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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)
)
Urban Drainage and Flood Control District, and) Docket No. CWA-VIII-94-20-
PII)
Kemp & Hoffman, Inc.)
)
Respondents)

INITIAL DECISION

Pursuant to Section 309(g) of the Clean Water Act ("CWA"), 33 U.S.C. §1319(g), the Respondent Urban Drainage and Flood Control District is assessed a civil penalty of \$75,000, and the Respondent Kemp & Hoffman, Inc., is assessed a civil penalty of \$5000 for discharging fill into waters of the United States without having obtained a permit pursuant to Section 404 of the CWA, 33 U.S.C. §1344, constituting a violation of the CWA §301(a), 33 U.S.C. §1311(a).

By: Andrew S. Pearlstein, Administrative Law Judge

Dated: June 24, 1998, Washington, D.C.

Appearances

For Complainant:

Elizabeth Suter Bohanon, Esq.
Enforcement Attorney
U.S. EPA Region 8
Denver, Colorado

For Respondents:

Edward J. Krisor, Esq.
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Denver, Colorado

Proceedings

The Region 8 Office of the United States Environmental Protection Agency (the "Complainant" or the "Region") filed an administrative Complaint, dated May 4, 1994, against three respondents. The first respondent, the Urban Drainage and Flood Control District (the "District"), is an independent government agency headquartered in Denver, Colorado, that assists local governments in the Denver metropolitan area in drainage and flood control projects. The second respondent, Kemp & Hoffman, Inc. ("Kemp & Hoffman"), is an earthmoving and construction company located in Northglenn, Colorado. The third respondent was the City of Lafayette, Boulder County, Colorado (the "City"). The Complaint charged those respondents with discharging fill into a navigable water of the United States, Coal Creek, on property owned by the City without having obtained the permit required by the Clean Water Act ("CWA") §404, 33 U.S.C. §1344. The Complaint alleges that this activity constituted a violation of the CWA §301(a), 33 U.S.C. §1311(a). The Complaint proposed assessment of a class II civil penalty of \$125,000, jointly and severally, against the respondents for this violation, pursuant to the CWA §309(g), 33 U.S.C. §1319(g).

The respondents filed their respective Answers to the Complaint on or about May 31, 1994. The Answer of the District denied liability for the violation on the basis that the site of the activity on Coal Creek was exempt from the individual permit requirement under the CWA §404, as within the stream's "headwaters" area. The Answer of the Kemp & Hoffman (originally represented by different counsel than indicated above) denied liability primarily on the basis that the District alone was responsible for CWA permitting compliance. The respondents also contested the amount of the proposed penalty, in the event a violation is found.

The Answer of the City also denied responsibility for any violation. On February 14, 1995, the former Administrative Law Judge ("ALJ") assigned to this case, Hon. Frank W. Vanderheyden, granted a motion for accelerated decision by the City, dismissing the City of Lafayette as a respondent in this proceeding. In an order dated December 19, 1996, the undersigned ALJ denied the District's and Region's respective motions for accelerated decision.

The hearing in this matter convened before ALJ Andrew S. Pearlstein in Denver, Colorado, on July 9-11 and July 30, 1997. The Region produced seven witnesses. The respondents jointly also produced seven witnesses. The record of the hearing consists of a stenographic transcript of 761 pages, and 59 numbered exhibits, of which 56 were received into evidence. The ALJ, along with respective counsel and an additional representative of the Region and District, also visited the site of the alleged violation, and the locations of the Corps of Engineers' stream gauge and headwaters point on Coal Creek, on the morning of July 11, 1998. The parties each submitted post-hearing briefs and reply briefs. The record of the hearing closed on December 12, 1997, upon the ALJ's receipt of the reply briefs.

Findings of Fact

- Background and Chronology of Events

1. The Urban Drainage and Flood Control District (the "District") is an independent governmental agency of the State of Colorado, headquartered in Denver, Colorado. The District was established by the Colorado legislature in 1969 to assist local governments in the six-county Denver metropolitan area in the planning, construction, restoration, and maintenance of drainage and flood control facilities. The District is funded by a real property tax levy on property in its jurisdiction. In 1997, the District had assets of approximately \$10 million, most of which was in cash. (Ex. 1, p. 1; Tr. 271-272, 730). ⁽¹⁾

2. In the fall of 1992, representatives of the City of Lafayette (the "City"), located in Boulder County about 20 miles north of Denver, asked the District for help in stabilizing an eroding stream bank along Coal Creek. The City

feared the erosion was encroaching on a fence bordering the City's storage and maintenance facility, known as the City of Lafayette "shops", situated adjacent to Coal Creek. The City's property includes the entire affected area in and along Coal Creek. After a visit to the site, the District agreed to place this project on its work program for 1993. (Ex. 51; Tr. 628).

3. Coal Creek at that location flowed in a meander or oxbow curving northward and then eastward and southeastward toward the City shops. The unstable north and northeast bank of the meander was about 7 to 10 feet high. Over the years, the City had dumped concrete, asphalt, and rubble materials into the bank in an effort to slow erosion. Since at least 1982, Coal Creek's course had extended further northward in the meander below the City shops, accelerating erosion of the stream bank. (Exs. 24, 24-A; Tr. 357, 635).

4. In March of 1993, David Bennetts, the District engineer assigned to this project, visited the site with the District's project inspector, Mike Sarmiento. The parties desired to complete the project before the late spring high runoff began. The project was first envisioned to encompass regrading and rip-rapping about 400 feet of the eroding north bank of Coal Creek adjacent to the City shops. However, upon further inspection of the site, Mr. Bennetts observed a relatively clear swale area or depression, about 210 feet long, that appeared to be a former channel of Coal Creek. He determined that redirecting Coal Creek into this swale would cut off flow into the meander, thus solving the erosion problem. Mr. Bennetts and Mr. Sarmiento also felt that this alternative would involve less earthmoving and disruption to the site as a whole, than would regrading and rip-rapping the eroding bank. The District's chief of its maintenance program, Mark R. Hunter, concurred in this decision. The project was thus converted in the field from a bank stabilization to a channel relocation project. (Tr. 629, 635, 638, 678-679, 684-685).

5. The project was then constructed from March 17, 1993 until April 8, 1993, by redirecting the flow of Coal Creek into the swale or apparent former channel. The District contracted with Kemp & Hoffman, Inc. of Northglenn, Colorado ("Kemp & Hoffman"), to perform the excavation and construction work. Kemp & Hoffman performed the work completely under the direction and control of the District. (Ex. 56; Tr. 715).

6. Kemp & Hoffman is a small construction company, with from 20 to 70 employees. The number of employees fluctuates seasonally with the company's work load. As of December 1996, the company was in a solid financial position, with a net worth of over \$750,000, and assets of \$400,000, of which \$250,000 was in cash. Kemp & Hoffman had sales of over \$4.8 million in 1996. However, Kemp & Hoffman anticipates that its receipts in 1997 and 1998 could be substantially reduced if and when its major client, Total Petroleum, is acquired by another company, as expected. (Ex. 19; Tr. 278-279, 717-720).

7. Kemp & Hoffman first placed a 42-inch pipe in Coal Creek, and built a ramp across the creek. The ramp was built with fill supplied by the City of Lafayette. Mr. Bennetts, with the assistance of Mr. Sarmiento, then determined the alignment, width and depth of the new channel. Kemp & Hoffman constructed the new channel as directed, excavating it to a depth of about 18 inches, and a width of 10 to 15 feet. Coal Creek was then allowed to flow in the new channel. Kemp & Hoffman then removed the culvert and constructed a 250-foot long earth berm along the new alignment, and installed rip-rap along the new channel banks. The berm varied in height from 3 to 9 feet, and was 8 feet wide at the top. Two 18-inch high drop structures were installed in the new channel. Finally, the disturbed areas were tilled and planted with a native seed mix. The placement of the diversion berm entailed the discharge of approximately 45 cubic yards of fill below the ordinary high water mark of Coal Creek. Counting the riprap and drop structures, the total fill placed in the creek was approximately 238 cubic yards. (Exs. 49, 56, 31-p.4; Tr. 630-633, 659-660, 663-664, 693).

8. The Respondents' actions in cutting off the oxbow, and straightening and shortening the Coal Creek channel eliminated 210 linear feet of natural

benthic habitat. The placement of the berm at either end of the oxbow eliminated about 2350 square feet of wetland, although potential new wetland area was created along the banks of the new channel. An area at the lower end of the meander was covered with side-cast material from the excavation of the new channel. The project actually directly disturbed a total area of approximately a quarter of an acre or 10,000 square feet. The total area potentially adversely affected by the project included adjacent areas such as the area within the curve of the oxbow, and covered approximately three-quarters of an acre, or 30,000 square feet. (Exs. 9, 25; Tr. 590-592).

9. The project (without mitigation) reduced the overall quality of wetland and upland riparian vegetation in the reach of Coal Creek adjacent to the City of Lafayette shops. There was a net loss of wetland and upland vegetation, and of natural stream channel and banks, due to direct land disturbance and the channel realignment. The loss of vegetative cover reduced the value of the site for wildlife habitat. Left unmitigated, the abandoned channel and adjacent wetland areas would continue to experience long-term adverse effects and a succession to drier conditions. (Ex. 24, p. 13; Tr. 386, 391, 584-586).

