UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Mr. William H. Jarvis	)	**Docket No. CWA -04-2000-1509**
	)	
Respondent	)	
	)	

INITIAL DECISION

Introduction

The Respondent, William H. Jarvis,("Jarvis"), has been charged with violating Section 301(a) of the Clean Water Act[1] ("CWA") by discharging pollutants into waters of the United States without having obtained a permit issued pursuant to Section 404 of that Act. A hearing was held in this matter on April 5th and 6th, 2001, in Blountville, Tennessee. EPA seeks a $30,000 civil penalty against Jarvis for the alleged violation.

I. Findings of Fact Regarding Liability

The events in issue took place at Boone Lake, which is located in Sullivan County, Tennessee. Jarvis owns property adjacent to that lake, which is known as Davis Marina. In August 1999 the Army Corps of Engineers ("Corps") received a permit application from Jarvis in which he sought to extend the marina's existing boat launching area. The project, as described by Jarvis in his application, provided:

> Current docks to be pushed out to river bed, existing harbor to be dug out and removed, some to be used for back fill,

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[1]Formally, the CWA is the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251 to 1387. Section 301(a), 33 U.S.C. §1311(a), entitled "Illegality of pollutant discharges except in compliance with law" provides: Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

> new concrete bulk head to be installed, new covered docks to be installed, ramp area extended as needed, fuel island to be moved, new deck area to be installed.

EPA Ex. 1. Thus, among other aspects, the plan provided for deepening of the harbor, the construction of a bulkhead and for improvements to the existing boat ramp. In response to the application, the Corps wrote to Jarvis, on September 17, 1999, posing several questions concerning details of the planned activity. Among other questions, the Corps wanted more information about the bulkhead and the rip rap bank stabilization, including the "amount of rip rap materials being used ... above and below the normal summer pool elevation." EPA Ex. 3. Jarvis responded, by letter, on September 21, 1999. In this response he stated that the base of the bulkhead would be at the 1380 elevation level and the top at 1385 and, along with other information, he detailed the use of rip rap. EPA Ex. 4. Shortly thereafter, on September 29th, the Corps noted Jarvis' response and informed that a public notice of the proposed work would be issued. The letter advised:

> **This is not an authorization to begin work. No work should be performed in the waterway below the ordinary high water before you receive a validated permit from TVA and us."**

EPA Ex. 5. (emphasis in original). The public notice, dated October 4, 1998, informed that "The proposed work consists of *harbor excavation*, retaining wall, development fill, *riprap*, ... and launching ramp extension...." EPA Ex. 6. (emphasis added). Among other approvals required for the proposal was a water quality certification from Tennessee, finding that the work would not violate the water quality standards. Tr. 42, 104. EPA Ex. 6. Comments from the public notice were forwarded to Jarvis for a response. Although Jarvis did respond, the Corps, in a letter dated December 29, 1999, asked for additional information. The Corps' Project Manager, Bradley Bishop, who had been in contact with Jarvis from the outset of the proposal, noted on a business record form dated January 6, 2000 that Mr. Bucky Edmonson, of the TVA, had informed him in a telephone conversation that calls from the public had been received, asserting that Jarvis had started excavating lake bottom material. EPA Ex. 10. Tr. 53 -55. A Corps' field office visit to the site confirmed that such activity was occurring and this resulted in the issuance of a "Cease and Desist Order" on January 18, 2000. EPA Ex. 11. The Order advised that Corps staff had observed excavation and fill activities being performed below the normal summer pool[2] elevation. In his testimony, Bishop denied that he ever told Jarvis that he could proceed without a permit, although he gave indications that it was likely, once the remaining issues were resolved, that a permit would be issued. Tr. 62 -63, 92.

[2]The "normal summer pool" refers to the ordinary high water elevation of the lake.

EPA witness Joe McMahan, a Corps regulatory specialist, visited the site, along with two other Corps employees, on January 10, 2000. At that time he observed several areas of freshly excavated soil, along with a track hoe, pneumatic chisel, and bulldozer, all of which were located in the lake bed below the normal summer pool. Tr. 116 -118. EPA Ex. 12A. He also observed deposited dredge material below the summer pool. EPA Ex. 12A, at area marked "B-B," Tr. 123 - 125. McMahan visited the site again on February 2, 2000. On that occasion he observed that the dredged area was larger. From his assessment, the area then looked like a work or launching area. He also saw two berms, composed of soil and rock, in the lake bed and, in the two impounded areas, he witnessed a track hoe and a dump truck excavating. Tr. 134. EPA Ex. 13A. Exhibits 13A and 13B also depict, in the area marked "Section AA," where McMahan believed dredged material had been placed and this too was below the normal summer pool.[3] Tr. 142. McMahan testified that he witnessed dredged material being loaded into a dump truck and then transported up the existing boat ramp and redeposited in the Section AA area. Tr. 147. He also saw a bulldozer moving the redeposited material within that section, pushing material below the normal summer pool. Tr. 148. Regarding the two berms, the witness estimated one, listed as "Section BB," to be 150', 15' wide, and 7' high, while the other, listed as "Section CC," was about 80' long, 10' wide and 6' in height. Tr. 149, 153.

McMahan took photographs of the site during this visit.[4] Among others, photograph 13G does show the track hoe with its bucket reaching into an impoundment area and it is clear that this activity was occurring below the normal summer pool. A generator, also in this lakebed area, was identified as well. McMahan confirmed that there were no berms on January 10th but the two berms he described were there on the February 2nd visit.

Ms. Louise Harrison, an owner of property adjoining the marina, testified that dynamiting occurred at the marina around the end of December 1999 and she believed that a new ramp had been constructed at the site. Tr. 237, 248.

Mr. Bobby Lane, a licensed civil engineer, testified for the Respondent. Lane helped prepare Jarvis' permit for the marina changes. The basic idea of the planned changes was to make the

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[3]EPA has contended that this area of redeposited material was a new boat ramp. Tr. 142. Whatever its proper label, McMahan testified that the area of dredge material was about 70' long, 40' wide and 20' deep and that it was located below the normal summer pool. Tr. 143.

[4]Exhibit 13E, for example, depicts the locations from which the photos were taken. In photograph 1, Exhibit 13F, a red line was added to mark the normal summer pool line. Tr. 159. At the Court's instruction, McMahan circled on 13 G the area the material he identified as dredge material that had been redeposited below the normal summer pool. Photograph 8 of Exhibit 13H shows the larger (150') berm along with a dump truck and the track hoe within the normal summer pool. Exhibit 13I is useful because it depicts both the alleged new ramp, which area the Court also instructed the witness to circle, and to the left of it, the existing ramp, with a generator located at the bottom of it. Tr. 170.

marina deep enough to float boats even when the lake level was at its winter low. While the plans called for the construction of a bulkhead, it was to be built along the existing shoreline. Thus, Lane maintained there was no plan to extend the shoreline lakeward, nor could he recall any plans for a second boat ramp. Lane revisited the site after the litigation had begun, and concluded that the shoreline had not been appreciably or significantly altered. Although he visited the location where Jarvis told him the dredged material had been deposited, and opined that some 15 to 20 thousand cubic yards of material had been removed from the lake, he could not assess what changes, if any, had occurred to the lake bottom, because the water level had risen, covering it.[5] Tr. 339. Lane did agree that one who places dredged material in a lake bed, whether the bed is dry or not, must have a permit to do so. Tr. 441.

The Respondent, William Jarvis, also testified. Jarvis testified that in the summer of 1999 he contacted Edmondson regarding the application he was intending to file and that Edmondson visited the marina and advised him as to the steps that needed to be taken. Filing his application in August 1999, Jarvis was hopeful that he would be ready to act when the winter lowering of the lake occurred. Jarvis denied that his plans called for any filling in the marina, but he asserted that the bank had eroded from one to five feet over the years and that his plan would restore the shoreline to its previous line before the erosion. Tr 461 - 463. Jarvis believed that a permit was needed for the aspects of his project that required construction, such as footers, new docks, or ramp extensions, but that the removal of material phase did not require a permit. Tr. 466 - 467. He also denied that there was ever an intention to build a second ramp at the marina and that the plans only called for enlarging and repairing the existing ramp. Tr 469. Jarvis represented that, around Christmas time, Edmondson told him it would be "around a couple of weeks" before the permit would be issued. At that time he advised Edmondson that the archaeological site was not an issue, as those who raised the issue had the wrong location. He also believed that he had responded to the misunderstanding by the wildlife officials regarding the idea that the dock would be extended. Tr. 471 - 472. Following the conversation with Edmondson, Jarvis started excavating material. Tr. 473. Jarvis admitted that this work involved removing material from the lake bottom in areas below the normal summer pool and that, in order to remove limestone, this activity included drilling and blasting. Tr. 474 - 476.

