Anderson, Sybil

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Sent:	Thursday, May 29, 2014 5:58 PM
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Subject:	Special Interest Auto Works / Peterson
Attachments:	Reply in support Motion for Discovery 052914.pdf; Reply in support Motion for Accelerated Dec 052914.pdf

Re: *In the Matter of: Special Interest Auto Works, Inc. and Troy Peterson*
U.S. Environmental Protection Agency, Docket No. CWA-10-2013-0123

Good afternoon: Attached please find "Respondents' Reply in Support of Motion for Leave to Conduct Discovery" and "Respondents' Reply in Support of Respondents' Motion for Accelerated Decision. Thank you.

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BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of: SPECIAL INTEREST AUTO WORKS, INC. and TROY PETERSON, Individual, Kent, WA Respondents	Docket No. CWA-10-2013-0123 REPLY IN SUPPORT OF RESPONDENTS' MOTION FOR ACCELERATED DECISION

I. INTRODUCTION

The EPA argues that Troy Peterson's position as President of Special Interest Auto, Inc. automatically makes him personally liable for any alleged violations of the Clean Water Act that it believes occurred at the subject site. Yet, there is no evidence Mr. Peterson in his personal capacity, and not as President of the corporation took any actions that resulted in a "discharge" to waters of the United States. The corporate entity has not been disregarded in any manner. There is absolutely no legal authority to impose liability on a person, such as Mr. Peterson, who is not the owner/operator of a facility.

With respect to liability for threatened discharges, the parties are in agreement that only actual discharges are actionable. There must be proof of such discharges to impose liability under the Clean Water Act. There is not a single case in which evidence of

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threatened or potential discharge has been ruled to constitute adequate proof of an actual discharge where there is no evidence that pollutants from the specific point source have ever in fact reached waters of the United States.

The very same arguments concerning liability for failure to apply for a permit made by the EPA have been rejected by other courts on the simple basis that there is nothing in the CWA that imposes liability for anything other than a discharge of pollutants. The decisions of these cases are not fact-specific, but founded on the plain language of the CWA. The EPA cannot amend by fiat the CWA to create a cause of action that does not exist under the law.

II. REPLY ARGUMENT

B. There is No Basis to Hold Troy Peterson Liable Individually.

Special Interest is the operator of the Special Interest Auto Wrecking facility located at 25923 78th Avenue S., in Kent, Washington. Mr. Peterson is the President of the corporation, but is not the "owner or operator" of the facility.

Contrary to the EPA's response, Respondents have not alleged that Mr. Peterson has had any "day-to-day operational control of activities" that are separate and distinct from those of Respondent Special Interest Auto Works, Inc. Paragraph 3.2 of the Amended Answer generally admits that Respondents have operational control. As set forth in Mr. Peterson's declaration in support of the motion for accelerated decision, the site is neither owned nor operated by Mr. Peterson individually. There is no evidence Mr. Peterson personally participated in any alleged "discharge" of pollutants into waters of the U.S.[1] Nor is he a

[1] *See Riverside Market Dev. Corp. v. International Building Products, Inc.*, 931 F.2d 327 (5th Cir.1991) (law "prevents individuals from hiding behind the corporate shield when, as 'operators,' they themselves actually participate in the wrongful conduct prohibited by [CERCLA]"); *United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726, 745 (8th Cir.1986) (plant supervisor who "personally arranged for the disposal

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"responsible corporate officer" under 33 U.S.C. § 1319(c)(6), as defined in *United States v. Iverson*, 162 F.3d 1015, 1025 (9th Cir. 1998).

The facts in this case are nothing like those in the two cases relied upon by Complainant in its response brief. First, unlike Mr. Waterer in *In the Matter of Thomas Waterer and Waterkist Corp. d/b/a Nautilus Foods*, Docket No. CWA-10-2003-0007 (EPA ALJ, January 28, 2004) (Order on Complainant's Motion for Accelerated Decision), Mr. Peterson has not: (1) personally held himself out as the operator of the facility in permit applications; (2) personally held himself out as the "responsible official" for the facility; or (3) personally held himself out as facility owner/operator in his individual capacity. The circumstances are also distinguishable from those in *U.S. v. Gulf Water Co.*, 972 F. Supp. 1056 (S.D. Miss. 1997) where an individual held himself out as being in "ultimate control" of the corporate entity, and personal and corporate assets had been substantially commingled.

The EPA alleges that Mr. Peterson has stated he is the governing person for the corporation, negotiated with the EPA as the President of the corporation, and as President is responsible for updates, reporting and conducting inspections onsite of the facility. Response Br. at pp.5-6. However, each of these actions do not rise to the level of the facts in the cases cited by EPA and – importantly – are not characterized by fraud or a commingling of assets, as was present in the *Waterer* case and the *Gulf Water* case.

The EPA cannot, as a matter of law, establish in any way that Peterson is the real person in interest when it comes to the corporation's operations.

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of hazardous substances" individually liable as an operator under CERCLA), *cert. denied,* 484 U.S. 848, 108 S.Ct. 146, 98 L.Ed.2d 102 (1987).

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C. The EPA Does Not Dispute That Threatened Discharges are Not Actionable

Complainant agrees that there is no liability under the CWA for a threatened or potential discharge.[2] The Administrative Law Judge should confirm in a summary determination that any allegations of the EPA against Respondents in this regard are not cognizable under the CWA.

The EPA goes on to argue that proof of threatened discharges may be offered as circumstantial evidence of actual discharge from the Site. Contrary to its arguments, the case cited by the EPA, *In re Robert Wallin*, 10 E.A.D. 18 (EAB 2001) did not hold that allegations of threatened or potential discharges constitute admissible circumstantial evidence of actual discharges. In fact, in the *Wallin* case, the Board specifically rejected the EPA's argument that there was any "actual or possible harm" to the White River, stating that, "the problem with the Region's argument is that the record is devoid of any evidence that whatever portion of the Dairy's discharge may have ultimately reached the White River in fact posed a significant risk to the River. Indeed, the Region is poorly positioned to address the amounts or toxicity of dairy waste entering the White River on February 13, 1998, since ***the Region's inspectors never sampled the unnamed creek anywhere near the point at which it entered the White River.***" *Id.* at p.33.[3] The Board also noted the fact that there was no indication that the flow of the unnamed creek was limited to the Dairy's wastewater. *Id.* at p.34.

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[2]The plain language of the CWA only prohibits the *actual* discharge of a pollutant into navigable waters without a permit. 33 U.S.C. § 1311(a); *Sackett v. EPA*, 132 S. Ct. 1367, 1369-70 (2012). The EPA must prove more than a threat of discharge; the EPA must prove an actual discharge. *National Min. Ass'n v. U.S. Army Corps of Engineers*, 145 F. 3d 1399, 1404 (D.C. Cir 1999); *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 504-06 (2nd Cir. 2005); *see also, Natural Resources Defense Council, Inc. v. Environmental Protection Agency,* 859 F.2d 156 (D.C. Cir. 1988), the CWA "does not empower the agency to regulate point sources themselves; rather, EPA's jurisdiction under the operative statute is limited to regulating the discharge of pollutants." *Id.* at 170.

[3] This decision is found at http://www.epa.gov/eab/disk11/robertwallin.pdf and a copy is attached hereto as Appendix A.

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This is precisely the same circumstance as facing the Respondents here. The EPA cannot base its entire case on "discharges" where there is no proof any such discharges even reached the Green River and/or can solely be attributable to Respondents.

Nor does *Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114 (2nd Cir. 1994), upon which *Wallin* relied, support EPA's contention that the alleged circumstantial evidence of actual discharges here will satisfy EPA's burden of proof. In *Concerned Area Residents*, a jury concluded that where there was actual eyewitness testimony and photographs of liquid manure being discharged to waters of the United States on four occasions, circumstantial proof of discharges via the same mechanism was sufficient to establish discharges on two other days where liquid manure was spread on the fields but no one actually witnessed it entering the water. 34 F.3d at 120.

Here, there is not a single shred of evidence of an actual discharge from Respondents' facility to the Green River. The EPA's entire case is based upon hypothetical discharges, based on a model. There were no witnesses who saw a discharge, no sampling data that establish a discharge occurred, or even an established pathway by which stormwater actually travelled from the facility to the river. The EPA cannot meet its burden, and Respondents' motion should be granted.

D. The EPA Cannot Impose Penalties for a "Failure to Apply for a Permit"

The EPA broadly cites Section 308 and Section 309 of the CWA to support its allegations that it has authority to impose penalties for a "failure to apply" for a NPDES permit. Notably, the actual provisions of the federal statute are not cited. If there was such authority to impose liability in this regard, the EPA would have quoted the language on which it is relying. Instead, its Response Brief at pp.8-9 is filled with reasons why the CWA ***should***

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include such a provision (i.e. to assist with information gathering and use enforcement mechanisms). Simply put, it does not exist.

It is true that the CWA requires owners/operators of point sources to apply for a discharge permit. 40 C.F.R. §122.21(a)(1). Federal law, 33 U.S.C. §1318(a), regarding maintenance of records and reports is silent with respect to a requirement to apply for a permit. None of the other CWA provisions (the violation of which may support a civil penalty under Section 309 of the Act) give the EPA authority to impose liability for an alleged failure to apply for an NPDES permit.

