UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
J. Phillip Adams	)	**Docket No. CWA-10-2004-0156**
Bannock County, Idaho,	)	
	)	
Respondent	)	

Initial Decision

In this administrative enforcement action under Section 309(g), 33 U.S.C. § 1319(g) of the Clean Water Act, ("CWA"or "Act"), the United States Environmental Protection Agency ("EPA"or Complainant), alleges that the Respondent, J. Phillip Adams, unlawfully discharged dredged and/or fill material into navigable waters in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), without having a permit, under either Section 402 or 404 of that Act, issued by the Army Corps of Engineers ("Corps"), authorizing that activity. The core factual allegations of the Complaint are that, in the fall of 2001, while constructing a road crossing over Potter Creek,[1] the Respondent discharged dredged or fill material into "approximately 0.1 acres[2] of wetlands and other waters of the U.S." and "below the ordinary high water mark" of Potter Creek. Complaint at ¶ 5.

The Respondent contested the charges in the Complaint and a hearing was held on the matter from July 27 through August 1, 2005, in Pocatello, Idaho. In its defense, Respondent asserts that: 1. no permit was needed for the road crossing as such construction is exempt under the CWA; 2. no jurisdiction existed under the CWA because EPA failed to establish the required "significant nexus" between Potter Creek and navigable-in-fact waters of the United States; and 3. Adams could not be a respondent, as the only proper respondent that could be named was

[1]Potter Creek is very small; there is no portion of it that one could not easily step across. In general, its width is one to two feet and in most places its depth is one to two inches. Testimony of Corps' James Joyner. Tr. 281.

[2]Later in the same Complaint EPA states that the "Respondent cleared and/or filled approximately *one-half* acre of stream channel, wetlands and riparian habitat." (emphasis added) Complaint at ¶ 15.

Diamond T Ranch, L.L.C, the owner and operator of the property in question and the real party in interest.[3] For the reasons that follow, the Court rejects Respondent's defense that Adams was not a proper respondent as well as the claim that no nexus was established between Potter Creek and navigable waters. However, the Court finds that Adams' activity in constructing a road crossing was exempt from the permit requirement of the CWA by virtue of the farm road provision of that Act.

I. Applicability of the "Farm Road Provision."

The farm road provision, found at 33 U.S.C. § 1344(f) of the Clean Water Act provides an exemption from the usual requirement that one must obtain a permit before discharges dredged or fill material. It is entitled: "**Non-prohibited discharge of dredged or fill material**," and, as pertinent here, provides:

(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material – . . .

> (E) for the purpose of construction or maintenance of farm roads ... where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized;
>
> . . . is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title). . . .
>
> (2) any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

33 U.S.C. §1344(f)(1)(E) and (f)(2).

[3]A fourth defense, that the penalty sought by EPA was egregious and unjustified, was raised, but is not addressed, given the Court's holding.

The federal courts have provided scant gloss to this provision. In *United States v. Huebner*, 752 F.2d 1235, (7th Cir. 1985), the farm road provision was mentioned but in the context of whether farmers had violated a consent decree they had entered into with the Corps. Noting that the exemptions in 1344(f)(1) are also subject to limitations in subsection (f)(2), the Court of Appeals stated that the (f)(1) exemptions from the permit process cover "only 'narrowly defined activities . . . that cause little or no adverse effects either individually or cumulatively [and which do not] convert more extensive areas of water into dry land or impede circulation or reduce the reach and size of the water body." *Id*. at 1242. Having expressed that view, the court affirmed the "district court's interpretation of the farming exemptions. In particular, as it relates to this case, the Court of Appeals adopted the district court's finding that the farm roads in issue "were broader than necessary according to best management practices . . . " *Id.* at 1242. Thus, because the farmers' activity resulted in "excess road fill into adjacent wetlands and maintained roads at a greater width than necessary," best management practices were not followed in the road maintenance, with the consequence that they were obligated to "give[] notice and obtain[] a permit if necessary before widening the roads." *Id*. at 1244.

In *United States v. Akers*, [4] 785 F.2d 814, (9th Cir. 1986)("*Akers*"), a farmer's effort to apply the farming exemption was rejected because the wetlands in issue had not previously been "subjected to any established upland farming operation." Thus, the court held that the exemption is limited such "established operation[s]" Speaking specifically to the farm road exemption, the court held that the "roadbuilding regulations set forth . . . with sufficient clarity what [the farmer] had to do to comply with [the] § 1344 (f)(1)(E) [exemption]." *Id*. at 822. The court added that the "intent of Congress . . . was to prevent conversion of wetlands to dry lands . . . [and that] the exemptions do not apply to discharges that convert more extensive areas of water into dry land or impede circulation or reduce the reach or size of the water body." *Id.* With this in mind, the court stated that [i]t is thus the substantiality of the impact on the wetland that must be considered in evaluating the reach of § (f)(2)." *Id.* This led it to conclude that Akers activities were not within the exemption due to the "likely drying effect" connected with the conversion of wetlands to non-wetlands and because the changes were not minor. *Id*. at 822-823. It is also interesting that the court noted that the "litigation resulted from an inability [of the parties] to work cooperatively . . . [and that] [b]oth parties bear some fault for the breakdown in communications." *Id*. at 823.

---

[4]Although, not critical to this case, it is noted that in *Huggett v. Department of Natural Resources*, (*Huggett*), 232 Mich. App. 188, 590 N.W. 2d 747, October 16, 1998, the Michigan Court of Appeals, in addressing that state's administration of the federal clean water act, determined that the farming exemption is limited to ongoing, established farming operations and consequently activities necessary to create new farmland are not covered. In contrast, in this case there is no question that Adams' operation was an established and ongoing farm and that no new farm land was created as a consequence of the farm road activity.

Although a decision involving the requirement for a National Pollutant Discharge Elimination System (NPDES) permit, in *Na Mamo O 'Aha 'Ino v. Galiher,* 28 F.Supp. 2d 1258, (D. Hawaii, 1998) one count dealt with an alleged failure to obtain a dredge and fill permit prior to filing a stream in connection with a farm road. The court there stated that "interpreting agricultural activity to include road construction and maintenance is consistent with other provisions of the CWA [such as] 33 U.S.C. § 1344(f)(1)(E) [which] excludes from the dredge and fill permit requirement . . . construction or maintenance of *farm roads* or forest roads . . . ." Upon reconsideration, the district court did not accept the argument that it had created an exemption. Rather, it explained that it had "painstakingly interpreted the existing exemption." 60 F. Supp. 1058 at 1060. As that court expressed it, "[f]aced with 1) the parallelism of silvicultural[5] and agricultural activities in silvicultural and agricultural activities in section 122.3(e)'s exemption, 2) the inclusion of road construction and maintenance in section 122.27(b)(1)'s definition of non-point source silvicultural activities, and 3) the absence of a definition of non-point source agricultural activities, [it] interpreted 'non-point source agricultural activities' to include the construction and maintenance of farm access roads." *Id*. The court then drew support for this construction from section 404 of the Clean Water Act, stating that it was "Congress' intent that farm roads and forest roads be treated similarly . . . Congress viewed the construction of both forest and farm roads as unique activities, warranting an exception to the rule." In this context, the court referred to the Senate Report for section 404, which provided "that 'permit issuances for such activities . . . would delay and interfere with timely construction of access for cultivation and harvesting of crops and trees with no countervailing environmental benefit.'" *Id*. at 1060, quoting from S.Rep. No. 95-370 at 168 (1977). Thus, that court also makes the point that the exemption must be taken seriously as Congress intended to limit the CWA burden on farmers.[6]

A. The Parties' Arguments Regarding the Farm Road Exemption.

1. EPA's Contentions

EPA begins its argument regarding this issue by asserting that "it is not the Corps' responsibility to raise section 404(f) exemptions for permit applicants." EPA post-hearing brief ("EPA Br.") at 14. EPA also reminds that it is the Respondent's burden to establish both that it qualifies for the exemption and that it does not come within that section's recapture provision, as

---

[5]"Silviculture," refers to forestry and the care and cultivation of forests.

[6]So too, in *Jones v. Thorn*, 1999 WL 1140863 (D.Or.), not Reported in F.Supp. 2d, the court took note of the exemptions from a section 404 permit, as listed at 33 U.S.C. §1344(f)(1). It held that §1344(f)(2), the recapture provision, applies only to the six exemptions listed in (f)(1) but that court also noted that the provision has a purpose, namely that qualified activity is *exempt* from the permit requirement. Thus it observed that an "individual also may consider whether he even needs to apply for a § 404 CWA permit because his activity may pertain to a farming activity exempt under § 1344 (f)(1)."