Jarvis insisted that his "productive work" stopped once he received the cease and desist order. After that, a dump truck, bulldozer and track hoe continued to work, but that because some dynamiting had already been drilled and some measures to deal with erosion had to be addressed, he had to finish up those tasks. This required another seven to ten days to complete. Tr. 480 - 483, 598. He admitted he was agitated by the cease and desist order, as expressed with the comment he wrote on the order to the effect that he had done his part and now it was the

[5]Although, on cross-examination, EPA made extended inquiries regarding alleged discrepancies between Jarvis' permit application and the submitted drawings and whether material and concrete would be added below the summer water level, these excursions dealt with prospective matters and did not deal with the matter at hand of whether Jarvis made discharges without a permit.

Corps' turn to act. Thus, feeling that he had met his obligations, Jarvis believed that the Corps had not held up their end of responsibility with their slow processing of his permit. Tr. 480. Time was of the essence, given the short opportunity for the lake work to be completed while the lake level was momentarily down. As part of wrapping up work that was in progress prior to receiving the cease and desist order, Jarvis stated that he took rock and deposited it along the shoreline. Jarvis represented that such activity, which he described as using rip rap for erosion control, is a recognized method and Jarvis believed that no permit is required when the activity is done to control erosion. Tr. 605 - 606. He also asserted that Bishop agreed that clean up work was necessary and that he did not expect that Jarvis would simply leave the site abruptly.[6] Tr. 484. Jarvis also stated that he never dug any footers, nor placed any anchoring devices and he denied building a second ramp. Tr. 485 - 486. He believed that the area EPA thought was a ramp was actually the result of Jarvis' digging around the existing ground. Jarvis did agree that he placed rip rap around one side of this excavated area, the putative ramp. Tr. 487. He denied constructing the berms, maintaining that they had been built at an earlier time by other contractors who were dealing with a sewer plant problem. Tr. 490, 540.

Witness Fred Frazier, an official with the Boone Lake Association, was also called as a witness for the Respondent. Frazier testified that, during the time in issue, he checked several times each day to be sure the Respondent was not putting anything in the water. However, he stated that he observed settlement ponds being constructed and that rock and straw were installed on top of those ponds. Tr. 616, 624. He asserted that the adjoining lake level was higher than the area where Jarvis was excavating. Tr. 627. Last, he witnessed rock being dumped back into the lake for erosion control. Tr. 617.

Respondent produced several witnesses who maintained that Jarvis only removed material from the lake. Ms. Debbie Hixson, an employee at the Marina, stated that she observed Jarvis adding rock along the bank. Tr. 631 - 632. She also related that Edmondson told her, during a conversation at the marina, that no permit was needed to remove dirt and that the archaeological issue was to be resolved favorably. Tr. 634 - 636. She contradicted Frazier's claim that the lake level was higher than the work area, believing that the witness was simply confused. Tr. 640. Witness Terry Mendehall, another Jarvis employee, ran the track hoe at the site. He stated that, other than the placement of the rip rap , there was no discharge of materials. He maintained that the berm on the left side was already present and that only some rip rap was added to it, with straw and a silt fence added to the other side. Tr. 649. While he agreed that no second ramp was constructed and that the area only looked like a ramp because surrounding material had been removed, he also stated that it was used as a means to go into and out of the area.[7] Tr. 651. Witness Jerry Cross also asserted that he only trucked material out of the lake and that no material was deposited in it. Tr. 659. Witness Kenneth McKinney, a dump truck operator for

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[6]Bishop did not refute this claim.

[7]Thus, by the testimony of a witness for Jarvis, functionally, albeit temporarily, the area in fact served as a ramp for the excavation activity.

Jarvis, testified to the same effect: materials were only removed from the lake.

On this record, the Court concludes that although there were issues regarding subjects such as the composition and size of the two berms and whether a second ramp had been constructed, the evidence is clear that dredging activity, below the summer pool, took place during the times in issue, that machinery was working in that area, that while most of the dredged material from that activity had been trucked out, some of the material, including rip rap, had been moved around within the lake bed, that during this activity, a ramp-like structure effectively had been created, in addition to the marina's original boat ramp.

Additionally, regarding the berms, the Court finds that, as the photographic and other evidence reveals, Jarvis did construct two berms within the lake bed in order to facilitate his dredging activities. The assertion that these were created by an earlier project addressing sewer problems is not credible. First, had that occurred, Respondent could have brought forward witnesses to substantiate the claim that the berms were created by the earlier project. Second, that the berms would have, by happenstance, been created by the earlier project and conveniently benefitted the exact area where Jarvis was working is highly improbable, to say the least. This conclusion is buttressed by the photographic evidence showing both berms. Third, the Court has determined that Mr. Frazier, who was a witness for Jarvis, was not confused, but in fact did observe the settlement ponds being constructed. Last, even assuming for the sake of argument that the berms were created at an earlier time, there was testimony that rip rap and straw were placed on them.

Regarding the putative ramp, while not intended formally as a second boat ramp at the marina, it did in fact serve as a ramp during the excavation project. Further, Jarvis's placement of rip rap along one side of this putative ramp, along the shoreline, and, at a minimum, on the berms, all constituted more than mere excavation activity in the lake bed and cannot in any manner be characterized as incidental fallback, either in quantity or by the purpose to which such material was put to use.

II. Legal Issues Raised in the Post-Hearing Briefs[8]

Section 301 of the CWA provides that the "discharge of any pollutant[9] by any person" is unlawful unless in compliance with the Act's permit requirements. Under Section 404, permits may be issued by the United States Army Corps of Engineers for the discharge of dredged or fill material into navigable waters at specified disposal sites. The Act defines "discharge" as any addition of any pollutant to navigable waters from any point source.

EPA's view of the alleged violation of Section 301(a) of the CWA

Asserting that Jarvis' conduct involved the unpermitted discharge of a pollutant to navigable waters from a point source, EPA notes that each of the terms are broadly defined. It maintains that the term "pollutant" includes dredged spoil, biological materials and rock, while "discharge" refers to any addition or redeposit of dredged material, other than incidental fallback, to such waters, and "point source" applies to any discernable, confined and discrete conveyance from which pollutants are discharged.

Regarding the "point source" element of the violation, EPA calls attention to Jarvis' use of

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[8]Although the Court speculated at the hearing that the Rivers and Harbors Act, ("RHA"), and not the Clean Water Act, might control the activity in issue, it concludes that is not the case. As EPA noted, jurisdiction to regulate activities in navigable waters and waters of the United States can be found in both Acts. While acknowledging that there are differences in the scope of jurisdiction between the RHA and the CWA, EPA contended that these differences are of no practical importance in this instance and that "[s]ince the regulatory scope of the CWA is in some aspects broader than the RHA, the U.S. Army Corps of Engineers (COE) in its discretion properly applied the CWA to Respondent's activities, and EPA and COE in their discretion properly chose to prosecute Respondent's violations under Section 404 of the CWA." EPA Br. at 3. Jarvis effectively did not contest the CWA's applicability to this case. The Court's inquiry stemmed from the recognition that *dredging itself* is regulated under the RHA. Thus, while Section 404 regulates the discharge of dredged material, it does not regulate the dredging itself. That activity is covered under Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403. Another major distinction is that "navigable water" has a broader meaning under the CWA. In recognition of this distinction, the Eighth Circuit, in *Minnehaha*, while holding that the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, did not apply to Lake Minnetonka as a "navigable water" of the United States because it was an entirely intrastate body with no interstate navigable water linkage, determined that the same lake and its outlet, Minnehaha Creek, were "navigable waters" under the CWA. As such, the Corps of Engineers had jurisdiction under Section 404 of that Act to regulate the discharge of dredge or fill into that water. 597 F.2d 617.