10. Under Section 404 of the Clean Water Act ("CWA"), persons who discharge fill into a water of the United States must obtain a permit for the proposed activity from the United States Army Corps of Engineers (the "Corps"). Certain categories of activities are covered under nationwide or regional permits, which do not generally require advance notification and a permit application to the Corps. Examples are Nationwide Permit 13, which applies to bank stabilization projects, and Nationwide Permit 26, which applies to projects in headwaters or isolated waters. To qualify for these nationwide permits, the projects must not exceed certain threshold criteria and must comply with general conditions to minimize environmental impacts. Project sponsors must apply to the Corps for issuance of individual permits for projects not authorized by nationwide or regional permits. (33 CFR Parts 320-330; Tr. 60-64).

11. Individual permits may be issued, issued with conditions, or denied, after public notice and comment by interested persons and agencies. The Corps may also issue "after-the-fact" individual or nationwide permits, in consultation with the EPA, after a person is discovered to have conducted an activity in a water of the United States without proper authorization under one of these permit programs. (33 CFR Parts 320-330; Tr. 60-64).

12. The District had extensive contact with the Corps during the years preceding these events. The District had built hundreds of projects in the Denver area requiring either individual §404 permits or nationwide permit authorization from the Corps. The District's usual practice was to seek an advance concurrence from the Corps that a proposed activity would be covered by a nationwide permit. The District was familiar with the Corps' permit programs, since its chief business involved projects to improve drainage and flood control facilities, which entailed regular contact with the Corps of Engineers. (Exs. 6, 21; Tr. 65-66).

13. Prior to the events that are the subject of this proceeding, the District had never been formally charged with a violation of the Clean Water Act. The only prior enforcement incident with the Corps occurred in 1987. In that year, the District obtained an after-the-fact permit for emergency bank stabilization work it had done on the South Platte River. Before this proceeding, Kemp & Hoffman had never been charged with a violation of the Clean Water Act. (Ex. 5; Tr. 716, 748).

14. The District did not seek or obtain a CWA §404 individual permit, or a nationwide permit concurrence, from the Corps before beginning construction of the Coal Creek channel realignment at the City of Lafayette shops property. Kemp & Hoffman did not contact the Corps concerning this project at any time. (Ex. 1, ¶26).

15. The District had worked often over the preceding 17 years with Kemp & Hoffman, one of its regular contractors. In these projects the District was responsible for obtaining all necessary federal permits, such as Section 404 permits from the Corps. Kemp & Hoffman was responsible for obtaining any necessary local permits, such as road crossing rights-of-way. The contract between the District and Kemp & Hoffman provided that the contractor was responsible for obtaining all required permits and authorizations, "unless otherwise provided by the District". At the beginning of the job, Mr. Sarmento had told Calvin Hoffman, Kemp & Hoffman's vice-president and general manager, that the District had obtained the required CWA permit for the project. (Exs. 1, 56; Tr. 713, 723).

16. On April 2, 1993, a local resident telephoned the Corps' Tri-Lakes office to register a complaint and ask if a permit had been obtained for the work he observed being done in Coal Creek at the City of Lafayette shops site. By this time, the channel relocation had been essentially completed. The complaint was received by Sandra Laney of the Corps' Tri-Lakes office in Littleton, Colorado. On April 6, she telephoned Mr. Bennetts of the District. Mr. Bennetts told her that the project was for bank stabilization at the site, without making it clear that the channel was also relocated. When Ms. Laney visited the site on April 7, she observed, to her surprise, that the channel had been relocated, and that the stabilized banks were along the new channel. (Ex. 3; Tr. 40).

17. Ms. Laney then again telephoned Mr. Bennett, and informed him that the project did not appear as previously described to her. She told him that an after-the-fact individual permit would likely be required. Mr. Bennetts indicated that paperwork requesting a nationwide permit concurrence had been sent to the Corps. A letter to that effect, with attachments, dated April 7, 1993, was sent by Mr. Bennetts to Terry McKee of the Corps. (Exs. 3, 4; Tr. 642).

18. Ms. Laney then referred this matter to her supervisor, Timothy Carey, manager of the Tri-Lakes Corps office. After consultation with his supervisors in the Corps' district office in Omaha, Nebraska, that office sent a letter, dated May 11, 1993, to the District's Executive Director, L. Scott Tucker. The letter stated that the investigation of the Coal Creek project showed that the District had failed to comply with the Clean Water Act by undertaking this project without having obtained an individual §404 permit. The letter also declared that the project site was downstream of the creek's headwaters area and therefore did not qualify for a nationwide permit. It further appeared that the project would not have complied with the CWA §404(b)(1) guidelines, since the alternative chosen, cutting off a stream meander, was not the least environmentally damaging means to accomplish the project's purpose. Therefore, the letter concluded by ordering the District to restore the project area to preexisting conditions within 45 days of receipt of the letter. The Corps notified the EPA of this matter by sending Region 8 a copy of this letter/restoration order as provided by the CWA §309. (Ex. 9; Tr. 106-112).

19. Mr. Tucker responded on behalf of the District in a letter to Mr. Carey dated June 23, 1993. The District acknowledged its error in not securing the required permit, but appealed the restoration order. The District requested an on-site meeting to consider alternative mitigation plans to restore lost environmental benefits to the site as a whole, without having to restore the site to preexisting conditions. (Ex. 10).

20. Representatives of the District, the Corps, the City, and the Region met at the Coal Creek site at the City of Lafayette shops on July 1, 1993. The Region confirmed that the District had realigned the Coal Creek channel at that location. At that meeting, and at follow-up meetings held over the next few months, the parties discussed mitigating and resolving the project's apparent violation of the Clean Water Act. As a result of those meetings, the District retained a consultant, Greenhorne & O'Mara, Inc., to prepare a detailed report. The report, dated October 1993, included a discussion of the site history and of the restoration and mitigation alternatives for redressing

the situation. (Exs. 21, 23, 24; Tr. 308-310, 330-338).

21. The Greenhorne & O'Mara report recommended a mitigation plan that would restore hydrology to the cut off oxbow, while enhancing wetland vegetation in the area. This alternative would allow the realigned channel to remain, thus resolving the erosion problem along the north bank bordering the City shops, with minimal impact to the Coal Creek stream system. The report included aerial photographs that showed the migration of Coal Creek into the meander, and increasing erosion, coinciding with increased development of this part of Boulder County in the early 1980's. (Ex. 24).

22. During the ensuing months, the District continued discussions and correspondence with the Region and the Corps concerning those agencies' enforcement responses and the proposed mitigation work. The EPA Region 8 office had at this point assumed lead agency status in the enforcement proceeding pursuant to its agreement with the Corps. The basic outline of the proposed mitigation plan remained as set forth in the Greenhorne & O'Mara report. The Region expressed its desire for several additional enhancements, including additional planting of willows, and creation of additional wetland area. The District responded to those items in a letter dated December 3, 1993, and filed its responses to the Region's information request on January 21, 1994. The District stated it was willing to construct the additional enhancements, in return for some consideration in the penalty assessment. (Exs. 16, 58; Tr. 352, 688-689).

23. The Region's next official response was the filing of a Findings of Violation and Administrative Order for Compliance on March 14, 1994. This document ordered the District to either restore the site or apply to the Corps, after EPA review, for an after-the-fact permit that would include the mitigation plan. The District responded with a notification that it would apply for the after-the-fact permit. The District submitted its draft permit application for EPA review on April 21, 1994. The EPA responded with comments on April 28, 1994. The District then submitted the application formally to the Corps, which published the required public notice on May 31, 1994. The Region submitted additional comments on June 28, 1994. The Corps issued the after-the-fact permit to the District on September 30, 1994. Also during this period, on May 4, 1994, the Region filed its Complaints seeking an administrative penalty against the respondents in this matter. (Exs. 26, 27, 28, 29, 30, 31, 59).

24. The after-the-fact permit authorized the completed realignment of Coal Creek, and required the District to carry out the basic mitigation plan as proposed in the Greenhorne & O'Mara report, in addition to several conditions proposed by the Region in its comments. The original basic mitigation plan required installation of a rock grade beam and culvert with a slide gate to allow a trickle flow from the creek into the former channel meander. Regrading of the downstream end of the meander, at its confluence with Coal Creek, was required in order to allow ponding in that area. The permit also required the District to regrade and riprap a rundown, or small drainage channel, leading from the City shops into the oxbow area. (Ex. 31).

25. The permit also ordered the District to comply with several additional components and conditions that were proposed by the Region in its comments. The additional required mitigation included the removal of concrete rebar and asphalt rubble from the banks of the old alignment; the planting of live willow stakes along the banks of the creek; and the lowering of a mixed upland area between the old and new channels to allow additional ponding and wetland enhancement. The permit also included several special conditions proposed by the Region. These included a requirement for a monitoring period of at least 3 years or until the site met success criteria of an 80% survival rate for plantings, 85% wetland species coverage, and maximum 10% occurrence of noxious weeds. The District was required to submit annual reports to the Corps documenting the progress of the mitigation areas. Finally, the permit required that a deed restriction be placed on the property to prevent any man-made activities that could damage or eliminate the mitigation wetlands on the site.

(Ex. 31).

26. Following issuance of the permit, the District initially took the position that it should not proceed with construction of the mitigation project until the deed restriction had been recorded by the City of Lafayette, the owner of the land. The Region urged the District to proceed without waiting for the City to record the restrictive covenant. The Region and District were aware that the City's legal staff was working on the deed restriction language in late 1994 and early 1995. The District then proceeded to perform the mitigation work in March of 1995, although the deed restriction had not been recorded. This was the next suitable time window for successful planting of willows and wetland vegetation, before high runoff later in the spring. The deed restriction still had not been recorded as of the dates of the hearing in July 1997. (Exs. 31, 32, 33, 34; Tr. 368-374, 406, 708-711).