set forth in 33 U.S.C. §1344(f)(2). It also notes that the section 404(f) exemptions are to be narrowly construed.[7] With those arguments in mind, EPA asserts that the Respondent failed to meet its burden. In support, it looks to the testimony of the Army Corps of Engineer's James Joyner, who stated that "dual use" structures, in this case a "crossing/dam," do not qualify for the section 404(f) farm road exemption.[8] In effect, EPA asserts that, in practice, there can be no such thing as a farm road exemption, as it states that "to qualify for the farm road exemption, one must satisfy *at least* fifteen specific requirements [as] set out in 33 C.F.R. § 323.4(a)(6) *in addition to* the recapture provisions of 33 C.F.R. § 323.4(c)." *Id*. at 15. (emphasis added). EPA maintains that the Respondent failed to meet "many" of the best management practices, naming a failure to have the road crossing, as originally planned, be of minimal width, that the road was "not specifically for farming operations" and that "[i]t is also a dam."[9] EPA also points to 33 C.F.R. § 323.4(a)(6)(iii), and its provision that "road fill shall be bridged, culverted or otherwise designed to prevent the restriction of expected flood flows." On the premise that the Respondent's road is a dam, EPA asserts that it "does not allow for the free passage of flows."[10] *Id.* EPA also looks to 33 C.F.R. § 323.4(a)(6)(iv) and its requirement that "the fill shall be properly stabilized and maintained during and following construction to prevent erosion." *Id*. at 16. In this regard, EPA states that when the site was first inspected in November 2001, there was no erosion control in place. Even later, when silt fences had been installed, EPA asserts that they were "poorly maintained and ineffective." *Id.* EPA also maintains that the Respondent violated 33 C.F.R. § 323.4(a)(6)(v) and (vi), because its "initial construction work . . . obliterated the existing Potter Creek channel where [Respondent] intended to build his dam and impoundment," action which it asserts went beyond the "minimization of impacts by heavy equipment."[11] *Id.*

---

[7]In support of its assertion that the section 404(f) exemptions are to be narrowly construed, EPA cites *Greenfield Mills v. O'Bannon*, 361 F.3d. 934, 949 (7th Cir 2004), *United States v. Brace*, 41 F.3d 117, 124 (3d Cir. 1994), and *United States v. Sargent County Water Resource Dist.*, 876 F. Supp. 1090, 1098 (D.N.D. 1994).

[8]No authority for the claim that dual use structures are not permitted was cited. In any event the Court finds that the crossing was for that single use, to wit, as a farm equipment crossing.

[9]Yet, as this decision discusses *infra*, the Court finds that not one of these three bases was factually established by EPA.

[10]In this regard, and assuming that the road is indeed a dam, EPA notes that the Idaho Department of Water Resources expressed that the dam would not meet the dam safety requirements for passage of flood flows. EPA Br. at 16.

[11]As will be discussed in greater detail later, EPA's support for this assertion is thin. It cites the Corps' testimony by Joyner that "the earth work . . . indicated that more than a road was planned because Respondent had cleared the Potter Creek bed and hillsides *for some distance upstream* of the planned crossing. *Id.* citing Tr. 185-186. (emphasis added).

EPA also asserts that Respondent violated 33 C.F.R. § 323.4(a)(6)(vi)'s requirement that the "design, construction and maintenance of the road crossing shall not disrupt the migration or other movement of those species of aquatic life inhabiting the water body." It contends that the standpipes[12] installed by the Respondent "prevent the free-flow of Potter Creek underneath the crossing [and thereby] prevent[] the migration of aquatic organisms that live in Potter Creek."[13]

Beyond these deficiencies, EPA also maintains that the Respondent's crossing/dam violates the recapture provisions of 33 U.S.C. §1344(f)(2), because a permit is still required if the discharge of fill material is "part of an activity whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject, where the flow or circulation of waters of the United States may be impaired . . . ." *Id*. at 17. EPA asserts that by the Respondent's installation of the vertical standpipes, Respondent impaired the flow and circulation of the waters and by building a dam, created a use to which it was not previously subject, turning the creek into a pond.[14] *Id.*

In its Response Brief,[15] EPA dismisses Respondent's consternation at EPA's failure to ever inform it of the existence of a farm road exception under the CWA. Offering no apology, EPA replies that it is not its duty to "argue the exemption for [the Respondent]," and adds that it is the "Respondent's obligation to show he qualifies for the exemption . . . ." EPA Response at 3.

Responding to the assertion that its crossing was the minimal necessary size, EPA maintains that its foot print for the construction was larger than necessary and that Respondent's agreement to reduce the size of the road was after the fact. Thus, it asserts that the original construction activity violated the CWA at the moment it occurred and the eventual constructed size of the crossing is meaningless. On the belief that this was a crossing *and* a dam, EPA contends that such a dual use structure necessarily has more than minimal impacts. *Id.* at 4. Framing the issue as whether the Respondent cleared the minimal amount of stream to build the road, EPA asserts that was not the case. Relying on Joyner's testimony, it maintains that the bulldozing was "well in excess of what was necessary . . . [and that] [m]ore than 1,000 feet of

---

[12]As will be explained in more detail later, the Respondent, in constructing the road crossing, installed two pipes, or "culverts," under the road. Later, standpipes, that is, vertical extensions, were added to the pipes.

[13]EPA's support for the organisms in Potter Creek comes from the testimony of EPA's Carla Fromm that "organisms such as mayflies, stoneflies, beetles, crane flies, midges and bivalves inhabit" the creek and that those species migrate as part of their life cycles.

[14]EPA cites *Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F.3d 810, 815-816 (9th Cir. 2001), *aff'd per curiam*, 537 U.S. 99 (2002), and involving the conversion of ranch lands to orchards and vineyards, as creating a new use.

[15]For both parties, the Court only discusses new arguments or points made in the responses briefs. Some contentions, while new, do not warrant discussion.

stream was completely filed." *Id.* at 5. Replying to the Respondents' arguments that there was a lack of proven environmental harm, EPA asserts that "whether [EPA's witness] Ms. Fromm personally identified harmed fish or insects in the creek is irrelevant." *Id*. at 6. Last, EPA dismisses Respondent's claim that the recapture provision of 33 U.S.C. §1344(f)(2) does not apply as it is a mere unsubstantiated assertion, and consequently that it fails to meet the Respondent's burden of proof. In contrast, it maintains that the damming of Potter Creek, transforming it from a flowing creek into a pond, speaks for itself.

2. Respondent Adams' contentions.

Respondent states that its farmland is "bisected entirely by Potter Creek." The Creek flows through a steep and narrow ravine and this geography made it impossible for it to move its farm equipment between adjacent fields. Instead, to get its equipment to the adjacent field, it would have to move the equipment along a circuitous route, traveling some six miles along a county road. To deal with this problem, it decided to improve a farm road crossing that already existed, but which was too steep and narrow for its equipment to use. Thus, it "planned to install a culvert, build up the crossing over [Potter] [C]reek, and ease the grade of the approach roads on the north and south sides of the ravine." Respondent's post-hearing brief ("R's Br.") at 3.

Respondent notes that:

> Congress enacted the farm road exemption in 1977 because it felt that requiring a permit for the construction of farm roads 'would delay and interfere with timely construction of access for cultivation and harvesting of crops and trees with no countervailing environmental benefit.

R's Br. at 10, quoting Pub. L. No. 95-217 (1977).

Respondent also observes that:

> Congress understood that the construction of farm roads 'may necessarily result in incidental filling and minor harm to aquatic resources . . . [but that] it created . . . the exemption because the construction of farm roads consistent with the statutory guidelines 'should have no serious adverse impact on water quality.'

Id., quoting *United States v. Akers*, 785 F.2d 814, (9th Cir. 1986) and Pub. L. No. 95-217 (1977).

Addressing the farm road exemption, Respondent maintains that it followed best management practices "so as to maintain Potter Creek's natural characteristics, not reduce the reach of navigable waters, and minimize any adverse [e]ffect on the aquatic environment." *Id*. at 11. It asserts that it followed each of the fifteen "best management practices"("BMPs") listed at 33 C.F.R. § 323.4(6)(i-xv). Noting that the road construction was at the location of a pre-existing road, it contends that the its size was kept to [the] "bare minimum." It also contends

that the road project maintained the creek's natural characteristics. Noting that the BMPs required that a culvert be placed under the farm road, Respondent asserts that its effort minimized that amount of dredge that actually entered the creek. This was achieved by the creation of a ditch to divert the creek while the road construction occurred, a procedure which limited the amount of silt moving downstream to 1/4 of a mile. Although EPA variously claimed that the construction impacted between .5 and .1 acres, Respondent maintains that less than .05 acres of riparian land was impacted.[16] *Id.* at 12. Beyond that, Respondent asserts that EPA "presented absolutely no evidence that Diamond T's farm road caused any harm to aquatic wildlife or water quality." *Id.* at 13.[17]

Respondent asserts that Congress enacted the exemption provision because, as noted, it felt that requiring a permit "would delay and interfere with timely construction of access for cultivation and harvesting of crops and trees with no countervailing environmental benefit." Pub. L. No. 95-217 (1977) Thus Congress expressed that the construction of farm roads under the statutory guidelines "should have no serious adverse impact on water quality." *Id.* In this regard Respondent notes that the Ninth Circuit has commented that Congress appreciated that the construction of farm roads "may necessarily result in incidental filling and minor harm to aquatic resources."[18] R's Br. at 10, quoting *United States v. Akers*, 785 F.2d 814, 919 (9th Cir., 1986).

Drawing from the statute, Respondent asserts that the farm road exemption applies because it did follow the "best management practices" ("BMPs") referred to in that provision. 33 U.S.C. §1344(f)(1)(E). Noting that the Code of Federal Regulations implementing that provision, 33 C.F.R. § 323.4(6), sets forth 15 such practices, Respondent contends that it followed them. In this regard it states that the existing route, entailing a 5 to 6 mile route to travel between the adjacent fields, made that method impractical, as well as being "time

---

[16]Respondent bases its claim of less than 0.05 acres of impacted riparian land on a number of factors. First the riparian land itself is very narrow because the ravine itself is steep and narrow. It points to EPA testimony that, on average, the stream and adjacent wetlands total six feet in width. It notes that the notice of violation from the Corps only claimed that 225 feet of the creek had been filled by the activity, not the 1,000 feet Joyner claimed at the hearing. Using the 225 feet estimate, and allowing an additional 500 square feet for the temporary diversion, only yields 0.04 acres impacted.

