areas within a horizontal distance of 300 feet (91.4 m) from the normal line of high water of a stream channel (600 feet or 182.8 m, when both sides of the stream channel are included) * * * .
>
> (a) Snake River Sockeye Salmon (Oncorhynchus nerka). [Critical habitat is designated to include] * * * all Salmon River reaches from the confluence of the Snake River upstream to Alturas Lake Creek; Stanley, Redfish, Yellow Belly, Pettit, and Alturas Lakes (including their inlet and outlet creeks); Alturas Lake Creek, and that portion of Valley Creek

Continued

and therefore subject to official notice by the Board (and by the ALJ below). 40 C.F.R. § 22.22(f) (official notice may be taken of any matter that can be judicially noticed in the federal courts); *see In re EK Assocs., L.P.*, 8 E.A.D. 458, 466 (EAB 1999) ("the contents of the Federal Register 'shall be judicially noticed'") (quoting 44 U.S.C. § 1507); *accord Seymour v. Oceanic Navigating Co.*, 453 F.2d 1185, 1192 n.7 (5th Cir. 1972). The designation notice is quite technical, requiring familiarity with the boundaries of "hydrological units" defined by the U.S. Geological Survey, knowledge of the locations of various dams, waterfalls, lakes, and other geographic features, and information on the direction of flow of various rivers and streams to achieve full understanding of the habitat being designated.[29] *See* 58 Fed. Reg. at 68,551-53 (codified at 50 C.F.R. § 226.205). Assuming Meadow Creek falls within the "Upper Salmon [River] hydrologic unit," it appears that the creek and its adjacent riparian zones are in fact included in the critical habitat for spring/summer chinook, based on our understanding that Meadow Creek is a "river reach presently or historically accessible" to the chinook.[30] *See*

(continued)

> between Stanley Lake Creek and the Salmon River. Critical habitat is comprised of all river[s,] lakes and reaches presently or historically accessible (except reaches above impassable natural falls, and Dworshak and Hells Canyon Dams) to Snake River sockeye salmon in the following hydrologic units: * * * Upper Salmon. * * *
>
> (b) Snake River Spring/Summer Chinook Salmon (Oncorhynchus tshawytscha). Critical habitat is designated to include * * * river reaches presently or historically accessible (except reaches above impassable natural falls (including Napias Creek Falls) and Dworshak and Hells Canyon Dams) to Snake River spring/summer chinook salmon in the following hydrologic units: * * * Upper Salmon * * * .

50 C.F.R. § 226.205(a)-(b).

[29] The map accompanying the notice is small and fails to identify all the geographic features and other details necessary for a precise, stream-by-stream understanding of the designation. *See* 58 Fed. Reg. at 68,554.

[30] The term "river reach" is not specifically defined in the statute or regulations. *See* ESA § 3, 16 U.S.C. § 1532; 50 C.F.R. § 222.102. However, the preamble to the critical habitat designation rule appears to employ the term broadly to include creeks and streams, even intermittent ones. 58 Fed. Reg. at 68,547-48 (stating that above the confluence of the Columbia and Snake Rivers, spring/summer chinook inhabit a wide range of habitats, from large rivers to small perennial and intermittent streams; stating further that the "vast majority" of streams about the Columbia/Snake confluence "contribute essential elements such as food, gravel, large woody debris, and water quality"; and until more information can be gathered, "NMFS chooses to adopt a more inclusive critical habitat designation"). The dictionary defines the common meaning of "reach" as, among other things, "a continuous unbroken stretch or expanse: as (1): an extended portion of water or land (2): a straight portion of a stream or river * * * (4): an arm of the sea extending up into the land * * * ." Webster's Third New Int'l Dictionary at 1888. Mr. Arthaud testified that anadromous species of salmon are physically capable of swimming 920 miles from the Pacific Ocean to Meadow Creek and that such treks are "required" by their life history. Tr. at 254. Thus, it would appear Meadow Creek would qualify as a "river reach" under the regulation.

id. at 68,552 (codified at 50 C.F.R. § 226.205(b)). Meadow Creek may also be included in the critical habitat designation for sockeye salmon, unless the creek is upstream of Valley Creek's confluence with Stanley Lake's outlet creek, in which case it is excluded from the designation. *See id*. at 68,548, 68,552. Because the record lacks detailed information on the geography of the Stanley area and other factors, we cannot be completely certain that these suppositions regarding the habitat designation notice are correct. However, we note that Appellant itself has clarified, on appeal, that Meadow Creek is critical habitat for spring/summer chinook salmon but not for sockeye salmon. Appeal Br. at 14-15.