The EPA next tries to distinguish the rulings in *National Pork Producers Council v. EPA,* 635 F.3d 738 (5th Cir. 2011) *and Service Oil v. EPA,* 590 F.3d 545 (8th Cir. 2009), alleging that the factual circumstances of the cases are distinguishable. One need only review the clear holdings in these cases to determine that the rulings cannot be distinguished. First, in National Pork Producers, the court plainly explained:

> 33 U.S.C. § 1319 allows the EPA to impose liability if it "finds that any person is in violation of any condition or limitation which implements [violations of]": the discharge prohibition, certain water-quality based effluent limitations, national standards of performance for new sources, toxic and pretreatment effluent standards, the EPA's information-gathering authority, provisions permitting the discharge of specific aquaculture pollutants, any permit condition or limitation, and provisions governing the disposal or use of sewer sludge. ***Notably absent from this list is liability for failing to apply for an NPDES permit.*** ...
>
> [O]nly certain violations of the Act can be enforced using section 1319's penalties. *See* 33 U.S.C. § 1319; *see, e.g., Serv. Oil, Inc.,* 590 F.3d at 550 ("Congress in § 1319(g)(1) granted EPA limited authority to assess administrative monetary penalties for violations of specific statutory provisions related to the core prohibition against discharging without a permit, or contrary to the terms of a permit")... ***Accordingly, the***

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imposition of "failure to apply" liability is outside the bounds of the CWA's mandate.

635 F.3d at 752-53 (footnotes and citations omitted; emphasis added).

Second, the EPA in the *Service Oil* case made the same arguments as it does here, asserting that section 1318, which provides the EPA its information-gathering authority, gives the EPA power to impose liability for failing to apply for an NPDES permit. 590 F.3d at 550. The Eighth Circuit rejected this argument, as the ALJ should do here. *Id.* ("the agency's authority to assess monetary penalties by administrative proceeding is limited to unlawful discharges of pollutants"); *see also Envtl. Prot. Info. Ctr. v. Pac. Lumber Co.,* 469 F.Supp.2d 803, 826 (N.D.Cal.2007) (33 U.S.C. § 1342(p) does not authorize liability for "failure to apply" for NPDES permit coverage, but only for non-compliance with permit terms).

As the court in *National Pork Producers Council* confirmed, since the creation of the NPDES permit program, Congress has not made any changes to the CWA that creates a "failure to apply" liability. 635 F.3d at 753. The factual circumstances of *National Pork Producers* and *Service Oil* do not limit the application of their rulings. In short, there is simply no authority under the CWA for the EPA to impose penalties for anything other than actual discharges. It matters not whether there are issues of fact concerning whether or not a discharge occurred at the site, notwithstanding the Complainant's arguments at pp.11-12 of its Response. As a matter of law, there is no legal basis for the EPA to assess penalties for "failure to obtain a permit." The agency cannot bootstrap a summary judgment standard to avoid an accelerated decision on an issue over which it clearly has no legal authority.

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V. CONCLUSION

For all the foregoing reasons, the Administrative Law Judge should grant Respondents' motion for an Accelerated Decision.

RESPECTFULLY SUBMITTED this 29th day of May, 2014.

DENNIS D. REYNOLDS LAW OFFICE

By _____

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify under penalty of perjury under the laws of the State of Washington, that I am now, and have at all times material hereto been, a resident of the State of Washington, over the age of 18 years, not a party to, nor interested in, the above-entitled action, and competent to be a witness herein.

I caused a true and correct copy of the foregoing pleading to be served this date, in the manner indicated, to the parties listed below:

FILED WITH: Sybil Anderson, Headquarters Hearing Clerk Office of Administrative Law Judges U.S. Environmental Protection Agency 1200 Pennsylvania Avenue NW / Mail Code 1900R Washington, D.C. 20460 OALJfiling@epa.gov, email	❑ *Legal Messenger* ❑ *Hand Delivered* ❑ *Facsimile* ❑ *First Class Mail* ❑ *Express Mail, Next Day* ☒ *Email*
SERVED ON: Christine D. Coughlin, Administrative Law Judge c/o Sybil Anderson, Headquarters Hearing Clerk Office of Administrative Law Judges U.S. Environmental Protection Agency 1200 Pennsylvania Avenue NW / Mail Code 1900R Washington, D.C. 20460 OALJfiling@epa.gov, email	❑ *Legal Messenger* ❑ *Hand Delivered* ❑ *Facsimile* ❑ *First Class Mail* ❑ *Express Mail, Next Day* ☒ *Email*
SERVED ON: Elizabeth McKenna, Office of Regional Counsel U.S. Environmental Protection Agency, Region 10 1200 Sixth Avenue, #900 / Mail Code OCE-133 Seattle, WA 98101-3140 (206) 553-0016, tel Mckenna.Elizabeth@epamail.epa.gov, email	❑ *Legal Messenger* ❑ *Hand Delivered* ❑ *Facsimile* ❑ *First Class Mail* ❑ *Express Mail, Next Day* ☒ *Email*

DATED at Bainbridge Island, Washington, this 29th day of May, 2014.

Christy Reynolds

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APPENDIX A

IN RE ROBERT WALLIN

CWA Appeal No. 00-3

FINAL DECISION

Decided May 30, 2001

Syllabus

This proceeding arises from a discharge of manure-laden wastewater from the Bob Wallin Dairy (the "Dairy"), a dairy cattle operation owned and operated by Robert J. Wallin. On February 13, 1998, inspectors from the U.S. Environmental Protection Agency Region X (the "Region") observed manure-laden wastewater entering a wetland on the Dairy property and then exiting the property in the direction of the White River. Sampling conducted by the inspectors on the Dairy property revealed that the wastewater contained high levels of fecal contamination.

In connection with these events, the Region filed an administrative complaint against the Dairy pursuant to Clean Water Act ("CWA") section 309(g)(2)(A), alleging that the Dairy had violated CWA section 301(a) on February 13, 1998, by discharging a pollutant through a manmade ditch into a navigable water without a National Pollution Discharge Elimination System ("NPDES") permit. In its complaint, the Region charged that the Dairy qualified as a Concentrated Animal Feeding Operation ("CAFO") pursuant to regulations at 40 C.F.R. pt. 122, thus constituting a point source subject to NPDES permitting requirements under the CWA. The Region proposed a penalty of $11,000 for the alleged violation, the maximum allowable amount for a single violation under CWA section 309(g)(2)(A).

Following an evidentiary hearing, the Presiding Officer issued an initial decision in which he concluded that the Dairy was a CAFO subject to NPDES permitting, and that the Dairy had violated CWA section 301(a) on February 13, 1998, by discharging a pollutant into the wetland located on its property without an NPDES permit. The Presiding Officer, however, reduced the Region's proposed penalty to $3,000, stating that the Region had failed to demonstrate that the Dairy's discharge posed a risk of environmental harm to the White River and that the Dairy could not pay a more substantial penalty because of its limited financial resources. In reaching his decision, the Presiding Officer also declined to increase the penalty to recoup any of the more than $15,000 of economic benefit the Region alleged the Dairy realized by deferring, over an extended period of time, expenditures on waste storage capacity needed to achieve CWA compliance.

The Region appealed, seeking an increase in the Dairy's penalty on the grounds that the Presiding Officer misapplied CWA statutory penalty factors directing the EPA, in imposing administrative penalties, to consider, *inter alia*, the gravity or harm associated with a violation, any economic benefit gained by a violator through noncompliance, and a violator's ability to pay a penalty.

Held: (1) The record does not support recovery, pursuant to the statutory penalty factors, of the alleged economic benefit the Dairy gained through noncompliance. The Region's economic benefit calculation was predicated on an extended period of noncompliance, and in this regard the record is insufficient to establish that the Dairy was out of CWA compliance on any day other than the single documented violation on February 13, 1998. Consequently, the Board will not increase the penalty assessable against the Dairy on the basis of the economic benefit of noncompliance.

(2) In reducing the Region's proposed penalty based on the gravity of the Dairy's violation, the Presiding Officer clearly erred by concluding that it was highly unlikely or improbable that the discharge of wastewater from the Dairy on the date of violation reached the White River. Despite this error, the Region has adduced insufficient evidence to support its claim that on the date of violation the Dairy's discharge posed a significant threat to the White River. The Board therefore declines to increase the gravity-based penalty based on this claim.

(3) In holding that the Dairy lacked the financial resources to pay a penalty greater than $3,000, the Presiding Officer misapplied the Agency's and a violator's respective burdens of proof regarding a violator's ability to pay a penalty as delineated in several previous Board decisions. Here, the Region satisfied its initial burden of producing general financial information showing that the Dairy's financial status would not prevent it from paying the full penalty sought. By providing only vague statements regarding its lack of financial resources, the Dairy, however, failed to satisfy its burden of contradicting, through specific facts, the Region's initial showing. In addition, the Presiding Officer erred by relying upon the Dairy's *pro se* status as the principal reason for reducing the Dairy's penalty. The mere fact that the Dairy proceeded *pro se*, and nothing more, does not satisfy the Dairy's burden of specifically showing that it could not pay the otherwise assessable penalty. Therefore, the Board reverses the Presiding Officer's reduction of the Dairy's penalty based on its inability to pay.

(4) Without the benefit of a downward adjustment for inability to pay, the Dairy is subject to a gravity-based penalty of $5,500. Thus, the Dairy is ordered to pay a total penalty of $5,500 for its CWA violation.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Kathie A. Stein.