[17]Respondent asserts that all EPA could muster was Fromm's assertion that she "had heard that there was most likely 'some type [of] aquatic wildlife in Potter Creek.'"

[18]Although Respondent acknowledges that Congress limited this exemption through a recapture provision which applies to "any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject... ," it maintains that provision does not apply here, because it never converted the Creek into a use for which it was not previously subject and because the actions did not significantly alter its flow or circulation or reduce its reach. 33 U.S.C. §1344(f)(2). R's Br. at 10, 15.

consuming, expensive, inefficient, and pos[ing] numerous safety hazards." R's Br. at 11. It notes that the changes did not create a wholly-new road, but rather added to the pre-existing one.[19] Adams further maintains that the road's width was "kept to a bare minimum," and that it agreed to the government's request to reduce that size per the Crossing and Restoration Plan. R's Br. at 11, and R's Ex. 4.

Respondent states that its action maintained the creek's natural characteristics and minimized any adverse effect on the aquatic environment.[20] Instead of using heavy equipment in the creek, Adams built a ditch to divert the water around the work site. This limited the amount of dredged material entering the creek and was preferable to impounding the creek's flow.[21] It also takes issue with EPA's claim that 0.5 acres were impacted. In this regard it notes that the Complaint alleged that 0.1 acres were affected, and but that even the 0.1 figure is an overstatement, and that the real amount of riparian land disturbed was less than 0.05 acres.[22] Respondent also asserts that it was following the Corps' BMPs[23] by installing a culvert under the farm road. R's Br. at 11-12.

---

[19]Respondent Adams contends that EPA conceded that the road was beneficial as it connected agricultural land and facilitated effective farming. R's Br. at 11, citing Tr. 284, 865-866.

[20]Respondent maintains that the record does not offer evidentiary support of aquatic damage. It notes that Potter Creek is small, previously had been dammed for 25 years and that its natural channel "has been obliterated in its lower reaches for at least 50 years." All EPA could muster was hearsay from Fromm who *heard* it was most likely that there is aquatic life in the Creek. Not only did EPA fail to identify any specific types of such aquatic life, it offered nothing to show harm to it.

[21]Adams states that its approach was effective, as EPA acknowledged that there was no evidence of silt traveling more than a quarter of a mile downstream. R's Br. at 12.

[22]Respondent supports this claim on the basis that the riparian land adjacent to Potter Creek is on average about six feet wide, with the Creek itself accounting for two feet along with adjacent wetland adding two more feet on each side of it. Respondent contests EPA's claim that 1,000 feet of Potter Creek were filled, noting that the Corps of Engineer's May 2002 Notice asserted that only 225 feet of the Creek (a riparian width of six feet multiplied by 225 feet) had been filled. By Respondent's calculation, even considering the area impacted by the Creek's temporary diversion would only add 500 more square feet, for a total impact of 0.04 acres. R's Br. at 13.

[23]As an equitable argument, Respondent observes that it took the Corps four months to decide that the farm road exemption did not apply. At a minimum, Respondent maintains that the Corps and EPA owed a duty to be forthright by disclosing to it the existence of the exemption provision. R's Br. at 14.

Respondent believes that to exclude its project from the farm road exemption would have the practical effect of making the exemption meaningless. In this regard, it points to other activities which Congress has exempted from the Clean Water Act's Section 404 permit requirement such as the discharge of dredge or fill material from the maintenance of dikes, dams, and ripraps. Noting that another farmer,[24] with property along Potter Creek's reaches and below the property in issue here, has regularly done such dredging without any permit, Respondent states that it makes no sense to exempt such activity, which involves work in the waterway itself, and does far more harm in terms of the amount of discharge of dredge or fill material, while not exempting Respondent's farm road activity. R's Br. at 14.

B. Discussion[25]

Prior to articulating the reasons for the Court's conclusion that the farm road exception applies to this case, it is necessary to set forth a more complete recounting of the attendant facts. EPA's first witness, James Joyner, is employed by the U.S. Army Corps of Engineers ("Corps") and is an expert on their Section 404 CWA permitting and enforcement program, but he is not an engineer. Tr. 91, 262. He first became involved with the Adams case in November 2001 when the Corps was contacted by the Department of Water Resources regarding possible unauthorized work on Potter Creek. *Id.* Joyner's first visit to the site occurred on November 5, 2001. Tr. 96. Roger Warner with the Idaho Department of Water Resources ("IDWR") was also present, along with Diamond T Ranch Manager, Ralph Wheatley. Tr. 96. Joyner stated that he viewed the Potter Creek stream channel, observing that the immediate area, as well as the side slopes, had been bulldozed. There was fill in the stream bed itself, and he initially stated that approximately 1,000 feet, or ½ an acre of the stream had been filled. Tr. 97. Later, under cross-examination, Joyner amended that estimate down to 1/7 of an acre. Tr. 316. Also the creek had been diverted to the hillside and water from it was flowing into the diversion.[26] There were no pipes or culverts in place at that time. The Corps deferred to IDWR taking the lead in the case because their requirements would also satisfy those of the Corps. Joyner's understanding was that IDWR would require that "the portion of the stream not directly involved with the structure would be restored to preproject conditions." The IDWR notice of violation also required that the Respondent apply for a permit and Adams did make such an application, filing a joint application[27] on November 14, 2001. Tr. 100. EPA Ex. 7. It shows the letter was from

---

[24]Respondent is referring to the adjacent property owner, Mr. Egan. Respondent states that such activity occurred most recently in the spring of 2005. R's Br. at 14. Tr. 849-850.

[25]The discussion section includes findings of fact related to this issue.

[26]Not pertinent to the farm road issue, but noted as a fact, the IDWR levied a fine against Mr. Adams for altering the creek's natural channel without having a permit. Adams paid a $1,450.00 fine for that violation. Ex. C 6.

[27]The "joint application" is a form used by the Department of Water Resources, the Idaho Department of Lands, and the U.S. Army Corps of Engineers, allowing one form to be used for

Diamond T Ranch, LLC with a cover letter from Mr. Adams, listed as the Managing Member, attached to it. In describing the project, the application states "impoundment for road crossing," with the reason for the project listing solely "Road Crossing." EPA Ex. 7.

Joyner walked the site, beginning from Marsh Valley Road, and then proceeded upstream to the site of the crossing construction. In doing so, he followed a ditch that had water in it, and from there to the former site of an old dam. At that point he observed that the bed and bank had been tramped down by cattle and he saw sheet flow, that is, surface water flowing but not in a confined channel. About one hundred feet further upstream from there, the water was in a confined channel. Tr. 127. Every time he has visited the site he has observed water flowing in Potter Creek. Tr. 128. Thus, Joyner concluded that Potter Creek was a "year-round" or perennial stream. He observed water running from Potter Creek and moving under Marsh Creek Road[28] to Marsh Creek. He did not follow the water after it flowed under the road because he lacked permission to access that area, but it was his view that the flow was substantial enough from the road to make it to Marsh Creek.[29] Tr. 131. Based on these observations, Joyner made a jurisdictional determination, concluding that Potter Creek was a tributary to Marsh Creek and was a water of the United States,[30] having determined that Potter flows to Marsh Creek, which in turn flows to the Portneuf River and from there to the Snake River, which waters then go to the Columbia River and from there to the Pacific Ocean.[31] Tr. 117. EPA Ex. 5.

Returning to EPA Ex. 7, the application for a permit, Joyner stated that upon reviewing it,

---

the three agencies. Tr. 101.

[28]Joyner could determine this because, after passing under the road, the water flowed out on the other side through "a constructed ditch for approximately 75 feet or so before it fanned out into a marshy area." Tr. 131.

[29]Counsel for Respondent objected to testimony from Joyner that the Potter Creek flowed into wetlands adjacent to Marsh Creek, contending that the Complaint only asserts water flow from Potter to Marsh Creek, and not a claim of flow into adjacent wetlands. The Court overruled the objection that this was beyond the scope of the Complaint. Tr. 132-133.

[30]Although this issue will be discussed further in the portion of this decision addressing the Respondent's challenge to jurisdiction, it is noted that for the CWA to apply at all, waters of the United States must be involved. Therefore, the Court briefly notes its finding here that, based on his statements and conclusions about Potter Creek, Joyner's testimony, along with other statements and exhibits in the record, established CWA jurisdiction.

[31]The Corps' form, entitled "Jurisdictional Determination," as reflected in EPA exhibit C 5 also states that there are adjacent wetlands, a conclusion which Joyner said was based on office resource materials and his initial visit to the site. Tr. 119.

he could not determine if the crossing could be exempt, as a farm road crossing.[32] As a follow-up, he called Mr. Adams for information so that he could determine if the crossing was the minimum necessary size. This involved learning about the type of equipment that would be crossing the structure. Tr. 182. Joyner maintained that Adams did not provide him with all the information he needed and this prompted a letter for the additional information, as reflected in EPA exhibit 8, dated January 4, 2002. Tr. 182. While Joyner and the Corps kept the Respondent in the dark[33] about the possibility that the road crossing could qualify as an exempt activity, not requiring a CWA permit, it is obvious that the questions posed in his letter from the Corps were directed to that issue. The letter inquired about the size and type of equipment that would be using the road, asked how the current method of transporting equipment was no longer "viable," inquired whether a narrower crossing than that proposed could accommodate the farm equipment, and whether a lower crossing with steeper approach inclines would work. EPA Ex. 8.