[9]33 U.S.C. § 1362(6) of the CWA broadly defines "pollutant" to include "dredged spoil ... rock, sand, cellar dirt ... discharged into water." This broad definition has been held as "not unduly vague." *United States v. Eidson*, 108 F. 3d 1336, *1343 (11th Cir. 1997).

various pieces of heavy equipment, including a track hoe, drill, front-end loader, dump trucks, and bulldozer, within Boone Lake, at a location below the normal summer pool level. It observes that several courts have determined that such pieces of equipment constitute "point sources." EPA next identifies the "pollutants" associated with these point sources as the "dredged material, rip rap, straw bales and debris from dynamite blasting" generated by Jarvis' Boone Lake activities, and notes that these activities occurred below the summer pool level. As to the discharge of dredged material, EPA refers to this soil and the rip rap, pointing out that witnesses observed heavy equipment pushing and placing dredged soil in the area of the new ramp at locations below the normal summer pool. It also contends that photographs introduced into evidence and Respondent's own testimony support this assertion.

EPA further observes that courts consistently have determined that "rip rap," which is better recognized as rock,[10] is a pollutant when placed in navigable waters and that, along with other witnesses, Jarvis himself admitted placing such rip rap into Boone Lake in areas below its normal summer pool level. EPA Br. at 7. It maintains that Jarvis' assertion that this was done to control erosion and sediment is irrelevant to establishing the violation. In addition to arguing that the straw bales used by Jarvis and the debris from dynamite blasting were additional sources of pollutants, EPA asserts that Jarvis used dredged and excavated material to construct a new ramp in the lake bed as well as to build two berms which were composed of dirt, rip rap and straw bales. EPA Br. at 8 - 10. EPA, noting that under the regulations, the phrase "discharge of dredged material" includes the addition or redeposit of dredged materials, additionally claims that Jarvis redeposited excavated and dredged material within the lake bed. While EPA concedes that "incidental fallback" is outside of the reach of the CWA, it maintains that Jarvis' activity was far beyond such minimal quantities of material,[11] as amply demonstrated by Jarvis' activities of placing rip rap and constructing a ramp and berms within the lake bed. *Id*. at 13.

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[10]The dictionary defines "rip rap" as "[a] loose assemblage of broken stones erected in water or on soft ground as a foundation." The American Heritage Dictionary of the English Language, 3rd ed., 1992. Witness Bishop described it as angular rock used for bank stabilization. Tr. 88.

[11] By its calculation, based on its witness' estimates of the size of the berms and ramp, EPA figures that these structures were about 5,394 cubic yards, which would be more than 25 percent of the 15,000 to 20,000 cubic yards estimated by Jarvis' witness to have been removed from the lake bed. EPA asserts that this estimate, already representing far more than incidental discharge, does not take into account the rip rap it claims Jarvis used along the shoreline or the existing or new ramp, nor does it include the discharge from dynamiting. Given the informal basis for these estimates, the Court does not make a finding of fact that such quantified amounts were actually redeposited. Additionally, the Court finds that the putative ramp was created indirectly by removal of surrounding material. However, the Court finds that the EPA testimony was sufficient to establish that a quantity of material, far in excess of any incidental fallback was redeposited within the lakebed.

Respondent's View of the alleged violation of Section 301(a) of the CWA

Respondent Jarvis contends that as all material removed was above and away from the actual water of Boone Lake, the activity, at least at the time of removal, all occurred on dry land. Jarvis asserts that there is no proof that "an aquatic area was being replaced with dry land" nor that the bottom elevation of the lake had been filled. R's Br. at 8. It notes that the decision in *National Mining Association, et. al. v. U.S. Army Corps of Engineers, et. al.*, 145 F.3d 1399 (D.C. Cir. June 19, 1998) ("National Mining") voided the Corps "Tulloch Rule" as outside of the Corps' ability to regulate the addition of a pollutant to waters where the challenged activity only involved incidental fallback, where it occurs in the context of a net withdrawal of material.

Addressing EPA's assertion that the dredged material was used as rip rap, Jarvis asserts, using the same "dry land" theory, that no material for rip rap was taken from the lake itself. In support of this theory he notes that *Aroyelles Sportsmen's League v. Marsh*, 715 F.2d 897 (5th Cir. 1983) defined dredged material as that which comes *from the water itself.* By contrast, in this instance the rip rap was removed from the dry portion of the lakebed. Further, it contends that the amount of rip rap removed was "minuscule" when compared with the more than 1,200 truckloads of excavated material that were removed.

Jarvis, underscoring the importance of the D.C. Circuit's opinion in *National Mining*, also points to *U.S. v. Hallmark Construction Co.*, 30 F. Supp. 2d 1033 (N.D. Ill. 1998) ("*Hallmark*"), which relied upon *National Mining*, in holding that "neither excavation or incidental fallback or redeposit of material during excavation requires a § 404 permit." Jarvis submits that *Hallmark* operates to extend *National Mining* by including redeposit of material during excavation and urges that case is similar to, or the same as, the facts presented in Jarvis. *Id*. at 10.

Referring again to the issue of rip rap, Jarvis asserts that Congress created an exemption for the discharge of fill materials from the Section 404 permit requirements when such activity is done for the purpose of maintenance of currently serviceable structures. It submits that the listing of structures such as dikes, dams, levees, groins, rip rap and breakwaters was not exhaustive but only illustrative of such serviceable structures. It contends that another equally serviceable structure is the bank of a lake. Jarvis Br. at 10. Accordingly, Respondent's work, installing rip rap along the bank, being done exclusively for the purpose of maintaining the bank to protect it from erosion when the lake would rise to its summer level, fits the purpose that Congress intended for exemption from a Section 404 permit. Pointing to *Minnehaha Creek Watershed District v. Corps of Engineers*, 597 F.2d 617 (8th Cir. 1979), ("*Minnehaha*") as support for this argument, Jarvis also notes that while the permit exemption does not apply where the fill material is connected with activity designed to bring an area of navigable waters into a new use or where water circulation or flow may be impaired or the water's reach reduced, the Complaint does not assert that Jarvis was attempting to bring the area of navigable water into a new use nor that the activity would impair the reach, flow or circulation of that water.

Respondent also believes it is important to recognize that the definition of "fill material," as set forth at 33 CFR § 323.2(e), means material used for the *primary purpose* of *replacing* an

aquatic area with dry land or *changing the bottom elevation* of the water body. In contrast, Jarvis identified his sole purpose for installing the rip rap was to protect the bank. Thus, Respondent maintains that even if Jarvis' activity does not come within the maintenance exemption of CWA Section 1344(f)(1)(B),[12] the rip rap is not material contemplated under 33 CFR 323.2(e) nor was it used as contemplated by Section 1344(f)(2) of the CWA.

Jarvis notes that the CWA must be carefully interpreted and applied. This approach includes a recognition that this is not a wetlands case nor one being enforced under the Rivers and Harbors Act. It also means that, as applied to man-made lakes such as Boone and other TVA lakes, this analysis should take into account that such a lake is not controlled by natural forces, but rather by human decisions. Consequently, TVA's decisions, not those of nature, determine the lake levels. People who use lakes, such as Boone, are aware of TVA's practices, allowing the lake level to drop in the fall and winter. When Boone's level dropped during the winter of 1999 - 2000, Mr. Jarvis used that time to remove materials from that lake, believing that no permit was required. As mentioned, Jarvis also asserts that he was told he could remove material without a permit. Jarvis Br. at 12.

In contrast, Jarvis recognized that he could not move forward with the other aspects of his project such as constructing pilings, extending the boat ramp, or pouring the concrete for the bulkhead wall along the lake bank, as those steps required a permit. While he acknowledges excavating the dry lake bed and dumping that material away from the lake, he contends that the evidence demonstrates that he did not fill or discharge dredged material into the lake bed or lake water. *Id*. at 12. Regarding rip rap, Jarvis concedes that he did pack some along the lake bank, doing so solely for control of bank erosion and that, as the bank was both "high and dry" at that time, this activity was not discharging into the lake.