Opinion of the Board by Judge Fulton:

I. *INTRODUCTION*

U.S. Environmental Protection Agency, Region X ("Region") appeals an Initial Decision issued by the Presiding Officer imposing upon Respondent Robert Wallin, doing business as the Bob Wallin Dairy (the "Dairy" or "Wallin Dairy"), a civil penalty of $3,000 for violating section 301(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1311(a), by discharging agricultural wastes through a man-made ditch into a navigable water without a National Pollution Discharge Elimination System ("NPDES") permit.

While not contesting the Presiding Officer's liability finding, the Region contends that the Presiding Officer erroneously reduced the $11,000 penalty it had proposed to $3,000, in contravention of statutory provisions and policy guidance on CWA penalties. The Dairy does not appeal the Initial Decision.

II. *BACKGROUND*

A. *Regulatory Background*

In concluding that the Dairy was liable under the CWA as alleged by the Region, the Presiding Officer made the predicate determination that the Dairy constituted a "Concentrated Animal Feeding Operation" ("CAFO") and was thus a "point source"[1]required to obtain an NPDES permit before discharging[2] a pollutant into a navigable water. Although the Dairy's liability as a CAFO is not in direct contention here, a brief review of the regulatory status of CAFOs is nonetheless instructive in addressing the penalty issues on appeal.

Part 122 of Title 40 of the Code of Federal Regulations sets forth numerous criteria for determining whether agricultural operations that raise farm animals constitute CAFOs. These criteria include, *inter alia*: the purpose of the agricultural operation; the number of animals confined by an operation; the type of farm animal raised (whether cattle, swine, horses, poultry, sheep, etc.); and certain site-specific factors affecting the likelihood of the operation to discharge animal and process wastes into a navigable waterway, such as the operation's proximity to navigable water, rainfall amounts, and type of vegetation. *See* 40 C.F.R. § 122.23; 40 C.F.R. part 122, app. B.

At a minimum, all CAFOs must meet the definition of an "Animal Feeding Operation." In order to qualify as an Animal Feeding Operation, "any lot or facility other than an aquatic animal production facility" must meet the following two requirements: (1) the lot or facility must stable or confine and feed or maintain animals for a total of 45 days or more in any 12-month period; and (2) the lot or facility must not sustain "crops, vegetation forage growth, or post-harvest residues * * * over any portion of [the] lot or facility." 40 C.F.R. § 122.23(b).

To determine which Animal Feeding Operations qualify as CAFOs, Appendix B of Part 40 of the Code of Federal Regulations subjects Animal Feeding

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[1] Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines a "point source" as "any discernible, confined and discrete conveyance, including but not limited to any * * * *concentrated animal feeding operation*, * * * from which pollutants are or may be discharged." (emphasis added).

[2] Section 502(12)(A) of the CWA, 33 U.S.C. § 1362(12)(A), defines "discharge of a pollutant" as the "addition of any pollutant to navigable waters from any point source."

Operations to a two-tiered system of thresholds associated with the number of animals that an operation confines. *See* 40 C.F.R. part 122, app. B. Within each tier, a CAFO is determined by animal-specific thresholds (dairy cattle, slaughter cattle, swine, sheep, ducks, hens, etc.) or a generic "animal-unit" threshold derived from a formula that assigns a specific "animal unit" value to different types of animals. The first tier of thresholds applies to Animal Feeding Operations regardless of how they cause a discharge to a navigable water; the second tier — which establishes lower thresholds than the first — applies only if a discharge occurs to a navigable water "through a manmade ditch, flushing system or other similar man-made device."[3] *See id.*

It is the second tier of size thresholds that applies to this proceeding, since the Region asserted, and the Presiding Officer found, that Wallin Dairy discharged to a navigable water directly "through a manmade ditch, flushing system or other man-made device." To qualify as CAFOs under this tier, dairy operations must exceed a size of "200 mature dairy cattle," or, for diverse livestock operations, "300 animal units." For purposes of the latter threshold, a mature dairy cow counts as 1.4 animal units. *Id.*[4]

B. *Factual and Procedural Background*

Robert Wallin is owner and operator of the Wallin Dairy, located near Enumclaw, Washington, which he has operated since 1969. At the time of the Dairy's violation on February 13, 1998, the facility confined 240 mature dairy cows or 336 animal units, thus exceeding the thresholds for regulation as a CAFO. *See* Complainant's Trial Exhibit ("CTE") No. 4 (CAFO Inspection Report Bob Wallin Dairy).

The Wallin Dairy property includes an upper pasture area, containing the Dairy facilities, and a lower pasture area, containing a wetland, which consists of a permanent swamp. *See* Hearing Transcript ("Tr") at 25; CTE No. 4. The upper and lower pasture areas are separated by a canyon wall. Tr. at 25. Located outside

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[3] An Animal Feeding Operation is also subject to the second tier of lower thresholds if it "discharge[s pollutants] directly into waters of the United States which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation." 40 C.F.R. part 122, app. B. The Region did not seek to establish the Dairy's CWA liability upon this basis.

[4] The regulations at part 122 also allow the Region or an authorized state to designate an animal feeding operation as a CAFO on a case-by-case basis regardless of whether the animal feeding operation meets a numeric size threshold. Such case-by-case designation requires assessment of numerous factors such as operation size, location, manner of discharge; it also involves consideration of additional factors such as rainfall, vegetation and slope that affect the likelihood of a facility to discharge wastes into waters of the United States. *See* 40 C.F.R. § 122.23. The Region did not seek to establish the Dairy's status as a CAFO upon this basis; here the numeric thresholds are the linchpin.

the Dairy property line and abutting the lower pasture from the south is a wooded flood plain, which slopes down to the White River. *Id.;* CTE No. 1.

At the time of the violation, the Dairy facilities on the upper pasture included a dirt floor and concrete confinement areas for housing cows, a silage bunker for cattle feed, and a 30,000-gallon underground storage tank. Tr. at 24; CTE No. 1 (CAFO Inspection Report Bob Wallin Dairy). The Dairy used the underground storage tank to contain dairy wastes, primarily manure, although water and other liquids also drained into the tank. The Dairy routinely pumped wastes from the storage tank and then applied them to fields on its property using a sprinkler system. During the wet winter months, such as at the time of the Dairy's violation, it was necessary for the Dairy to land-apply wastewater daily because of inadequate waste storage. CTE No. 4 att. A (CAFO Inspection Checklist Bob Wallin Dairy).

On February 13, 1998, two Region X inspectors, Joseph Roberto and Jed Januch, discovered dairy waste in the vicinity of a sprinkler that had sprayed liquid manure onto a field. Tr. at 42-43. The dairy waste ran off the field into a drainage ditch that bordered the property and then flowed down the canyon wall into the wetland on the lower pasture. Tr. at 25, 46. From there, runoff entered an unnamed creek. Initial Decision at 5; CTE No. 4, att. C. The Region's inspectors observed the unnamed creek flowing in the direction of the White River, but did not follow its course further downstream, assuming that the unnamed creek entered the White River below the Dairy property. Tr. at 48; CTE No. 4; CTE No. 8. The Dairy did not have an NPDES permit for the observed discharge.

The inspectors sampled runoff at several locations at the Dairy. The inspectors took one sample of wastewater in the field where manure had recently been applied as well as another in the drainage ditch bordering the Dairy. CTE No. 1; Tr. at 44-45. The inspectors also took one sample in the unnamed creek just before it entered the forested flood plain. *Id.* at 47 (Roberto Testimony). Tests of these samples revealed extremely high levels of fecal coliform, a bacteria species used to indicate the presence of fecal contamination. *Id.* at 117. The inspectors also took a control sample upstream of the Dairy, which revealed considerably lower levels of fecal coliform. *Id*. at 44-47; CTE No. 4.

On May 22, 1998, the EPA issued an administrative complaint against owner Robert Wallin pursuant to section 309(g)(2)(a) of the CWA, 33 U.S.C. § 1319(g)(2)(A), alleging that Wallin Dairy, on February 13, 1998, had discharged a pollutant ("manure laden dairy wastes") into a navigable water of the United States without an NPDES permit, in violation of section 301(a) of the CWA. The Region proposed an administrative penalty of $11,000 for the alleged violation — the maximum allowable amount per violation under this statutory

provision.[5] Mr. Wallin filed an answer to the Complaint on June 29, 1998.

On November 18, 1998, a number of months after the filing of the Complaint, Region X inspector Roberto (accompanied by Mr. Lazzar, another Region X inspector), Troy Wallin (Robert Wallin's son), Wallin's attorney, and an EPA attorney returned to the area of the Dairy where Mr. Roberto had earlier witnessed a discharge. Tr. at 53. (Roberto Testimony). Mr. Roberto explained that the purpose of the return visit was to establish that there was a connection between the wastewater and waters of the United States (i.e., the White River), and that the visit was prompted by Mr. Wallin's concerns that the Region had failed to show such a connection as alleged in its Complaint. *Id.* at 53-54. According to Mr. Roberto, the group, starting with the Dairy buildings, followed the drainage ditch to the point where it ran "down the canyon wall into the lower pasture area." *Id.* at 54. Mr. Roberto related that up to this point there was no flow in the channel, but there was a "well-defined channel going into the flood plain area." *Id.* at 54-55. He stated that the group followed the course of the channel into the forested flood plain and encountered water in the channel at a point "just past an unidentified access road" located in the flood plain. *Id.* at 55. According to Mr. Roberto, the water there was "a couple feet deep." *Id.* at 55.