Given the facts, at the hearing Joyner had little choice but to agree that the road *was* a farm road crossing[34] but he added that there must be "best management practices" or "BMPs" applied. Tr. 184-185. The BMPs include minimizing the size of the crossing, that the crossings be the minimum number necessary, and that the crossing(s) cause "no more disturbance than necessary during construction to aquatic resources" as well as "taking prudent measures to prevent sediment and erosion from occurring [due to] the construction."[35] Tr. 184.
The concession was reflected in his March 13, 2002 file memorandum in which he admitted the crossing would serve to move equipment from one field to another, and that it would unquestionably save time and increase safety. EPA Ex. 10. Joyner stated that there was some initial confusion about whether the project was for an impoundment or a crossing, but that after communication with Idaho Water Resources, it was clarified that it was only a crossing. Tr. 395. As for the standpipe, Joyner stated that the Corps' and EPA's concern was that the road crossing still accommodate the free flow of aquatic wildlife. Tr. 398. He added that if the vertical part of

---

[32]Joyner admitted that Respondent's Wheatley told him his intention was to build a crossing and Joyner knew its purpose was to move farm equipment and that this would require some building up. Tr. 318.

[33]Joyner acknowledged that he never discussed with Mr. Wheatley about the possibility that the road might be exempt as a farm road. Tr. 328, 329.

[34]Indeed, EPA Counsel EPA stipulated that the Respondent needed to construct the crossing at the location involved in this litigation. Tr. 933.

[35]In Joyner's view, the road had a dual purpose. This view was based on its size, and later, because of the standpipes. He also believed that the clearing went "well beyond the immediate crossing," concluding that the activity was consistent with one who was creating an impoundment, as brush and vegetation had been cleared from the area where a pool would exist. Tr. 185-186. Joyner believed that the road could be half as wide as planned. He stated that Adams was *proposing* a "hundred foot wide [road] at the top and 225 feet wide at the base," yet the equipment the Respondent would be using "could be articulated to 30, 35 feet." Tr. 186.

the standpipe was removed, that action would satisfy this concern. Tr. 398. Joyner represented that if the vertical part of the standpipe were removed, the project could be approved, as long as any deficiencies in the restoration plan were addressed. Tr. 398.[36] Regarding the vertical portion of the pipe, Joyner agreed that, as long as it was maintained, it was effective in allowing water to pass while retaining sediment or other debris that could otherwise clog the pipe. Tr. 404.

When EPA witness Ervin Ballou, with the Idaho Department of Water Resources, testified, his concern involved the state's stream protection act, but he agreed that the Respondent advised him that the project was for a crossing.[37] Ballou admitted that *it was his idea* to install the perforated pipe as a means to prevent clogging. Tr. 493. Ballou also agreed that, per EPA
Ex. 7, Adams described his intent to install two perforated caps on the pipes and this was his recommendation to the Respondent a year later when he visited the site. The same exhibit, he conceded, lists the purpose of the project as a "road crossing." Tr. 502, 505. Further, Ballou admitted that his agency never told the Respondent to remove the pipe caps. Tr. 504.

C. The Court's Determination Regarding the Applicability of the Farm Road Exemption.

As noted in the earlier discussion of cases involving the farm road exemption, the provision cannot be meaningless and without effect, because that would thwart Congress' expressed intention. In this instance the resolution of the applicability of the provision is significantly easier to resolve than the facts other courts have faced. This is because EPA

---

[36]Joyner also stated that if the Respondent later received an approval for a dam or impoundment, not merely a crossing, then the standpipe issue is eliminated. Tr. 398. In that event, the structure could still serve as a crossing for farm equipment use. *Id.* Although Joyner asserted that a "dual use" structure, serving as a dam and a road does not qualify for the farm road exception, no citation to authority for that claim was made. In any event, through the time of the hearing, the evidence is, and the Court finds, that only a crossing has been constructed.

[37]Ballou had some questions about the intent of the Respondent's project, as he believed that the project included the creation of a dam and reservoir. Despite this impression he *never* communicated his questions about the project's purpose to Adams. Tr. 478. Even in his testimony, Ballou referred to the project as a "culvert *crossing*." Tr. 503 (emphasis added). Further, while entertaining the belief that the project was a dam, Ballou stated that the structure was not competent to hold water. It also lacked a spillway to allow for the storing or release of water, another requirement if one wants a dam. Tr. 494. As part of his communication with Adams, Ballou agreed that Adams told him he would eliminate any impoundment aspect from the crossing. Tr. 505. The Court finds that the agencies can't have it both ways, suggesting, despite the Respondent's statement to the contrary, that it was intended to be a dam, while at the same time asserting that it couldn't function as a dam. Consequently, the only supportable finding on this record is that the Respondent constructed a road crossing.

Counsel conceded that the road in issue was a farm road.[38] Beyond that, as discussed above, the facts at hearing could only lead to the conclusion that the road was a farm road. Ralph Wheatley, manager of the Diamond T. Ranch, Tr. 912 confirmed that there was a old crossing site in same location where the new crossing was constructed. Tr. 929. The old crossing had been there as long as Wheatley could remember and it allowed a tractor or a 4 wheeled vehicle to be able to cross but it was not sufficient for the ranch's other farm equipment to cross. Tr. 930-931. Diamond T grows grain crops on each side of the crossing. Tr. 931. Before altering the existing crossing, they would have to break down, that is, dismantle, the farm equipment. Some of it would then have to be put on a trailer and transported down the road, an effort requiring a 6 to 7 mile trip, with all of this effort simply to get to the other side of the existing, inadequate, road. Tr. 932. Thus, with the existing method of moving the farm equipment involving a two hour trip, the alteration in the crossing was brought about by the need to cut time and for safety. Wheatley stated that it was he who raised the issue of need to improve the existing crossing with Mr. Adams in 2000, and that Adams subsequently authorized the improvement. Tr. 936. Construction started in the fall of 2001. Tr. 937. Apart from the crossing itself, the total width of the area impacted, including the stream itself, was six to eight feet across. Tr. 941.

J Phillip Adams, the Respondent, as the managing member of Diamond T Ranch confirmed there was an old farm crossing where the new one was constructed on the same location. Adams also stated that his equipment could not use the old road, as it was too small and attempting such a crossing would've knocked down trees. Because the road was inadequate, Adams was forced to move equipment by "go[ing] east ... about a mile and a half to hit Marsh Valley Road. And then . . . go[] north probably about two miles to hit Hawkins Road. And then [the equipment] would have to go about two miles up Hawkins Road and then back onto [the Diamond T] property about a mile to get to the [other side.]" Tr. 704-705. Adams estimated this circuitous route causes an extra 5 to 7 miles to transport his farm equipment. Tr. 705. He expressed that the old way was dangerous as well, as the equipment, even when folded up, is 15 to 22 feet wide. Thus he deemed it risky for his farm employees to have to drive the farm equipment on the roundabout route to the other side of his farm, and in this regard he noted that the equipment's width takes up the entire road width, and then some, during these efforts. Tr.

---

[38]Certainly, while the regulators kept their knowledge of the exemption and its internal debate about its applicability secret, it is fair to state that the activity of Adams at the site of the existing crossing and its eligibility for the farm road exemption was not so easy for the Corps itself to figure out. Although Joyner was first at the site on November 5, 2001, two months later, at the time he sent the Corps' letter to Adams, Joyner conceded that he was still trying to determine at that point if the exemption applied. Tr. 340. Keeping the potential applicability of the farm road exemption secret from the Respondent, despite EPA Counsel's insistence that it was perfectly fine to do so, is inconsistent with the regulating authorities' obligation for fair dealing with those subject to the CWA. As noted by the Court in the *Akers* decision, there is a duty to communicate and to work cooperatively, something that the regulating agencies, including the Corps and the EPA blatantly failed to do in this instance.

705. Since, the farm equipment is moved at only 15 to 16 mph during these transporting events, he has safety concerns. All of these farming concerns led to the decision to improve the crossing in the spring or summer of 2001.

Consequently, the only issue that remains to be resolved is whether the road was constructed in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters were not impaired, that the reach of the navigable waters was not reduced, and that any adverse effect on the aquatic environment was otherwise minimized. *On this record*, the evidence is that such best management practices were followed.[39] Among EPA's witnesses, none offered probative evidence on these issues. The Corps' Joyner, for example, conceded that he is not an engineer and that he has no experience in measuring water flow. Thus, he admitted to having no experience in being able to view flowing water and make an estimate as to the quantity involved. Tr. 262. While Joyner expressed that the buried length of pipe did not appear to be associated with the crossing and his view the pipe was not the minimum size necessary, he has no expertise or experience to support those views. Tr. 251. Witness Ms. Carla Fromm,[40] EPA's

---

[39]The transcript and the exhibits of record demonstrate that nearly all of EPA's case proceeded from the assumption that the Respondent had to have a permit. Working from that erroneous starting point, the government's evidence at the hearing focused almost entirely on its theory that the Respondent obstinately continued to fall short in its restoration efforts. Consequently, EPA's evidence that the road in issue was not constructed in accordance with best management practices to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters were not impaired, that the reach of the navigable waters was reduced, and that any adverse effect on the aquatic environment was not otherwise minimized, was wanting.