27. Since the completion of the basic mitigation work in March 1995, the District has continued to maintain and monitor the site as required by the after-the-fact permit. The basic purposes of the mitigation plan - to restore water into the oxbow channel and to enhance wetland benefits at the site - have been fulfilled. A perennial flow of water has been restored to the natural oxbow channel. Wetland species have become well established in the oxbow channel and the enhanced wetland between the old and new channels. The current site with the mitigation work now contains more area of wetland than it did before the District began the realignment project in 1993. (Exs. 17, 25, 36; Tr. 602-603, 667).

28. Several components of the mitigation plan have not been fully successful. The chief problems have been the survival rate of the willow stakes along the realigned channel, and the invasion of noxious weeds in the upland area at the top of the bank along the fence line. The District planted about 900 willow stakes initially in 1995, and an additional 450 in 1996. High spring flows in Coal Creek and shading by wetland vegetation prevented some areas of willows from growing. The willow survival rate has not met the 80% survival rate criterion as of the summer of 1997. However, under normal conditions, five growing seasons are required for willow communities to establish themselves optimally. (Exs. 17, 36; Tr. 386-390, 593-600, 617, 671-674).

29. Weeds, such as Russian thistle and knapweed persist in the upland area along the top of the bank near the fence line. It is likely that these weeds have germinated from seeds blown in from off the site. The District has been mowing this area at times recommended by its consultant, to suppress weed growth. (Exs. 17, 36; Tr. 388-390, 595-596).

30. The District has continued active maintenance of the mitigation site. In addition to mowing weeds in the upland area, these activities include maintaining the slide gate to the oxbow, removing debris, and monitoring the growth of wetland vegetation. (Ex. 17).

31. The cost to the District in constructing the mitigation project at the site was about \$35,000. The District incurred annual site maintenance costs in 1996 of about \$6500, of which about \$2000 is expected to be recurring. If those expenses are considered to have been deferred from the time of the original construction in March 1993, the District realized an economic benefit from such deferral of approximately \$10,500 as of December 1997. The District paid Kemp & Hoffman about \$37,500 for its work in performing the original channel realignment work, of which Kemp & Hoffman retained about \$1450 as its profit. If that is considered a wrongful profit obtained in March 1993, its present value in December 1997 would be about \$2500. The combined economic benefit to the respondents as a result of the Coal Creek realignment, under this analysis, was thus approximately \$13,000. (Exs. 16, 17, 18, 20; Tr. 256-267).

- Hydrology and Headwaters of Coal Creek

32. In its Answer to the Complaint, filed on May 31, 1994, the District took

the position that the City of Lafayette shops site was above the "headwaters" point on Coal Creek, as that term is defined in the Corps' regulations at 30 CFR §330.2(d). The District thus asserted that the Coal Creek project did not require an individual CWA §404 permit, since the discharge of fill in headwaters is authorized by Nationwide Permit 26. The District took this position after investigation by its engineering consultant, Kenneth Wright, P.E., indicated to the District that there was a reasonable possibility that the average flow in Coal Creek at the site was less than 5 cubic feet per second ("cfs"). This information led the District to reverse its earlier acknowledgments, in correspondence to the Corps (dated June 23, 1993), and at a District Board of Directors meeting (on September 16, 1993), that it had failed to obtain the proper permit, and that Coal Creek at that location was in fact a "5 cfs" stream. (Answer of District, ¶32; Exs. 10, 41; Tr. 456-461).

33. Coal Creek originates on the east slope of the Front Range of the Rocky Mountains about 20 miles southwest of Lafayette. Beginning in small feeder creeks at elevations ranging up to 10,000 feet above sea level, it flows southeastward about seven miles through the mountains and foothills in a narrow canyon. It then leaves the mountains in the vicinity of a location known as Plainview, at an elevation of 6540 feet. The course of Coal Creek then turns generally northeastward across the rolling high plains of Colorado between the cities of Boulder and Denver. It passes the community of Louisville, and then, some 13 miles after its exit from the mountains, reaches the City of Lafayette shops site at an elevation of 5230 feet. Downstream, Coal Creek is tributary to several other creeks, which, in turn, are tributary to the South Platte River. The South Platte River flows into Nebraska, where it joins the North Platte River, forming the Platte River. The Platte flows into the Missouri River near Omaha. The Missouri is the largest tributary to the Mississippi River, joining it near St. Louis. The Mississippi River flows into the Gulf of Mexico south of New Orleans. (Exs. 2, 13, 43; Tr. 481-482). [\(2\)](#)

34. The United States Army Corps of Engineers, as authorized by the Clean Water Act §404(e), has established a series of nationwide permit categories that do not require individual permit applications. One of these categories is for the discharge of fill in "headwaters" reaches of streams, or isolated waters, known as Nationwide Permit 26. The Corps' regulations define "headwaters" as "non-tidal rivers, streams, and their lakes and impoundments, including adjacent wetlands, that are part of a surface tributary system to an interstate or navigable water of the United States, upstream of the point on a river or stream at which the average annual flow is less than five cubic feet per second." The regulations further state that the Corps' District Engineer "may estimate this point from available data by using the mean annual area precipitation, area drainage basin maps, and the average runoff coefficient, or by similar means." 33 CFR §330.2(d).

35. The Corps has made such designations of headwaters points on streams throughout the United States. For Colorado, the Omaha District Office has printed a computer-generated list of all the streams in the state over which the Corps has jurisdiction, with their headwaters points. The headwaters point for Coal Creek was determined by a now retired Corps employee, Bud Nelson, in 1982. The headwaters for Coal Creek is listed as upstream of the point where the creek crosses the south section line of Section 32, Township 1, Range 70 West, in Boulder County, Colorado. This point also coincides with the county line forming the boundary between Jefferson and Boulder Counties. The headwaters point is about 3 miles downstream from Coal Creek's exit from the mountains, and about 10 miles upstream from the City of Lafayette shops site. (Exs. 2, 7, 8; Tr. 80-91, 165).

36. Interested persons may challenge the Corps' designations of headwaters on a specific stream. In that event, the Corps may review any new data and change its headwaters designation. No party had ever challenged the headwaters designation for Coal Creek before this proceeding. (Tr. 92-94, 141).

37. From 1961 until 1996, the United States Geological Survey maintained a stream gage on Coal Creek at Plainview, virtually at the point where the creek exits the mountains. The gage recorded daily average flows for that period, except during some of the fall and winter months of the years 1988 to 1995, when the gage did not operate. The records also give the mean, or arithmetic average flows, in cubic feet per second, for each month. The records are organized by "water years," defined as from October of the prior year to September of the cited year. (Ex. 14).

38. On the date that the District began construction of the realignment of Coal Creek at the City shops, March 17, 1993, the gage at Plainview was not yet operating since the preceding winter. It began operation on March 22, 1993, when the average flow at Plainview was recorded as 1.4 cfs. The flow increased gradually each day to 5 cfs on March 31, and 12 cfs on April 8, 1993, the date on which the work on Coal Creek was completed. (Ex. 14).

39. The gage records show that Coal Creek's flows fluctuate greatly throughout each water year, and from year to year. The flow is uniformly highest in the spring, coinciding with snowmelt and peak runoff from the mountain drainage basin above the gage. The highest mean flows are in May, at about 25 cfs, followed by April and June, at about 13 and 10 cfs, respectively. The mean flows drop sharply throughout the rest of the year, ranging from 2.8 cfs in March, down to 0.7 cfs in September. In several Septembers, the gage recorded zero flow in Coal Creek. Because the flow in Coal Creek fluctuates so greatly, and is extremely low for much of the year, it is considered unable to support aquatic life by the State of Colorado Board of Water Resources. (Ex. 13, Table 2; Tr. 208, 510).

40. The mean flow at the Plainview gage from 1960 to 1987, the period of complete records, was 5.03 cfs. With interpolated values inserted for the missing months from 1988 to 1996, the mean flow from 1960 to 1996 was 4.78 cfs. The period from 1960 to 1981, providing the data available to the Corps at the time of its 1982 designation, was somewhat drier. The mean annual flow at the gage during that period was 4.57 cfs. The average annual flow at the gage changes from year to year, as each year's data is added. Coal Creek's annual mean flows varied from a minimum of 0.55 cfs in water year 1966 to a maximum of 14.75 in 1983. In the entire 37-year period, the annual mean flow at Plainview exceeded 5 cfs in 12 years, and was below 5 cfs in 25 years. The flow exceeded 10 cfs in 5 water years. (Ex. 13, Tables 1 and 2; Ex. 14; Tr. 171, 208).

41. The area of the Coal Creek drainage basin above the Plainview gage is approximately 15.1 square miles. The cumulative drainage basin area above the headwaters point, at the Jefferson-Boulder County line, is about 19.6 square miles. The Coal Creek drainage basin area above the City of Lafayette shops site is approximately 35.8 square miles. One method of estimating average stream flow is to assume that the flow increases downstream in proportion to the increase in the area of the stream's drainage basin. Calculated on that basis, Coal Creek's mean annual flow at the headwaters point would be approximately 6.5 cfs, and at the City shops, approximately 11.5 cfs. (Ex. 13; Tr. 154-163).

42. This drainage basin area extrapolation method was used by the Region's consultant, James Reilly, P.E., of Stetson Engineers, San Rafael, California, to estimate downstream flows in Coal Creek. Mr. Reilly spoke with Bud Nelson, the retired Corps employee who made the headwaters designation for Coal Creek in 1982. Mr. Nelson told Mr. Reilly that he had used that method in determining the headwaters point for Coal Creek. (Tr. 167-170).

