UNITED STATES OF AMERICA
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
RAY AND JEANETTE VELDHUIS,	)	**Docket No. CWA-9-99-0008**
	)	
Respondents	)	
	)	

INITIAL DECISION

Federal Water Pollution Control Act ("Clean Water Act"): Pursuant to Sections 301 and 309 of the Clean Water Act, 33 U.S.C. §§ 1311 and 1319, Respondents, Ray and Jeanette Veldhuis, are assessed a civil penalty of $87,930 for violating Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a).

Issued: June 24, 2002
Washington, D.C.

Before: Barbara A. Gunning
Administrative Law Judge

Appearances:

For Complainant: Elizabeth La Blanc, Esquire
Marcela Von Vacano, Esquire
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U.S. Environmental Protection Agency, Region 9
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BACKGROUND

This proceeding was initiated by a Complaint filed September 30, 1999 by the United States Environmental Protection Agency ("EPA" or "Complainant") pursuant to Sections 301(a) and 309(g) of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1311(a), 1319(g). The complaint alleges that Ray and Jeanette Veldhuis ("Respondents"),[1] who are individuals owning property in Stanislaus County, California, violated Section 301(a) of the CWA, 33 U.S.C. §1311(a), by discharging pollutants from a point source into "waters of the United States" without a permit issued under the CWA. Specifically, Complainant alleges that Respondent "deep-ripped"[2] 3.46 acres of "jurisdictional wetlands identified as vernal pools"[3] on or about November 6, 1995 on his "field #5" and 17.58 acres of "wetlands identified as vernal pools, drainage swales and intermittent drainages"[4] on or about

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[1]Although the caption of the complaint names "Ray and Jeanette Veldhuis" as Respondents, the complaint clarifies that: "Use of the term 'Respondent' in the complaint indicates Mr. Ray Veldhuis only." (Complaint, p. 6, n.3). Therefore, the term "Respondent" in this Order *hereinafter* refers only to Mr. Ray Veldhuis.

[2]"Deep-ripping" is a form of plowing which involves the dragging of steel shanks through the ground at depths of approximately 3 to 7 feet in order to break an impermeable, water-retaining "restrictive layer" of hard soil, sometimes called the "hardpan." As the Ninth Circuit explained in *Borden Ranch Partnership v. United States Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001), *cert. granted*, 70 U.S.L.W. 3562 (June 10, 2002) (No. 01-1243): "Vernal pools ... [s]wales ... [and] [i]ntermittent drainages ... depend upon a dense layer of soil, called a 'restrictive layer' or 'clay pan,' which prevents surface water from penetrating deeply into the soil... [O]rchards, however, require deep root systems, much deeper than the restrictive layer... For ... orchards to grow on this land, the restrictive layer of soil would first need to be penetrated. This requires a procedure known as 'deep ripping,' in which four- to seven-foot long metal prongs are dragged through the soil behind a tractor or a bulldozer. The ripper gouges through the restrictive layer, disgorging soil that is then dragged behind the ripper." *Borden Ranch*, 261 F.3d at 812.

In the case at bar, Complainant's expert witness Robert Leidy similarly testified: "...[O]ver tens of thousands to hundreds of thousands of years, soils [can form] ... an impermeable layer, through chemical reaction, like a calcium carbonate layer, which will become a hard, impenetrable layer that's also known sometimes as a hardpan or claypan or an impenetrable layer. When the deep ripper is moved through the soil, it cracks or fractures this layer and it also mixes the various soil horizons together. It homogenizes the soil and mixes up the different layers that have formed, and then breaks, again, any impermeable layer that would be there into small fragments and pieces." [Transcript ("Tr."), pp. 152-153]. *See also*, Tr., p. 225 (Respondent's counsel William Gnass): "...[R]ipping can be of any depth ... depending on what's needed. So I guess we can go from 12 inches to seven feet." *See also*, Tr., pp. 415-418, 441-446 (Respondent's expert witness Diane Moore, describing "deep-ripping" generally). Specifically, Ms. Moore explained: "Most of the ripping that's done for orchards and vineyards and actually the implement that was used on this property is a slip plow ... and it does have a vertical shank, but then it ... hooks forward too. So the shank sort of goes down at a – not a vertical angle but a slight slant and has a little hook and so ... as well as cutting through hardpan it flips it due to ... the angle of the shank." (Tr., p. 446). The record of this case contains a photograph of a deep-ripper at Complainant's Exhibit ("CX") 34, although the specific machine depicted at CX 34 is not the deep-ripper used by Respondent in this case. (Tr., p. 155).

[3]Complaint, ¶ 21.

[4]Complaint, ¶ 29. As the Ninth Circuit explained in *Borden Ranch*: "Vernal pools are pools that form during the rainy season, but are often dry in the summer. Swales are sloped wetlands that allow for the movement

August 8, 1997 on his "fields #3 and #4" without a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344.[5] Complainant alleges, therefore, that the deep-ripping destroyed a total of 21.04 acres of "waters of the United States" consisting of tributaries to navigable waters and wetlands adjacent to such tributaries. Complainant proposes the assessment of a civil administrative penalty of $103,070. Complainant arrives at this proposed penalty amount by proposing a penalty of $47,670 for "economic benefit," $50,400 for the "nature, circumstances, extent and gravity of the violation," and $5,000 for the "culpability" of Respondent.[6]

Respondent filed an Answer to the complaint on November 3, 1999 denying liability and contesting the appropriateness of the penalty. Respondent raised several affirmative defenses and requested a hearing.

An evidentiary hearing was held December 11 through 13, 2000 in Modesto, California. Both parties have filed post-hearing briefs and post-hearing reply briefs.[7]

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of aquatic plant and animal life, and that filter water flows and minimize erosion. Intermittent drainages are streams that transport water during and after rains. All of these hydrological features depend upon a dense layer of soil, called a 'restrictive layer' or 'clay pan,' which prevents surface water from penetrating deeply into the soil." *Borden Ranch*, 261 F.3d at 812.

[5]The complaint alleged that Respondent deep-ripped 3.46 acres of "adjacent wetlands" (*i.e.*, wetlands "adjacent" to tributaries to navigable waters) on field #5 and 21.58 acres of "jurisdictional wetlands" on fields #3 and #4 (consisting of 3.16 acres of "isolated wetlands" over which jurisdiction was based upon the "Migratory Bird Rule," 16.61 acres of "tributaries to navigable waters," and 1.81 acres of wetlands "adjacent" to such tributaries). However, subsequent to the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 121 S.Ct. 675, 148 L.Ed.2d 576 (Jan. 9, 2001) (*SWANCC*), Complainant withdrew its allegations regarding the 3.16 acres of "isolated wetlands" on fields #3 and #4 for lack of jurisdiction. Further, in light of testimony given at hearing by Complainant's expert witness Robert Leidy in which Mr. Leidy opined that the "wetland" originally identified on CX 31 as "wetland #6" on field #4 is actually an irrigation "spigot," (Tr., p. 572), Complainant withdrew its allegation regarding "wetland #6," which had comprised .84 acres of "tributaries to navigable waters," so that the total "tributary" acreage currently alleged to have been destroyed is 15.77 acres. Thus, the total acreage of "waters of the United States" currently alleged to have been deep-ripped is 21.04 acres (consisting of 3.46 acres of "adjacent wetlands" on field #5, 15.77 acres of "tributaries to navigable waters" on fields #3 and #4, and 1.81 acres of "adjacent wetlands" on fields #3 and #4).

[6]Complainant originally proposed a penalty of $121,750 ($56,750 for "economic benefit," $60,000 for "nature, circumstances, extent and gravity of the violation," and $5,000 for "culpability"). (*See* CX 61 - "Penalty Assessment"). However, Complainant subsequently withdrew it's allegations regarding 4 of the original 25.04 acres of wetlands alleged to have been destroyed (3.16 acres of "isolated wetlands" and .84 acres of "tributaries" on fields #3 and #4). That is, Complainant withdrew its allegations regarding 16% of the original 25.04 acres. Therefore, Complainant amended its proposed penalty amount to reflect a 16% reduction of both the "economic benefit" component (from $56,750 to $47,670) and the "nature, circumstances, extent and gravity" component (from $60,000 to $50,400), which were both based on total acreage. Complainant did not amend the proposed penalty of $5,000 for "culpability" because that component was not based on total acreage. Therefore, Complaint currently proposes a total penalty of $103,070 ($47,670 for "economic benefit," $50,400 for "nature, circumstances, extent and gravity of the violation," and $5,000 for "culpability").