[40]Regrettably, the Court was unable to conclude that Ms. Fromm was a credible witness. There are several reasons the Court reached this conclusion. For example, EPA Ex 21, Fromm's report dated Dec 17, 2003, is a typed copy of her notes relating to the Dec 9, 2002 inspection. Tr. 520. The typed report, which she admitted was based strictly on her notes, was thus prepared nearly a year after she took her notes. The *next* day she prepared her second report, this one based on her June 20, 2003 visit. Critically, Ms. Fromm admits that her typed notes have *more* detail and accuracy than her original notes. Tr 598. Ex C 22. Tr. 596. In another oddity**,** she stated that it is her practice to destroy her notes upon creating her typed report. This practice obviously prevents one from comparing what the witness wrote at the time of the event with the final, *more detailed*, version created a year later. It was also not credible for Ms. Fromm to claim that she could not "recall" if anyone from the Respondent's side was present when she first visited the property on Dec 9, 2002. Particularly on the first visit, one would remember if anyone from the opposing side was present. Thus, using the Respondent's gracious open permission for the regulating authorities to enter the property freely, EPA opted to do so secretly without informing or inviting the Respondent to attend EPA's visit to its own property. This unsavory conduct was at least consistent, as EPA and the Corps never revealed to the

environmental scientist, was focused on restoration, not whether the activity was exempt from the Section 404 permit requirement. In terms of any asserted failure by Adams to comply with BMPs, Fromm's testimony offered nothing. She had only '*heard*' there were sculpin and minnows present at site. She also conceded that she is not a hydrologist, nor an engineer, nor a fisheries biologist. Tr. 516, 544.[41] None of EPA's other witnesses offered anything with regard to the BMPs.[42]

The Corps' regulatory implementation of the farm road exemption, 33 U.S.C. § 1344(f) of the Clean Water Act, appears at 33 C.F.R. § 323.4. Aptly titled "**Discharges not requiring permits**," it acknowledges that discharges of dredged or fill material resulting from normal farming of an established, on-going, operation, are not prohibited or otherwise subject to regulation under Section 404 of the Act. Among the exempt activities listed is the "[c]onstruction or maintenance of farm roads . . . where such roads are constructed and maintained in accordance with best management practices (BMPs) to assure that the flow and circulation patterns and chemical and biological characteristics of waters of the United States are not impaired, that the reach of the waters of the United States is not reduced and that any adverse

---

Respondent that there was even an issue about whether the Respondent's road crossing activity could be exempt from the CWA permitting process. Beyond these observations, in her testimony at the hearing, Fromm denied the restoration was then substantially complete, a conclusion that placed her at odds with her own counsel for EPA. Tr. 594. In fact she had to contradict herself on that issue, as her own report from her Dec 9, 2002 (first) visit to the site admits that some restoration had been done, as some silt fences were in place. EPA Ex. 21. Tr. 599. Pressed, she admitted that a double screen silt fence was present at the time of that initial visit, and that, per photos 16, 17, & 20, most silt screens were in place and leveling had been done. Tr. 614. In response to another question designed to show the effort the Respondent was making towards restoration, Fromm could only muster "I don't recall," when asked whether the seeding had been done in the fall of 2003. Tr. 656.

[41]Fromm asserted that there are aquatic organisms as found in the IDEQ survey. She learned this upon speaking with IDEQ's Mr Dave Hull, who is a water quality specialist. While Fromm stated that DEQ conducted a survey of Potter Creek, the survey was not made a part of the record. Further, the survey was conducted 200 feet below the crossing. Tr. 585. Fromm also acknowledged that her knowledge on this issue all comes from the IDEQ report. Tr. 586. Asserting that the survey found mayflies, stoneflies, beetles, bivalve species, all common invertebrates, and that each of them she have an aquatic stage in their life and they all migrate, their presence, as noted earlier, was only found *below the crossing.* Tr. 587. Further, again speaking from her unsupported opinion, while she expressed that it is *most likely* that there will be small fish in the stream such as minnows and sculpin, she agreed that there is no survey to support this belief. Tr. 588.

[42]These witnesses were Mr. Ervin Ballou, Mr. Terry Blau, and Mr. Roger Warner, all with the Idaho Dept of Water Resources.(IDWR).

impact on the aquatic environment will be otherwise minimized." The regulation goes on to list fifteen (15) "baseline" provisions which must be applied to satisfy the exemption. Most of these 15 provisions have not been asserted by EPA or the Corps as having been violated.[43] In fact, EPA does not *cite* to a *specific* provision, among the 15, as violated during Adams' activity in modifying the existing crossing.

While the Court has concluded that none of the 15 baseline provisions were violated, some warrant additional discussion. Paragraph (i), dealing with permanent roads, requires that such roads "be held to the minimum feasible number," and that the "width, and total length [be] consistent with the purpose of [the] specific farming . . . and local topographic and climatic conditions." Here, there is not legitimate contention that the road did not meet these requirements. Joyner admitted both that he had no idea how long that the existing road crossing had existed and that, contrary to Congress' expressed will in 33 U.S.C. § 1344(f) of the Clean Water Act, consideration of the fact of the existing crossing was not part of his investigation regarding Diamond T's activity or its application for a permit. Tr. 293. However, Joyner had stated that a factor considered by him was a determination of the area which would do the least amount of damage to the terrain. Tr. 294. However he skirted answering whether building up an existing crossing would be less intrusive that constructing an entirely new crossing, stating that it "would depend on the size of the road and the size of the previous road." *Id*. Ultimately however, he conceded that generally it is the Corps' preference that the number of crossings be minimized and by implication that it is better to build and improve an existing crossing, than to create a new one. Tr. 294

Although EPA claimed that the violation occurred because Adams' originally *planned* a road width of 100 feet, that contention has no merit because the actual constructed width, not original width *proposals*, is the only determinative factor. The CWA is concerned with actual harm to waters, not planned activities that never go beyond a paper proposal. Thus EPA's claim that the violation occurred by the mere fact that a wider road was proposed is a fatuity. The fact here is that the roadway in issue was 40 feet wide. The only testimony was that this actual constructed width was consistent with the specific farming, and the topographic and climatic

[43]For example, provision (xi), prohibiting discharge in the proximity of a public water supply intake, and provision (xii), prohibiting discharge in areas of concentrated shellfish production, clearly do not apply. Nor, by any stretch, do provisions (ii), (viii), (ix), (x), (xiii), (xiv), or (xv) apply. The Corps' Joyner agreed that the impact from the construction was minimal as the limited downstream sedimentation did not impact any drinking water supplies, fisheries, or recreational activities. Aesthetically, as the activity occurred on private property and it could not be viewed from any road, Joyner conceded that he knew of no economic activity adversely impacted by the work. Also, Joyner had no *personal* knowledge of any impact on wildlife using the crossing and he admitted that the Idaho Department of Fish and Game did not fine the Respondent. Tr. 305.

conditions involved.[44] Adams' witnesses explained that the farming equipment that would use the crossing needed that width and that, because of the steepness of the approaches and weather issues, the 40 foot width was the minimum to safely have its farm equipment use the improved crossing. No EPA witness claimed that a width less than 40 feet would suffice under these usage conditions.[45] Last, with respect to paragraph (i), neither EPA nor the Corps claimed that the road in issue was more than the "minimum feasible number."

Paragraphs (iii) and (iv), require that the road be culverted "to prevent the restriction of expected flood flows," and that the fill be properly stabilized during and following construction to prevent erosion. In this instance, the road crossing was culverted and there is no record evidence that the fill was not stabilized to prevent erosion. As to the latter, to that end Adams diverted the creek during construction. It is noted that EPA never had a witness explain how the road should have been constructed and, beyond that, how much less sedimentation would have occurred if the Respondent had followed such an alternative road construction plan.[46] Joyner agreed that the dam, unless it failed, would hold any sedimentation. The sedimentation soil came from the area immediately adjacent to the stream. Tr. 301-302. Thus he conceded that the soil was natural to the area. Joyner agreed that the impact from the construction was minimal. Further, Joyner agreed that siltation was the only degradation to the water quality that he was concerned about and this was limited to such siltation as would reach Marsh Creek. Tr. 299. However, his own testimony dispelled that worry as he stated that the sedimentation from the activity in issue ran not more than 200 feet below the crossing site. Tr. 301. Thus, sediment

---

[44]Joyner agreed that a 40 ft width was sufficient for the crossing instead of the 100' originally proposed. Tr. 341. However the Court concluded that he was evasive when asked if the road in fact did not exceed 40 ft, stating that he "didn't specifically measure the road surface on the top." Tr. 342. Slowly, he subsequently admitted that the road crossing's width was satisfactory. In stages, he agreed with the characterization that the road was "way short of 100 feet." Tr. 342 Then, still later, he agreed, upon looking at C's Ex 18, a photograph showing a Jeep on the road crossing, that the width in fact would be more like 40 feet. Tr. 344. Next, upon being directed to R's Ex 4, he agreed that it reflects the restoration plan that he requested and that it shows the road width to be 40 feet. Finally, he conceded that the *width* of the road was satisfactory from the Corps' standpoint.

[45]Although the absence of an alternative, reduced, width was fatal, EPA would've had to present evidence showing that the equipment Adams employed could still have safely traversed a roadway with a specifically identified smaller width. The record has no such evidence.

[46]A respondent cannot be required to prove a negative by having to establish that there are no other less intrusive means of constructing a farm road. In a situation analogous to EPA's burden in establishing a respondent's ability to pay a proposed penalty, once a respondent puts forth a modicum of evidence showing that it qualifies as a farm road (as conceded here by EPA) and that BMPs were applied, it is then up to EPA to present contrary evidence by showing how the road could have been constructed with less impact on waters of the United States, while still accomplishing its purpose of accommodating the farm equipment that will use it.

from the activity did not move far and never came close to reaching Marsh Creek.