As for the ramp issue, Jarvis absolutely denies that he ever constructed a second boat ramp and, in support of that assertion, he notes that such a ramp would not be constructed because a serviceable ramp, in need of an extension only, already was present. Further, building a second ramp would be illogical because such construction would eliminate the floating dock and several covered slips, the effect of which would be to reduce the income potential for his planned marina improvement. Such a conclusion is also at odds with common sense, as Jarvis hardly would have blasted rock in an area intended for a ramp. Beyond that, such a conclusion would be in conflict with the testimony of several witnesses who denied a ramp was being constructed. Rather than viewing a ramp construction, Jarvis suggests that the EPA witnesses were simply mistaken, viewing only material that had not yet been excavated. Such excavation had to await the next winter lake level drop and a permit from the Corps of Engineers. R's Br. at 14.

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[12]This section provides: "Non-prohibited discharge of dredged or fill material ... (1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material – (B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;

Respondent's witnesses testified that the excavation was not completed as more would be needed[13] before the lakebed would become low enough to permit a functional floating dock during the winter's low level. Further, as reflected in R's ex 28, the "ramp" EPA believes existed would have to be removed in order to accommodate the Jarvis' proposed floating dock number 3. *Id.*

Finally, Jarvis contends that, even if liability is found, it would be appropriate to consider Jarvis' activity as warranting an "after-the-fact" permit, since it has effectively been admitted that his work was proper in all other respects and that a permit inevitably would be issued. *Id.*

In responding to Jarvis' argument that the activities in issue took place on dry land, while EPA agrees that the actions took place on a dry lake bed, it contends that fact does not change and is irrelevant to the analysis. EPA asserts that the only question is whether there was a discharge of a pollutant within a navigable water. Noting that the term "navigable waters" is both broadly defined and so recognized by the courts, EPA observes that the Corps has implemented regulations that include impoundments of waters within the term "waters of the United States." These regulations provide that jurisdiction over non-tidal waters extends to the "ordinary high water mark," which is defined as "that line on the shore established by the fluctuations of water and indicated by physical characteristics such as [the] clear, natural line impressed on the bank, ... [and by] destruction of terrestrial vegetation ..." 33 C.F.R. § 328.3(e). EPA Reply Br. at 2 - 3. Further, "dredged material" is broadly defined to include material that is "excavated or dredged from waters of the United States." 33 C.F.R. § 323.2 and 40 C.F.R. § 232.2. The discharge of such dredged material encompasses its addition and redeposit. As Boone Lake was created by the impoundment of the South Fork of the Holston River, it falls within the definition of a water of the United States. In addition, there is no dispute that Jarvis' activities took place below the ordinary high water mark. Accordingly, EPA asserts that any material removed from the lakebed[14], dry or not, is dredged material which, upon being redeposited, is a discharge of a pollutant into such water.

In its reply brief, EPA also contends that a close reading of *Hallmark* refutes Jarvis' contention that rip rap is not covered by the CWA. In that case, the court only limited CWA jurisdiction where incidental fallback was involved. Further, the term "incidental fallback"

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[13]Jarvis points to photographs 20, 28, P12, 34, 35, P15 and Exhibit 32 to demonstrate that more excavation would be required to take the lakebed down to 1355 foot level or below. Jarvis also contends that R's ex. 28, 29, P12, R 34, 35 and P15 show rock outcroppings within the winter lake draw down and demonstrate that the proposed floating docks would still be on dry lakebed, thus demonstrating the need for further excavation.

[14]EPA contends that Jarvis' references that his activities did not occur in "wet lands" is irrelevant, as the activity here involves navigable waters and "wetlands" are only a subcategory of that term. The Court agrees, wetlands are not pertinent to this proceeding.

means "minute redeposits that occur as a byproduct of excavation." *Hallmark* at 1036. Because Jarvis's redeposits were in no sense incidental fallback and because they included rip rap and soil, EPA argues that *Hallmark* does not suggest that the CWA is inapplicable. EPA R.Br. at 4.

EPA also responds to Jarvis's claim that the placement of rip rap was exempt under Section 404(f)(1)(B) of the CWA because it was done for the purpose of maintenance of currently serviceable structures. EPA contends there is no evidence in the record to support the claim that Jarvis' placement of rip rap along the shoreline, along the newly constructed or the existing ramp, or that the berms he installed, were put there for maintenance of such structures. In addition, while challenging Respondent's premise that the bank of a lake is a "serviceable structure" and that Jarvis' installing rip rap was solely to prevent erosion, EPA contends that the case Jarvis relies upon for support, *Minnehaha Creek Watershed District v. Hoffman*, 597 F.2d 617 (8th Cir. 1979) and the District Court's underlying decision, 449 F.Supp. 876 at 879-881(D. Minn. 1978), in fact held that such rip rap placement for shoreline protection was *not* within the Section 404(f)(1)(B) exemption under the CWA .

Speaking to the factual issue of whether Jarvis constructed a new ramp, EPA relies upon the testimony of Mr. McMahan and Ms. Harrison to support this claim. EPA speculates from McMahan's testimony that the new ramp permitted Jarvis to be more efficient in his lake bed activities, allowing trucks to enter the lake by means of the new ramp, while other trucks used the existing ramp to exit the lake. EPA Reply at 6. However, whether a new ramp was or was not constructed,[15] EPA emphasizes that the critical determination is whether Jarvis discharged dredged material below the normal summer pool, activity which witnesses McMahan and Harrison confirmed.

The Court's Analysis and Determinations Regarding Liability

At the outset the Court notes that there is no dispute that Jarvis performed excavation work in Boone Lake, below the ordinary summer high water mark or "summer pool" during December 1999 and January 2000 and that this activity involved heavy equipment, including dump trucks, a track hoe, bulldozer and pneumatic chisel, all operating in the lake bed at that level. It is also undisputed that the activity at this level included dynamiting, the use of straw bales, and the placement of rip rap along the shoreline and in an area which, for identification purposes, is described as the "second ramp." While contested, the Court has determined that Jarvis did create the two berms as identified in the photographs in EPA exhibit 13. Thus, it is against this set of facts that the Court must evaluate Jarvis' contentions and analyze the applicable case law.

[15]EPA, while contending that a new ramp was created, concedes that its "construction" could have occurred either by Jarvis affirmatively building it or by blasting rock around the new ramp area, with the latter tactic creating the appearance of a new ramp by leaving the natural slope intact and excavating around that area. EPA R.Br at 6.

First, the Court summarily rejects Jarvis' suggestion that a different standard for evaluating the CWA's applicability should obtain when a lake is man-made as opposed to those lakes that were naturally created. No case law has been cited in support of this approach nor is there any logical reason for making such a distinction. However a lake comes into being, it is still a lake and the fact that, for man-made lakes, controls which can affect the lake's water levels may be included with its construction, or thereafter, does not affect that status. Natural lakes can also be subject, through natural forces or otherwise, to varying lake water levels, as in times of drought or flood, and it would not make sense to apply one standard, as Respondent suggests, for prohibited CWA activity where lake levels drop in a natural lake due to natural causes and another standard where the drop occurs from implementation of man-made controls. Thus, the suggestion that Jarvis was not working in the lake but rather on 'dry land,' is rejected where, as here, Jarvis concedes that his activity occurred in the lake bed below the normal summer pool. In addition, given that the CWA has been expansively interpreted to include wetlands within its purview, it would be inconsistent to suggest that a lake's bed, be it natural or man-made, becomes exempt from such coverage to the extent it becomes dry during intervals when its waters temporarily recede.

For similar reasons, the Court rejects the assertion that Jarvis' activity was exempted as the work was being performed on "dry land," because man-controlled actions had lowered the lake level. In interpreting the waters covered under the CWA this distinction has not been recognized by the courts. Rather the consistent view has been that "waters of the United States" has very broadly interpreted. While the CWA refers to "navigable waters" it defines that term as "waters of the United States." The consequence of that, as interpreted by the courts, is that one would better understand that term "navigable waters" by ignoring the term "navigable." Thus, wetlands adjacent to such waters, human-made tributaries, brooks and drainage ditches are all within the scope of waters of the United States. *See United States v. TGR Corporation*, 171 F3d 762 (2nd Cir. 1999), citing the array of waters recognized by other Circuits as within the purview of the CWA's definition. Accordingly, that a water body is man-made makes no difference. *United States v. Eidson*, 108 F. 3d 1336, *1342 (11th Cir. 1997), quoting from *United States v. Holland*, 373 F.Supp. 665, 673 (M.D. Fla. 1974).