On December 22, 1998, inspectors Roberto and Lazzar revisited the Dairy, having determined that they needed additional information to document a connection between the Dairy and the White River. Tr. at 56. (Roberto Testimony). On this visit, the inspectors returned to the same location just south of the access road where they had found water during their previous inspection, and from this point walked the course of the unnamed creek down to the White River. Mr. Roberto reported that during their trek, the inspectors observed the unnamed creek flowing continuously below the access road to the White River. *Id.*

After proceedings in this case had commenced, Robert Wallin initiated improvements to the Dairy's waste containment system. In August 1998, Robert Wallin installed a much larger underground waste storage facility to store manure at a cost of approximately $32,000, and implemented additional changes to the Dairy's waste management system. Tr. at 150-52. According to Mr. Wallin, the storage facility became operational in October 1998. Tr. at 150.

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[5] In accordance with CWA section 309(g)(2)(A), the Region sought to assess upon Mr. Wallin a class I civil penalty, which cannot exceed $10,000 per violation and $25,000 in total. However, pursuant to the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and implementing regulations at 40 C.F.R. § 19.4, the statutory maximum penalty under section 309(g)(2)(A) for any violation occurring after January 30, 1997, has increased from $10,000 to $11,000 per violation.

The Presiding Officer held an evidentiary hearing on April 6, 1999, at which Robert Wallin appeared *pro se*.[6] On May 12, 2000, the Presiding Officer rendered an Initial Decision, which found that the Dairy, on February 13, 1998, had violated CWA section 301(a) by discharging a pollutant[7] into the wetland — a navigable waterway within the meaning of the CWA — without an NPDES permit. In finding the Dairy liable, the Presiding Officer agreed with the Region that the Dairy constituted a CAFO, and thus a point source under the CWA.

The Presiding Officer, however, reduced the $11,000 penalty the Region proposed to $3,000. In the course of his decision, the Presiding Officer ruled that the Region had failed to demonstrate that the Dairy's discharge posed a risk to the White River and that the Dairy could not pay a substantial penalty in light of its limited financial resources. Initial Decision at 11-12.

The Region filed its notice of appeal on June 1, 2000, and with the Board's leave, filed its supporting brief on June 12, 2000. *See* Appellate Brief ("Appeal Brief"). The Dairy did not file a brief in opposition or appeal the Initial Decision.[8]

In arguing that the Presiding Officer's $3,000 penalty should be increased, the Region contends, in essence, that the Presiding Officer erred by:

> (1) ignoring uncontested expert testimony showing that the Dairy's noncompliance had resulted in an economic benefit to Respondent of greater than $15,000;
>
> (2) concluding that the Region had failed to demonstrate a connection between the Dairy's discharge and the White River — a sensitive ecosystem — and thus assessing a penalty that ignored "significant threats to human health and the environment posed by the discharges from Respondent's facility"; and

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[6] The Dairy retained legal counsel to represent its interests in this proceeding until February 4, 1999, on which date the Dairy's counsel withdrew its representation. *See* Notice of Intent to Withdraw, Docket No. 10-98-0069-CWA/G (Jan. 25, 1999).

[7] In agreeing with the Region that the Dairy had illegally discharged a "pollutant," the Presiding Officer explained that the wastes constituted "agricultural waste," one of the many materials listed under the CWA's definition of "pollutant." Initial Decision at 5; CWA section 502(12); 33 U.S.C. § 1362(12).

[8] The Board's records indicate that the Dairy received proper service, via certified mail, of the Initial Decision and the Region's appeal brief. *See* 40 C.F.R. §§ 22.5-.7.

> (3) concluding that Wallin did not have the ability to pay a civil penalty greater than $3,000.

Appeal Brief at 8-23.

III. *DISCUSSION*

The Region's appeal of the Initial Decision is limited to the Presiding Officer's penalty assessment. Accordingly, this proceeding turns on the Presiding Officer's examination of the CWA statutory penalty factors that govern the imposition of administrative penalties. These factors direct the Agency, in imposing such penalties, to consider:

> 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).[9]

In appealing the Presiding Officer's penalty determination, the Region focuses its challenge on the Presiding Officer's examination of the following penalty factors: (1) "the economic benefit or saving * * * resulting from the violation"; (2) the "nature, circumstances, extent and gravity" of the violation; and (3) the violator's "ability to pay." We discuss each of these challenges, in turn, below.

A. *Economic Benefit of Noncompliance*

In its appeal, the Region contends that the Presiding Officer erred by failing to include in the penalty the full economic benefit the Dairy realized as a result of

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[9] In imposing a penalty according to these factors, the Presiding Officer did not have the benefit of a statute-specific penalty policy to guide his decision; EPA has not developed such a penalty policy for the CWA. However, in assessing penalties, the Agency often relies for guidance on EPA's two general penalty policies: the *Policy on Civil Penalties* (EPA General Enforcement Policy #GM-21) (Feb. 16, 1984) and *A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties* (EPA General Enforcement Policy #GM-22) (Feb. 16, 1984). While the regulations governing this proceeding require that Presiding Officers consider such civil penalty policies in reaching their penalty determinations, *see* 40C.F.R. § 22.27(b), Presiding Officers are not required to follow them, since such policies, not having been subjected to rulemaking procedures of the Administrative Procedure Act, lack the force of law. *See In re B & R Oil Co.*, 8 E.A.D. 39, 63 (EAB 1998); *In re Employer's Ins. of Wausau*, 6 E.A.D. 735, 756 (EAB 1997); *In re DIC Americas, Inc.*, 6 E.A.D. 589, 600 (EAB 1996).

deferring the construction of waste storage needed to achieve CWA compliance over an approximately five-year period lasting from May 29, 1993, to November 30, 1998.[10] The Region's expert calculated this economic benefit to be $15,418. According to the Region's expert witness, the calculation sought to estimate how much the Dairy gained financially by investing its funds in economically remunerative projects, as opposed to required pollution control, during the period of deferred compliance. CTE No. 15 (Billy J. Henderson, *Economic Benefit Derived From Delaying Compliance with the Clean Water Act* 2 (Feb. 5, 1999)).

In his Initial Decision, the Presiding Officer gave only cursory consideration to the Region's arguments in favor of full recovery of the Dairy's unwarranted economic benefit in light of his determination elsewhere in the decision that the Dairy lacked the financial resources to pay more than a minimal penalty. As the Presiding Officer stated:

> Notwithstanding any economic benefit which the Respondent may have realized, based solely on [the Dairy's] ability to pay, I find that the penalty should not be increased for economic benefit.

Initial Decision at 14.

In challenging the Initial Decision, the Region avers that the Dairy failed to challenge the expert witness's conclusions, "impeach his methodologies, or contest the assumptions he used in arriving at a $15,418 economic benefit figure." Appeal Brief at 22. In addition, the Region notes the strong emphasis the Agency places upon removing the economic benefit a violator gains from noncompliance. Appeal Brief at 20 (citing EPA General Enforcement Policy #GM-21). Citing this policy as well as Board precedent, the Region explains that removing a violator's economic benefit is crucial in order to dampen incentives for noncompliance and eliminate any competitive advantage that the violator gains through its illegal activities. *Id.; see In re B.J. Carney Indus., Inc.*, 7 E.A.D. 171, 207-08 (EAB 1997), *appeal dismissed as untimely*, 192 F.3d 917 (9th Cir. 1999), *vacated pursuant to settlement*, 200 F.3d 1222 (2000). Moreover, the Region asserts that its expert witness, if anything, understated the economic benefit total, because he did not calculate additional economic benefits such as the *avoided* costs of maintaining

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[10] The starting point for the Region's calculation of the benefit the Dairy derived by delaying its compliance costs was the $32,000 the Dairy spent in building a waste storage facility, (along with a pump and agitator), and in seeding and fencing its property after the Region filed its complaint in this proceeding. *See supra* Part II.B.; CTE No. 15, at 4 (Testimony of Billy J. Henderson). The calculation assumed that the Dairy reaped its financial advantage over an approximately six-year period — that is, from an "on-time" compliance date of May 29, 1993 (which preceded the filing of the Region's complaint by exactly five years) to October 30, 1999, the date the expert estimated the Dairy would pay a penalty associated with its noncompliance.

and operating a pollution control system between May 29, 1993 and November 30, 1998, and did not include in his economic benefit calculation the other benefits the Dairy realized by delaying construction of other waste handling improvements over this period. Appeal Brief at 23.

Moreover, the Region asserts that, in view of the magnitude of the Dairy's economic benefit, the Dairy should pay a penalty amount not less than the statutory maximum of $11,000 in order to allow fullest possible recovery of the Dairy's unwarranted gains. Finally, the Region contends that, contrary to the Presiding Officer's findings, the Dairy has the resources to pay this amount. Appeal Brief at 22.

We do not quarrel with the Region's methodology in arriving at its economic benefit amount nor question the paramount importance Agency penalty policy and previous Board decisions place upon extracting the economic benefits violators reap through their noncompliance. In our view, however, the Region has not adduced sufficient information from which one could reasonably infer that the Dairy more likely than not engaged in an *extensive* period of noncompliance during which it derived unwarranted economic benefit by deferring expenditures that would have brought it into CWA compliance.