Regarding paragraph (v), requiring that "[d]ischarges of dredged or fill material into waters of the United States to construct a road fill shall be made in a manner that minimizes encroachment of trucks . . . or other heavy equipment within waters of the United States . . . that lie outside the lateral boundaries of the fill itself," the record shows that Adams diverted Potter Creek to achieve that very purpose. So too, applying paragraph (vi) that vegetative disturbance in the waters of the U.S. be kept to a minimum, the record supports the conclusion that this was achieved. It bears repeating that EPA never countered with any expert who presented an alternative construction plan that would accommodate the farm equipment and yet would impact Potter Creek to a lesser extent than the activity which occurred here.

For paragraph (vii) and its requirement that the "design, construction and maintenance of the road crossing shall not disrupt the migration or other movement of those species of aquatic life inhabiting the water body," several evidentiary observations are apt. First, EPA presented no knowledgeable witness concerning species of aquatic life in the water body. Fromm had no first hand knowledge of the aquatic life, if any, in Potter Creek. All of Fromm's knowledge about aquatic organisms was derived from the IDEQ survey. Tr. 586. However, that survey was never made a part of the record. Instead, Fromm related only what she learned about this report from speaking with IDEQ's Mr Dave Hull who, she asserted, is a water quality specialist. Obviously Respondent's Counsel could not cross-examine Fromm about the report, as neither it nor its author were available to question. While one may deduce that the same organisms exist at the site of the crossing construction, no witness claimed that to be the case and the DEQ survey of Potter Creek was conducted 200 feet *below* the crossing. Tr. 585, 587. Although Fromm asserted that *the survey* found mayflies, stoneflies, beetles, and bivalve species, with her describing them as common invertebrates, each with an aquatic stage in their life and each migratory, her expressed concern, that the bugs and flies may not be able to go up and over the dam and as a consequence that the wildlife corridor was disrupted by the construction, is only uninformed speculation on her part. Tr. 587. So too, her expressed belief, that it is *most likely* that small fish inhabit Potter Creek, is only that, a belief, which the evidentiary requirements for proof in a hearing do not recognize. Nor does Fromm's view, insufficient as it is, address the fact that the crossing has *two* pipes running under it. One of those pipes, it is true, had an extension added to it but the other, lower, pipe was described by the Respondent's witness, Dr. Charles Brockway, a licensed professional engineer and hydrologist, who examined the standpipes, as essentially a flush bottom inlet to a pipe. That lower pipe, Brockway stated, carries flow of Potter Creek at *low* to moderate flows. Given that function, EPA was obligated to put forth evidence to contradict that the lower pipe functioned as a flush bottom inlet and could not operate to accommodate whatever common invertebrates, if any, actually do migrate in the creek.

Thus, on this record, with none of the 15 baseline provisions, as set forth at 33 C.F.R. §323.4(a)(6)(i) through (xv), having been violated, and with the other provisions of that section also inapplicable, as no toxic pollutant is involved in this case and there is no allegation that the Respondent was converting an area of the waters to a use to which it was not previously subject, it is concluded that the Respondent's activity was exempt from the CWA permitting provisions

per 33 U.S.C. § 1344(f) of the Clean Water Act.

II. Determination of the Applicability of the Clean Water Act to Potter Creek

A. The Parties' contentions regarding the applicability of the CWA to Potter Creek.

1. Respondent's contention that EPA failed to establish jurisdiction over Potter Creek as it failed to show a significant nexus between that Creek and navigable-in-fact waters of the United States.

Starting from the premise that Congress' jurisdiction under the CWA rests upon its authority to regulate "the channels of interstate commerce, or 'navigable waters,'" Respondent contends that for EPA to have jurisdiction over non-navigable waters, such as Potter Creek, it must establish that such waters are an "integral part of the nation's navigable-in-fact waterways." R's Br. at 15. Using EPA's statement of the connection between Potter Creek and the nearest navigable-in-fact waterway, the Snake River, the Respondent recites that Potter Creek flows into Marsh Creek, which in turn flows to the Portneuf River, then to the American Falls Reservoir before reaching the Snake River. Even then, the Snake River itself does not become navigable until 500 miles from that point, when it reaches Lewiston, Idaho. Under this view, Respondent maintains that Potter Creek has no such nexus, that is, no significant connection to navigable waters,[47] at the start of that chain, at the point where Potter Creek meets Marsh Creek.

While the Respondent states that EPA and the Army Corps of Engineers have asserted that the reach of the CWA captures all U.S. waters, regardless of their navigability or such waters' "legitimate potential to impact navigable-in-fact waters," it maintains that this claim ignores the requirement of navigability and that the Supreme Court recognized this in its *SWANCC* decision[48] by its "significant nexus" requirement. R's Br. at 17. According to the Respondent, that requirement means that it must be shown "that a discharge into the non-navigable waterway poses an actual, legitimate threat of environmental damage to jurisdictional waters." *Id.* It contends that such a showing does not exist here, as Potter Creek is "too tenuously, if at all, connected with navigable-in-fact waters ..." *Id*. Respondent concludes that to show jurisdiction under this test EPA must show by a preponderance of the evidence "that a discharge of dirt into Potter Creek poses an actual, legitimate threat to Marsh Creek." *Id*. at 18.

Applying this "legitimate threat" measure, Respondent contends that a number of facts dispel such a claim. It notes that Potter Creek does not *flow* into Marsh Creek by "any

---

[47]Respondent cites to *Solid Waste Agency of Northern Cook County v. The Army Corps of Engineers* ("*SWANCC*"), 531 U.S. 159, 174 (2001) for the proposition that non-navigable waters must have a significant nexus with navigable waters-in-fact for there to be CWA jurisdiction. R's Brief at 16.

[48]See n. 47, next above.

established channel, but [rather] dissipates into a hayfield. Even this, it contends, is rare, as the Creek runs dry in its lower reaches for most of the year, only making it to Marsh Creek during spring runoff, heavy rain events or through the result of irrigation. Most of the time the ditch simply ends several hundred feet short of Marsh Creek, with any water simply sinking or evaporating. *Id.* at 19. Thus, Respondent distinguishes its situation from those where a legitimate threat has been established.[49] Respondent points to *Rice v. Harken Exploration Co.*, 250 F.3d 264, 271 (5th Cir. 2001), as an example of an insufficient link where there was "no detailed information about how often the creek runs, how much water flows through it and when it does run, or whether it flows directly into navigable waters." *Id*. at 19. Respondent states that the evidence does not show a significant connection between Potter and Marsh Creeks and that EPA's attempt to show "head-cutting" at the edge of Marsh Creek is only speculation as there was no defined channel shown between the head-cutting and the terminus of Potter Creek ditch. It submits that any frayed thread of surface water between the creeks was not at all significant.

As a separate matter, Respondent objects to EPA's late attempt to claim that Potter Creek is a tributary to a protected wetland when it had only asserted that Potter Creek is a tributary to Marsh Creek. To support this assertion it points to the testimony of EPA witness Ervin Ballou, with IDWR, who stated that there were no wetlands issues involved. Tr. 484. Beyond that objection, Respondent states that what separates Potter and Marsh Creek is a hay field, not a wetland. As the field is regularly used for agriculture, its occasional saturation by flood irrigation does not transform it into a wetland. Nor does Respondent accept the claim of EPA's Joyner that the field is an "emergent wetland." As an evidentiary matter, Respondent asserts that Joyner's claim, based on unauthenticated maps, and with no ground evaluation to determine the actual soil conditions and vegetation, falls short of the necessary proof of the conditions. Further, even if the maps were accurate, per *U.S. v. Newdunn Associates*, 195 F.Supp. 2d 751, 767-68 (E.D. Va. 2002), it must be shown that the hay field was contiguous or adjacent to navigable-in-fact waters. As Marsh Creek is not navigable-in-fact, Respondent concludes that CWA jurisdiction of a hayfield does not exist.

2. EPA's contention that Potter Creek is a "Water[] of the United States."

EPA agrees that for the CWA to apply, the water involved, Potter Creek, must be shown to be "navigable waters," that is, "waters of the United States." It notes that the Corps defines that term in its regulations to include all interstate waters and their adjacent wetlands. 40 C.F.R. § 232.3. EPA points to the testimony establishing that Potter Creek is a tributary of Marsh

[49]Thus, Respondent contends that its situation is very different from cases where an irrigation canal carried a pollutant into jurisdictional waters, in amounts sufficient to kill fish or where dairy waste moved through a culvert into such waters, or where a drainage pipe admittedly emptied into jurisdictional waters. R's Br. at 19, case citations omitted.

Creek, which in turn flows into the Portneuf River, and then to the Snake and Columbia Rivers, before finally reaching the Pacific Ocean. EPA Br. at 9. It further notes that the record is replete with photographs and maps, as well as testimony from employees of the Corps and IDWR, that demonstrates that Potter Creek is a perennial stream. That evidence also shows that Potter Creek flows in its natural channel at the site of the Respondent's crossing construction, and while ditching has altered its flow in its lower portions below the site of the Respondent's activity, that does not change the fact that the record established that Potter Creek, albeit through sheet flow, connects to Marsh Creek in "a continuous path of water on the surface from Marsh Valley Road to Marsh Creek." *Id.* at 11. In fact, EPA's witnesses walked the applicable parts of the waters in question, beginning with the Corps' Ballou walking from the site of the Respondent's road crossing construction down to Marsh Valley Road and with IDWR's Terry Blau then walking the last part of Potter Creek where it meets Marsh Creek at Marsh Valley Road.