Was Jarvis' activity exempt from the CWA permitting process on grounds that there was no addition of any pollutant to the water?

Jarvis next contends that *National Mining's* "Tulloch Rule" exclusion was extended by the decision in *Hallmark*, with the consequence that the exception now includes the redeposit of material removed during excavation.

In *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (DC Cir 1998), the D.C. Circuit held that the "Tulloch Rule" exceeded the Corps authority under the Clean Water Act by its attempt to regulate *any addition* of pollutants to navigable waters. It took note that the Corps has the authority, under Section 404 of the CWA to issue permits "for the discharge of dredged or fill materials into navigable waters," and that, under Section 301(a) of that Act, discharge refers to the "addition of any pollutant to navigable waters from any point

source." By regulation, the Corps, in 1986, at first defined the "discharge of dredged material" as "any addition of dredged material into waters of the United States" but it excluded *de minimus*, incidental soil movement occurring during normal dredging operations. Subsequently, in 1993, it dropped the *de minimus* exception, with the consequence that thereafter, any addition, including any redeposit, of dredged material was then within the scope of regulated discharges. This regulatory change, known as the *Tulloch Rule*, was challenged as beyond the Corps Section 404 authority on the theory that, by attempting to regulate "incidental fallback," that is, the return of dredged material to nearly its original location, there had been no "addition" of material.

Although the court was addressing only incidental fallback, several aspects of its analysis arguably lend support to Jarvis' argument. This is so because the court implied that its underlying problem with the Corps' regulatory action stemmed from the statute, which defines the discharge of dredged material in terms of the *addition* of such material to waters. While the court stated that a small portion of material which falls back during dredging can not be considered an "addition," its reasoning was grounded on the observation that because there was "a net withdrawal, not an addition, of material, it cannot be a discharge." *Id*. at *1404. A "discharge," it observed, "contemplates the addition, not the withdrawal, of a substance or substances." *Id.* Thus, it emphasized that it could not find there had been an addition of dredged material when there had been no addition of material. Focusing as it was on the term "addition," the court did not limit its analysis to minuscule amounts, as evidenced by its remark that the attempt to remove 100 tons of material can not be deemed an "addition" because only 99 tons were actually removed. By including incidental fallback within the permitting process, the Court concluded that the Corps was attempting to cover "a wide range of activities that cannot remotely be said to 'add' anything to the waters of the United States." *Id*. at 1405.

The court also rejected the government's argument that Section 404(f) of the CWA, by setting forth specific exemptions from the permit requirement and not including fallback on that list, inferentially includes fallback as an action requiring a permit. Instead, it concluded that the specific exemptions were not an exclusive list, noting that permits are required where the activity has "as its purpose bringing an area of navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced."[16]

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[16]It is arguable that the provision of CWA Section 404(f), providing that permits are still required where the activity has as its primary purpose bringing a water "into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters reduced," must be read as a whole. Consequently, under this interpretation, a permit would be required only where one is bringing an area into a new use *and* this activity may impair the flow or circulation of the waters or the reach of the waters may be reduced. While Jarvis' activity was about a new use, there is no evidence that it impaired water flow or circulation nor that the reach was reduced. Rather, the activity by removing material from the lake, had the opposite effect. However, the D.C. Circuit did not take this approach,

Despite the referenced passages hinting at a potentially broader exemption from the permitting process, tied to whether there had been a true addition of material, it is clear that the Court of Appeals, was excluding only incidental fallback from the permitting process. That its holding was so limited is clear from the distinction it drew between cases involving redeposit as opposed to fallback. For example, it characterized the displacement activity in *United States v. M.C.C. of Florida*, 772 F.2d 1501 (11th Cir. 1985), involving placing dredged spoil from a waterway bottom onto adjacent sea grass beds, as akin to sidecasting rather than fallback.[17] It also distinguished *Rybachek v. EPA*, 904 F.2d 1276 (9th Cir. 1990), because that involved a "discrete act of dumping leftover material into the stream after it had been processed," rather than incidental fallback. Of greater significance here, the court distinguished, without criticism, the holding in *Minnehaha Creek Watershed District v. Hoffman*, 597 F. 2d 617 (8th Cir. 1979) that the construction of dams and riprap was covered by Section 404 permitting, as it involved the placement of rock, sand and cellar dirt into the water body. *Id*. at 1406. Moreover, the court accepted the principle of deference to an agency's interpretation of a term, such as "addition," except where an interpretation is "manifestly unreasonable." By attempting to include *incidental* fallback, the court found the agency had reached such an unreasonable interpretation.

The Court does not read *Hallmark* as aiding Jarvis' position. *Hallmark*, 30 F. Supp. 2d 1033, (N.D. Ill.1998), involved the alleged discharge of pollutants into wetlands. Specifically at issue was the unpermitted discharge of dredge or fill material onto land that Hallmark intended to develop for a residential subdivision. The government contended that Hallmark discharged a pollutant when it added sand and dirt in filling, and by redepositing, material to a particular area. Hallmark asserted that it made no fill "addition" but rather created a net withdrawal through its excavation efforts for a storm water pond. In fact, Hallmark, citing *National Mining*, maintained that because its activity was excavation, any discharge would have to be characterized as incidental fallback. The district court, interpreting the breadth of *National Mining*, held only that "neither excavation nor incidental fallback or redeposit of material during excavation requires a § 404 permit." *Id*. at *1037. Thus, its holding did not operate to extend *National Mining* and it concluded that, under the particular facts, there had not been a "true addition" of fill material but only incidental fallback, at least where the stormwater detention pond was being constructed.[18]

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holding that the Corps was precluded only from attempting to regulate "*any* redeposit" and consequently that it could regulate deposits other than incidental fallback.

[17]In yet another indication that the D.C. Circuit's ultimate focus was upon whether an "addition" had occurred, it noted with reference to the sidecasting in *M.C.C. of Florida* that the Fourth Circuit expressed concerns along this line; with one member of the panel there finding that sidecasting was not an addition, another finding that it was, and the third member declining to adopt either view.

[18]Other parts of the area were admitted by Hallmark to have been filled and graded but those aspects, involving a determination whether those parts were established as "farmed wetland," are not relevant here.

Other cases analyzing this issue point to a conclusion that Jarvis' activity constituted an addition under the CWA and therefore required a permit.

For example, *Avoyelles Sportsmen's League*, 715 F.2d 897, (5th Cir. 1983), involved part of a 20,000 acre tract of forested land which the owners wanted to clear for agricultural use. A citizens' suit sought to have the area declared a wetland and alleged that the land clearing activities would result in the discharge of dredged and fill material and pollutants into waters of the United States in violation of the CWA. It had to be determined whether the landclearing activities fit the four elements necessary to sustain a Section 301(a) violation by resolving whether there had been a discharge, of a pollutant, from a point source into navigable waters. As pertinent here, the court determined that bulldozers and backhoes were "point sources" because they collected into piles material that could find its way back into the waters. The court also addressed the argument that only removing wetlands vegetation could not be considered a "discharge" because there had been no "addition" of materials. Subscribing to the view of the D.C. Circuit[19] that focusing on the word "addition" would produce an "overly literal and technical" construction, and noting that it was not dealing with a "mere removal" case, the Fifth Circuit concluded that "addition" in the context of the CWA "may reasonably be understood to include "redeposit" of materials taken from wetlands.[20] *Id*. at *923.