In deriving an economic benefit figure, the Region's formula assumes that, lacking sufficient waste storage capacity to prevent illegal waste discharges, the Dairy was out of CWA compliance not just on the date of the established violation, but for an *extended period* of time leading up to the violation. The Region defined as a starting point for this period an "on-time" compliance date of May 29, 1993 — the date by which, according to the Region, the Dairy first became subject to CWA requirements and thus should have constructed its waste storage in order to ensure compliance. The Region defined as an endpoint a "compliance" date of November 30, 1998 — the date the Region determined that the Dairy installed its waste storage facility. The span of time between by these two points underpinned the Region's economic benefit calculation.

The record, however, is devoid of any evidence that over this time frame, the Dairy had maintained a similar scale of operation — and thus waste production — such that lacking sufficient waste containment, the Dairy's discharge would likely have reached a navigable water. Likewise, there is no evidence in the record upon which we can conclude that the Dairy was, in fact, regulated as a CAFO over this time frame. Without such evidence, we are unable to conclude that the Dairy was, during the entire period encompassed by the economic benefit calculation, a regulated point source subject to the requirement to obtain an NPDES permit before discharging into navigable waters. We note in this regard that on the date of violation the Dairy exceeded the 200 cow threshold for regulation by only 40 cows. There is nothing in the record upon which we can conclude that the Dairy maintained at least 200 mature dairy cows over the extended non-

compliance period alleged by the Region. Moreover, the Region does not demonstrate how the Dairy, during the alleged period of noncompliance, satisfied the predicate condition of constituting an "Animal Feeding Operation," by "not sustaining" "crops, vegetation forage growth, or post-harvest residues * * * in the normal growing season," and by "stabl[ing] or confin[ing] and fe[eding] or maintain[ing]" animals "for a total of 45 days or more in any 12-month period." 40 C.F.R. § 122.23(b)(i)-(ii).

Without information along these lines, we are unwilling to infer from a single, documented violation that the Dairy was out of compliance over a much longer period of time and thus subject to sanction for having improperly deferred its pollution control investment over that same extended time frame.[11] Indeed, based on the record before us, we are unprepared to assume, for purposes of assessing a penalty, that the Dairy's noncompliance began before the date of violation — February 13, 1998. Moreover, because the record concerning the Dairy's regulatory compliance status after February 13, 1998, suffers many of the same weaknesses as the record pertaining to the Dairy's status prior to February 13, 1998, we are without an adequate basis for computing whatever benefit the Dairy might have garnered by waiting until November 30, 1998, to install its new storage facility. Consequently, we will not increase the penalty assessable against the Dairy on the basis of the economic benefit of noncompliance.

B. *Presiding Officer's Finding Regarding the Nexus Between the Dairy's Discharge and the White River*

The Region asserts that the Presiding Officer committed a factual error in assessing a $5,500 penalty based on the gravity of the Dairy's violation. In particular, the Region argues that the Presiding Officer overlooked "evidence and testimony produced at hearing illustrat[ing] * * * significant threats to human health and the environment posed by the discharges from Respondent's facility." Appeal Brief at 1.

Our review of the record on this point begins with the Presiding Officer's decision itself. In rejecting the Region's request for the maximum statutory penalty, the Presiding Officer explained as follows:

> Notwithstanding the sensitive nature of the White River and its ecosystem, or the highly pathogenic nature of the cattle manure containing wastewater discharges, the Region's testimony is only relevant, pertaining to the White

[11] We note that in its complaint, the Region alleged CWA noncompliance by the Dairy only on February 13, 1998; it did not plead such noncompliance over the time period forming the basis of its proposed economic benefit assessment against the Dairy. *See* Complaint ¶¶ 11, 18.

> River, if the discharge posed a potential risk of harm to the White River. The Region is required to produce some evidence of a potential risk of harm to the White River to sustain its position that the gravity of the violation warrants the maximum penalty.

Initial Decision at 10. The Presiding Officer then assessed a penalty half of that proposed by the Region. *See* Appeal Brief at 15; Initial Decision at 7-11. As the Presiding Officer stated:

> I find the discharge [from the Dairy] entered wetlands, which are waters of the United States, but * * * that the subject discharge did not enter, or have the potential to enter the White River.

Initial Decision at 6.

In contesting the Presiding Officer's gravity assessment, the Region maintains that the Presiding Officer erred in making his predicate determination that the Dairy's waste did not enter or have the potential to enter the White River. Appeal Brief at 15. As we explain below, we agree with the Region's argument that the Presiding Officer's determination on this point was indeed erroneous. Nevertheless, we find that an increase in the gravity-based component of the penalty would not be appropriate in this case.

The Presiding Officer's conclusion that it was unlikely that any pollutants reached the White River was based in large measure upon his specific finding that dry conditions prevailed on portions of the unnamed creek on the day of the violation:

> Because the unnamed creek was dry at several points along its 1.5-mile channel connecting it with the White River, it is highly improbable that the discharge [from the Dairy] could have migrated downstream, through the dry stretches of the channel, to pose a potential risk of harm to the White River.

Initial Decision at 6.

At the outset, it is noteworthy that in considering it improbable that discharges from the Dairy could have reached the White River on the day of violation, the Presiding Officer nevertheless assumes a connection or nexus does exist between the unnamed creek and and the White River. This assumption is clear from the words in his statement above that the "unnamed creek was dry at several points along its *1.5-mile channel connecting it with the White River*." Also, the

Presiding Officer, in this regard, does not appear to question the testimony of two Regional inspectors, who, over the course of two inspections, traced the channel of the unnamed creek from the lower pasture to the White River, and who, during their last inspection, found continuously flowing water in the channel starting from a point in the forested flood plain (below the lower pasture of the Dairy) and extending to the White River. *See supra* Part II.B.

Indeed, the Presiding Officer's conclusion that segments of the unnamed creek were dry on the day of the violation, thereby preventing dairy wastes from reaching the White River, appears to have been based on an erroneous co-mingling of information from an inspection report written nearly one year after the violation at issue with testimony concerning conditions on the date of violation. The November 18, 1998 inspection report upon which the Presiding Officer erroneously relied stated that on this date, a "segment of the unnamed creek closest to the Wallin Dairy was dry at the time of the [Nov. 1998] inspection." CTE No. 11, at 1.

A review of the hearing transcript reveals, however, that areas of the unnamed creek that inspectors had found to be dry on November 18, 1998, were continuous and flowing on February 13, 1998, the date of the violation. For example, under questioning by Regional Counsel at the public hearing, Mr. Roberto, the Region's inspector, described his observations on February 13th in the following manner:

> Q. Did you observe a continuous flow of contaminated wastewater between the land application field and the lower pasture area?
>
> A. Yes there was a *continuous* flow.
>
> Q. Could you describe the path this ditch water took after it reached the lip of the canyon wall?
>
> A. When the drainage ditch entered the canyon wall it flowed down the canyon wall through a well-defined channel, and when it hit the lower pasture area it turned towards the southwest and it headed out towards the direction of the White River. The width of the channel down at the lower pasture area was probably maybe a foot wide and maybe eight inches deep or so in places. And *throughout* that area there was foam in the drainage ditch itself and in that unnamed creek down at the bottom of the hill.

See Tr. at 46 (emphasis added).

We find it difficult to reconcile this description of events on the day of violation with the Presiding Officer's characterization of dry conditions in the unnamed creek channel. Inspector Roberto's testimony, above, that he saw the discharge from the Dairy entering the pasture and then "head[ing] out" towards the White River, *supra,* strongly suggests that the wastewater traversed the lower pasture, exited the pasture, and then entered the forested flood plain below. That is further bolstered by Mr. Roberto's statement on the day of the violation that "we took a [water] sample in the creek just before it *entered the forested flood plane* [sic]." Tr. at 47.

By contrast, Mr. Roberto recounted his observations on November 18th as follows:

> First of all, what we did was *we started at the dairy buildings* and we followed the channel down the canyon wall into the lower pasture area. And at the time that we were there, though, *there was no flow in that channel at the time,* but there was still a well-defined channel going into the flood plane (*sic)* area.

Tr. at 54-55 (emphasis added). Clearly, this statement indicates that, unlike February 13, 1998, wastes from the Dairy facilities did not achieve a significant flow on November 18, 1998.

There is additional circumstantial evidence in the record that supports a conclusion that the Presiding Officer erred in finding it highly improbable that the discharge from the Dairy reached the White River. For instance, the Region's inspectors reported that Robert Wallin's son, Troy, had informed them during an inspection that the unnamed creek into which the Dairy waste flow entered the White River, an acknowledgment that Troy Wallin did not deny during the hearing. Tr. at 48; CTE No. 4; CTE No. 8. Moreover, Inspector Roberto recounted that Jack Smith, a Conservation Technician with the Natural Resources and Conservation Services, had informed him that runoff from the Dairy did connect to the White River. CTE No. 4, Att. D. *See Concerned Area Residents for the Environment v. Southview Farm,* 34 F.3d 114 (2d Cir. 1994) (holding that evidence of discharge of liquid manure to a navigable water from a point source may be proved by circumstantial evidence).