While EPA concedes that Potter Creek is not a large creek, and that there may be times when water may not flow through completely to Marsh Creek, that is not usually the case and, in any event, even intermittent streams are protected under the CWA. Further, it observes that the Respondent's own expert witness, Mr. Brockway, admitted that he observed surface water on wetland between Marsh Valley Road and Marsh Creek. *Id.* Beyond the water connections between Potter Creek and other linking waters, EPA notes that the "area between Marsh Valley Road and Marsh Creek is wetlands" and that such "adjacent wetlands are waters of the United States. *Id*. at 12, citing *United States v. Newdunn Associates, LLP*, 344 F. 3d 407 (4th Cir. 2003).

B. The Court's findings of fact and determination of applicability of the CWA to Potter Creek.

The Corps' Joyner, testifying with regard to EPA Exhibit 30, identified photographs taken at the affected site in May 2004. Based in part on that EPA exhibit and EPA Exhibits 1 and 31, Joyner's conclusion[50] was that Potter Creek flows directly into Marsh Creek and that this has been the case historically. Tr. 141. Joyner also expressed, per EPA Exhibit 31, the U.S.G.S. quadrangle for the lower portion of Potter Creek, and the National Wetlands Inventory maps, and the soil survey map for the same area, that Potter Creek[51] is a channel or waterway and there are

[50]EPA's evidence included testimony about the historic flow of Potter Creek to show that, before being altered by farmers creating ditches, the water was previously a natural channel that flowed directly from Potter Creek to Marsh Creek. Tr. 143.

[51] Joyner also identified Potter Creek on EPA Ex. 31, at page 2, as well as the emergent wetlands behind it. A separate area on the upper left-hand corner of the map, was also identified as an emergent wetland system. Such a system refers to plants that are emergent, that is to say, not submerged, in the water. Tr. 150-151. Joyner also referred to the Bannock County soil survey, which shows an area of hydric soils adjacent to Marsh Creek. Tr. 164. One such hydric soil he identified is Downata Bear Complex. Tr. 168-169. Hydric soil is one of three parameters to determine if an area is a wetland.

emergent wetlands along Marsh Creek. In addition, a National Wetlands Inventory map overlaying an aerial photograph, reflects Potter Creek's historic channel and depicts wetlands. EPA Exhibit 31, at page 3. The evidence also reflects that the historic channel of Potter Creek crosses Marsh Valley Road. Tr. 156. However, at its lower reaches, at some subsequent point in time, Potter Creek was moved out of its historic channel. Tr. 157. Joyner identified the site of the crossing in issue as located a mile or two above the site of the old dam and that Potter Creek runs the entire distance from the crossing to the old dam. Tr. 170. Below the old dam it flows in an artificial ditch. Tr. 283. Because he did not have access rights to continue following the Creek's course beyond Marsh Valley Road, Joyner's personal observations were limited to the area of Potter Creek from the construction location all the way down to where the flow of Potter Creek meets Marsh Valley Road. Tr. 282. He added that Potter Creek, from Marsh Valley Road and on top of the culvert at that location, is an artificial ditch that flows into the middle of a hayfield. Tr. 282. Per EPA Ex. 30, he stated that at the point where the ditched portion of Potter Creek ends, it no longer has an identifiable channel. Tr. 387

Asserting that, absent a drought, Potter Creek flows year-round, Joyner expressed his view that it was a spring-fed system. He stated that farmers draw water out of Potter for irrigation, with the downstream land owner taking water from the area where Potter reaches Marsh Creek. Tr. 178. Joyner agreed that, based on his personal observations, Potter Creek is an artificial ditch "at all locations below what [he] identified as the old dam."[52] Tr. 271. He stated that some distance downstream from the site of the crossing, Potter Creek spreads out, but that it continues with surface sheet flows. From that point it is not a single channel. Tr. 208. Joyner stated that the vegetation found along the Potter Creek stream corridor is typical wetland species: birch, alder, and dogwood[53] but, because the stream is nebulated, it also had some sages and grasses,[54] which are found in arid environments.[55] Tr 211-212, 287-288. An observation not to be discounted, Joyner stated that Potter Creek has been flowing every time he has visited it. Tr. 214.

---

[52]However, it is noted that Respondent's Counsel conceded, through a question he posed, that the location in issue in this litigation is not part of any artificial ditch. Tr. 279. Certainly, the evidence in this case only supports a finding that at the site of the activity in contention, Potter Creek flows in its natural channel.

[53]For example, Joyner observed alder and birch just below the area of crossing Adams' constructed.

[54]These trees grew within the approximate six foot width of the creek streambed. Tr. 288-289. Outside of that six foot band one would mostly find juniper and sagebrush, which are non-wetland species. Tr. 289.

[55]Although Joyner agreed that outside of approximate six foot width encompassing Potter Creek itself and its adjoining wetlands, one would mostly find non-wetland species such as juniper and sagebrush, this does not diminish, but rather emphasizes the importance of the adjoining wetlands, as it demonstrates how precious wetlands are in this area. Tr. 289.

Thus, based upon his site visits and research and review of information in his office, including National Wetland information, Joyner reached the conclusion that waters of the U.S. were involved. Tr. 325. He summed up his conclusions, stating that Potter Creek does flow by means of an identifiable channel to Marsh Valley Road and at that point it appears to fan out with surface flow across there. Further, along Potter Creek there are adjacent wetlands. Tr. 325-326.

Terry Blau, the IDWR stream channel protection specialist who visited the site with Joyner in May 2004 observed the area below Marsh Valley Road, where Joyner had lacked access rights. Tr. 433- 434. Having the access authority, Blau physically walked Potter Creek to Marsh Creek and he took photographs of his viewing, as reflected in EPA Ex. 30. Although it is true that, below the ditched portion, Potter Creek flows on the surface, through meadow grasses, the key point is that Blau observed the flow all the way to Marsh Creek.[56] Tr. 434-435, 442-443.

Respondent Adams, like Joyner, stated that Potter Creek leaves its natural channel above the old dam and enters an artificially constructed and maintained channel or ditch and continues in an easterly direction until it goes into an area below Marsh Valley Road. Tr. 680-681. While Adams stated that Potter Creek is all so small in width that it requires only a small step to cross it, he conceded that Potter Creek, downstream of its intersection with Shrives Creek, has a continuous flow and he acknowledged seeing water flowing under the culvert at the road and into the field to the east. Tr. 692, 697.

Although Respondent's witness, Dr. Charles Brockway a licensed professional engineer, believed that, after Potter Creek's flow enters the area of the old reservoir (i.e. the old dam), its water spreads out and sinks, and then either evaporates, or gets used up through the vegetation, the Court rejects this conclusion,[57] based on the overwhelming other evidence of record. Even

---

[56]While Blau agreed that it is *possible* that a *portion* of the water he observed could be coming from irrigation water at land adjacent to Adams' property, the possibility of a portion being so derived does not negate the substantial evidence of Potter Creek's flow to Marsh Creek. Blau had no doubts about this conclusion either. Tr.462, 469.

[57]Even if the Court were to accept Brockway's statement that at the time he visited the site in July of 2005, there was no Potter Creek water coming into the Marsh Creek area, this is not representative of its usual flow. Again, dams are not built and new dams are not contemplated for areas that do not produce water. Tr. 855. Thus, based on the record as a whole, the Court does not adopt Brockway's belief that the groundwater he observed was derived from Marsh Creek drainage, or from irrigation water from the west side of Marsh Valley Road, or from direct recharge from Marsh Creek, nor that water from the adjoining landowner's sprinkler systems would flow into Potter ditch, then under Marsh Valley Road, through one of the two culverts and out to wetlands or the pasture.

Brockway admitted to observing an identifiable channel connecting Potter Creek drainage with Marsh Creek.[58] Tr. 852. He also agreed that Marsh Creek is at a lower elevation than Potter Creek. Further, Dr. Brockway conceded that during his July 2005 visit there were 300 gallons a minute coming out of the natural channel of Potter Creek. Tr. 860. Even accepting his estimate that, after the old dam area, the flow of water from Potter was reduced to 100 to 150 gallons a minute, this is not a negligible amount of water, particularly in an area where water is scarce. Tr. 861. Further, Dr. Brockway conceded that if the flow is sufficient water from Potter Creek can reach Marsh Valley Road and that it is possible that there could be a natural flow from Potter Creek flowing under Marsh Valley Road. Tr. 891, 894-895. With Respondent Adams' employee Wheatley conceding that the flow of Potter Creek is "fairly constant," it is found that all of the Respondent's witnesses essentially admitted that Potter Creek, albeit in a course that has been altered over time, flows perennially, and reaches Marsh Creek.[59] Tr. 919.

Accordingly, based on the substantial evidence of record, the Court finds that Potter Creek is a perennial stream which is connected, hydrologically, to Marsh Creek and is a water of the United States.

C. The Supreme Court's decision in *Rapanos v. United States*, 126 S.Ct. 2208 (2006).

Subsequent to the hearing in this matter, the United States Supreme Court heard two cases involving the breadth of the Clean Water Act. Those cases were consolidated by that Court and both cases were remanded for further proceedings.[60] This Court has reviewed the Supreme Court's decision in *Rapanos* and it has also considered the post-hearing filings submitted by the parties in this litigation, offering their views on the effect and impact of the

[58]Although the Court rejects the contention that Potter Creek plays no part of the water which travels under Marsh Valley Road to Marsh Creek, and therefor rejects the idea that the flow is all attributable to water from the sprinkler system of the adjoining landowner, the two sources of water are not mutually exclusive. Tr 458-459.