A similarly broad interpretation was applied in *United States v. Sinclair Oil Company*, 767 F. Supp. 200 (D. Mont. 1990) The defendant there had engaged in river channel maintenance, removing obstructions from the riverbed, including rocks, sand and gravel, and it had redistributed river cobble, by redepositing it, in order to reinforce existing banks and to block new channels. As with Jarvis, the work in the channel required use of a bulldozer, in the riverbed. The government charged that, by performing such maintenance without a permit, the defendant violated Section 404 of the CWA. The central contention raised by the defendant was that since it only redeposited or removed indigenous riverbed material there was no discharge of dredge or fill material. It argued that, because the CWA defines the discharge of a pollutant to require the addition of material, a redeposit is outside that definition. However, the court observed that, as Congress had delegated broad regulatory authority to the Corps, other courts have shown great deference to the agency's interpretations of the CWA. Under such a standard, courts will defer to the agency's interpretation if it is reasonable. It then noted that several other

[19]The 5th Circuit's decision was issued many years before *National Mining*.

[20]Although the court did not precisely answer whether there had been a discharge of dredged material because it determined that a discharge of *fill* material had been involved, that determination does not detract from the authority of *Avoyelles* because the owners were contending that dredging requires excavation and argued that removal of wetland *vegetation* was distinct from removal of the wetland itself.. *Id*. at * 924. Clearly the activity of Jarvis involved excavation.

courts[21] had found that a redeposit of indigenous material is an addition of pollutants under the CWA. With this deference, the court noted that the test for liability depended upon whether the redeposit of riverbed materials was within the definition of "discharge of dredged or fill material." It found that the defendant constructed artificial barriers in the river channel by redistributing river cobble and other materials from the bed. Since the definition of fill includes any material used for the primary purpose of replacing an aquatic area with dry land and a discharge of fill materials requires a permit where the material is used in the construction of any structure in a water of the United States, the defendant's redeposit of fill material constituted a discharge of a pollutant, requiring a permit.

United States v. Bay-Houston Towing Company, Inc. 33 F.Supp. 2d 596 (E.D. Michigan, S.D., Jan. 14, 1999) ("Bay-Houston") provides additional support for this Court's conclusion that Jarvis' activity required a permit. There, the United States alleged a violation of the CWA, asserting the permitless discharge of pollutants by means of peat bob drainage into a river and by the discharge of dredged or fill material into wetlands. Bay-Houston maintained that its peat harvesting did not constitute a discharge or addition to the wetlands and therefore that no Section 404 violation could be established.

In rejecting these claims, the court first returned to the broad objectives of the CWA of "restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. In support of those objectives the Act prohibits, except through permit, the discharge of any pollutant with pollutants including dredged spoil, biological materials, rock and sand. The court reviewed the essential elements behind the prohibition of the discharge of any pollutant. Discharge of pollutants, refers to any addition of any pollutant to navigable waters from any point source. Point source, in turn, refers to any discernable, confined and discrete conveyance from which pollutants may be discharged. Pollutants, another broad term, includes dredged spoil, rock, sand, and biological materials. Last, it noted that navigable waters, under the CWA, is a very broad term which includes wetlands.

The court then reviewed the litigation associated with the Corps' attempt to expansively define the discharge of dredged material to capture any addition of dredged material. As noted earlier, while the CWA allows the Corps to regulate the discharge of dredged material, it does not extend to dredging itself as that is regulated under the Rivers and Harbors Act, 33 U.S.C.

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[21]The court looked to: the 5th Circuit's decision in *Avoyelles Sportsmen's League, Inc. v. Marsh,* 715 F. 2d 897, 910 (1983), holding, as discussed supra, that "addition" includes the redeposit of indigenous materials; the 11th Circuit's decision in *United States v. M.C.C. of Florida, Inc.*, 772 F.2d 1501, and the redeposit analysis in 848 F.2d 1133 and 863 F.2d 802, holding that redeposit of sediment by the action of tugboat propellers disturbed the physical and biological integrity of the waters by destroying sea grass beds, and the 9th Circuit's decision in *Rybachek v. United States Environmental Protection Agency,* 904 F.2d 1276, 1285-86, which concurred with the rationale of the 5th and 11th Circuits, deferring to the agency's interpretation of "addition."

§403. Since the purpose of dredging is the removal of material from water and not the discharge of such material into the water, the Corps excluded from Section 404 coverage dredging and fallback incidental to that activity. It noted that litigation arising out of the Corps' interpretation of incidental fallback produced what became known as the "Tulloch Rule." It recounted that this interpretation was challenged in *American Mining Congress*[22], 951 F.Supp. 267 (D.D.C. 1997), with the court distinguishing excavation with incidental soil movement, as where soil being scooped by a bucket has some portion fall back in the same place where it was removed, from excavation where soil is moved away from its original site, such as placing dredged soil alongside a ditch. Although the *American Mining Congress* decision expressed discharge as contemplating the addition of material, the context of its expression pertained only to the subject of incidental fallback. Evidence that the court was only addressing incidental fallback is clear from the distinction it recognized in *Rybachek v. U.S. E.P.A.*, 904 F.2d 1276 (9th Cir. 1990), in which mining activity, excavating soil in and near waterways, followed by extraction of ore and the discharge of material back to the water, was held to be within Section 404 coverage because, as opposed to imperfect extraction, there was a discrete act -- the dumping of leftover material back to the water after processing. In *Bay-Houston* the court concluded that, as distinct from incidental fallback, the activity involved purposeful relocation: the deliberate redeposit of materials to other locations.[23] The court noted that *National Mining* did not hold that the Corps' jurisdiction was limited to situations where there had been an introduction of foreign materials and that the dredge and fill provision of the CWA would be meaningless if all pollutants had to come from outside sources. *Id*. at *606.

Finally,[24] the D.C. Federal District Court's analysis in *American Mining Congress v. U.S.*

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[22]On appeal, what was captioned as *American Mining Congress* before the District Court became *National Mining* before the D.C. Circuit.

[23]The court stated: "in digging the ditches, Bay-Houston purposefully moved bog materials to the side of the ditch." 33 F.Supp.2d 596, *605.

[24]The Court is aware of a minority view of this issue, as expressed in *Catskill Mountains Chapter of Trout Unlimited et al v. City of New York*, 2001 U.S. App. LEXIS 22724, (2nd Cir. Oct. 23, 2001). There, environmental organizations alleged that in the delivery of water to New York City a tunnel used in its conveyance discharged pollutants in the form of suspended solids and turbidity, without having a permit to do so. Noting that the primary purpose of the CWA is to regulate the discharge of pollutants into navigable waters, and that such discharges are regulated by a permit system, the court focused on whether the challenged activity constituted an "addition" of a pollutant. The court related that "EPA's position ... is that for there to be an 'addition,' a 'point source must introduce the pollutant into navigable water from the outside world." The Second Circuit agreed with that interpretation as long as "outside world" means "any place outside the particular water body to which pollutants are introduced." *Id*. at * 25. As applied to the facts, the court found that the transfer of pollutants from one body of water to another distinct body of water is an addition, and thus a permit was required. The court noted that although the 'addition' addressed in *Gorsuch,* 693 F.2d 156, (D.C. Cir. 1982) and

Army Corps of Engineers, 120 F.Supp. 2d 23 (Sept. 13, 2000) provides useful post-*National Mining Association* interpretation from the district court within the same circuit. The plaintiffs asserted that Corps continued to apply the Tulloch Rule in violation of the D.C. Circuit's decision in *National Mining*. The district court noted that in the wake of the D.C. Circuit's decision, the Corp promulgated a revised (interim) rule modifying the definition of "discharge of dredged material" to exclude incidental fallback, but standing by what it described as "well-settled doctrine" that some redeposits of dredged materials constitute a discharge of dredged material. The plaintiffs, who maintained that *National Mining* covered not only incidental fallback but also "all small-volume soil movements incidental to mechanized landclearing," asserted that the rule claimed unqualified authority to regulate all mechanized landclearing. However the District Court held that *National Mining* only dealt with the Corps attempt to regulate incidental fallback because that could not be considered an addition. That decision did not preclude all regulation of redeposit and, as with the CWA itself, set no "bright line" between incidental fallback and regulated redeposits. Thus, because the Corps' rule eliminated the attempt to regulate incidental fallback, it was consistent with the Appeals Court's injunction. Further, the Court of Appeals accepted that a reasonable attempt by agencies to distinguish between incidental fallback and regulable redeposits would warrant considerable judicial deference.