43. As indicated earlier, the Plainview gage is located at the point where Coal Creek leaves the Rocky Mountain foothills and enters the Great Plains. There are major physiological, climatological, and hydrological differences in the characteristics between Coal Creek's upper drainage basin, above the gage, and its lower basin, between the gage and the City of Lafayette. The Coal Creek upper basin is characterized by steep, forested slopes and shallow soils

overlying metamorphic bedrock. Elevations in the upper basin range from 6500 to over 10,000 feet above sea level, and average 8500 feet. In the lower basin, elevations range 5200 and 6500 feet, and average 5800 feet. The lower basin (except for a small area in the immediate vicinity of the gage that consists of steep foothills) is characterized by relatively flat or gently rolling grassland, with deep soils overlying sedimentary rock. Precipitation in the upper basin averages 20 inches per year. Precipitation in the lower basin averages 16 inches per year. In short, the upper basin consists of relatively well watered mountain terrain, while the lower basin is a semiarid plain. (Ex. 43; Tr. 228-230, 481-483).

44. These differences between the upper and lower basins result in a greater runoff coefficient in the upper basin than in the lower basin. A greater proportion of precipitation per unit of land area will appear in surface water streams in the upper basin than in the lower basin. This means that the method of extrapolating downstream flows, based on the Plainview gage records and drainage basin area, will tend to overestimate flows downstream of the gage, in the lower basin. (Tr. 230, 519, 542-544, 553).

45. The District's consultant, Kenneth R. Wright, P.E., of Wright Water Engineers, Denver, Colorado, conducted a study in which he endeavored to quantify the actual average flow in Coal Creek, at the City shops, under both developed conditions and natural conditions. Mr. Wright is an eminent hydrological engineer with over 40 years of professional experience in the Denver and Boulder areas, including extensive work on Coal Creek itself. The effects on Coal Creek flow that Mr. Wright considered included, generally: in-basin and out-of-basin diversions; wastewater treatment plant effluent; lower basin inflow; and losses to alluvium, to a deep aquifer, underflow, stream evaporation, and transpiration by riparian vegetation. His study encompassed the period of the Plainview gage records, beginning in 1960, until the year of the alleged violation, 1993. (Exs. 44, 45).

46. Under "natural" conditions, i.e., without considering man-made diversions and development, Coal Creek loses some of its flow in the lower basin due to hydrogeological factors that are typical of streams in a semiarid environment. Coal Creek sustains a loss of flow shortly after leaving the mountains to a thick gravel deposit known as the Rocky Flats alluvium. Additional significant losses occur downstream to the Fox Hill sandstone, a deep regional aquifer. Coal Creek also loses flow to the uptake of water by riparian vegetation, evaporation from its surface, and underflow to the alluvium in its flood plain. The combined annual loss from these natural conditions remains constant at about 732 acre feet, or a bit more than one cfs per year. ⁽³⁾ (Ex. 44; Tr. 491-497).

47. Man-made development in the Coal Creek basin has created sources of both losses and gains to the flow in the stream. The chief source of losses are diversions taken directly from Coal Creek by way of ditches constructed by water rights holders, including farmers, ranchers, and municipalities. A series of such ditches located about a half-mile downstream from the Plainview gage conveys water from Coal Creek entirely out of its basin and into the neighboring Big Dry basin, where it is stored in reservoirs or otherwise used by the appropriators. None of this water is returned to Coal Creek from these out-of-basin diversions. The records of the Colorado State Engineer show large annual variations in the amounts of water cumulatively taken from Coal Creek for these out-of-basin diversions. The amounts vary from 2657 acre-feet in 1960 to none in several years. The average loss from these out-of-basin diversions from 1960 to 1993 was at least 927 acre-feet per year, or approximately 1.28 cfs. ⁽⁴⁾ (Ex. 45; Tr. 484-489).

48. Further downstream are several additional ditches that divert water from Coal Creek for irrigation within the lower basin. It may be assumed that about half of that water will return to Coal Creek after its use on crops in the basin. The amounts of these diversions, which also vary widely from year to year, are also recorded by the State Engineer. The annual average net effect

on Coal Creek from these in-basin diversions is a loss of about 479 acre-feet, or 0.66 cfs. (Ex. 45; Tr. 490).

49. A major source of gain to the flow of Coal Creek in the lower basin is the discharge of effluent from the City of Louisville Wastewater Treatment Plant, located about two and one-half miles upstream from the City of Lafayette shops. The discharge from the Louisville plant has increased markedly in recent years, as the population of Louisville has grown and the plant's capacity was expanded. In the three most recent years recorded by Mr. Wright, 1991-1993, the plant discharged an annual average of 1880 acre-feet, or about 2.6 cfs, into Coal Creek. For the entire period from 1960 to 1993, the plant's average annual discharge into Coal Creek was approximately 771 acre-feet, or 1.06 cfs. (Ex. 45; Tr. 498-499).

50. The assessment of flows in Coal Creek must also include direct inflow into the stream from precipitation falling in the lower basin. Mr. Wright used a runoff coefficient of 0.04 in his calculations for natural conditions, assuming no human development in the 19.9-square mile lower basin. With an average precipitation of 16 inches per year, the average annual inflow to Coal Creek under natural conditions would be about 466 acre-feet, or 0.64 cfs. Man-made development creates areas of relatively impervious surfaces, such as streets and rooftops, that accelerate runoff and increase the proportion that finds its way to surface streams. Inflow to Coal Creek thus increases with the increase in developed area within the basin. Mr. Wright used an average runoff coefficient for urban areas of 0.28 to calculate the annual lower basin inflow into Coal Creek under developed conditions. He used aerial photographs to estimate the increases in developed area in the basin during this period. This calculation indicated an increase from about 706 acre-feet in 1960 to 953 acre-feet in 1993. The average annual inflow for the entire period was 776 acre-feet, or about 1.07 cfs. (Exs. 44, 45; Tr. 503, 543-546).

51. The analysis of Coal Creek's flow by Mr. Wright indicates that the average discharge of the stream declines somewhat at the City shops, relative to the Plainview gage, under both natural and developed conditions. For the period from 1960 to 1993, under natural conditions, the average annual flow at the City shops as calculated by Mr. Wright was 4.3 cfs. Under developed conditions, it was 3.9 cfs. The flow at the gage averaged 4.7 cfs during this period. In some water years, however, particularly the more recent ones, the average flow at the City shops exceeded that at the gage, primarily due to increased inflow from the Louisville wastewater treatment plant. (Exs. 44, 45).

Discussion

- Liability - Headwaters of Coal Creek

The parties have stipulated that Coal Creek and its adjacent wetlands at the City of Lafayette shops site comprise "navigable waters" as defined in the Clean Water Act §502(7), 33 U.S.C. §1362(7), and "waters of the United States" as further defined at 33 CFR §328(a,b). The essential facts concerning the Respondents' actions at the Coal Creek site are also not disputed. The Urban Drainage and Flood Control District, through its contractor, Kemp & Hoffman, Inc., discharged fill into Coal Creek and its adjacent wetlands, in the course of rerouting the flow of Coal Creek into a newly constructed channel. Neither the District nor Kemp & Hoffman obtained an individual permit from the United States Army Corps of Engineers, pursuant to Section 404 of the Clean Water Act, 33 U.S.C. §1344, before constructing this project. [\(5\)](#)

The Complaint alleges that the Respondents violated Section 301(a) of the Clean Water Act, 33 U.S.C. §1311(a). That statute renders unlawful the discharge of any pollutant, except as in compliance with several sections of the CWA, including Section 404, 33 U.S.C. §1344. The liability of the District turns on its defense that it was not required to obtain an individual permit under that section because its project was authorized under the "headwaters" nationwide permit, known as Nationwide Permit 26. The District is not

precluded from raising this defense although it became aware of it only after the construction of the Coal Creek project. (See Finding of Fact, "FF," #32).

The District contends that the evidence it offered at the hearing demonstrates that the City shops site was in the headwaters area of Coal Creek. If that is so, the project would have qualified under Nationwide Permit 26, and would have been exempt from the requirement to obtain an individual permit under the CWA §404. The Respondent bears the burden of proving the facts showing the applicability of the nationwide permit. *U.S. v. Cumberland*

Farms of Connecticut, Inc., 826 F.2d 1151, 1157 (1st Cir., 1987). While the District has informed the record with substantial factual information on factors influencing flows in Coal Creek, it has not succeeded in showing that its project qualified under the headwaters nationwide permit. The District is therefore liable for constructing this project without having obtained an individual permit as required by the CWA §404.

Subsection (e) of the CWA §404, 33 U.S.C. §1344(e), authorizes the Secretary of the Army to issue general permits on a State, regional, or nationwide basis, for the discharge of fill into the waters of the United States. Such general nationwide permits ("NWP") may be issued for categories of activities determined to cause only minimal adverse environmental effects. One of those categories is that entitled *Headwaters and Isolated Waters Discharges*, NWP 26. Nationwide Permit 26, at the time of the construction of the Coal Creek project, allowed discharges of dredged or fill material into headwaters and isolated waters provided the discharge would not cause the loss of more than 10 acres of waters. The project sponsor was further required to notify the District Engineer if the discharge would cause the loss of more than 1 acre of waters of the United States. ⁽⁶⁾ 56 FR 59110, November 22, 1991.