[7]Attached to Respondent's post-hearing Reply Brief is a "Declaration of Ray Veldhuis" dated July 3, 2001.

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice") at 40 CFR Part 22 (2000).

For the reasons discussed below, having fully considered the record of the case and the arguments of counsel, and being fully advised, I find Respondent to be in violation of the CWA as alleged in the complaint and hold that Respondent shall pay a civil administrative penalty in the amount of $87,930.

FINDINGS OF FACT

1. This is an administrative proceeding to assess a civil penalty under Section 309(g) of the Federal Water Pollution Control Act [otherwise known as the Clean Water Act ("CWA")], 33 U.S.C. § 1319(g). (Complaint, ¶ 1).

2. Complainant issued a complaint to Respondent on September 30, 1999. (Complaint).

3. The complaint alleged that Respondent violated Section 301(a) of the CWA, 33 U.S.C. § 1311(a), by discharging pollutants into waters of the United States (tributaries to navigable waters and adjacent wetlands) without a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, in that: 1) "On or about November 6, 1995, Respondents employed heavy construction equipment to deep-rip and land-level land located north of Monte Vista Road, west of the Highline canal (Tract 2375, Field #5). Respondents then discharged dredged or fill material into 3.46 acres of jurisdictional wetlands identified as vernal pools...;" and 2) "On or about August 8, 1997, Respondent employed heavy construction equipment to deep-rip and land-level land located north of Monte Vista Road, east of Highline canal (Tract 2375, Fields #3 and #4). Respondent then discharged dredged or fill materials into 21.58 acres of wetlands identified as vernal pools, drainage swales and intermittent drainages."[8] (Complaint, ¶¶ 21 and 29).

4. Respondent is Ray Veldhuis (Complaint, ¶ 19, n.3),[9] an individual owning property in Stanislaus County, California, which property is the subject of the complaint, identified as "fields #3, #4, and #5." [Answer, p. 1, ¶¶ 2, 6; CX 69 ("Stipulated Facts"), ¶ 20].

5. Respondent's property here at issue is a farm located in Stanislaus County, Denair,

[8]As noted *supra* at note 5, subsequent to the filing of the complaint, Complainant withdrew its allegations regarding 3.16 acres of "isolated wetlands" and .84 acres of mistakenly identified "tributaries to navigable water" on fields #3 and #4 so that the total acreage of "waters of the United States" alleged to have been deep-ripped on fields #3 and #4 is now 17.58 acres (consisting of 15.77 acres of "tributaries to navigable waters" and 1.81 acres of "adjacent wetlands").

[9]Although the caption of the complaint names "Ray and Jeanette Veldhuis" as Respondents, the complaint clarifies that: "Use of the term 'Respondent' in the complaint indicates Mr. Ray Veldhuis only." (Complaint, ¶19, n.3).

California, Tract #2375, Farm #4709 (Assessor's Parcel Nos. 024-0304-817, 024-0306-726, and 019-4142-874). The property is divided into three contiguous sections, designated for the purposes of this proceeding as "fields #3, #4 and #5," lying north of Monte Vista Avenue and east of Hall Road. The property is bisected by the Highline Canal, with field #5 lying west of the Canal and fields #3 and #4 lying east of the Canal. Taylor Road, running east and west, forms the northern boundary of field #5 and intersects the Highline Canal at approximately the midpoint of field # 3. Sand Creek runs along the southwestern borders and through the southwestern corner of field #5. The Merced River lies approximately 15 miles to the south and the San Joaquin River lies approximately 20 miles to the southwest of Respondent's property. [Complaint, ¶15; Answer, p. 1, ¶¶ 2 and 6; CX 2; CX 7 (attached map); CX 29; CX 30; CX 45-48; CX 51; CX 59 (Response #1-2); CX 60; CX 69, ¶20; Respondent's Exhibit ("RX") 2-A; RX 2-B; RX 3-RX 7; Tr., pp. 191-195].

6. Respondent purchased fields #3 and #4 in 1993 for $1,384,000.[10] The combined acreage of fields #3 and #4 is 608.92 acres. Therefore, Respondent paid approximately $2,270 per acre for fields #3 and #4. (CX 64; CX 69, ¶21; Tr., pp. 267-268).

7. Sometime between December 2, 1994 and December 8, 1994, the U.S. Department of Agriculture, Natural Resources Conservation Service ("NRCS") received a complaint from an adjacent landowner that Respondent was using "heavy equipment" (Tr., p. 81, ln. 25) in "leveling" (Tr., p. 81, ln. 20) a portion of field #5 and "filling in wetlands" (Tr., p. 82, ln. 1) in preparation for the installation of a dairy. (Tr., pp. 81-82, 93-94). Such "leveling" involved a "scraper ... moving material" (Tr., p. 93, ln. 23) and was "prior to the ripping process." (Tr., p. 94, ln. 1). In response to this "complaint," Michael A. McElhiney, a soil scientist (CX 1) employed as the District Conservationist for NRCS (Tr., p. 21), telephoned Respondent in order to arrange a meeting at the property. (Tr., pp. 24-25, 82-82).

8. On December 8, 1994, Mr. McElhiney visited the property and met with Respondent. (Tr., pp. 81-82; CX 8, p. 2). At that time, the earth-moving operation was in progress and present in field #5 for such operation were "... a D-6 631 Carry All, a John Deere paddle wheel, [and perhaps] one other piece of caterpillar equipment." [Tr., p. 539 (Mr. Veldhuis)].

9. On December 13, 1994, Mr. McElhiney (NRCS) sent a letter to Respondent by both facsimile and regular mail which stated, in part: "Karen [Shaffer, U.S. Army Corps of Engineers] told me that you need to obtain a Section 404 permit from the US Army Corps of Engineers before you level this property [ASCS Tract #2375, Field #5]." This letter also advised Respondent that the wetland delineation on his property was scheduled to begin December 20, 1994. [CX 8 (underlining in original); Tr., pp. 41-42].

10. On December 16, 1994, Mr. McElhiney mailed a letter to Respondent to which was attached, among other items, "Instructions for Preparing a Department of Army [Section 404] Permit

[10]Respondent leased the subject property in 1991 and purchased it in 1993. [Tr., p. 267, line ("ln.") 23-24 (Ms. Goldmann); Tr., pp. 340, ln. 23-24, p. 346, ln. 25 - p. 347, ln. 9, p. 348, ln. 10-12 (Mr. Van Gaalen); Tr., p. 500, ln. 5-7, p. 532, ln. 24 (Mr. Veldhuis); CX 64 ("Grant Deed"); CX 69, ¶ 21].

Application and Form 4345." (CX 9; Tr., pp. 43-44).

11. On February 19, 1995, Mr. McElhiney mailed a letter to Respondent which stated, in part, that: "...the delineation map of wetlands on your property near Hall Rd. & Monte Vista Rd. in Stanislaus County ... will ... [be] completed in the near future." (CX 10). This letter also provided the names and contact information for two "consultants" who were qualified to assist Respondent with the process of applying to the U.S. Army Corps of Engineers ("Corps") for a permit under Section 404 of the CWA. (CX 10; Tr., p. 45).

12. From December 1994 through March 1995, the NRCS performed a "wetland delineation" in order to determine the existence and location of wetlands on Respondent's field #5. (Tr., pp. 24-25, 81; CX 2; CX 3). The wetland delineation report for field #5 was provided to Respondent by Mr. McElhiney on May 19, 1995. (CX 11).

13. On August 10, 1995, Mr. McElhiney sent by facsimile a letter to Respondent which stated, in part: "**Please do NOT begin leveling without a Section 404 Permit from the US Army Corps of Engineers.**" [CX 11, p. 1 (underlining and bold type in original); Tr., p. 47].

14. On August 12, 1995, Mr. McElhiney completed a hand-written draft "Section 404" permit application on behalf of Respondent and sent the application by facsimile to Respondent for Respondent's review. (CX 12; Tr., pp. 48-49).

15. On August 15, 1995, Mr. McElhiney completed a type-written draft "Section 404" permit application on behalf of Respondent and sent the application by facsimile to Respondent for Respondent's review. The facsimile cover page explained that: "I need you to review the typed copy of the 'Application for Department of the Army Permit.' I have compiled the rest of the data needed to submit the application to the Corps of Engineers. We need to get together to review and sign this application ASAP." (CX 13, Tr., p. 52).