In sum, the evidence at hearing and the inspection reports do not support the Presiding Officer's conclusion that on February 13, 1998, dry conditions on the unnamed creek made it "highly improbable" that the discharge from the Dairy entered the White River. Indeed, we are struck by the fact that there is no apparent reference anywhere in the record to dry conditions on February 13, 1998; rather, only the November 18, 1998 report references such conditions. In view of this anomaly, it seems likely that the Presiding Officer simply confused the November

18, 1998 report as relating facts about the February 13, 1998 inspection event. Alternatively, perhaps the Presiding Officer was treating the conditions on November 18, 1998, as representative of conditions more generally at the site, including on February 13, 1998. Such an extrapolation strikes us as inappropriate in view of the obvious variability of site conditions reflected in the record. In any case, the Presiding Officer clearly erred in concluding that it was highly unlikely or improbable that the discharge on the date of violation would have reached the White River.

In terms of how this error bears on the calculation of a gravity-based penalty in this case, we start with what the Presiding Officer did, in fact, consider in arriving at his $5,500 gravity assessment. As we have discussed, the error in the Presiding Officer's analysis was his discounting the possibility that the unnamed creek flowed into the White River on the day of violation. He appears to have recognized that the unnamed creek was at least an intermittent tributary to the White River, and to have considered the evidence in the record relating to the risks posed by the Dairy's discharge to both the wetland and the unnamed creek. With respect to this aspect of the Presiding Officer's ruling, we note that the Board generally will overturn a presiding officer's penalty assessment only where it can be shown that the presiding officer committed an abuse of discretion or a clear error in assessing the penalty. *See In re Chempace Corp.*, 9 E.A.D. 119, 131 (EAB 2000) (citing *In re Pacific Ref. Co.*, 5 E.A.D. 607 (EAB 1994)). *See also In re Spitzer Great Lakes*, 9 E.A.D. 302, 315 (EAB 2000). In its appeal, the Region has not pointed to an abuse of discretion or a clear error in the Presiding Officer's assessment as it relates to the wetland and the unnamed creek. Accordingly, we will not disturb this aspect of the Presiding Officer's ruling.

This leaves the question whether, in light of the Presiding Officer's error in concluding that it was highly improbable that the unnamed creek flowed into the White River on the day in question, the gravity-based penalty should be increased based on this consideration. As discussed below, while we have concluded that there is a higher probability than that surmised by the Presiding Officer that on the day of violation the unnamed creek flowed into the White River, based on the record before us, we find wanting the Region's proof of its assertion that the result was a significant risk to the White River.

In the absence of a statute-specific penalty policy for the CWA, we will refer to an Agency general enforcement policy document — *A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties* (EPA General Enforcement Policy #GM-22) (Feb. 16, 1984) ("Framework") — to assist in our analysis on this point. Of relevance to the instant proceeding, in which the parties dispute the environmental impact of the Dairy discharge, the Framework states that in determining the gravity of a violation, the Agency should consider the "actual or possible harm" associated with a violation. Framework at 15. In arriving at a figure to reflect a violation's harm,

the Framework proposes that the Agency consider, among other things, the amount and toxicity of the pollutant in question — the source of the Region's concern on appeal.

While there does not appear to be any question that, when discharged in large or concentrated amounts, dairy waste can be quite harmful to a sensitive ecosystem like the White River,[12] or that samples taken well upstream of the White River indicated the presence of harmful amounts of fecal coliform, the problem with the Region's argument is that the record is devoid of any evidence that whatever portion of the Dairy's discharge may have ultimately reached the White River in fact posed a significant risk to the River. Indeed, the Region is poorly positioned to address the amounts or toxicity of dairy waste entering the White River on February 13, 1998, since the Region's inspectors never sampled the unnamed creek anywhere near the point at which it entered the White River.

As noted, the evidence in the record does demonstrate that the Dairy's operations contaminated the Dairy property and its immediate surroundings, including the wetland area and portions of the unnamed creek. For instance, the Region's sampling of wastewater in the upper and lower pastures of the Dairy revealed extremely high levels of fecal coliform indicative of serious fecal contamination.[13] Remarking on findings from one sample, the Region's inspector testified that in seven years of inspecting CAFOs, he had only encountered a higher fecal coliform level on two previous occasions. Tr. at 45. Moreover, the levels of fecal coliform sampled by the Region at the Dairy were many times higher than the those levels at which, according to the Region's chief microbiologist, the *Salmonella* bacterium occurred with almost "100 per cent frequency." Tr. at 122; (Testimony of Stephanie Harris). Even the Presiding Officer, in his Initial Decision, acknowledged the high toxicity of the waste discharged by the Dairy, explaining that he would reject the Region's requests for the maximum penalty assessment, *notwithstanding the highly pathogenic nature of the cattle manure containing wastewater discharge.* Initial Decision at 10.

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[12] The Presiding Officer accepted as a given that the White River is, by virtue of its uses and the species it supports, a sensitive ecosystem. *See* Initial Decision at 10 n.15. The record is also replete with evidence that dairy wastes can harm aquatic life through excess nutrients, oxygen depletion, and sedimentation of waterways and can cause danger to human health through pathogens, such as *E. coli*, *Salmonella*, and *Cryptosporidium*, that are carried in the feces of livestock. *See* CTE No. 16 (Testimony of Robert Fritz); Tr. at 120-125 (Testimony of Stephanie Harris).

[13] The Region took three samples of wastewater downstream of the point at which the Dairy had applied Dairy waste to the upper pasture. The first sample, close to the application point, showed a concentration of 16 million fecal colonies per 100 milliliters ("ml"); the second sample, further downstream, measured 3 million fecal colonies per 100 ml; and a final sample, furthest downstream on the lower pasture, measured 900,000 fecal colonies per 100 ml. According to the Region's inspector, this third sample was taken on the unnamed creek close to where the creek exited the Dairy property. Tr. at 45, 47.

Significantly, however, the record bears no indication that the flow of the unnamed creek into which the Dairy waste ran was limited to the Dairy's waste water. To the contrary, the record suggests that the unnamed stream collected drainage from other sources of water (principally stormwater), increasing the potential for dilution as the unnamed creek flowed in the direction of the White River. *See* Tr. at 55-58; CTE No. 11. The record also indicates that, with increasing distance downstream from the Dairy, fecal contamination became more attenuated. *See supra* note 13.

In contrast with the fecal coliform sampling it conducted on the upper and lower pastures of the Dairy, *see* Tr. at 47, the Region conducted no comparable sampling anywhere near the point at which the unnamed creek flowed into the White River. The Region's failure to sample the unnamed creek in proximity to the White River prevented the Region from gauging the toxicity of the flow at its point of entry into the White River, leaving unaddressed the question of that toxicity having attenuated over the course of migrating approximately 1.5 miles from the Dairy to the White River.

Therefore, because of its limited sampling information, we conclude that the Region has not presented sufficient evidence to support its argument that the penalty should be increased because waste that entered the White River presented a significant risk to the environment and human health. Accordingly, we decline to increase the amount of the penalty on this basis.

C. *Ability to Pay Determination*

The Region challenges as erroneous the Presiding Officer's decision to lower the gravity-based penalty to $3,000 on the basis of his determination that the company lacked the financial resources to pay a higher penalty. The Region maintains that it had shown that the Dairy, based upon the tax records the Dairy had submitted before the evidentiary hearing, had the means to pay the full statutory penalty amount of $11,000, and that the Dairy "failed to produce *any* evidence or information indicating that he would be unable to pay" this penalty amount. Appeal Brief at 16.

In reaching his determination that the Dairy could not afford a penalty greater than $3,000, the Presiding Officer stated that the Region's financial analyst had not demonstrated that the company had the ability to pay the full penalty because the analyst had failed to determine whether certain expenses listed in the company's tax records, which the Region has proffered as examples of the Dairy's financial wherewithal, were necessary for the company to remain in business. Initial Decision at 12. Furthermore, the Presiding Officer stated his determination that the Dairy lacked the ability to pay the proposed penalty "does not require a highly technical financial analysis of its assets" because the company was "forced to proceed *pro se*" owing to the lack of funds. *Id.*

As we describe below, we find that the Region had adequately satisfied its initial burden of demonstrating that its proposed penalty should not be reduced in light of the Dairy's financial resources. We also find that the Dairy, to whom the burden shifted to show through specific information that it could not pay this amount, failed to sustain its burden.

On a number of occasions, the Board has examined the Agency's and respondent's respective burdens of proof in the application of statutory penalty factors closely resembling those in the instant case. *See In re Spitzer Great Lakes, Ltd.*, 9 E.A.D. 302, 320 (EAB 2000); *In re Chempace Corp.*, 9 E.A.D. 119, 132-33 (EAB 2000); *In re Woodcrest Mfg., Inc.*, 7 E.A.D. 757, 773 (EAB 1998) (considering EPCRA penalty factors); *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 541 (EAB 1994) (considering TSCA penalty factors). In those cases, we have found that the Region, as the party bearing the ultimate burden of proof that a penalty it seeks to impose is appropriate,[14] can discharge this burden by showing that it considered each of the statutory penalty factors in making its appropriateness determination. As we observed in *Spitzer*:

> Although the Region bears the burden of proof on the appropriateness of the overall civil penalty, it does not bear a separate burden with regard to each of the statutory factors. *Id.* Instead, in order to make a *prima facie* case, the Region must show that it considered each of the statutory factors and that the recommended penalty is supported by its analysis of those factors. With this showing, the burden then shifts to the Respondent to rebut the Region's *prima facie* case by showing that the proposed penalty is not appropriate either because the Region failed to consider a statutory factor or because the evidence shows that the recommended calculation is not supported.