The term "headwaters" is defined as follows at 33 CFR §330.2(d):

Headwaters means non-tidal rivers, streams, and their lakes and impoundments, including adjacent wetlands, that are part of a surface tributary system to an interstate or navigable water of the United States upstream of the point on the river or stream at which the average annual flow is less than five cubic feet per second. The DE [District Engineer] may estimate this point from available data by using the mean annual area precipitation, area drainage basin maps, and the average runoff coefficient, or by similar means. For streams that are dry for long periods of the year, DEs may establish the point where headwaters begin as that point on the stream where a flow of five cubic feet per second is equaled or exceeded 50 percent of the time.

The District Engineer in Omaha estimated the headwaters point on Coal Creek in 1982, at a location approximately 10 miles upstream from the City of Lafayette shops site. The record shows that this was a reasonable estimate, in conformance with the regulatory definition of headwaters.

The definition, in its use of the word "estimate," indicates that precision is not required in making headwaters designations. Indeed, precision would be impossible. The Corps explicitly recognized as much in its re-promulgation of the headwaters definition in 1991, as follows:

It should also be noted that precision is not required in establishing the five cubic feet per second point. The definition allows the DE to use approximate means to compute it. The drainage area that will contribute an average annual flow of five cubic feet per second can be estimated by approximating the proportion of the average annual precipitation that is expected to find its way into the stream. Having the area that will produce this flow, the five cubic feet per second point can be approximated from drainage area maps. 56 FR 59112-59113, November 22, 1991.

The mean annual flow in rivers and streams is naturally variable. The Corps

regulations recognize that flow rates can appropriately be determined by estimating runoff per unit of drainage basin area.

The Region's consultant, James Reilly, followed the method used by the Corps in determining the headwaters point. The District's consultant, Kenneth Wright, used a more analytical approach. Both expert witnesses, however, agreed that it was appropriate to use the Plainview stream gage records as the starting point for estimating flow in Coal Creek at downstream locations. The actual flow records obviate the need to use a runoff coefficient for the drainage basin above the gage, since the actual drainage basin area and flow rate are known at that point on the stream. The experts differed, however, in their methods for estimating downstream flows.

Mr. Wright certainly took a more sophisticated and analytical approach than did Mr. Reilly in his estimates. Mr. Reilly's method, however, was more consistent with the intent of the Corps' regulations. He computed the point by extrapolating flow rates based on the creek's drainage basin area. Mr. Wright's analysis of streamflow was also an approximation, albeit a more sophisticated one. Even assuming the complete accuracy of his results, Coal Creek at the City shops still had a mean annual flow greater than 4 cfs.

Mr. Wright's study is not however unimpeachable. He relied on many assumptions and generalized calculations of stream loss, and did not give ranges of values or margins of error for his calculations. He did not survey wells or the water table in the vicinity of the stream. This information could have indicated whether groundwater baseflow may contribute to the flow in any reaches of Coal Creek.⁽⁷⁾ It is not clear whether certain of the losses calculated by Mr. Wright might have been accounted for more than once. (Tr. 537). In addition, Mr. Wright did not fully account for the cumulative change in the nature of the drainage basin as one proceeds downstream. (Tr. 546). But these points are mere quibbles. There is no question that Mr. Wright's estimate of the flow at the headwaters point or the City shops is closer to the actual reality than that estimated by Mr. Reilly's extrapolation method.

However, even if it is assumed that Mr. Wright's estimate is fully accurate, the flows in Coal Creek between the gage and the City shops were still in the range of 4 to 5 cfs. Neither party provided a range of values nor a margin of error for their calculations, although all values are estimates. Given the variability in flow in Coal Creek, and the known fact that average flows at the gage are approximately 5 cfs, the Corps' headwaters determination must be considered reasonable and consistent with the regulations.

The definition of headwaters at 33 CFR §330.2(d), including its suggested method for determining headwaters points, is not designed to be completely comprehensive or absolute. It does not explicitly account for various types of streamflow regimes, such as those, common in the arid West, that may lose flow downstream. The Corps did, however, account for arid conditions in its definition of headwaters. The last sentence of 33 CFR §330.2(d) recognizes a category of streams that could be dry much of the year, again most commonly in arid regions. For those streams, the headwaters point is to be estimated as the *median* point where flows exceed 5 cfs, rather than the point where *mean* flows exceed 5 cfs.

The designation of headwaters "upstream" from the 5 cfs point assumes that streams will generally gain flow downstream. The definition of headwaters only allows for a single headwaters point, with the headwaters area upstream from that point, regardless of downstream fluctuations in flow. Although some streams may lose flow downstream, that will not necessarily affect the headwaters determination. The Corps has recently affirmed its intent to retain the current definition of headwaters in the regulations, including its estimating methodology for determining the 5 cfs point.⁽⁸⁾

The definition of headwaters also does not explicitly address the effect of man-made diversions and contributions to the flow in rivers and streams.

However, the methods cited for estimating the flow only refer to precipitation, drainage basin area and runoff coefficients. These factors may be considered without reference to man-made development. The record indicates that the Corps did not consider man-made diversions in its estimates. A neutral reading of the definition lends at least equal support to the Region's position that such consideration of only "natural" conditions is appropriate.⁽⁹⁾

The District undertook an arduous task in seeking to sustain its burden of proving that the Corps' headwaters determination for Coal Creek should be disregarded. Reviewing courts must accord agency actions a presumption of regularity. See *Citizens to Preserve Overton Park, Inc., v. Volpe*, 401 U.S. 402, 415 (1971). The Administrative Procedure Act limits judicial review of agency decisions to whether they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2). Courts will defer to federal agencies' decisions in matters generally committed to their expertise and discretion, unless an abuse of discretion is shown. See *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 904 (5th Cir. 1983). These review standards have been held to specifically apply to the Corps' interpretations of the applicability of nationwide permits. *Orleans Audubon Society v. Lee*, 742 F.2d 901, 907 (5th Cir. 1984). Review in this proceeding, and by the Administrator of the EPA, of a decision by a sister agency, the Corps of Engineers, should be guided by the same principles.

The Corps is charged with the duty to determine headwaters points on thousands of rivers and streams throughout the United States.⁽¹⁰⁾ It carries out this duty by using drainage basin maps, precipitation data, and runoff coefficients. Where stream gage data is available, that can be substituted for the use of runoff coefficients. The Corps does not consider additional factors that could influence flows, such as man-made diversions and contributions, and hydrological conditions specific to each stream. This interpretation is practical, reasonable and consistent with the regulatory definition of headwaters in 33 CFR §330.2(d), which provides for only a single headwaters point on each stream. It would be impractical and inefficient for the Corps to undertake a detailed hydrological study of each stream to determine their headwaters areas.

The regulatory definition of headwaters at 33 CFR §330.2(d) provides a suitable method for making headwaters determinations. The Corps followed that method in determining the headwaters point on Coal Creek. The Corps' headwaters determination for Coal Creek was thus reasonable, and cannot be said to have been arbitrary and capricious or an abuse of discretion.

It is unnecessary to speculate on what type of showing would be required in order to justify disregarding a Corps' headwaters determination. Many factors unique to each case would have to be considered. Respondents are certainly not precluded from attempting to show that a Corps' headwaters estimate was in error to the extent that it was arbitrary and capricious, and should be disregarded. In this case, however, the evidence shows that the Corps' estimate was based on gaged flows averaging approximately 5 cfs. The determination of a headwaters point some three miles downstream of the gage was reasonable and consistent with the definition of headwaters at 33 CFR §330.2(d).

The decision in *Cumberland Farms, supra*, does not provide any reason to alter this conclusion. The District asserts that that case provides authority for the proposition that a respondent may seek to establish the headwaters point with "pinpoint" accuracy.⁽¹¹⁾ In *Cumberland Farms*, however, the Corps had apparently not made specific headwaters determinations for the streams at issue on the Cumberland Farms property. The Court upheld the district court's finding that respondent had failed to meet its burden of showing where on its property the flows fell below 5 cfs. 826 F.2d 1157. In the district court, the discussion on methodology for locating the headwaters points evinced an

exclusive reliance on drainage basin maps, based on a gaged flow downstream of the property. *United States v. Cumberland Farms of Connecticut, Inc.*, 647 F. Supp 1166, 1177 (D. Mass. 1986).

In this proceeding, where the Corps has already made a headwaters determination on the subject stream, Respondent's burden of proof is greater than the respondent's in *Cumberland Farms*. The District must not only provide evidence on flows in Coal Creek, but that evidence must also show that the Corps' determination was arbitrary and capricious. The evidence here will not support such a conclusion. Even assuming the complete accuracy of the District's expert's conclusions, average flows exceeded 4 cfs and approached 5 cfs at points upstream from the project site. The mean annual flow at the gage itself was indisputably 5 cfs when rounded to the nearest whole number, for any of the time periods under consideration.

For these reasons, the Corps' determination of the headwaters point on Coal Creek will not be disturbed. The District's realignment of the channel of Coal Creek at the City of Lafayette shops site took place 10 miles below the headwaters of Coal Creek. Therefore Nationwide Permit 26 did not authorize this project. The District is thus liable for the discharge of fill into the waters of the United States without having obtained the required permit pursuant to the CWA §404. This constitutes a violation of the CWA §301(a), 33 U.S.C. §1311(a).

- Liability of Kemp & Hoffman

Violators of the Clean Water Act are held to a standard of strict liability for civil violations. *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979). Such civil liability may be "predicated on either (1) performance, or (2) responsibility for or control over performance of the work, in the absence of the necessary federal permit." *United States v. Board Of Trustees of Florida Keys Community College*, 531 F. Supp. 267, 274 (S.D. Fla. 1981). The Corps' enforcement regulations speak in terms of "parties responsible for violations." See 33 CFR §326.3(c).