16. In August 1995, Mr. McElhiney and Mr. Chuck Jachens, an NRCS Engineer, completed a "Conceptual Mitigation Plan for Loss of Wetlands" which was to be submitted with the "404 Permit" application prepared by Mr. McElhiney on behalf of Respondent. (Tr., pp. 58-59; CX 19). This "Mitigation Plan" was never implemented. (Tr., p. 59).

17. On August 15, 1995, Mr. McElhiney mailed a letter to Respondent which stated, in part: "FIELD #5 has 3.46 acres of Wetlands (vernal pools)...," and directed Respondent to "CONTACT OUR OFFICE BEFORE ANY LEVELING OR DEEP RIPPING ACTIVITIES BEGIN." Attached to this letter was a copy of a document entitled "HIGHLY ERODIBLE LAND AND WETLAND CONSERVATION DETERMINATION" and a map of Respondent's property showing the delineated wetlands on field #5. [CX 7, p.1 (capitalization in original); CX 69, ¶25; Tr., p. 40). Respondent received this letter. (CX 59, p. 7; Tr., p. 259).

18. Respondent did not contact the NRCS before deep-ripping field #5. (Tr., p. 553, ln. 23).

19. On or about November 6, 1995, Respondent deep-ripped field #5, including 3.46 acres of wetlands, using a "D-11" deep-ripper. (CX 69, ¶¶26-27).

20. Respondent's deep-ripping of field #5 on or about November 6, 1995 destroyed at least 3.46 acres of wetlands. (CX 6, p. 3; Tr., p. 420).

21. On November 6, 1995, Michael McElhiney of the NRCS conducted a site visit and confirmed that deep-ripping was in progress on field #5. NRCS telephoned Respondent on that same date and informed him that his deep-ripping activities were in violation of Section 404 of the CWA, 33 U.S.C. § 1344. (CX 69, ¶28; CX 18, p. 2).

22. On November 17, 1995, NRCS completed and mailed to Respondent a revised "Highly Erodible Land and Wetland Conservation Determination" which reiterated that there were 3.46 acres of wetlands on field #5 and directed Respondent to "contact NRCS before any additional ripping or leveling." (CX 69, ¶29; CX 18, p. 4; Tr., p. 105).[11]

23. On January 10, 1996, the NRCS, having determined that it could not independently resolve the matter of field #5 with Respondent, referred the matter to the Corps. (CX 18, Tr., pp. 56-57).

24. On January 22, 1996, Tom Cavanaugh, then-Regulatory Project Manager/Ecologist with the Corps' Sacramento District (CX 22, p.1, Tr., pp. 109-110), sent a certified letter to Respondent which stated, in part:

> Information received from the [NRCS] indicates that approximately 3.46 acres of wetlands have been filled ... [and] that you have placed this material. Our jurisdiction in this area is under Section 404 of the [CWA]. A Department of the Army permit is required prior to discharging dredged or fill materials into waters of the United States... Since [such a] permit has not been issued authorizing this discharge, this work has been done in violation of the [CWA]. We are currently conducting an investigation to determine the impact of this work ... and the course of action that should be taken... (Y)ou are invited to provide any information which you feel should be considered... Until this violation has been resolved, you should refrain from any further work involving these illegally converted waters of the United States.[12]

(CX 23, pp. 1-2; CX 69, ¶30). This letter advised Respondent to direct any communications to Tom Cavanaugh. (CX 23, p. 2). Respondent received this letter. (CX 25; Tr., p. 116). Mr.

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[11]Although the Stipulated Facts at CX 69, ¶ 29 state that the "Revised Highly Erodible Land and Wetland Conservation Determination" was completed and sent to Respondent on November 15, 1995, that document was actually completed and mailed on November 17, 1995. [CX 18, p. 4; Tr., p. 105, ln. 12 (Mr. McElhiney)]. The "Revised Determination" was only "requested" on November 15, 1995. (CX 18, p. 4).

[12]Although the letter was written for the signature of Art Champ, Chief of the Corps' Sacramento District Regulatory Branch, the letter was written by Tom Cavanaugh. (Tr., p. 112).

Cavanaugh never received any information from Respondent in response to this letter. (Tr., p. 112).

25. On April 1, 1996, Art Champ, Chief of the Corps' Sacramento District Regulatory Branch, sent a certified letter to Respondent informing Respondent that no response to the January 22, 1996 letter had been received by the Corps, directing Respondent to "...cease and desist from any additional work involving these illegally converted waters...," (CX 24, p. 2) and stating: "...you must, immediately, cease activities associated with the installation of the orchard on the illegally converted area and either submit a permit application or your plans to restore the area to its pre-project condition."[13] (CX 24, p. 2; *See also*, Tr., pp. 113-114; CX 69, ¶31). Respondent received this letter. (CX 25; Tr., p. 116).

26. On or about September 9, 1996, Lisa H. Clay, Corps Assistant District Counsel, sent a letter by certified mail to Respondent, stating in part:

> ...[O]ur Regulatory Office advised you by letters dated January 22, 1996 and April 1, 1996 that your work violated the Clean Water Act and directed you to cease all activities in wetlands. To date, you have continued to perform work in the delineated wetland area... Because of your continued violation ... your case will be referred to the U.S. Attorney ... unless you respond within 30 days...

(CX 26, p. 1; *See also*, Tr., pp. 116-117, 128-129; CX 69, ¶32).

27. By letter dated February 28, 1997, the Corps transferred Respondent's file to the EPA for enforcement of the CWA pursuant to the Memorandum of Agreement ("MOA") between the EPA and the Corps concerning wetland determinations under Section 404 of the CWA. (CX 27; CX 55; Tr., pp. 120-121, 249-250; CX 54; Tr., pp. 245-248).

28. On or about August 8, 1997, Respondent's contractor deep-ripped fields #3 and #4, including 17.58 acres of wetlands, using a "D-11" deep-ripper. (CX 69, ¶¶33-34).

29. Respondent's deep-ripping of fields #3 and #4 on or about August 8, 1997 destroyed at least 17.58 acres of wetlands. (CX 32; Tr., pp. 148-149, 230-232).

30. On August 8, 1997, Elizabeth Goldmann,[14] an Environmental Scientist with the U.S. EPA, Region 9 (CX 53; Tr., p. 243), in response to receiving Respondent's file from the Corps (Tr., p. 249, ln. 9) and having been notified by the Corps and NRCS that Respondent was plowing fields #3 and #4 (CX 69, ¶35; Tr., p.252, ln. 6-9), spoke with Respondent by telephone. Ms. Goldmann informed Respondent that he may be in violation of the CWA and advised Respondent to cease all activity on fields #3, #4, and #5. Ms. Goldmann's notes of the conversation state: "Mr. Veldhuis

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[13]Although the letter was signed by Art Champ, it was written by Mr. Cavanaugh. (Tr., p. 113).

[14]During some times relevant to the instant case, Ms. Goldmann was identified by her previous married name of "Elizabeth White," which name appears in some documents admitted into evidence (*see, e.g.*, CX 58; CX 59). (Tr., pp. 257-258).

said he was still going to mitigate at the 12 + acre site & confirmed he was going to plant almonds & was preparing land." (CX 56, p. 1).[15] Ms. Goldmann did not respond to Respondent's proposed mitigation plan during this conversation or suggest to Respondent that such proposed mitigation would eliminate the necessity of obtaining a "404 Permit" for Respondent's activities on fields #3, #4 and/or #5. (CX 69, ¶35; CX 56; Tr., pp. 251-253).

31. On August 28, 1997, Ms. Goldmann (EPA) and Mr. McElhiney (NRCS) visited the subject property and met with Respondent. Ms. Goldmann observed that "[t]he majority of the site [fields #3 and #4] was deep-ripped at that time." (Tr., p. 255). Ms. Goldmann explained to Respondent the need to obtain a "404 Permit" before deep-ripping wetlands. Ms. Goldmann informed Respondent that wetlands still existed on fields #3 and #4, and Respondent stated that he would avoid such wetlands. Respondent stated that he intended to perform mitigation for the 3.46 acres of wetlands which had been deep-ripped on field #5. Ms. Goldmann believed such mitigation to be a viable option at that point and did not advise Respondent not to proceed with such mitigation. (CX 69, ¶ 36; CX 57; Tr., pp. 254-256).