Clearly, Jarvis' activity was far beyond incidental fallback. Further, it was beyond any small-volume soil movements. Under such facts, deference to the Agency's interpretation is fully warranted. Jarvis' activity was not exempt from the CWA's permitting process.

Was Jarvis' admitted installation of rip rap along the shoreline within the Section 404 permit-exempted activities.

As mentioned, Jarvis has noted that Congress created an exemption for the discharge of fill materials from the Section 404 permit requirements when such activity is done for the purpose of maintenance of currently serviceable structures. Included among these structures is the bank of a lake. As Respondent's installation of rip rap along the bank was done solely for the purpose of maintaining the bank to protect it from erosion when the lake reached its higher summer level, this activity fits the purpose Congress intended for exemption from a Section 404 permit. It looks to *Minnehaha Creek Watershed District v. Corps of Engineers*, 597 F.2d 617 (Eighth Cir

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Consumers Power, 862 F.2d 580, (6th Cir. 1988), dealt with the recirculation of water, the test for determining an 'addition' was not an application peculiar to where water was involved. Rather, the test posed by the court examined whether anything "was introduced into the water that was not, in some sense, already there." *Id*. at *26. Further, what is "already there" need not remain there in exactly the same state. In *Consumers Power*, for example, fish and water were removed from a body of water, then returned to that body. Even though some of the fish were in a decidedly different form upon their return to the water, having been pureed, it was determined that no "addition" had occurred.

), ("*Minnehaha*") as support for this argument. While Jarvis admits that the permit exemption does not apply where the fill material is connected with activity designed to bring an area of navigable waters into a new use or where water circulation or flow may be impaired or the water's reach reduced, the Complaint does not make those assertions.

Respondent also points out that the definition of "fill material," is limited to material used for the primary purpose of replacing an aquatic area with dry land or changing the bottom elevation of the water body but that the evidence here demonstrates that Jarvis' sole purpose for installing the rip rap was to protect the bank. Thus, Respondent maintains that even if Jarvis' activity does not come within the maintenance exemption of Section 1344(f)(1)(B), the rip rap is not material contemplated under 33 CFR 323.2(e) nor was it used as contemplated by Section 1344(f)(2) of the CWA.

see section cited: 33 USC Sect. 1344(f)(2).

In the Court's view, there are several problems with Jarvis' position. First, the activity which transgressed the Section 404 permit requirement is not limited to the rip rap installed along the shoreline. Jarvis has conceded that rip rap was also installed in what has been denominated as the "second ramp" area and the Court has found that Jarvis created the two berms. Second, the material placed in those locations was not fill material. All of it was dredge material. Third, Jarvis concedes that the permit exemption does not apply where the activity is designed to bring the area into a new use. By expanding the marina to permit year-round boating activity, it would appear that such a modification could be construed as a new use. While Jarvis is correct that complaint does not assert that either of the permit exemptions apply, this argument overlooks that the complaint does not claim that the activity was ordinarily exempt from a permit but that Jarvis' actions fell outside of the exemption. Rather, the Complaint asserts that Jarvis' activity required a permit in the first instance. Thus, it would be Jarvis' burden to affirmatively demonstrate that his activity was exempted generally and that the activity was not among those outside of the exemption.

The issue in *Minnehaha* was whether the construction of dams and the placement of riprap should be considered a discharge of dredge or fill. The district court's analysis found that as such construction activities did not alter water quality, there was no discharge of a pollutant. Although it noted that the Act's definition of "pollutant" included rock, sand and cellar dirt, it concluded that where those items were only incidentally required for construction, and no water quality degradation occurred, they were not in fact the pollutants contemplated by that Act. Thus, the district court concluded that the construction of dams or riprap[25] were beyond the Corps regulatory jurisdiction under the CWA.

[25]As with Jarvis, the plaintiffs in *Minnehaha* were also challenging the right of the Corps to regulate the placement of rip-rap *along the lake shoreline*.

Reversing the district court, the Court of Appeals held that, given the "far-reaching objectives of the Act ... the construction of dams and riprap in navigable waters was clearly intended by Congress to come within ... the Act." *Id*. at *625. In reaching this conclusion the court noted that the definition of "pollution" refers to "man-made or man-induced alteration of the chemical, physical, biological ... integrity of water" and that the broad definition of "pollutant" to include rock, sand and cellar dirt was a Congressional recognition that such substances, when placed "into the body of water," could affect the physical, chemical, and biological integrity of a waterbody *Id*. at 626. In addition it noted that the Corps' regulations had broadly defined "fill material" to include "[p]lacement of fill that is necessary to the construction of any structure in a water ... the building of any ... impoundment requiring rock, sand, dirt, or other material for its construction ... or reclamation devices such as riprap." 33 C.F.R. § 323.2(n).[26] The court also found support for its conclusion in the provision exempting the need for a permit where the discharge was done for maintenance or emergency reconstruction of damaged parts or currently serviceable structures such as dams or riprap, reasoning that such an exemption would only be needed if the original work, creating such structures, required a permit in the first place. *Id*.

[26]The support the Court found in the Corps' regulation was not unqualified. The Court believed that the legislative history of the CWA of 1977 reflected support for the Corps' interpretation of Section 404. However the legislative history cited by the court referred to the need for a permit to control adverse effects on waters caused by "*replacing water* with dredged material or fill material; and ... the contamination of water resources with dredged or fill material *that contains toxic substances*." *Id*. at *626. Thus, the legislative history reflects a concern by Congress with particular types of discharges. By contrast, Jarvis was neither replacing water with dredged materials nor contaminating the water with toxic substances.

Determination of an Appropriate Penalty

Section 309(g)(3) of the CWA lists the factors to be considered in assessing a civil penalty. These are: the nature, circumstances, extent and gravity of the violation, the ability of the violator to pay the penalty, any prior history of such violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and such other matters as justice may require.
33 U.S.C. § 1319(g)(3).

EPA's Perspective on the Penalty

Dan Sherry, a biologist with the Tennessee Wildlife Resources Agency since 1968, testified as an expert on the impact of pollution and lake encroachments on organisms. The area impacted, known as the "littoral waters," that is the shallow areas just off the shoreline, is an aquatic breeding zone. Sherry believed that Jarvis' planned thirty foot lakeward encroachment would obviously affect the species in that zone. Tr. 260- 265. However, Sherry never visited the site and his assumption regarding the thirty foot encroachment was based on his reading of the public notice of Jarvis' planned activity. Sherry never read Jarvis' application itself.

EPA witness Eric Somerville, an environmental scientist who spends much of his time reviewing Section 404 permits, testified regarding the proposed penalty. Noting that the nature of the violation was the unlawful depositing of dredged materials into waters of the United States, he believed that the violation was flagrant, as Jarvis' activity was done in the face of knowledge that a permit was needed. Tr. 280-282. For this reason he viewed the culpability as major, particularly since Jarvis had applied for a permit and because he continued working at the site after the cease and desist order was issued. Although he conceded that the gravity was minor when measured by its impact on the ecology, he maintained that it was 'major' in terms of the harm to the Section 404 regulatory program because others may be tempted to ignore the requirements. While he discerned no economic benefit to Jarvis, he believed there was a significant need to deter his conduct, a consideration Somerville placed under the "other factors as justice may require" category.

However, in arriving at the proposed $30,000 penalty, Somerville effectively conceded that the computation process is amorphous. He stated that the penalty is arrived at "sort of by committee." Tr. 294. There is no penalty policy to be applied. Rather, a penalty committee discusses the issue and reaches an agreement on the amount. To some extent, cases viewed as

similar to the case being evaluated are considered. However, EPA conceded that when a case enters the hearing stage the determination of the penalty is "entirely in [the court's] hands." Tr. 298.

Somerville also informed that while Jarvis' permit application is put on hold during litigation, the only matters which remained, before a permit could be issued, involved the archaeological issue and the alternatives analysis regarding the Agency's understanding that a thirty-foot extension of the parking lot into the lake was part of Jarvis' plan. Tr. 298-299.