Spitzer, slip op. at 28.

With reference to a party's ability to pay, we have held that the Region need not specifically prove that a respondent has the ability to pay a penalty before a penalty can be assessed. Rather, the Region need only show that it *considered* a

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[14] The procedures governing this procedure state, in relevant part, that:

> The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that *the relief sought is appropriate*.

40 C.F.R. § 22.24.

respondent's ability to pay, among all the penalty factors, in imposing the penalty. *See New Waterbury*, 5 E.A.D. at 541.

In *New Waterbury*, we found that "consistent with Agency policy and prior Agency decisions, * * * a respondent's ability to pay may be *presumed* until it is put at issue by a respondent." *Id.*; *accord Spitzer*, 9 E.A.D. at 321. In *New Waterbury*, we rejected the respondent's argument that the Region as part of its *prima facie* case, had to present specific evidence that the respondent could pay the penalty:

> The Region 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 which can support the *inference* that the penalty assessment need not be reduced.

New Waterbury, 5 E.A.D. at 542.

We further found that once the Region satisfies its initial burden of production as described above, the burden of production then shifts to the respondent to establish with *specific* information that "despite its sales volume or apparent solvency it cannot pay any penalty." *Id.* at 543; *accord In re Chempace Corp.*, 9 E.A.D. 119, 133 (EAB 2000). Only when the respondent discharges this burden does the burden again shift back to the Agency to "introduc[e] additional evidence to rebut the repondent's claim [of inability to pay]" or to use "cross examination * * * [to] discredit the respondent's contentions." *New Waterbury*, 5 E.A.D. at 543.

In our view, the Presiding Officer misapplied the burden-shifting sequence we delineated in *New Waterbury* and its progeny, and thus erred. In particular, we find that the Region provided sufficient information on the Dairy's solvency from which it could be inferred that the Dairy had the means to pay the full penalty amount requested. At the evidentiary hearing, the Region's financial analyst, summarizing information in the Dairy's tax returns, explained that the Dairy experienced positive cash flows in 1994, 1995, 1996, and 1997 of $109,732, $54,085, $70,126, and $42,689, respectively, supporting in his words "the inference that Robert Wallin has the ability to pay an $11,000 civil penalty." CTE No. 15 (Written Testimony of Billy J. Henderson at 3). The Region's financial analyst further noted that the Dairy's gross farm income increased from $555,474 in 1994 to $830,595 in 1997, and suggested that Mr. Wallin might have used "some of the positive cash flow to pay the proposed penalty." *Id.* (Written Testimony of Billy J.

Henderson at 4).[15] Finally, indicating that the depreciation schedule attached to the Dairy's tax returns showed several purchases exceeded the proposed penalty amount of $11,000, the Region suggested that Mr. Wallin could have deferred such expenses in order to pay the penalty. *Id.*

In our view, the above information was more than sufficient to discharge the Region's initial burden as described in *New Waterbury* and its progeny.

Once the Region had satisfied its initial burden of production, it was incumbent upon the Presiding Officer to hold the Dairy to its countervailing burden to present *specific* information detailing its inability to pay the full penalty amount. This he failed to do. As indicated in this statement by Troy Wallin, Robert Wallin's son, the Dairy, at best provided only a general, anecdotal response:

> [T]here's never anything left * * *. You keep assuming there's money I mean, all these dollar signs and everything, all these paperwork dollars. I mean, you guys don't understand, there's never enough to go around. But I did it all my life * * *. I mean, it's all speculation, yeah.

Tr. at 98. In our view, such vague statements of financial hardship do not satisfy the Dairy's burden to show through specific facts that it was unable to pay the proposed penalty amount.

Moreover, in our view, the Presiding Officer erroneously relied upon the Dairy's *pro se* status as a reason for reducing Wallin's penalty. The Presiding Officer stated that the Dairy's decision to proceed *pro se* indicated the Dairy's "lack of funds" to pay the proposed penalty and that this fact alone made unnecessary a "highly technical financial analysis of [the Dairy's] assets" in order to determine the Dairy's ability to pay the penalty. Initial Decision at 12. This finding is, however, entirely conclusory and assumes too much. The Presiding Officer does not point to any place in the record showing that the reason the Dairy was proceeding *pro se* was a lack of funds or that the Dairy was financially incapable of both paying the requested penalty and retaining counsel. The mere fact that Dairy proceeded *pro se*, and nothing more, does not satisfy the Dairy's burden of specifically showing that it could not pay the otherwise assessable penalty.[16]

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[15] In its appeal brief, the Region notes its proposed penalty of $11,000 represents only 1.3 percent of the Dairy's gross farm income in 1997. Appeal Brief at 17.

[16] In this same discussion, the Presiding Officer also appeared to suggest that the Dairy, because of its *pro se* status, was unable to adequately defend itself against the Region's charge that it had sufficient resources to pay the full statutory amount. Initial Decision at 12. While we are sensitive to the plight of *pro se* parties, *see, e.g., In re Sutter Power Plant*, 8 E.A.D. 680, 687 (EAB 1999); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 127 (EAB 1999); *In re Commonwealth Chesapeake Corp.*,
Continued

In sum, because the Region showed that the Dairy's financial resources would not prevent it from paying the full penalty amount, and because the Dairy was unable to discharge its burden of production by specifically contradicting this showing, we reverse the Presiding Officer's reduction of the Dairy's penalty based on inability to pay.

Without the benefit of a downward adjustment for inability to pay, the Dairy is subject to the $5,500 gravity-based penalty otherwise assessed by the Presiding Officer. Thus, the Dairy is ordered to pay a total penalty of $5,500 for its CWA violation.

IV. *CONCLUSION*

As explained above, we assess against the Dairy a penalty of $5,500 for discharging agricultural waste from a point source into a navigable water, in violation of the CWA.

The Dairy shall pay the full amount of the civil penalty within thirty days (30) of receipt of this decision. Payment shall be made by forwarding a cashier's or certified check payable to the Treasurer, United States of America, to the following address:

EPA-Region X
Mary Shillcut
Regional Hearing Clerk
P.O. Box 360903M
Pittsburgh, PA 15251

So ordered.

(continued)
6 E.A.D. 764, 772 (EAB 1997); *In re Rybond, Inc.*, 6 E.A.D. 614, 627 (EAB 1996), we do not believe that concerns about a party's lack of legal sophistication relax a party's burden of production to the extent contemplated by the Presiding Officer in this case, particularly since the Dairy was the source of all of the records upon which the Region based its ability to pay arguments, *see* Hearing Tr. at 97, 100, and thus should have been in a position to make pointed responses to the Region's arguments.

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of: SPECIAL INTEREST AUTO WORKS, INC. and TROY PETERSON, Individual, Kent, WA Respondents	Docket No. CWA-10-2013-0123 RESPONDENTS' REPLY IN SUPPORT OF MOTION FOR LEAVE TO CONDUCT DISCOVERY

I. INTRODUCTION

Respondents are not requesting "extensive and time-consuming discovery." They will be deprived of the opportunity for a full and fair hearing on the merits if relevant information is withheld pursuant to an overly restrictive reading of Section 22.19(e) of the Consolidated Rules of Practice. The EPA should not be allowed to "hide the ball" by withholding prior to hearing the reasoning process by which it applied generalized predictive models regarding discharge and economic benefit to the site-specific conditions at Special Interest Auto Works to determine – without explanation – that a "discharge" took place. The brief summary of the EPA's witnesses' testimony in the Prehearing Exchanges is silent in this regard. Because the EPA's Prehearing Exchanges do not meet the "discovery procedure" envisioned for administrative proceedings under the Consolidated Rules, additional discovery is warranted. *See* 40 C.F.R. §22.19(b), (e).

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II. REPLY ARGUMENT

Respondents have satisfied the requirements of 40 C.F.R. 22.19(e)(1) & 22.19(e)(3), and their motion for discovery should be granted. *See In the Matter of Safety-Kleen Systems, Inc.*, 1999 EPA ALJ LEXIS 70 at *2 (EPA ALJ 1999).

A. No Unreasonable Delay or Burden Will Result from Providing Probative Information

Respondents' request for additional discovery is specific and limited, and solely within the EPA's custody. There is no showing that the proceedings would be unreasonably delayed by the requested discovery, nor that the discovery requests would be unduly burdensome on the EPA, other than the agency's bald assertions otherwise.[1] Presently, the EPA and Respondents are looking at a September 29, 2014 hearing date.

Respondents estimate that the limited written discovery requested should take no longer than a total of twenty (20) days to complete. *See* 40 C.F.R. §22.19(e)(i). Moreover, there is no dispute that all of the information requested is within the possession and control of the EPA, such that the requests will not unreasonably burden the agency, but the EPA has refused to provide such information. *See* 40 C.F.R. §22.19(e)(ii). The EPA questions the Respondents' need for information regarding other penalty cases and other cases in which its predictive model has been used as "not probative." 40 C.F.R. §22.19(e)(iii). However, because other EAB cases

[1] With the exception of requests pertaining to the issuance of civil penalties in other cases and use of the hydrologic model in other cases, the EPA does not dispute that the requests satisfy the standard in Section 22.19(e)(iii) of the Rules which state that discovery may be ordered if it "Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought." The requested documents directly pertain to the question of whether Respondents did in fact discharge pollutants into waters of the United States and are required to weigh the strength of the basis of EPA's allegations that such occurrences took place. This evidence is of significant probative value because it may or may not prove a fact of consequence to the case. *Chautauqua Hardware Corporation*, EPCRA Appeal No. 91-1, 3 E.A.D. 616, 622, 1991 EPCRA Lexis 2 (CJO, Order on Interlocutory Review, June 24, 1991). Given the EPA's concession of this

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have *stare decisis* value,[2] they are directly relevant to a determination of whether the EPA has properly determined liability and assessed penalties against Respondents in this case.