We turn for resolution of this issue to the Consolidated Rules of Practice governing these proceedings, which specify that all matters in controversy must be established by a preponderance of the evidence in the record. 40 C.F.R. § 22.24(b); *see In re City of Salisbury*, 10 E.A.D. 263, 289-91 (EAB 2002); *In re Britton Constr. Co.*, 8 E.A.D. 261, 274 (EAB 1999). The record in this case contains the testimony of a fisheries biologist, accepted as an expert witness by the ALJ, that Meadow Creek, Goat Creek, Valley Creek, and adjacent wetlands are critical habitat for salmon species of some kind.[31] Tr. at 257, 275. The record also contains a letter from NMFS to the Corps of Engineers stating that Valley Creek is critical habitat for Snake River spring/summer chinook salmon and proposed critical habitat for Snake River steelhead. EPA Ex. 11. (The letter contains no specific mention of Meadow or Goat Creeks.) The record contains a field investigation report prepared by a Corps employee, stating that both Valley and Meadow Creeks "support anadromous fish species [that] would be adversely affected by water quality degradation" in those streams. EPA Ex. 12, at 2. The record contains Appellee's bridge crossing permit, which placed restrictions on Appellee's construction activities to reduce the possibility of adversely affecting "chinook salmon spawning or spawning reds in Meadow or Valley Creeks." Cutler Ex. D at 4. Notably, the record contains no contrary expert testimony or evidence of any kind that Meadow Creek and surrounding environs are not critical habitat for salmon.

On the basis of this record, we conclude that a preponderance of the evidence indicates that Meadow, Goat, and Valley Creeks are critical habitat for Snake River spring/summer chinook salmon. The Appellee did not rebut this evidence at the hearing and does not address on appeal the question whether the area is critical habitat for certain fish. *See* Reply Br. at 10-12. Appellee also presented no evidence that his filling activities did not cause harm to other species of fish that use or could use Meadow Creek even though it may not be designated critical habitat for them. In ignoring the weight of the evidence in favor of his own layperson's reading of a technical notice, which reading in any event appears to

---

[31] In his testimony at the hearing, Mr. Arthaud did not specify the particular species of salmon for which Meadow Creek is designated critical habitat. Tr. at 257, 275.

be erroneous with respect to the Snake River spring/summer chinook salmon, the ALJ clearly erred. *See*, *e.g.*, *Indian Coffee Corp. v. Proctor & Gamble Co.*, 752 F.2d 891, 894-95 (3d Cir.) (trial court erred by substituting own view of reasonable reliance for view of experts), *cert. denied sub nom. Folger Coffee Co. v. Indian Coffee Corp.*, 474 U.S. 863 (1985); *Lagway v. Dallman*, 806 F. Supp. 1322, 1338-39 (N.D. Ohio 1992) (trial judge erroneously substituted own psychological expertise for that of court-appointed expert); *Arrigo v. Heckler*, 604 F. Supp. 401, 403 (E.D. Pa. 1985) (administrative law judge improperly substituted his own lay opinion for that of medical experts); *cf. Wash. State Farm Bureau v. Marshall*, 625 F.2d 296, 305-06 (9th Cir. 1980) (district court erroneously substituted its own judgment for expert opinions relied on by Secretary of Labor).