32. On November 13, 1998, Complainant mailed to Respondent a "Request for Information" pursuant to Section 308 of the CWA, 33 U.S.C. § 1318, ("308 Request"), which explained that a written response must be submitted within 15 days of receipt of the letter, and that such response must be signed and include a specific sworn "certification." (CX 69, ¶ 37; CX 58; Tr., pp. 257, 278-279).

33. In December 1998, Respondent not having responded to the 308 Request, (Tr., p. 327, ln. 10), Ms. Goldmann telephoned Respondent to determine why Respondent had not done so. (Tr., pp. 278, 326). During that conversation, Ms. Goldmann "granted ... an extension verbally on the phone" (Tr., p. 278, ln. 17-18) of the deadline by which Respondent was to submit a response to the 308 Request. During this conversation, Ms. Goldmann also advised Respondent not to pursue his proposed plan to utilize approximately 12 acres in the northwestern corner of field #3 to "mitigate" the destruction of 3.46 acres of wetlands on field #5. Ms. Goldmann explained at the hearing that: "...because we were initiating the formal investigation, I just felt that it wouldn't be fair to ask [Respondent] to invest in that [mitigation] not knowing the outcome of this investigation." (Tr., pp. 326-327; *See also,* Tr., pp. 324-325).

34. On January 15, 1999, Respondent mailed to Complainant a response to Complainant's 308 Request. (CX 59). This response was timely submitted in light of numerous deadline extensions granted by Respondent. (Tr., pp. 278-279). This response did not include some documentation required to be submitted by the "308 Request," to wit: "The correspondence from the Corps of Engineers to Mr. Veldhuis was missing." (Tr., p. 279). This response also failed to include the requisite sworn certification. (Tr., p. 279; CX 59).

35. Between August 28, 1997 and May 16, 2000, Mr. Robert Leidy, a Wetlands Science and

[15]Respondent had proposed to create a 12 acre mitigation area in the northern portion of field #3 in order to compensate for the impact to field #5. However, such mitigation was never accomplished. (Tr., pp. 252-253).

Field Program Manager and "404 Enforcement Coordinator" with the U.S. EPA (Region Nine) Wetlands Regulatory Program (CX 28; Tr., p. 133), performed a wetland delineation on Respondent's fields #3 and #4 (CX 31; CX 32; Tr., pp. 138-139). Mr. Leidy examined historical aerial photographs (Tr., pp. 139-140, 142, 573-574; CX 29; CX 30), considered the previous site inspection of field #5 (Tr., pp. 143-144, 176-177), considered soil surveys and USGS and National Wetland Inventory maps (Tr., pp. 567-568, 570-571, 583-585; CX 51; RX 2-B), spoke with individuals familiar with the site (via Ms. Goldmann) (Tr., pp. 74, 204-205, 328-329, 574-576, 583-586), and considered adjacent vegetation and adjoining sites of similar soils and geographic characteristics which had not been deep-ripped (Tr., pp. 139-140, 161, 186, 583). In addition, Mr. Leidy and Ms. Goldmann visited fields #3 and #4 on May 16, 2000 and dug pits to examine and characterize buried soils. (Tr., pp. 149, 157, 199, 305-306, 582-584; CX 33; CX 35 - CX 44).

36. At no time did Respondent ever have a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344. (CX 69, ¶39; Tr., p. 256).

37. The NRCS accurately delineated 3.46 acres of wetlands on field #5 of Respondent's property, and the EPA, by atypical delineation, accurately delineated 17.58 acres of wetlands on fields #3 and #4. These wetlands were determined to have been inundated or saturated by surface or ground water at a frequency and duration sufficient to support a prevalence of vegetation typically adapted for life in saturated soil conditions.

38. The farming and deep-ripping of fields #3, #4, and #5 by Mr. Van Gaalen (the previous owner of the property in question) did not destroy the "hardpan" in those fields, and 21.04 acres of functioning wetlands persisted in existence until Respondent deep-ripped field #5 in November 1995 and fields #3 and #4 in August 1997 in preparation for the planting of almond trees. Wetlands continue to exist on the unripped portion of field #3.

39. The 3.46 acres of wetlands on field #5 had surface water connections to Sand Creek, which is a "water of the United States." The 17.58 acres of wetlands on fields #3 and #4 had surface water connections to the Turlock and Highline Canals, which are tributaries to the Merced and San Joaquin Rivers, which are navigable waters.

40. Neither the NRCS nor the EPA ever determined that the wetlands on fields #3, #4, or #5 were "prior converted cropland." The NRCS determined that the wetlands on field #5 were "farmed wetlands" and noted that there were farmed wetlands on fields #3 and #4. The determinations made by the NRCS and the EPA are supported by the record.

41. The "D-11" deep-ripper attached to heavy equipment used by Respondent's contractor to deep-rip fields #3, #4, and #5 in November 1995 and August 1997 is a "point source" as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14). The deep-ripping breached the "hardpan" and caused some soil and other fill material to be moved from the areas surrounding the wetlands into the wetlands and from the wetlands into the surrounding areas.

42. Complainant considered the statutory penalty factors of the nature, circumstances,

extent, and gravity of the violations, and with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violations, and such other matters as justice may require in determining the amount of the proposed penalty for Respondent's violations of the CWA. Complainant's proposed penalty was calculated in accordance with the EPA "Penalty Policy" set forth in the "Policy on Civil Penalties - EPA General Enforcement Policy #GM-21" (CX 63), and "A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties - EPA General Enforcement Policy #GM-22." (CX 62).

43. Complainant's proposed penalty is in the total amount of $103,070, consisting of $47,670 for the economic benefit component, $50,400 to account for the nature, circumstances, extent, and gravity of the violations (gravity component), and $5,000 for culpability.

44. The proposed penalty of $47,670 for the economic benefit component is calculated on a one-to-one acre mitigation basis, using Respondent's uncontested purchase price of $2,270 per acre. Such method and the resulting penalty are both reasonable and appropriate.

45. The proposed amount of $50,400 for the gravity component encompasses the deterrent effect of the penalty, the importance of the violation to the regulatory scheme (including the continuing loss of wetlands in the California Central Valley and the impact upon the "water quality impaired" San Joaquin and Merced Rivers), and the irreversible damage to the wetlands. The proposed penalty also takes into account the moderate functioning of the wetlands. However, the proposed amount shall be reduced 35% to reflect the absence of invertebrates in the wetlands, resulting in a $17,640 reduction of the proposed gravity component to an assessed amount of $32,760.

46. The proposed amount of $5,000 for the upward adjustment for Respondent's culpability is increased 50% to $7,500 to more accurately reflect Respondent's significant degree of culpability in this matter.

CONCLUSIONS OF LAW

1. Respondent is a person within the meaning of Section 301(a) of the CWA. 33 U.S.C.§§ 1311(a), 1362(5).

2. The drainage swales and intermittent drainages on fields #3 and #4, Sand Creek and the Highline Canal on Respondent's property, and the Turlock Canal and Merced and San Joaquin Rivers are "waters of the United States" within the meaning of Sections 301(a), 404(a), 502(7) and 502(12) of the CWA. 33 U.S.C. §§ 1311(a), 1344(a), 1362(7), (12); 33 CFR §§ 323.2(a), 328.3(a), (b), (c) (1995), (1997); 40 CFR §§ 230.3, 232.2 (1995), (1997).

3. The delineated wetlands on fields #3, #4, and #5 on Respondent's property, consisting of 21.04 acres, are "waters of the United States" within the meaning of Sections 301(a), 404(a), and

502(7) of the CWA. 33 U.S.C.§§ 1311(a), 1344(a), 1362(7); 33 CFR § 328.3(a); 40 CFR § 232.2.

4. Respondent's "deep-ripping" of field #5 on or about November 6, 1995 and of fields #3 and #4 on or about August 8, 1997 constituted the discharge of pollutants from a point source into waters of the United States. 33 U.S.C.§§ 1311(a), 1362(6), (12), (14); 40 CFR § 232.2.

5. Respondent discharged pollutants from a point source into waters of the United States without a permit issued under Section 404 of the CWA in violation of Section 301(a) of the CWA. 33 U.S.C. §§ 1311(a), 1344(a).

6. The delineated wetlands on Respondent's fields #3, #4, and #5 were not "prior-converted cropland." 33 CFR § 328.3(a)(8).

7. An appropriate and reasonable civil administrative penalty for Respondent's violations of Section 301(a) of the CWA is $87,930. 33 U.S.C.§§ 1319(g)(2)(B), (3).