Under these standards, the Respondent Kemp & Hoffman must also be held liable for the violation at issue in this case. A contractor has a responsibility to ensure that work it is doing is authorized by the appropriate permits. Indeed, the contract between the District and Kemp & Hoffman specifically provided as much. (FF #15). The following reasoning in *Florida Keys Comm. College, supra*, cannot be disputed:

Nor does the application of the statutes impose an unreasonable burden on construction companies. The companies may protect themselves merely by requiring a copy of the necessary permits to be shown to them prior to commencement of the work. 531 F. Supp. 274.

If Kemp & Hoffman had required the District to actually display a copy of the Corps permit before commencing the work, this entire violation might have been avoided.

It is not disputed here that Kemp & Hoffman completely relied on the District's permitting in past projects, and was told that a permit had been obtained for the Coal Creek work. (FF #15). This does not completely absolve a contractor from all responsibility to ensure that the proper permit has been obtained. In very similar circumstances, a contractor was held liable for discharging fill into a wetland without a permit although he had been told by the landowner that the Corps permit had been obtained. *United States v. Van Leuzen*, 816 F.Supp. 1171, 1175 (S.D. Texas, 1993).

Therefore, Kemp & Hoffman is also found liable for a violation of the CWA §301(a) for discharging fill into a water of the United States without a permit issued by the Corps pursuant to the CWA §404. However, as in both *Florida Keys Comm. College* and *Van Leuzen*, the contractor's degree of culpability was far lower than that of the party controlling the conduct of

the work, in this case the District. The facts surrounding the parties' relative culpability for the violation will be discussed below in the context of determining their appropriate civil penalties.

- Civil Penalty

Having determined that the Respondents are liable for the violation alleged, I turn to the determination of the appropriate amounts of the civil penalties to be assessed. The CWA §309(g)(3) sets forth the factors the Administrator must take into account in assessing civil penalties for CWA violations in administrative enforcement proceedings:

In determining the amount of any penalty assessed under this subsection, the Administrator . . . shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) from the violation, and such other matters as justice may require.

The Region has proposed that a civil penalty of \$125,000, the maximum for a Class II penalty under the CWA §309(g)(2)(B), be assessed jointly and severally against the two Respondents in this matter. The Respondents argue that, if they are found liable for the violation, any penalty should be minimal or limited to the costs already incurred for site mitigation.

The EPA Rules of Practice for administrative enforcement proceedings require the Administrative Law Judge to consider any civil penalty guidelines issued under the applicable Act. The EPA has not promulgated any civil penalty guidelines specific to the Clean Water Act. The Region does, however, cite two companion documents promulgated to guide the EPA enforcement staff generally in the assessment of civil penalties. These are entitled: *Policy on Civil Penalties* (the "Penalty Policy"), and *A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties* (the "Penalty Framework"), both dated February 16, 1984.

The "nature, circumstances, extent and gravity" of the violation will be considered initially as the "gravity component" of the violation, as committed by both Respondents. The remaining statutory factors -- ability to pay, culpability, economic benefit, prior violations, and other matters as justice may require -- will be considered as "adjustment factors" with respect to the penalty amount. The adjustment factors will be considered separately for each Respondent. The overall approach, consistent with the Penalty Framework, will be to derive a base penalty amount, based on the gravity of the violation, which may then be modified and apportioned between the two Respondents based on the adjustment factors.

- Nature, Circumstances, Extent and Gravity

The nature, circumstances, extent, and gravity of the violation focus essentially, on the seriousness of the violation. The seriousness of the violation at issue here -- the discharge of fill into waters of the United States without a permit -- depends primarily on the actual or potential harm to the environment resulting from the violation. The importance of the violated requirement to the regulatory scheme must also be considered.

In the particular circumstances of the Coal Creek project, the assessment of environmental harm arising from the violation alone must be considered first. The ultimate analysis of the gravity of the violation, however, must also encompass a consideration of the degree of success and timeliness of the mitigation plan. The District performed the mitigation work pursuant to an after-the-fact ("ATF") permit that authorized the original relocation of the channel of Coal Creek at the site. The violation and its mitigation should be considered together in ultimately determining the environmental impact of the violation and gravity component of the penalty.

The nature of the Respondents' violation in this case is clear. They relocated the channel of a creek without obtaining the required individual permit from the Corps pursuant to Section 404 of the Clean Water Act. The Respondents discharged fill into the actual creek itself and adjacent wetlands, cutting off a meandering reach of the channel. This activity shortened the length of Coal Creek, and eliminated natural benthic habitat and a 2350-square foot area of wetland. The total impacted area was about 30,000 square feet, or three quarters of an acre. (FF #8).

The violation of diverting a natural stream channel without a permit is, by its nature, a relatively serious one. The Corps witness, Timothy Carey, testified that the Corps would not normally grant a permit for such a project, as it would not generally be the least environmentally damaging alternative for accomplishing the applicant's objective. (FF #18; Tr. 105-106). In this case, the goal of halting erosion of the bank below the City shops could have been accomplished through regrading and reinforcing the natural meander bank. The District's own consultant, Mary Powell, stated that, left unmitigated, the site would suffer long term adverse effects from the channel realignment, and a succession to drier conditions. (FF #9; Ex. 24; Tr. 608).

On the other hand, the Region produced little substantial evidence of any specific adverse environmental impacts caused by the project. The Region's John Brink testified that wildlife appeared more abundant upstream and downstream from the site, but he could not say whether that condition existed before construction of the project. (Tr. 426). The Region did not produce any eyewitness or expert witness who could compare conditions on Coal Creek at the City of Lafayette site before and after the stream channel realignment. It seems probable that the site previously had a somewhat reduced value for wildlife in any event due to its close proximity to the City shops maintenance facilities. The City shops facility is an active light industrial land use. Also, after the channel relocation but before the construction of the mitigation plan, some water remained in the oxbow and adverse impacts did not yet appear significant. (Tr. 586).

In addition, the amount of fill and the size of the impacted waters and wetlands were relatively small. In one administrative proceeding where a \$125,000 penalty was assessed, the respondent flooded 75 acres of wetlands, by constructing dikes without a permit. *In re Marshall C. Sasser*, 3 E.A.D. 703 (CWA Appeal 91-1, CJO, November 21, 1991).⁽¹²⁾ In another proceeding, in which a \$100,000 total penalty was ultimately assessed, the respondent filled approximately 6 acres of wetlands without a permit. *In re The Hoffman Group*, 3 E.A.D. 408 (CWA Appeal 89-2, CJO, November 19, 1990). The District here filled only about 1/20 of an acre of wetlands. The entire affected area between the new and old channels consists of less than an acre. (FF #8). The diversion of a stream from its natural channel is qualitatively different from the filling (or flooding) of wetlands. The relocation of a stream channel and the destruction of wetlands cannot be directly compared with respect to the magnitude of the violations, or the potential or actual environmental impacts. Nevertheless, the relative magnitude of this violation, in the context of the potential universe of discharges of fill into waters, whether wetlands or streams, is not at the maximum end of the penalty spectrum.

The ultimate determination on the environmental impacts of this violation must also include a consideration of the effects of the mitigation work. One of the elements in this analysis is the duration of the violation. The violation of the unpermitted discharge of fill into waters of the United States continues as long as the illegal fill remains in place. *U.S. v. Reaves*, 923 F.Supp. 1530 (D. Fla. 1996). In this case, that is from March 1993 when the Coal Creek channel was relocated, until March 1995 when the District constructed the mitigation plan pursuant to the after-the-fact permit. The Region argues that the violation thus continued for a period of approximately two years. Since the CWA §309(g)(2)(B) authorizes penalties of up to \$10,000 per day, the Region argues that the proposed amount of \$125,000 is easily justified.

The concept of daily penalties for continuing violations is not however meaningful in assessing the gravity of this type of violation. Any discharge of fill into wetlands or waters will, as a practical matter, tend to remain for at least the twelve and one half days required to reach the maximum penalty of \$125,000 at \$10,000 per day. The period at issue here, over 700 days, is not atypical for completion of mitigation work after the unpermitted filling of a wetland or water of the United States.⁽¹³⁾ Rather than focus on the number of days, the gravity of the violation should be assessed in the context of the statutory maximum of \$125,000. Is the violation serious enough to merit assessment of the maximum penalty? The length of time from the violation until remediation will be discussed further, and in more detail, below in relation to the District's degree of cooperation.

As mentioned above, the ultimate determination on environmental impacts and the gravity component of this violation must also include consideration of the degree of success of the mitigation plan. The mitigation plan here was completed pursuant to an ATF permit that authorized the Coal Creek channel relocation, provided the District completed the specified mitigation work.

It is not disputed that the District carried out all required elements of the mitigation plan in a competent manner. It is also not disputed that the basic purpose of the mitigation plan -- the restoration of wetland hydrology to the oxbow and adjacent areas -- has been accomplished successfully. The site now contains more high quality wetland than it did before the District relocated the Coal Creek channel in March 1993. (FF #27).

The only problems with the mitigation work have been the failure to meet criteria for the survival of willow stakes in some areas, and for the proportion of weeds in the upland area above the bank. (FF ##28, 29). These elements of the mitigation plan, however, are enhancements that augment the environmental values of the mitigated site. They were not intended to restore or replace conditions that existed before the violation occurred. (Tr. 429). As a matter of current permit compliance, the District is certainly obligated to ensure adequate survival of the willows and to control weeds. Complete success in meeting these criteria is not expected anyway, this soon after planting. (FF #28). These requirements are integral to the proper functioning of the mitigated site as a whole. The gravity component of the civil penalty should be based primarily, however, on the overall effect on the wetland and riparian values that were adversely affected originally by the violation.