We recently observed that "in assessing the gravity or seriousness of any violation, [EPA] customarily considers 'the sensitivity of the environment' at the location where the violation occurred." *In re Phoenix Constr. Servs., Inc.,* 11 E.A.D. 379, 405 (EAB 2004) (citing EPA General Enforcement Policy #GM-22, *A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties* 15 (Feb. 16, 1984)). Furthermore, in an "illegally-filled wetlands case, a 'sensitivity of the environment' analysis would almost always necessarily include a consideration of the quality of the wetlands" affected. *Id.* 11 E.A.D. at 405. In a case where, as here, the wetlands unlawfully filled are federally designated critical habitat for endangered or threatened species, plainly the sensitivity of the environment is extremely high and the gravity of the violation correspondingly high. *Cf. In re Phelps Dodge Corp.*, 10 E.A.D. 460, 522-25 (EAB 2002) (remanding CWA permit for reinitiation of interagency ESA consultation in light of new critical habitat designation for spikedace, a threatened fish species, that was issued prior to issuance of permit but after conclusion of initial ESA consultation). We note in this regard that the record makes clear that the growing season in this part of Idaho is very short, Tr. at 235, and thus it will take at least three-to-five years after wetlands restoration is completed to determine whether that restoration will be successful, allowing potential for ongoing adverse effects on the aquatic ecosystem in the interim. Tr. at 235-38. Moreover, Mr. Olson testified that since the time of European settlement, the semi-arid area now identified as the State of Idaho has lost over half its wetlands, with the best approximation of existing wetlands acreage today being only 0.7 percent of the total land surface of the State. Tr. at 238-39. Thus, the kind of further incremental reduction in wetlands occasioned by actions like those featured in this case are far from inconsequential. All of these factors together convince us that the ALJ understated the gravity of Appellee's violation in this case.

D. *Appellee's Culpability*

A final penalty issue that bears mention is the ALJ's assessment of Appellee's *culpability*. Here again, we find clear error in the ALJ's determination that Appellee was not "culpable" within the meaning of CWA section 309(g)(3), 33

U.S.C. § 1319(g)(3). As Appellant argues with some force, Appellee had numerous prior contacts with regulatory authorities pertaining to filling of wetlands around his Stanley home, and he plainly knew or should have known the areas he filled for his new lawn were jurisdictional wetlands. Appeal Br. at 27-29. Thus, his claims that he lacks culpability because he believed the areas filled were not wetlands, or because he had attempted after-the-fact to restore at least some of the filled areas, *see* Init. Dec. at 29-30, 53-55, simply ring hollow. Having identified error in this portion of the ALJ's analysis as well, we move on in the next section to a reassessment of the penalty.

E. *Calculation of Penalty*

While the Board typically grants administrative law judges deference on penalty assessments, we have found in this instance that, as set forth in the preceding pages, the ALJ committed errors with respect to several key predicates that caused him to understate the significance of the violation. Accordingly, we decline to grant the ALJ's penalty assessment deference and will consider the penalty anew. *See*, *e.g.*, *In re Phoenix Constr. Servs., Inc.*, 11 E.A.D. 379, 390 (EAB 2004) ("[a]lthough the regulations grant the Board *de novo* review of a penalty determination, the Board generally will not substitute its judgment for that of a presiding officer absent a showing that the presiding officer committed clear error or an abuse of discretion in assessing a penalty"); *In re Chem Lab Prods., Inc.*, 10 E.A.D. 711, 735-37 (EAB 2002) (vacating administrative law judge's penalty determination as clearly erroneous and deriving penalty afresh).

Because we regard both the violations and the conduct at issue more serious than suggested by the ALJ, we are inclined towards a more significant penalty. This is, of course, limited by Appellee's ability to pay. *See supra* Part II.A. While we accept the ALJ's conclusion that Cutler is unable to pay a $25,000 penalty, there is evidence in the record that he may be able to pay a penalty more substantial than that assessed by the ALJ. We note, for example, Appellee's testimony relating to the possibility of selling a truck not essential to the business valued at $15,000. This being said, there is no clear indication in the record regarding the upper limits of Appellee's ability to pay.