DISCUSSION

Complainant alleges that Respondent violated Section 301(a) of the CWA, 33 U.S.C. §1311(a), by discharging pollutants from a point source into "waters of the United States" without a permit issued under the CWA. Specifically, Complainant alleges that Respondent deep-ripped 3.46 acres of "jurisdictional wetlands identified as vernal pools"[16] on or about November 6, 1995 on his field #5 and 17.58 acres of "wetlands identified as vernal pools, drainage swales and intermittent drainages"[17] on or about August 8, 1997 on his fields #3 and #4 without a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344.[18] Complainant alleges, therefore, that the deep-ripping caused dredged or fill material to be discharged into and destroyed a total of 21.04 acres of "waters of the United States" consisting of tributaries to navigable waters and wetlands adjacent to such tributaries. Complainant proposes the assessment of a civil administrative penalty of $103,070, consisting of $47,670 for "economic benefit," $50,400 for "nature, circumstances, extent and gravity of the violation," and $5,000 for "culpability" of Respondent.[19]

Respondent admits that he deep-ripped fields #3, #4 and #5 as alleged in the complaint, stipulating that: "On or about November 6, 1995, Respondents' contractor deep-ripped land located

[16]Complaint, ¶ 21.

[17]Complaint, ¶ 29.

[18]*See* note 5, *supra*.

[19]*See* note 6, *supra*.

north of Monte Vista Road and west of the Highland [sic] canal (Tract 2375, Field #5) in Winton, [sic] California ... using a D-11 [deep-ripper]," and that "[o]n or about August 8, 1997, Respondent's contractor deep-ripped land located north of Monte Vista Road, east of Highland [sic] canal (Tract 2375, Fields #3 and #4) in Denair, California ... using a D-11 [deep-ripper]."[20] However, Respondent's Answer to the complaint, Post-Hearing Briefs, and Proposed Findings and Conclusions, together with his argument, testimony, and exhibits offered at hearing, advance twelve arguments in defense; nine going to liability and three going to the penalty calculation.

Regarding liability, Respondent first asserts that "no jurisdictional wetlands" existed on the subject property and/or that Complainant failed to carry its burden of proving the accuracy of its wetland delineations.[21] Second, and relatedly, Respondent contends that wetlands could not have existed on the subject property because the property had been farmed and deep-ripped prior to Respondent's ownership.[22] Third, intertwined with the "prior ripping" argument, Respondent argues that Complainant's jurisdiction is precluded by 33 CFR § 328.3(a)(8) due to "EPA's stipulation [at CX 69, ¶ 16] that they do not exercise jurisdiction over prior converted farm land."[23] Fourth, Respondent argues that even if wetlands were present, Respondent did not place dredged or fill material into such wetlands by deep-ripping fields #3, #4 and #5.[24] Fifth, Respondent asserts that even if wetlands did exist as delineated by Complainant and Respondent's deep-ripping did place dredged or fill material into such wetlands, Complainant nevertheless lacks jurisdiction over such activity in light of the Supreme Court's recent decision in *Solid Waste Agency of Northern Cook*

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[20]CX 69, ¶¶ 26-27, 33-34. The reference to "Winton" is meant to be to "Denair" (Tr., pp. 488-489), and the reference to "Highland canal" is meant to be to "Highline Canal." (*See, e.g.*, CX 51).

[21]*See, e.g.*, Answer, p. 2, ¶¶ 1 and 5: "...[N]o jurisdictional wetlands are located on the subject property... [T]here is no evidence that jurisdictional wetlands existed on the parcels, as the growth of the agricultural crop ... is consistent throughout the subject parcel;" Respondent's Brief, p. 8: "The [ALJ] should dismiss the Complaint because there are no jurisdictional waters ... and for lack of jurisdiction based on the inability of the EPA to make a determination as to whether or not any jurisdictional wetlands existed on the site;" Respondent's Reply Brief, p.2: "The burden of proof is not to shift any burden, it is on EPA to show that the activities of the Respondent resulted in the depositing of pollutants into the waters of the United States;" and Respondent's Reply Brief, p. 5: "...[Respondent's expert witness] Diane Moore spent hours and hours ... completing [her] wetland delineation and used all available sources... [S]he ... did not rely, as [did Complainant's expert witness] Mr. Leidy, on aerials and sticking a shovel in the ground. It is evident by her opinion that she did not make errors as mapping an irrigation spigot as a wetland." *See also*, Tr., p. 335: "Specifically we do not believe that the wetlands identified were accurate nor do we believe that there were wetlands located on these parcels that are within the jurisdiction of the United States Government."

[22]*See, e.g.*, Answer, p. 2, ¶¶ 3-4: "...[T]he subject property was extensively farmed for a number of years prior to Respondents' ownership... [T]he 28.8 [sic] acres referenced in the Administrative Complaint is [sic] part of a larger parcel which was ripped at least twice prior to Respondents' ownership."

[23]Respondent's Brief, p.8, ¶ 5.

[24]*See, e.g.*, Answer, p. 2, ¶ 2: "...[N]o dredged or fill materials were deposited into jurisdictional wetlands." *See also*, Respondent's Reply Brief, p. 6: "How can anyone state with a straight face that a farmer's sole activity on property is plowing or ripping his fields is [sic] a discharge into navigable waters[?] ... Nobody in their right mind understands that a point source is a plow."

County v. U.S. Army Corps of Engineers, 531 U.S. 159, 121 S.Ct. 675, 148 L.Ed.2d 576 (Jan. 9, 2001) (*SWANCC*). This is so, Respondent contends, because Complainant asserts jurisdiction based on the "Migratory Bird Rule" which was held invalid by *SWANCC*, and because any wetlands on the property are isolated and are not "adjacent" to any "navigable water."[25] Sixth, Respondent asserts that Complainant "... is estopped from seeking relief sought based on erroneous or misleading statements and/or conduct of government employees or agents."[26] Respondent's "estoppel" theory is that:

> ... based on statements and conduct of related government employees of agencies, Respondents were led to believe that if in fact jurisdictional wetlands existed on the subject parcel, such could be mitigated by Respondents setting aside approximately 12 acres of land ... [and] Respondents [did] set aside 12 acres of otherwise possible [sic] farmable land for purposes of addressing this issue.[27]

Seventh, Respondent asserts that "...there exists selective prosecution or treatment."[28] Although Respondent's specific theory in this regard is not clear,[29] Respondent's "selective prosecution" argument is closely linked to his "estoppel" theory, as Respondent explains: "The fact that Respondent was being punished because of mitigation being held in abeyance was wrong."[30] Respondent also suggests that an improper prosecutorial motive exists because Complainant is "trying to make an example"[31] of Respondent, thus implying that improper "selective prosecution" is evident from Complainant's objective of deterring others from violating the CWA. Eighth, Respondent contends that "... the Administrative Permit action is barred by [the] Statute of Limitations."[32] Ninth, Respondent contends that Complainant's proposed action to enforce the

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[25]*See, e.g.*, Answer, p. 2, ¶ 1: "...[N]o jurisdictional wetlands are located on the subject property." *See also*, Respondent's Brief, p. 4: "All alleged wetlands on field 5 were isolated wetlands. Jurisdiction of field 5 was exclusively invoked under the "Migratory Bird Rule," ... which was thrown out by the U.S. Supreme Court in *SWANCC*. All wetlands on [fields] 3 and 4 except for the one which is referred to as 21 in exhibit 31 are isolated wetlands and jurisdiction on such were proscribed under *SWANCC*." *See also*, Respondent's Reply Brief, p. 6: "Under SWANCC a body of water is jurisdictional only if it is 'actually navigable or is adjacent to an open body of navigable water.' [Citation omitted in original]. Intermittent creeks are not sufficiently linked to an open body of water to warrant [CWA] protection..."

[26]Answer, p. 3, ¶ 7.

[27]Answer, p. 3, ¶¶ 8-9.

[28]Answer, p. 3, ¶ 10.

[29]*See, e.g.*, Respondent's Brief, p. 7: "Especially [sic] since every other farm in the area has been allowed to engage in similar farming practice as that of Respondent, with no harassment from the agencies."

[30]Respondent's Reply Brief, p. 3.

[31]Tr., p. 481, ln. 22 (Mr. Gnass).

[32]Answer, p. 3, ¶ 6.