In its post-hearing brief, EPA, noting that the CWA authorizes a civil penalty of $11,000 per day of violation, up to a maximum penalty of $137,500, contends that upon consideration of the statutory factors, its proposed penalty of $30,000 is fully warranted in this instance. Jarvis acted with knowledge that a permit was required before commencing his actions. Not only did Jarvis' permitless activity, depositing dredged material, rip rap, and dynamite debris in various locations below the normal summer pool, begin on or before the Corps' January 10, 2000 inspection, it continued into February of that year. These deposits, which involved the new earthen ramp and two berms, all created below the normal summer pool, were more egregious as Jarvis continued this work at the site after the Corps issued its Cease and Desist Order. EPA Brief at 15 -16.

Speaking to the particular statutory factors, EPA first grouping the factors of "nature, circumstances, extent and gravity" of the violation, reiterates the scope and nature of Jarvis' activities noting that the littoral waters where the activities occurred are important zones for fish and other aquatic life. Last, it notes that Respondent has not raised an inability to pay the proposed penalty.

Jarvis' view of the penalty

Jarvis only comments briefly on the issue of the penalty proposed by EPA.[27] Respondent contends that respect for the law and the permitting process was demonstrated by the fact that the dock footers, posts and sea wall have never been constructed, coupled with his belief that a permit was not needed for the phase of the project dealing with the removal of materials from the marina. Respondent also points out that Jarvis did apply for a permit and responded to the request for additional information. However, no lack of cooperation should be implied by his unwillingness to pay for an archeological survey, as Jarvis knew there was no substance to that claim. Jarvis also suggests that the penalty reflects a punitive aspect in reaction to his gruff response to the Corps that he had done his job and that it was time for the Corps to do its job and issue the permit to him. Given that much more work needs to be done on the project, and that Jarvis has suffered the loss of income he would have realized had the permit been granted in a timely fashion and because no permits are granted while litigation is pending, Respondent submits that the $30,000 penalty is unwarranted. Jarvis Reply Brief at 3, 4. Jarvis also suggests that the cases cited by

[27]Jarvis' penalty comments appear only in its post-hearing reply brief.

EPA[28] are without correlation to the facts at hand. Finally, Jarvis submits that there has been no harm to the water, vegetation, or wetlands around the Davis Marina and that it is appropriate to consider that in all likelihood the permit will be issued. Given these considerations, Jarvis asserts that no penalty should be imposed. *Id*.at 5.

The Court's Penalty Analysis.

With consideration of each of the penalty factors in mind, the Court makes the following findings regarding the violation in this case. The testimony of EPA witnesses makes it clear that the issuance of a permit was imminent at the time that Jarvis acted precipitously by beginning his dredging activity in the lake bed below the summer pool. With EPA's erroneous belief that the project contemplated an extension of shoreline some 30 feet lakeward about to be resolved and with the erroneous belief that there was an historical site issue now settled, only the routine water quality certification would be needed before the permit would be issued. Thus, it is fair to state that it was not *whether* Jarvis would be a permit for his project but only *when* the permit would be issued.

The Court also finds that the vast majority of work that Jarvis performed was in fact exempted from CWA coverage because it involved pure excavation of material from the lake bottom, along with the unavoidable incidental fallback. Such activity is regulated under the Rivers and Harbors Act. EPA in fact concedes that such pure dredging activity is outside of the CWA Section 301 violation claims. Further, putting the violation in perspective, it must be noted that Jarvis did not go further in his overall project, by engaging in any of the activity that would clearly violate this section, such as the pouring of concrete or other building activity in the lake. Restated, the wealth of the activity performed by Jarvis during this stage involved excavation. The Court also finds that Jarvis did not continue to perform excavation work after the cease and desist order was issued, but rather only performed shut down work. Indeed there is no evidence in the record to contradict Jarvis' assertion that the work he performed after the order was issued was necessary to responsibly stop the project. This included, of necessity, detonating remaining dynamite charges and placement of rip rap along the shoreline to control erosion. As Jarvis explained his post-cease and desist order actions, he could not simply walk away from the activities he had started. Further, the court notes that Jarvis has no prior history of CWA violations.

In terms of harm to the environment, EPA's witnesses essentially conceded that there was no significant harm from Jarvis' actions. This conclusion is buttressed by EPA's concession that the

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[28]Jarvis asserts that no civil penalty was reported for *Minnehaha Creek*, 597 F.2d 617 (8th Cir. 1979) where the construction of a dam and placement of riprap in the lake was involved. It also refers to *Lawrence John Crescio, III,* 2001 WL 537494, Dkt. No. 5 CWA-98-004, a wetlands case, for the principal that assessment of an administrative penalty for discharging pollutants without a permit should consider the economic benefit, multi-day penalties, the nature of the violation, and the extent, circumstances, gravity, ability to pay, history of violations, culpability, and other factors as justice may require.

permit was on the verge of being issued and that there was no significant environmental obstacle to its issuance. In fact, the harm which EPA spoke to involved its view that Jarvis' action impacted the program, not the environment, in that by Jarvis' ignoring the permit requirement others might be tempted to do the same. However the Court, while not discounting entirely EPA's concerns about the potential harm to the program by those who act before a permit is issued, does not view the harm in this instance to be major. This is because Jarvis did in fact recognize the need for a permit in the first instance and he acted responsibly in seeking one until his patience with the process ran out. Jarvis initiated the permit process and contacted the appropriate officials at the outset of his endeavor. Thus, the situation is markedly different from one who merely proceeds to discharge pollutants without any concern for the need for a permit. Certainly no rational observer of the events here could conclude that it would be wise to ignore the CWA's permitting process. In addition to the civil penalty the Court is imposing, and the attorney's fee[29] associated with this litigation, Jarvis has lost over two years' time during which he could have enjoyed the economic benefits of his project to establish a year-round marina. Accordingly, the Court view the harm to the program created by Jarvis as moderate.

It is upon consideration of all these attendant facts, as measured against the statutory penalty criteria,[30] that the Court concludes that a $10,000 (ten thousand dollars) penalty is appropriate to impose in this case.

ORDER

A civil penalty in the amount of $10,000 is assessed against Respondent, William H. Jarvis. Payment of the full amount of the civil penalty assessed shall be made within 30 (thirty) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c). Payment shall be submitted by a certified check or cashier's check payable to the Treasurer, United States of America, and mailed to:

Nations Bank
EPA Region IV
Regional Hearing Clerk
P.O. Box 100142
Atlanta, GA 30384

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[29]The Court is not implying that Jarvis' attorney fee is an offsetting penalty consideration. Rather, this observation is made only in the context of rebutting EPA's contention that there was major harm to the regulatory program in that others may be tempted to flaunt the law.

[30]The Court does not feel that the "such other matters as justice may require" element was necessary to apply in this instance, as consideration of the remaining statutory factors produced an appropriate penalty.

A transmittal letter identifying the subject case and the EPA docket number, plus the Respondent's name and address must accompany the check. Failure of the Respondent to pay the penalty within the prescribed statutory time frame after entry of the final order may result in the assessment of interest on the civil penalty.

Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order 45 (forty-five) days after its service upon the parties and without further proceedings unless (1) a party moves to reopen the hearing within 20 (twenty) days after service of the Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the EAB is taken from it by a party to this proceeding, pursuant to 40 C.F.R. § 22.30(a), within 30 (thirty) days after the Initial Decision is served upon the parties; or (3) the EAB elects, upon its own initiative, under 40 C.F.R. § 22.30 (b), to review the Initial Decision.

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William B. Moran
United States Administrative Law Judge

Dated: April 5, 2002

In the Matter of Mr. William H. Jarvis, Respondent
Docket No. CWA-04-2000-1509

CERTIFICATE OF SERVICE

I certify that the foregoing **Initial Decision**, dated April 5, 2002, was sent this day in the following manner to the addressees listed below.

_____
Maria Whiting-Beale
Legal Staff Assistant

Dated: April 5, 2002

Original and One Copy by Pouch Mail to:

Patricia Bullock
Regional Hearing Clerk
U.S. EPA
Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA 30303-8960

Copy by Pouch Mail and facsimile to:

Judy K. Marshall, Esquire
Associate Regional Counsel
U.S. EPA
Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA 30303-8960

Copy by Certified Mail Return Receipt and facsimile to:

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