[59]See, for example, photograph of Potter Creek sheet flow collecting and entering Marsh Creek, EPA Ex 30, photo 7. Tr. 444, 449-450.

[60]The other case consolidated with *Rapanos* is *Carabell v. United States Army Corps of Engineers*, No.04-1384. *See* 257 F.Supp.2d 917 (E.D. Mich. 2003)

Rapanos decision here.[61] For the reasons that follow, the Court determines that the *Rapanos* decision has no effect upon this case.[62]

As it pertains to the decision here, there are two key observations to be made about the Supreme Court's recent decision in *Rapanos*. The first is that the decision was a plurality opinion. The effect of that outcome, with four justices reading a more restrictive view of the breadth of the Clean Water Act and four justices holding to a less restrictive view, is that the swing vote, that of Associate Justice Kennedy is, for now, the only opinion that matters. The second point is that the *Rapanos* decision focused on wetlands. Although the matter here included wetlands issues, it is significantly distinguishable because the thrust of the case involved the discharge of dredged or fill material directly into a stream, i.e. Potter Creek.[63]

With the appreciation that Justice Kennedy's insightful observations about the Clean Water Act represent the more significant lessons to be drawn from the *Rapanos* decision, the Court makes the following comments about that decision. As Justice Kennedy notes, the consolidated cases involve "whether the term 'navigable waters' in the Clean Water Act extends to *wetlands* that do not contain and are not adjacent to waters that are navigable in fact." 128 S. Ct. 2208, at 2236 (emphasis added). Justice Kennedy notes that the term 'navigable waters' has been interpreted by the Supreme Court in *United States v. Riverside Bayview Homes*,

---

[61]The review of the parties supplemental post-hearing briefs, includes EPA's conclusion that *Rapanos* permits two tests to determine CWA jurisdiction – "the plurality's 'relatively permanent body of water' test and Justice Kennedy's 'significant nexus' test" and EPA's assertion that Potter Creek meets the plurality's test, as distinct from Justice's Kennedy's test. EPA Supp. Br. at 11-12. The Court comments that EPA's description of a 'plurality's test' is without meaning, as that 'test' was expressed by only four members of the Supreme Court. As for the Respondent's Supplemental Post-hearing Brief, the Court takes cognizance of Adams' argument that the "plurality narrows the definition of 'waters' and restricts jurisdiction over wetlands to only those with a 'continuous surface connection,' . . . [and Adams' contention that] Justice Kennedy['s] [concurrence] further qualifies the 'significant nexus' requirement." R's Supp. Br. at 8-9. The same observation made by the Court regarding EPA's contentions is applicable to those made by the Respondent. The reader is referred to the Court's analysis of the decision in the body of this decision.

[62]While Justice Kennedy concurred with the plurality's judgment, it could not have been a more limited concurrence, as it concurred only with the conclusion that the cases should be remanded for further proceedings. If there was any doubt about this, one only need consult Justice Kennedy's statement that "[i]n sum, the plurality's opinion is *inconsistent with the Act's text, structure and purpose*." *Rapanos* at 2246.

[63]This distinction should not be interpreted as inferring that the discharge of material into wetlands is a less significant threat to waters of the United States. It is mentioned because it is a factual distinction from those addressed by the Supreme Court in *Rapanos* and because it is a more direct form of intrusion into waters.

Inc. 474 U.S. 121 (1985) ("*Riverside Bayview*") and in *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"). From these, Justice Kennedy noted the long-established principle that an "agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." *Rapanos* at 2240. Applying that principle the Supreme Court has held that "the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act." *Id.* quoting 474 U.S., at 134. Although in *SWANCC*, the much discussed decision involving the migratory bird rule and its application to an isolated pond, the Court rejected the Corps' interpretation that such a pond constituted navigable waters, Justice Kennedy notes it was the lack of a 'significant nexus' between the pond and navigable waters that drove the outcome, just as the presence of the required 'significant nexus' caused the Court to uphold the Corps' jurisdiction in *Riverside Bayview*, because its interpretation was reasonable. *Rapanos* at 2241.

Justice Kennedy notes that the plurality acknowledges that it was part of Congress' intent to "regulate at least some waters that are not navigable in the traditional sense [of that word]." This conclusion was based on the recognition that Congress' concern was directed to the "protection of water quality and aquatic ecosystems." *Id*. at 2241, quoting *Riverside Bayview.* Thus, Justice Kennedy recognized that Congress' intended meaning for navigable waters was broader the literal words[64], rejecting the plurality's new construction of the term as at odds with the Act's concern with downstream water quality.[65] Further, he submits that nothing in the CWA suggests that Congress intended to exclude irregular waterways and thus he rejects the plurality's assertion that a waterway must have permanence.[66]

Beyond Justice Kennedy's review of the purpose of the CWA and the consequent rejection of the narrower view of navigable waters, he also departed from the plurality's view that wetlands need to have a continuous surface connection for CWA jurisdiction. Accordingly, Justice Kennedy noted that, because of adjacency, a bog, swamp or other nonnavigable wetland

---

[64]As Justice Kennedy aptly expressed it, "the Act contemplates regulation of certain 'navigable waters' that are not in fact navigable. *Rapanos* at 2247.

[65]However, it is worth noting that, as applied to *Adams*, the case at hand, even the plurality would apply the term to Potter Creek because it is a "relatively permanent . . . flowing bod[y] of water" and, at a minimum, the Creek here fits as a "seasonal river," that is, a river that "carr[ies] water continuously except during 'dry months,'but [is] not [an] intermittent or ephemeral stream[]." *Rapanos* at 2242.

[66]Here again it is noted that *Adams* would fit the plurality's more restrictive view, because Potter Creek, except in unusual circumstances, runs year-round. As the prior, now defunct, dam at the site reveals, and with Adams' acknowledgment that he at least entertained the idea of having a pond at the site of the crossing, people do not construct dams or contemplate doing so, where there is insufficient water to do so.

may be a navigable water, per the holding in *Riverside Bayview*, even for wetlands "that are not significantly intertwined with the ecosystem of adjacent waterways," where the Corps reasonably concludes that such "adjacent wetlands have significant effects on water quality and the aquatic ecosystem." *Rapanos* at 2244.

Thus, Justice Kennedy recognized the complexity of our water systems, rejecting the notion that the various waters of the United States are discrete bodies with no particular interrelationship. He also took note of the "aggregate effects [of wetlands] on national water quality," observing that "[s]cientific evidence indicates that wetlands play a critical role in controlling and filtering runoff." *Id*. at 2246-2247. Accordingly, while he acknowledged that a significant nexus must be established between wetlands and the traditional sense of the term navigable waters, that determination is complex, not simplistic, as it must be made in the context of assessing the Clean Water Act's goals and purposes. For that reason, a given wetland may have the required nexus, either by itself, or by its "combination with similarly situated lands in [a] region, [where the wetlands] significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id*. at 2248.

With the foregoing discussion in mind and without the necessity of evaluating the particular wetlands involved in this case, the Court concludes that, based on the nature of, and activity in, Potter Creek alone, the Clean Water Act clearly applies to the facts of this case. Nothing in *Rapanos* instructs otherwise. Accordingly, on the basis of the evidentiary record, the Court concludes that Potter Creek undeniably has a significant nexus with navigable waters of the United States.

III. The Court's Determination that Adams is a properly named Respondent

Although the Court dealt with this issue, briefly, at the start of the hearing, it allowed the parties to submit further briefing on the issue in their post-hearing briefs. In its remarks the Court noted that the CWA defines a "person" as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. § 1362(5). There could hardly be an more encompassing definition.

Significantly, Respondent cites no cases to support its contention that EPA may only look to Diamond T. Ranch, LLC for liability, nor its view that the action may only be brought against the "real party in interest," a term not found in the definition of "person." R's Brief at 33. Nor has Respondent called to attention elsewhere in the CWA the presence of the term "real party in interest." On the other hand, EPA has cited to cases supporting the construction. For example, in *United States v. Frezzo Bros. Inc.*, 602 F.2d 1123, 1130 (3d Cir. 1979), a criminal case, that court referred with approval to the "responsible corporate office doctrine." So too, in this Court's decision *In re Waterkist, Inc. and Thomas Waterer*, Docket No. 10-2003-0007 (ALJ January 28, 2004), it was noted that personal liability was premised on the individual's

"responsibility, control, participation and knowledge of the alleged violations" by the corporation. This Court concluded that given the individual's "level of responsibility and authority at the facility . . . [he could] be held jointly and severally liable [along] with Waterkist [Corporation]."

This determination requires little discussion. Adams is the *managing member* of Diamond T Ranch. He testified that in early 2001, he drew up the design for the crossing. Further, he admitted that he authorized and was "certainly responsible" for the work, as manager of the Diamond T Ranch. Tr. 708. The Court concludes that Adams is within the ambit of the term "person" under the CWA and is a properly named respondent in this proceeding.

Conclusion

On the basis of the foregoing, the Court concludes that liability was not established and accordingly this matter is hereby DISMISSED.

SO ORDERED.

_____
William B. Moran
United States Administrative Law Judge

Dated: October 18, 2006
Washington, D.C.