CWA would work a Fifth Amendment "taking" of Respondent's property without just compensation.[33]

Regarding the proposed penalty, Respondent advances essentially three arguments that the proposed penalty calculation is incorrect. First, Respondent asserts that Complainant's proposed "economic benefit" component of $47,670 is incorrect because "... there was no economic benefit to [Respondent] in converting the land from annual crops to trees."[34] Second, Respondent contends that Complainant's proposed "nature, circumstances, extent and gravity" component of $50,400 is incorrect because Complainant did not properly consider the degraded nature of the wetlands.[35] Third, Respondent argues that Complainant's proposed "culpability" component of $5,000 is incorrect because Respondent was unaware of the necessity of obtaining a "404 permit" prior to deep-ripping in order to plant an orchard of trees.[36]

For the reasons discussed below, I find none of Respondent's arguments as to liability to be persuasive, and that Complainant has carried its burden of proving that Respondent discharged dredged or fill material into 21.04 acres of "waters of the United States," consisting of tributaries to navigable waters and adjacent wetlands, without a permit issued under Section 404 of the CWA. I therefore find Respondent to be in violation of the CWA as alleged in the complaint. Further, for the reasons discussed below, I find that Complainant's proposed penalty of $103,070 should be reduced by $15,140, so that a penalty of $87,930 shall be imposed.

I. Complainant Proved that 21.04 Acres of "waters of the United States" Existed on Fields #3, #4 and #5 Prior to Respondent's Deep-Ripping

Complainant has the initial burden of proving that the violation occurred as set forth in the complaint by a preponderance of the evidence.[37]

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[33]Although Respondent's argument in this regard is not developed beyond the bare assertion, Respondent states: "...[T]his enforcement action is ... an attempt to take property of Respondent through enforcement under the guise of the migratory bird rule... If there is a penalty it should be a penalty on EPA for engaging in the attempt to take property without just compensation." (Respondent's Reply Brief, p. 4).

[34]Respondent's Reply Brief, p. 3.

[35]*See, e.g.*, Respondent's Reply Brief, p. 1, ln. 26 - p. 2, ln. 1; p. 5, ln. 27 - p. 6, ln. 1. *See also*, Tr., pp. 624-625 (Mr. Gnass): "We're not disputing that there's 3.46 acres and we've testified maybe as to its function and value or dispute of opinion." *See also*, Tr., pp. 420-423, 425, 438-442, 470, 471, 475 (Ms. Moore, regarding the "degraded" quality of the wetlands).

[36]*See, e.g.*, Tr., p. 625, ln. 5-9 (Mr. Gnass); Tr., pp. 540-542, 553 (Mr. Veldhuis). This argument also entails elements of the "estoppel" argument, in that Respondent suggests that Complainant led Respondent to believe that a "404 permit" was unnecessary in light of Respondent's promise to "mitigate" the 12-acre site on field #3.

[37]40 CFR § 22.24 states: "(a) The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate. Following complainant's

The complaint alleged that on or about November 6, 1995 Respondent deep-ripped 3.46 acres of "adjacent wetlands" (*i.e.*, wetlands "adjacent" to tributaries to navigable waters) on field #5.[38] The complaint further alleged that on or about August 8, 1997 Respondent deep-ripped 21.58 acres of "jurisdictional wetlands" on fields #3 and #4,[39] such "wetlands" consisting of 3.16 acres of "isolated wetlands" over which jurisdiction was based upon the "Migratory Bird Rule," 16.61 acres of "tributaries to navigable waters," and 1.81 acres of wetlands "adjacent" to such tributaries. However, subsequent to the Supreme Court's decision in *SWANCC, supra*, Complainant withdrew its allegations regarding the 3.16 acres of "isolated wetlands" on fields #3 and #4 for lack of jurisdiction.[40] Further, in light of testimony given at hearing by Complainant's expert witness Robert Leidy in which Mr. Leidy opined that the "wetland" originally identified as "wetland #6" on field #4 is actually an irrigation "spigot,"[41] Complainant withdrew its allegation regarding "wetland #6" which had comprised 0.84 acres of "tributaries to navigable waters,"[42] so that the total "tributary" acreage alleged to have been destroyed is now 15.77 acres. Thus, the total acreage of "waters of the United States" currently alleged to have been deep-ripped is 21.04 acres, consisting of 3.46 acres of "adjacent wetlands" on field #5, 15.77 acres of "tributaries to navigable waters" on fields #3 and #4, and 1.81 acres of "adjacent wetlands" on fields #3 and #4. Put another way, Complainant alleges that Respondent destroyed by deep-ripping 3.46 acres of "waters of the United States" on field #5

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establishment of a prima facie case, respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the burdens of presentation and persuasion for any affirmative defenses. (b) Each matter or controversy shall be decided by the Presiding Officer upon a preponderance of the evidence."

[38]Complaint, ¶ 21.

[39]Complaint, ¶ 29.

[40]Complainant explained: "... EPA sought ... penalties ... for discharging pollutants to three kinds of waters: isolated waters, tributaries to waters of the U.S., and wetlands adjacent to tributaries. The isolated waters consisted of 3.16 acres of isolated waters used by migratory birds on fields three and four. Transcript at 149. EPA ... is not seeking a penalty for these 3.16 acres of isolated wetlands which were used by migratory birds in light of the U.S. Supreme Court's holding in *SWANCC*. EPA expert Robert Leidy testified that the wetlands marked five, six, seven, eight, nine, ten, thirteen, fourteen, fifteen and sixteen, for a total of 3.16 acres, were isolated wetlands. Transcript at 230. Exhibits 31, 32." (Complainant's Brief, pp. 20-21, *including* n.13. *See also*, Complainant's Reply Brief, pp. 2-3).

[41]Mr. Leidy testified: "Q: Turning now to the wetland that you have marked as wetland six, having heard the testimony of Mr. Veldhuis and Ms. Moore, have you come to reconsider or reassess the jurisdictional status of this ... number six? A: Yes, I have. I had an opportunity to take another look at six and the aerial photos and the exhibits and having listened to Mr. Veldhuis' testimony I am willing to acknowledge that that probably is a spigot and defer to Mr. Veldhuis' expertise on that particular wetland, number six." (Tr., p. 572).

[42]Complainant explained: "The complaint originally listed 16.61 acres of tributaries, but at hearing, upon receipt of new information, [Complainant] ... subtracted wetland six which was .84 acres for a total of 15.77. Transcript at 572." (Complainant's Brief, p. 11, n.7. *See also*, Complainant's Reply Brief, p. 3, n.3.). Complainant's subtraction of .84 acres from the originally alleged 16.61 acres of "tributaries" is in error because "wetland #6" has *already* been eliminated for lack of jurisdiction as an "isolated wetland." That error notwithstanding, the total "tributary" acreage alleged to have been destroyed is now 15.77 acres.

and 17.58 acres of "waters of the United Sates" on fields #3 and #4.

Thus, setting aside for the moment jurisdictional questions such as "adjacency to navigable waters" and whether Respondent's deep-ripping discharged pollutants into any "waters of the United States," Complainant must first show by a preponderance of the evidence that 21.04 acres of "wetlands identified as vernal pools, drainage swales and intermittent drainages"[43] in fact existed on fields #3, #4 and #5 prior to Respondent's deep-ripping on or about November 6, 1995 (field #5) and August 8, 1997 (fields #3 and #4). Respondent asserts first that no "wetlands" in fact existed on the property and/or that Complainant failed to carry its burden of proving the accuracy of its wetland delineations, and second that wetlands could not have existed on the property because the property had been farmed and deep-ripped prior to Respondent's ownership.

A. The Wetland Delineations were Accurate

1) Field #5

Sometime between December 2, 1994 and December 8, 1994,[44] the NRCS[45] received a complaint from an adjacent landowner that Respondent was using heavy equipment to level a portion of field #5 and possibly fill wetlands in order to install a dairy.[46] Indeed, Respondent testified that in December 1994:

> ... [W]e ... laid out the location for the dairy. And then I brought in an [e]arth moving contractor and I believe they started on December the 2nd and proceeded to move dirt.

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[43] *See* note 4, *supra*, for definitions of "vernal pools," "swales," and "intermittent drainages."

[44] Respondent testified that he began "leveling" an area of field #5 "for the dairy" on December 2, 1994. (Tr., pp. 536-537). Mr. McElhiney testified that the neighbor's complaint was received by NRCS "in, perhaps, November or December of '94." (Tr., p. 93). Mr. McElhiney visited the property in response to the neighbor's complaint on December 8, 1994. (Tr., pp. 81-82; CX 8, p. 2).