The weight of the evidence, consistent with the testimony both of the District's Ms. Powell and the Region's Mr. Brink, shows that the project *with the mitigation plan* has not resulted in significant adverse environmental effects to the site. The restoration of a perennial flow into the oxbow and excavation to wetland elevations of the adjacent area has increased the site's wetland area and enhanced its wetland benefits.⁽¹⁴⁾ (FF #27).

In consideration of all these factors, the base gravity component for the violation here should be in the upper range of potential penalties, but not at the maximum of \$125,000. The discharge of fill to relocate a stream channel without a permit is by its nature a serious violation that strikes at the heart of the Section 404 permit program. The Corps would not ordinarily grant a permit for such a project. This type of alteration of a natural stream channel has the potential to cause significant environmental harm. A significant penalty may be imposed on the basis of potential environmental risk without necessarily demonstrating actual adverse effects. *U.S. v. Smithfield Foods, Inc.*, 972 F.Supp. 338, 344 (E.D.Va., 1997).

The gravity of Section 404 violations may be classified as minor, moderate, or major. Under such a scheme, the violation here would be a major violation. In terms of dollars, the amount should therefore be roughly in upper third of the possible range, or between \$75,000 and \$125,000. Due to the relatively small size of the project and the ultimate lack of actual significant adverse environmental effects with the mitigation plan, the gravity component of the

penalty should be at the low end of the major violation range. In consideration of all these factors, the gravity component of the civil penalty for this violation will be \$80,000.

- Culpability

- The Urban Drainage and Flood Control District

The District is the Respondent primarily culpable for proceeding with the Coal Creek project without obtaining the required Section 404 permit. Even if the project had remained as originally conceived, as stabilization of the oxbow bank, the District proceeded without following its usual procedure of seeking an advance concurrence from the Corps that the project would be authorized by a nationwide permit. The District's Mr. Bennetts then made the decision in the field to relocate the channel of Coal Creek, also without notifying the Corps in advance. The District did not notify the Corps until after the Corps first contacted the District in response to a citizen complaint. In addition, in that initial telephone conversation, Mr. Bennetts did not make it clear to Ms. Laney of the Corps that the project had involved a channel relocation. (FF #16).

The District's actions in this regard can, at best, be ascribed to a high degree of negligence. Mr. Bennetts testified that he believed the project was still authorized by Nationwide Permit 13, for bank stabilization, even after the channel was relocated. This still does not explain why the District did not seek a nationwide concurrence in advance, according to its usual practice. However, the Corps regulations do not require an applicant to seek such advance concurrence. The District has acknowledged that it was concerned that the project be constructed before the onset of high spring runoff. The District's Executive Director, Scott Tucker, denied, however, that being in a hurry led the District to deliberately bypass the permit requirement. (FF #4; Tr. 747-748).

The District and its project supervisors were, or should have been, fully conversant with CWA permit requirements due to their extensive experience in the field. In these circumstances, while I will not infer intentional misconduct, the District has offered no reasonable excuse for constructing this project without Corps approval. The headwaters defense was admittedly an afterthought, asserted for the first time in response to the administrative Complaint in this proceeding. (FF #32). The circumstances indicate a combination of expediency and simple inadvertence. The District was concerned that the project be constructed before the onset of spring runoff, and simply took the most expedient course by proceeding without notifying the Corps or following its normal procedures.

In summary, the District was relatively highly culpable, but short somewhat of the highest degree of culpability, which would be intentional disregard of the requirements. In other administrative proceedings, assessment of the maximum penalty has been based, in part, on a finding of the respondent's wilful disregard of the permit process or Clean Water Act requirements.⁽¹⁵⁾ The high degree of negligence here might justify some increase in the base penalty amount. However, as discussed below, any such increase would be offset by the District's degree of cooperation and willingness to perform mitigation work on the site.

- Kemp & Hoffman

It is not disputed that Kemp & Hoffman had absolutely no input in the decision to relocate the channel of Coal Creek or control over the course of the project in any way. Kemp & Hoffman was simply the contractor retained by the District to carry out the District's project for the City of Lafayette. The company's only error was to rely on the District's past practice and verbal assurances that the appropriate federal permit had been obtained, rather than insisting on seeing the permit.

As discussed above, the law does, however, render a contractor liable for the discharge of fill into a water of the United States without a permit in these circumstances. The law will, however, recognize the difference in the culpability between the project supervisor and the contractor, in the assessment of penalties. Federal courts have assessed significantly lower penalties against contractors than against project sponsors in similar circumstances. [\(16\)](#)

The degree of culpability of Kemp & Hoffman was a full order of magnitude below that of the District in the circumstances here. Therefore the civil penalty should be apportioned between them so that the penalty paid by the District is more than ten times that paid by Kemp & Hoffman. The assessment of the \$80,000 civil penalty will thus be apportioned as follows: \$75,000 for the District and \$5000 for Kemp & Hoffman.

- Economic Benefit

Civil penalties should, at a minimum, recoup any economic benefit the violator has accrued as a result of the violation. The Region presented an expert witness, James Fagan, who derived the economic benefit accruing to both Respondents as a result of this violation. Mr. Fagan estimated the gain to the District as a result of its deferred compliance and maintenance costs incurred in relation to the mitigation plan. For Kemp & Hoffman, he calculated the current value of its profit earned on the Coal Creek project. (FF #31). These methods of calculating economic benefit from violations have been recognized as valid by the Environmental Appeals Board and federal courts. [\(17\)](#) Although Mr. Fagan's analysis was not fully disclosed to Respondents before the hearing, they had ample opportunity to respond, and were not prejudiced by his testimony.

One reason Respondents are not prejudiced by the economic benefit analysis is that it will not lead to any increase in the penalty. Mr. Fagan found an economic benefit to the District of about \$10,500, and to Kemp & Hoffman of \$2500. The respective gravity-based penalties of \$75,000 and \$5000 for the Respondents are already sufficiently in excess of their economic benefit, such that no further adjustment on this basis is warranted.

- Prior History of Violations

In over 20 years of working with the Corps and EPA in constructing projects governed by the Clean Water Act, the District has not previously paid a civil penalty or been subject to a formal enforcement proceeding. Until this proceeding, the only blemish on its record was the issuance of an ATF permit in 1987 for "emergency bank stabilization" on the South Platte River. (FF #13).

The Penalty Framework lists the following factors for consideration in determining any adjustment to a civil penalty for prior violations: similarity of the previous violation(s); their recency; number of prior violations; and the violator's responses or corrections of previous problems. (Penalty Framework, p. 21). While there may be some similarity between the 1987 ATF permit and the violation in this case that also resulted in issuance of an ATF permit, the other factors militate against increasing the District's penalty on this basis. This single possible violation, which took place some six years before the instant one, does not indicate any pattern of non-compliance. Indeed, in view of District's extensive work under the Clean Water Act, the 1987 incident, as well as the instant violation, are more logically viewed as aberrations.

In addition, the record does not include a full description of the circumstances of the 1987 ATF permit. [\(18\)](#) On its face, the project entailed emergency bank stabilization work. The record does not disclose whether the District had some justification for proceeding with the project before obtaining a permit, due to emergency conditions. In any event, the EPA did not

initiate any enforcement action on the basis of the 1987 ATF permit for the District's bank stabilization work on the South Platte River. The District promptly responded by obtaining the appropriate ATF permit and, so far as is known, complying with its conditions. In view of all these factors, the single ATF permit issued to the District in 1987 does not provide sufficient reason to increase the proposed civil penalty.

Kemp & Hoffman had no prior history of any type of violation of the Clean Water Act. Hence this factor will have no effect on the penalty assessed against this Respondent.

- Ability to Pay

The District has ample funds and assets that will enable it to pay a penalty of the magnitude here proposed. (FF #1). In view of this ability to pay, no special consideration will be given to the fact that the District is a public, taxpayer-funded, agency that provides beneficial services in the Denver metropolitan area.

Kemp & Hoffman also has sufficient ability to pay the smaller penalty assessed by this decision. (FF #6).

Other Factors - Degree of Cooperation

The CWA §309(g)(3) cites "other factors as justice may require" as a final consideration in assessing a civil penalty for administrative violations. One of those factors is the respondent's degree of cooperation with the EPA in rectifying its violations. The Agency will recognize a respondent's cooperative attitude and willingness to correct environmental problems, in mitigation of civil penalty amounts. (See Penalty Framework, p. 19-20).

In this proceeding, the Region and District took opposing views of the District's degree of cooperation in implementing the mitigation plan to correct the environmental problems caused by the Coal Creek channel relocation project. The Region argues that the District was recalcitrant and delayed the final implementation of the mitigation plan. The District responds that it did complete the mitigation plan in an expeditious manner, consistent with its obligations as a taxpayer-funded public agency. An objective overview of the course of dealing between the two parties reveals essentially a normal arms-length negotiation process, in which each party sought to reach a mutually satisfactory resolution. The District at no time took a recalcitrant tone or intimated it was not willing to perform appropriate mitigation at the site. [\(19\)](#)

The record does not support the Region's contention that the letter from the District of December 3, 1993 created a real "impasse" in negotiations, as believed by the Region's John Brink. (Ex. 16; Tr. 352). From the District's point of view, the Region's changing demands represented something of a moving target. In the December 3, 1993 letter, the District actually offered to perform all new components of the mitigation plan, if some consideration would be given with regard to the civil penalty assessment. This can hardly be considered an unreasonable negotiating position that should create an impasse. In the exercise of its discretion, the Region responded with the compliance order some three months later, rather than with a counterproposal. (FF ##22, 23; Ex. 26). The delay during this period cannot be blamed solely on the negotiating stance of the District.