Depositions are necessitated because the information disclosed in the Prehearing Exchange does not describe how the experts reached the conclusions in their reports with respect to Respondents themselves, and does not explain calibration and use of its hydrologic model. The EAB and OALJ look to Rule 702 of the Federal Rules of Evidence and respective federal court decisions, particularly *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 570 (1993) and its progeny, as providing "useful guidance" in determining the reliability and weight of evidence presented in administrative proceedings. *See, e.g., In re City of Salisbury, Maryland*, No. CWA-III-219, 2000 EPA ALJ LEXIS, at 35-36 (ALJ, Feb. 8, 2000).

Respondents should be allowed to conduct discovery to prepare their arguments in this regard ahead of the hearing, rather than in a reactionary mode. The evidence is necessary in order for the Court to weigh the strength of the EPA's allegations that such occurrences took place. It is of significant probative value because it relates directly to facts of consequence to the case. *Chautauqua Hardware Corporation*, EPCRA Appeal No. 91-1, 3 E.A.D. 616, 622, 1991 EPCRA Lexis 2 (CJO, Order on Interlocutory Review, June 24, 1991).

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standard, this issue is not before the ALJ with respect to requests for depositions and written discovery regarding calibration and inputs of the hydrologic model.

[2] A decision issued by the Environmental Appeals Board is considered to be binding on all of the Agency's ALJs and RJOs, unless overturned on judicial appeal or contravened by a subsequent statute or regulation. Additionally, the EAB has generally adopted a philosophy of stare decisis concerning the holdings of Board decisions. Lisa, Joseph J. (Senior Assistant Regional Counsel, U.S. EPA, Region III), *EPA Enforcement Actions: An Introduction to the Consolidated Rules of Practice*, at p. 11., available at http://www.temple.edu/law/tjstel/2005/spring/v24no1-Lisa.pdf

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B. The Requested Information Has Not Been Provided

The EPA alleges that depositions are not necessary because it has already provided all relevant information sought by Respondents in its Prehearing Exchanges. Complainant's Response at pp.3-4. A simple comparison of the EPA's submittals with the information that Respondents desire to obtain through depositions shows that is not the case.

Respondents are seeking to determine the factual foundation of the witnesses' testimony, not a recitation of their testimony set out in a conclusory form. Without the requested information, Respondents cannot adequately prepare for hearing – let alone entertain settlement discussions – because they are unable to assess the relative strength of Complainant's allegations. *See, e.g., In re City of Salisbury, Maryland*, No. CWA-III-219, 2000 EPA ALJ LEXIS, at 35-36 (ALJ, Feb.8, 2000).

None of the EPA's expert witnesses have prepared reports that contain the substance of the facts and opinions to which they are expected to testify and a summary of grounds for each opinion, contrary to 40 C.F.R. §22.19(b). The Prehearing Exchanges consist of boilerplate, generalized statements concerning the predictive model it used, unidentified "concerns" regarding pollution, and an economic benefit model, none of which is tied in any way to the Respondents' site or activities at issue here.

Mr. Beyerlein's summary regarding the WWHM, calibrations and evaluations is silent regarding site-specific conditions. The summary of testimony of Mr. Oatis and Mr. Fuhrman similarly do not explain how they reached a penalty determination using an economic benefit model applied to the Respondents' themselves. The summarized testimony of Mann and Shepard do not tie in any "risk of environmental harm" to the actual conditions at Respondents' site.

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Under similar circumstances, where an EPA expert has not prepared a report and the description of the expert's expected testimony was insufficient to permit the respondent to understand the basis for the expert's conclusions and prepare for trial, discovery and depositions has been permitted. *See In the Matter of Intermountain Farmers Association*, 2000 EPA ALJ LEXIS 22 at *3 (EPA ALJ 2000) (respondent's request for more information regarding the expert's conclusions, as well as the basis for those conclusions, is a reasonable one which satisfies the criteria for further discovery under Rule 19(e)).

Likewise, the EPA's fact witness information in its Prehearing Exchanges is insufficient for Respondents to prepare for hearing or consider settlement discussions. Vague statements regarding the witnesses' "observations," at the site, without any specifics, do not constitute an adequate "narrative summary" of the witnesses' testimony, contrary to the Rules of Practice and the January 17, 2014 Prehearing Order. *See, e.g., In the Matter of Easterday Janitorial Supply Co.*, 2001 EPA ALJ LEXIS 19, **6-7 (EPA ALJ 2001) (narrative summary alone is insufficient; request to depose EPA witnesses who conducted inspections of respondent's facilities is reasonable and should be granted).

C. The Requested Information Cannot be Otherwise Obtained

The EPA alleges that the information sought by Respondents via depositions could be obtained through other forms of discovery such as "directed written interrogatories." Complainant's Response at p.8.[3] Again, this bald statement is not proof. The ALJ should note that follow-up questions that one might ask in a deposition are not available through written interrogatories. Thus, written discovery is a poor substitute for depositions. Further,

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limited depositions will streamline the process and improve efficiency at the hearing itself. Respondents estimate that each witness could be examined in three hours or less and that depositions would take no more than two weeks to complete.

With respect to the allegation that Respondents will have an opportunity to cross-examine the witnesses at the hearing and, thus, that depositions should not be allowed, this does not address the Respondents' right to determine the foundation of the witnesses' testimony to fully prepare for hearing without being ambushed by unexpected testimony. That argument has been rejected as "essentially read[ing] the discovery tool of deposition out of the procedural rules." *In the Matter of Environmental Protection Services, Inc.*, 2003 EPA ALJ LEXIS 30 at *1 (EPA ALJ 2003). In that case, the Administrative Law Judge noted:

> In view of the rather general narrative summary provided by EPA for this witness, this Tribunal is of the view that respondent cannot fairly prepare for the hearing in this case without more detail as to McPhilliamy's knowledge concerning the facts surrounding his inspection of the EPS facility. EPA's narrative summary of this witness's expected testimony essentially tells respondent very little. . . Respondent is entitled to more information than already provided by complainant as to this expected witness's testimony and the only way that it can obtain this information is to question McPhilliamy. Moreover, ***the fact that McPhilliamy ultimately may be asked these questions at the hearing is no reason for denying respondent the opportunity to depose this individual.*** First, the scope and nature of the deposition is different from the scope and nature of the administrative hearing. Second, in order to properly prepare its defense to the charges leveled against it, common sense and basic fairness require that respondent be given the opportunity to review and consider the sworn statements of the opposing witnesses before the hearing begins. ***The fact that McPhilliamy may be available for cross-examination is simply too little, too late.***

Environmental Protection Services, at **2-3 [emphasis added].

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[3] Ironically, the EPA opposes the written discovery requested by Respondents in their motion as causing an unreasonable delay or burden.

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Without depositions, Respondents will basically be conducting discovery at the hearing itself, rather than determining the foundation for the witnesses' testimony ahead of time. Such approach puts Respondents at a distinct disadvantage in defending themselves at hearing, and would deny Respondents due process.

An agency must always ensure that its procedures satisfy the requirements of due process. *See Withrow v. Larkin*, 421 U.S. 35, 46 (1975) ("Concededly, a 'fair trial in a fair tribunal is a basic requirement of due process.' . . . This applies to administrative agencies which adjudicate as well as to courts."); *see also Swift & Co. v. United States*, 308 F.2d 849, 851 (7th Cir. 1962) ("Due process in an administrative hearing, of course, includes a fair trial, conducted in accordance with fundamental principles of fair play and applicable procedural standards established by law."). The constitutional requirements of due process may be denied in the absence of discovery. *See, e.g.*, *Easterday*, 2001 EPA ALJ LEXIS at **11-12 (rejecting EPA argument that there was no fundamental unfairness or violation of due process in denying respondent the opportunity to depose EPA witnesses).

III. CONCLUSION

For all the foregoing reasons, the Administrative Law Judge should grant Respondents' motion for leave to conduct additional discovery.

RESPECTFULLY SUBMITTED this 29th day of May, 2014.

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By _____

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify under penalty of perjury under the laws of the State of Washington, that I am now, and have at all times material hereto been, a resident of the State of Washington, over the age of 18 years, not a party to, nor interested in, the above-entitled action, and competent to be a witness herein.

I caused a true and correct copy of the foregoing pleading to be served this date, in the manner indicated, to the parties listed below:

FILED WITH: Sybil Anderson, Headquarters Hearing Clerk Office of Administrative Law Judges U.S. Environmental Protection Agency 1200 Pennsylvania Avenue NW / Mail Code 1900R Washington, D.C. 20460 OALJfiling@epa.gov, email	❑ *Legal Messenger* ❑ *Hand Delivered* ❑ *Facsimile* ❑ *First Class Mail* ❑ *Express Mail, Next Day* ☒ *Email*
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DATED at Bainbridge Island, Washington, this 29th day of May, 2014.

Christy Reynolds

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