[45] The Natural Resources Conservation Service ("NRCS") of the U.S. Department of Agriculture ("USDA") was formerly the USDA's Soil Conservation Service ("SCS"). Under a January 7, 1994 "Memorandum of Agreement Concerning Wetland Determinations for Purposes of Section 404 of the Clean Water Act and Subtitle B of the Food Security Act," (MOA) (CX 54): "The Administrator of the EPA has the ultimate authority to determine the geographic scope of waters of the United States subject to jurisdiction under the CWA, including the Section 404 regulatory program... In accordance with ... this MOA, wetland delineations made by SCS [now the NRCS] on agricultural lands ... will be accepted by EPA and the Corps for the purposes of determining Section 404 wetland jurisdiction." (CX 54, p. 2).

[46] Tr., pp. 81-82, 93-94.

> And we ... did a lot of moving of dirt from a hill that was in this [southeast] corner [of field #5] ... [a]nd that was cut three foot and that removed and moved to the center of the property ... [t]o build a feed lot, animal confinement area [for the dairy].[47]

In response to the neighbor's "complaint," Michael A. McElhiney, a soil scientist[48] employed as the District Conservationist for NRCS,[49] telephoned Respondent in order to arrange a meeting at the property[50] and did meet with Respondent at the property on December 8, 1994, and again on December 12, 1994.[51] At that time, although heavy earth-moving equipment was present on the property[52] and Respondent was conducting "leveling" activities,[53] Respondent had not yet begun to deep-rip.[54] During these site visits Respondent was advised of potential wetlands on field #5.[55] Following these site visits, Mr. McElhiney contacted the Corps "regarding potential 'vernal pool' habitat in depressions observed on [Respondent's] property,"[56] and informed Respondent by letter dated December 13, 1994 that: "[Karen Shaffer of the Corps] told me that you need to obtain a Section 404 permit from the [Corps] before you level this property."[57] Respondent requested that NRCS assist him.[58]

By letter dated December 16, 1994, Mr. McElhiney advised Respondent that the NRCS

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[47]Tr., pp. 536-537.

[48]CX 1.

[49]Tr., p. 21.

[50]Tr., pp. 24-25, 82-82.

[51]Tr., pp. 81-82; CX 8, p. 2.

[52]Tr., p. 539, ln. 14-17 (Mr. Veldhuis).

[53]Tr., p. 93, ln. 22 - p. 94, ln. 5 (Mr. McElhiney).

[54]Tr., p. 94, ln. 1.

[55]CX 8, p. 2.

[56]CX 8, p. 2.

[57]CX 8, p. 2 (underlining removed).

[58]Mr. McElhiney testified: "A: ... So we had a responsibility, but we also do it at the request of the property owner. Q: But [Respondent] asked you to help; is that correct? A: Yes, he did." (Tr., p. 82). Respondent similarly explained: "... [Mr. McElhiney] said that he could bring out a biologist ... to examine the vernal pools ... [a]nd I said that I'd like for him to do that." (Tr., p. 540).

"delineation of wetlands on your property"[59] was scheduled to commence December 20, 1994.[60] The engineering staff of the NRCS prepared "wetland delineation maps" reflecting probable wetlands on field #5,[61] which Mr. McElhiney then showed to Respondent during a site visit in late February, 1995.[62] A copy of the wetland delineation report for field #5 was provided to Respondent by Mr. McElhiney when they met on May 19, 1995, and on August 15, 1995, Respondent was sent a copy of the "Highly Erodible Land and Wetland Conservation Determination."[63] Respondent deep-ripped field #5 on or about November 6, 1995.[64]

Although "wetlands" are not defined by the CWA, federal regulations implementing the statute do define "wetlands" as: "...those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."[65] In order to "accurately delineate ... on a map where those wetlands are located on the landscape,"[66] a "wetland delineation" employs a "methodology whereby one determines the geographic scope of [f]ederal jurisdiction over wetlands,"[67] based upon the presence of three wetland indicators: hydrology, hydrophytic vegetation, and hydric soils.[68] Mr. McElhiney explained that: "You need all

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[59]CX 9.

[60]CX 4; CX 4; CX 8; CX 9. At the hearing, Respondent protested an NRCS "trespass" on his property in December, 1994 but did not move to exclude any evidence concerning the delineation. (Tr., p. 618). Mr. Veldhuis testified that had he been asked, he would have granted permission to conduct a survey on his property. (Tr., pp. 616-618). I note that Mr. McElhiney's December 16, 1994 letter to Respondent, along with Respondent's testimony, strongly suggests that Respondent, at minimum, had implied his permission for the wetland determination.

[61]Tr., pp. 26-27; CX 2; CX 3.

[62]CX 2; CX 3; CX 10; Tr., pp. 617-618.

[63]CX 7; CX 11.

[64]CX 69, ¶¶ 26-27; Tr., pp. 93-94, 184-185.

[65]40 CFR § 230.3(t). *See also*, 33 CFR § 328(b), containing identical language.

[66]Tr., p. 25.

[67]Tr., p. 136. *See also*, Tr., p. 24.

[68]*See, e.g., In re Condor Land Company*, EPA Docket No. 404-95-106 (ALJ, Dec. 8, 1998): "In order to assist field personnel in making a wetlands determination, EPA relies on the Corps' 1987 *Wetlands Delineation Manual* (the '1987 Manual'). In this manual, the Corps sets out three criteria for making a wetlands determination. Those criteria are (1) a prevalence of hydrophytic plants, (2) hydrological conditions suited to such plants, and (3) the presence of hydric soils." (Citations omitted). *See also*, testimony of Robert Leidy regarding "atypical delineations:" "Q: How do you do an atypical delineation? A: You follow the methodology that is set forth in the Corps of Engineers' Wetland Delineation Manual. Q: And in the area of wetland science, is this generally an accepted way to do these delineations? A: Yes, it is." (Tr., pp. 137-138). Although Mr. Leidy was speaking specifically to the "atypical delineation" performed on fields #3 and #4, this testimony that the "1987

three properties to qualify as a wetland. So hydric soil is one observation, hydrology is another, hydrophytic vegetation is the third."[69] If any one of the three criteria is not met, then the area is not deemed to be a "wetland."[70] This methodology is generally accepted in the area of wetland science as the proper way to delineate wetlands.[71]

The NRCS wetland delineation of field #5 was performed by a "technical team"[72] consisting of a soil scientist, an engineer, and a biologist under the direction of Mr. McElhiney, himself a "soil scientist."[73] The NRCS team initially "utilized an engineering tool called a total station to delineate where probable wetland areas might be in field five..."[74] As Complainant explained in its brief, a "total station" is "a surveying tool which marks the precise boundaries of depressional areas."[75] The engineer operating the "total station" kept detailed records of each "observation point"[76] on individual data sheets and produced maps of field #5 showing the "probable wetland areas" corresponding to the "observational data points."[77] The individual data sheets are entered into the record as CX 5, pp. 1-22, and the maps are entered as CX 2 and CX 3.

On at least six occasions from December, 1994 through April, 1995, the NRCS team visited field #5 to verify and precisely delineate actual "wetlands" using the three criteria of wetland

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Manual" describes the generally accepted method of delineating wetlands is equally applicable to the delineation performed on field #5.

[69]Tr., pp. 31-32. Mr. Leidy similarly explained: "You look for positive indicators of wetland hydrology, wetland soils and wetland vegetation." (Tr., p. 137).

[70]Mr. McElhiney testified that: "...if all three properties are not observed; for example if there was ponded water, perhaps vegetation, or ... there was not enough vegetation of the right type, or a soil condition that was not evident to be a hydric soil – if you didn't have all three of those properties, then the decision of the team was that would then ... not be a wetland." (Tr., p. 36).

[71]*See* note 68, *supra*. *See also*, Tr., p. 370 (Respondent's expert witness Dianne Moore): "This is the 1987 Wetland Delineation Manual that the Corps put out which is considered the Bible, if you will, for wetland delineations."

[72]Tr., p. 25.

[73]Tr., pp. 25-26; CX 1.

[74]Tr., p. 26.

[75]Complainant's Brief, p. 9, n.6.

[76]Tr., p. 33, ln. 14.