In reviewing the entire chronology of events from the time of the violation until the completion of the mitigation plan, it is difficult to see how the entire process could have been significantly accelerated in any event. The initial meeting on the site took place several months after the construction, as soon as all parties were respectively available. (FF #20). The District then promptly retained a consultant who recommended the basic outline of the mitigation plan. (FF ##20, 21). Further negotiations ensued in November and December 1993, as described above, that resulted in additional components to

the plan. (FF #22).

Then, after the Region issued a compliance order, the District applied for an after-the-fact permit from the Corps. Due to the required period for public notice and comment, the permit process took the necessary six additional months. (FF #23). As a result of that process, some additional elements were required in the mitigation plan. (FF ##24, 25). The District was initially reluctant to begin the mitigation work due to the City of Lafayette's failure to record the required deed restriction. (FF #26). This cannot be said to have been an unreasonable position for a public agency to take. Nevertheless, at the Region's urging, the District constructed the mitigation project during the next available window of time suitable for such work, in March of 1995. (FF #26).

This review of the chronology leads to the conclusion that the District was reasonably cooperative in negotiating and implementing the mitigation plan. The two-year delay until the mitigation was completed cannot be ascribed solely to the District. The overall pace of meetings, reports, and negotiations, for which all parties, including the Corps, were responsible, could hardly have allowed for a more rapid response. It is the nature of the beast that these things are not usually resolved very rapidly. The ATF permit process alone consumed six months. This type of wetland creation and planting project then requires several years for the vegetation to become established. The District could perhaps have immediately acceded to all demands by the Region. But even that might not have significantly accelerated the process, since the Region proposed new elements for the mitigation plan as late as June 1994. The ATF permit was then not issued until September 1994. Despite the concern over the lack of the required deed restriction, the District then constructed the mitigation project in March 1995, the next suitable window of time for successful planting. (FF #26).

The Penalty Framework (p. 20) states that penalty reductions may be granted for prompt correction of environmental violations, even if the amount of the penalty remains in litigation. In this case, any such reduction will however be offset by what would be an equivalent increase for the District's high degree of culpability in committing the violation in the first place. Therefore, there will be no adjustment to the gravity based penalty assessed by this decision of \$80,000, of which \$75,000 is apportioned to the District and \$5000 to Kemp & Hoffman.

Conclusions of Law

1. The Urban Drainage and Flood Control District discharged fill into a water of the United States without a permit required by the Clean Water Act §404, 33 U.S.C. §1344, thereby violating the CWA §301(a), 33 U.S.C. §1311(a).
2. The site of the violation, Coal Creek at the City of Lafayette shops, is located below the headwaters area on Coal Creek, as determined by the U.S. Army Corps of Engineers pursuant to the CWA §404(e), 33 U.S.C. §1344(e) and 33 CFR §330.2(d). Hence, the District's project on Coal Creek was not authorized by Nationwide Permit 26 and was not exempt from the requirement to obtain an individual permit under Section 404.
3. The District's contractor, Kemp & Hoffman, Inc., is also liable for the violation of discharge of fill into a water of the United States without a permit. However, Kemp & Hoffman was far less culpable than the District in committing this violation.
4. In consideration of the civil penalty factors set forth in the CWA §309(g), 33 U.S.C. §1319(g), an appropriate civil penalty for this violation is \$80,000. The payment of the penalty should be apportioned as follows: \$75,000 payable by the District, and \$5000 payable by Kemp & Hoffman.

Order

1. The Respondent, Urban Drainage and Flood Control District, is assessed a civil penalty of \$75,000.
2. The Respondent, Kemp & Hoffman, Inc., is assessed a civil penalty of \$5000.
3. Payment of the full amount of these civil penalties must be made within 60 days of service of this order by submitting respective certified or cashier's checks in the above amounts, payable to the Treasurer, United States of America, and mailed to: EPA - Region 8, P.O. Box 360859, Pittsburgh, PA 15251-6859. The checks must be accompanied by transmittal letters identifying the case, docket number, and Respondent's name and address.
4. Respondents may be assessed interest on these civil penalties if they are not paid within the prescribed period.
5. Pursuant to 40 CFR §22.27(c), this Initial Decision will become the final order of the Agency unless an appeal is taken pursuant to 40 CFR §22.30, or the Environmental Appeals Board elects to review this decision *sua sponte*.

Andrew S. Pearlstein
Administrative Law Judge

Dated: June 25, 1998
Washington, D.C.

1. References to the exhibits ("Ex.") and stenographic transcript of the hearing ("Tr.") are representative only, and not intended to be exhaustive.
2. Official notice is taken of the full drainage course of Coal Creek's waters to the Gulf of Mexico. The parties stipulated that Coal Creek is a "water of the United States" and a "navigable water" as those terms are defined in the CWA §502 and 33 CFR §328.3(a) and (b). (Ex. 1, ¶7).
3. An acre-foot is the area of an acre, 43,560 square feet, covered by water to a depth of one foot. A discharge of one cubic foot per second for one year will yield approximately 724 acre-feet. (Tr. 507, 529).
4. The records of the State Engineer were not complete for one of the ditches. In several years, the records indicated water was diverted, but the amounts were not given. For the purpose of calculating the total, the values for the missing data were assumed to be zero, or no diversions from that ditch for those years.
5. The discussion in this section generally refers primarily to the liability of the District. Kemp & Hoffman's liability is discussed separately in the following section of the Discussion.
6. The Corps has since reduced the thresholds for authorization under NWP 26, and for notification, respectively to 3 acres and 1/3 acre, on an interim basis. 61 FR 65874, 65891, December 13, 1996.
7. Mr. Wright may well have assumed, based on his experience and the evidence of the single well testified about, that the water table was below the elevation of the bed of Coal Creek throughout the basin. This was not however clearly expressed in the record. (See Tr. 550).
8. 61 FR 65894, December 13, 1996.
9. On Coal Creek, man-made contributions to the flow, by the Louisville

wastewater treatment plant, especially in recent years, actually often exceeded diversions, and resulted in enhanced flows. (FF #51). Flows at the City of Lafayette shops, shortly downstream, are probably often heavily influenced by the discharge from that plant. The record does not reflect the source of the water used by the City of Louisville, but this finding assumes that the source was outside the Coal Creek drainage basin. There may also have been some "double counting" of runoff that finds its way into the Louisville sewer system. This illustrates the difficulty in attempting to empirically analyze all the factors affecting flow to a stream.

10. The Corps has made 265 headwaters determinations in Colorado alone. (Ex. 7).
11. See Respondent's brief, p. 4, citing *Cumberland*, *supra*, 826 F.2d 1157.
12. The respondent in *Sasser* also wilfully disregarded the Section 404 permit process and refused to obey compliance orders to remove the offending dikes. These distinctions provide further reason to assess less than the maximum penalty in this proceeding, as further discussed below.
13. See, e.g., *In re Britton Construction Company, et al*, Docket No. CWA-III-096 (Initial Decision, May 21, 1997), pp. 4-5 (findings of fact indicating a several year period between respondents' filling a wetland without a permit and constructing a mitigation plan).
14. These conclusions, as indicated, are based solely on the record of the hearing and not on my site visit. The site visit was undertaken over the Region's objection. The Respondents have referred to it in their brief. (Respondent's Closing Brief, p. 23). As stated on the record, I visited the site in order to obtain a better context in which to understand the evidence, and not to become, in effect, a witness myself. (Tr. 438). It is interesting to note, however, that the District Judge in *Cumberland Farms* freely and extensively discussed his own observations during his site visit in that case, while noting that they corroborated facts drawn from the record. See *Cumberland Farms*, *supra*, 647 F.Supp. 1166, 1173-1174.
15. See *In re Sasser*, *supra*, 3 E.A.D. 703, 708 (wilful disregard of permit process and refusal to comply with restoration orders); and *In re Labarge, Inc.*, Docket No. CWA-91-W-0078 (Initial Decision, March 26, 1997), p. 8 (continued discharge violations despite repeated notices).
16. See *Florida Keys Comm. College*, *supra*, 531 F.Supp. 267, 275 (contractor fined \$3000, while college landowner fined \$15,000 and required to perform mitigation or restoration of site); and *Van Leuzen*, *supra*, 816 F.Supp. 1171, 1175, 1181-1184 (contractor fined \$900; landowner required to restore site and establish a fund for restoration costs and for payment of a civil penalty, by paying \$350 per month for at least eight, but not more than twelve years, for a minimum payment of \$33,600).
17. See *In re B.J. Carney Industries, Inc.*, CWA Appeal No. 96-2 (EAB, June 9, 1997), p. 51; and *Smithfield Foods*, *supra*, 972 F.Supp. 338, 349.
18. Initially the exhibit concerning the 1987 prior violation was excluded as too remote. Later, I reversed that ruling and received it. The District's Executive Director, Scott Tucker, who signed the 1987 ATF permit application, could then have been examined concerning his knowledge of the circumstances; however, neither party pursued such examination. (Ex. 5; Tr. 70-71, 725-726, 748-749).
19. Most of the negotiations concerning the mitigation plan took place in late 1993 and early 1994, before the filing of the Complaints in this matter, and the District's adoption of the defense that it was not liable due to the headwaters nationwide permit exemption. Even after it took the position that it was not liable, the District continued to comply with all requirements of

the mitigation plan and after-the-fact permit.

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