The Agency has observed in at least two other statutory contexts that in circumstances in which there is an inability to pay a proposed penalty but the extent of that inability is not altogether clear, it is appropriate to assume that an entity can, at a minimum, afford to pay a penalty equivalent to four percent of gross receipts averaged over four years.[32] *See* Guidelines for the Assessment of

---

[32] For Board and pre-Board cases addressing these four percent guidelines, see *In re Chempace Corp.*, 9 E.A.D. 119, 138-39 (EAB 2000); *In re Lin*, 5 E.A.D. 595, 601 (EAB 1994); *In re*
Continued

Civil Penalties Under Section 16 of the Toxic Substances Control Act, 45 Fed. Reg. 59,770, 59,775 (Sept. 10, 1980); Office of Compliance Monitoring & Office of Pesticides & Toxic Substances, U.S. EPA, *Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)* 23 (July 2, 1990). In this case, Appellee's gross receipts of $132,915, $140,638, $63,241, and $142,550 over the period 1997 to 2000 yield a four-year average of $119,836. We will omit the gross receipts figure for 1999, however, as Appellee's receipts for that year were aberrational due to the temporary "sale" of the business to his children. The remaining three years of gross receipts average $138,701, and four percent of that figure is $5,548. In this case, given the lack of precision in the record on the upper limit of Appellee's ability to pay, we will apply this default assumption to derive a penalty. The resulting penalty, being greater than that assessed by the ALJ, better reflects the seriousness of Appellee's violation. Moreover, based on the record before us, it does not appear to be beyond Appellee's ability to pay.

F. *Liability*

Finally, because the amount of the penalty in this case is governed by Appellee's ability to pay, we do not reach the fifth issue raised by Appellant's appeal, which consists of a challenge to the ALJ's conclusions regarding the extent of wetlands filled by Appellee.[33] At oral argument before this Board, Appellant conceded that the only significance of this issue is that it could serve to increase the amount of the penalty because, if Appellant's arguments were to be accepted, a larger area of wetlands would be regarded as affected by Appellee's actions. OA Tr. at 7-14. In light of our finding that the penalty is already constrained by Appellee's ability to pay, however, a further increase in the penalty is not practicable. Accordingly, we decline to consider this issue further.

(continued)
New Waterbury, Ltd., 5 E.A.D. 529, 546-47 (EAB 1994); *In re Ray Birnbaum Scrap Yard*, 5 E.A.D. 120, 122, 124-28 (EAB 1994); *In re Cent. Paint & Body Shop, Inc.*, 2 E.A.D. 309, 317-18 n.13 (CJO 1987).

[33] The ALJ held that a preponderance of the evidence introduced at the hearing established that Appellee had filled wetlands to the south and east of his home in November 1999, for the purpose of constructing a lawn around his house. Init. Dec. at 47. The evidence also indicated that sometime after 1992, Appellee placed an undetermined amount of fill north of his house for the purpose of constructing a driveway and parking/turn-around area for his heavy equipment. The ALJ found that it was "not clear that all of the fill placed along the north side of the Cutler property was placed in wetlands." *Id.* at 48. The ALJ concluded that the unlawful fill at issue in this case covered approximately 0.1 acre of federally protected wetlands adjacent to Meadow and Goat Creeks. *See id.* at 46-49, 51-55. On appeal, Appellant argues that the ALJ erred in finding a lack of clarity regarding the extent of fill in wetlands on the north side, largely due to his allegedly improper admission of expert testimony from Dr. Bruce Lium, a man Appellant contends is unqualified to delineate wetland boundaries. Appeal Br. at 30-32.

III. *CONCLUSION*

For the foregoing reasons, a civil administrative penalty of $5,548 is assessed against Appellee for violating the CWA by discharging dredged or fill material into wetlands without a permit authorizing him to do so. Payment of the entire amount of the civil penalty shall be made within sixty (60) days of service of this Final Decision and Order, by cashier's check or certified check payable to the Treasurer, United States of America, and forwarded to:

U.S. Environmental Protection Agency, Region X
Regional Hearing Clerk
Post Office Box 360903M
Pittsburgh, Pennsylvania 15251-6903.

So ordered.