[77]Mr. McElhiney explained: "Q: Looking at [CX 5], what are these sheets? A: The engineer ... was surveying this field so that we could put in the field boundary areas... So using the total station, he was able to establish where these points were, not only in the total station, but he kept track of those on these individual sheets so as not to loose any of the data. Q: So on [CX 3] ..., [d]o those little points around the circle– A: Those would be observation points that were referenced here, yes." (Tr., pp. 32-33).

hydrology, hydric soils, and hydrophytic vegetation. For each "probable wetland area" identified on the maps (CX 2 and CX 3) by the "total station," the NRCS team delineated the actual wetland boundaries using the three criteria and recorded their observations and calculations on forms entitled, "Data Form - Routine Wetland Determination (1987 COE Wetlands Delineation Manual)."[78] As Mr. McElhiney explained: "...[E]ach of these data sheets would reference back to an observation that was made related to each of the delineations that are on this map. So there would be an observation sheet for every delineated area."[79]

Each "data form" is entered into the record as part of CX 4, pp. 1-102, and contains data on "vegetation," "hydrology," and "soils." Regarding hydrophytic vegetation, the NRCS biologist "classified the vegetation that was predominant" at each "probable wetland area" according to its likelihood of being found in a "wetland." Such classification was based upon an established ranking system established by the U.S. Fish and Wildlife Service and incorporated into the Corps' 1987 Manual.[80] Specifically, I note that at the vast majority of all the "total station" sites ("probable wetlands"), 100% of the dominant plant species were either "obligate," "facultative wet," or "facultative" regardless of the ultimate determination of that area as a wetland.[81] Most of the sites determined to be wetlands had significant "obligate species."[82] Regarding wetland hydrology, the NRCS team completed a checklist for each "probable wetland area" which included "field observations," such as "depth of surface water;" "wetland hydrology indicators," such as whether the area was "inundated" with water and/or "saturated in upper 12 inches;" and "remarks," such as the percentage of inundated area or any waterfowl usage observed.[83] Specifically, I observe that at most of the "total station" sites ("probable wetlands") there was surface water and that virtually all of the areas had the "inundated" wetland hydrology indicator.[84] Regarding hydric soils at each of the "probable wetland areas," Mr. McElhiney explained:

> [The NRCS team] would either dig with a shovel or a tile spade, or using a soil auger, and pull the soil horizons out and observe them, using a Munsell Color Chart, that is

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[78]CX 4, pp. 1-102.

[79]Tr., p. 32. *See also*, Tr., p. 28 (Mr. McElhiney): "This [CX 4] documents the point in a local area associated with an observation that our wetland team would evaluate and – in considering the vegetation, the hydrology, and the soils at that particular location, as to whether or not it is or is not a wetland."

[80]*See, e.g.*, Tr., pp. 187-188 (Mr. Leidy); Tr., pp. 29-30 (Mr. McElhiney).

[81]CX 4. As explained by Mr. McElhiney, the plant species are "ranked ... as to their likelihood of occurring in a wetland." (Tr., p. 187). A "facultative" species occurs in a "wetland, on average 33 to 66 percent of the time," a "facultative wet" species occurs 66 to 99 percent of the time, and an "obligate" species would be in a wetland 99 percent of the time. (Tr., p. 188).

[82]CX 4.

[83]*See, e.g.*, CX 4, p. 1. *See also*, Tr., p. 30.

[84]CX 4.

> used in the identification of hydric soils... [Hydric soil] has ... properties, such as color and concretions and [mottling], that indicate that this soil is in a reduced or semi-reduced form, as opposed to an oxidized form. Reduced meaning that ... when water saturates a soil, it essentially changes the coloration of the soil from a well-drained condition to more of a poorly drained condition, and the colors reflect that....[85]

Only if a "probable wetland area" met all three wetland criteria of hydrology, hydrophytic vegetation, and hydric soils would the NRCS team then delineate the area as a "wetland."[86]

Finally, the NRCS engineer "calculated and listed the acreage associated with each of the delineated areas,"[87] compiling the data into a document dated May 18, 1995 and entitled "Ray Veldhuis Wetland Plot Acreage," which is entered into the record as CX 6.

The wetland delineation performed by NRCS on Respondent's field #5 determined that field #5 contained 3.46 acres of "vernal pool wetlands."[88] Indeed, Respondent's expert witness Dianne Moore *concurred* with NRCS regarding the wetland acreage existing on field #5 prior to Respondent's deep-ripping,[89] and Respondent does not dispute the NRCS delineation of 3.46 acres of wetlands on field #5.[90] Based on the foregoing evidence, I find that Complainant has accurately delineated 3.46 acres of wetlands that existed on Respondent's field #5 prior to Respondent's deep-ripping.

2) Fields #3 and #4

On or about August 8, 1997, Respondent's contractor deep-ripped fields #3 and #4 using a "D-11" deep-ripper in preparation to plant almond trees.[91] Also on August 8, 1997, Elizabeth Goldmann, an Environmental Scientist with the U.S. EPA (Region 9),[92] in response to receiving

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[85]Tr., p. 31.

[86]Tr., p. 36 (*quoted supra* at note 70).

[87]Tr., p. 35 (Mr. McElhiney).

[88]CX 6, p. 3.

[89]Ms. Moore testified: "...I believe that *the acreage is probably pretty good as far as wetland acreage*. As far as what types of wetlands they were, I've just got to think that they were ... substantially degraded through farming." [Tr., p. 420 (emphasis added)].

[90]*See, e.g.*, Tr., pp. 624-625 (Mr. Gnass): "We're not disputing that there's 3.46 acres and we've testified maybe as to its function and value or dispute of opinion."

[91]CX 69, ¶¶33-34; CX 56.

[92]CX 53; Tr., p. 243.

Respondent's file from the Corps[93] and having been notified by the Corps and NRCS that Respondent was plowing fields #3 and #4,[94] spoke with Respondent by telephone. Ms. Goldmann informed Respondent that he may be in violation of the CWA and advised Respondent to cease all activity on fields #3, #4, and #5.[95]

On August 28, 1997, Ms. Goldmann and Mr. McElhiney visited fields #3 and #4 and met with Respondent.[96] Ms. Goldmann and Mr. McElhiney "...drove along the road adjacent to Highline Canal to view the deep-ripping that occurred on [fields #3 and #4]."[97] Although the deep-ripping of fields #3 and #4 was ongoing at that time,[98] Ms. Goldmann observed that "[t]he majority of the site [fields #3 and #4] was deep-ripped at that time."[99] Ms. Goldmann explained to Respondent the need to obtain a "404 permit" before deep-ripping wetlands and informed Respondent that wetlands still existed on fields #3 and #4.[100]

Between August 28, 1997 and May 16, 2000, Mr. Robert Leidy, a Wetlands Science and Field Program Manager and "404 Enforcement Coordinator" with the U.S. EPA (Region Nine)

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[93]By letter dated February 28, 1997, the Corps transferred Respondent's file to the EPA for enforcement of the CWA pursuant to the MOA between the EPA and the Corps concerning wetland determinations under Section 404 of the CWA. (CX 27; CX 55; Tr., pp. 120-121, 249-250; CX 54; Tr., pp. 245-248).

[94]CX 69, ¶35; Tr., p. 249, ln. 9; Tr., p.252, ln. 6-9. Ms. Goldmann's notes from her subsequent August 28, 1997 visit to Respondent's property explain: "I told [Respondent] that after he filled the vernal pools on field 5 ... EPA was referred the case, but chose to ... let NRCS take the lead since he agreed to cooperate with them. EPA received another call from the Corps [because Respondent] failed to do the mitigation [and] then reportedly filled more wetlands." (CX 57, p. 1).

[95]CX 69, ¶35; CX 56; Tr., pp. 251-253.

[96]Tr., pp. 255, 307; CX 56; CX 57.

[97]CX 57, p. 1.

[98]Ms. Goldmann's testimony was somewhat equivocal regarding whether the deep-ripping was completed or ongoing at that time. *See, e.g.*, Tr., pp. 307-308: "A: ...I actually viewed the deep-ripping on the site and Mr. Veldhuis told me he was deep-ripping the site and I saw it with my eyes when I was out there August 28th, '97... Q: You saw a piece of equipment on the site? A: No, I can honestly say I don't remember if I saw the actual piece of equipment. I may have but I don't remember." However, Mr. Veldhuis clarified: "...Mr. Price came in and *he was ripping and that's when Elizabeth Goldmann came there* and she says, 'How come you haven't completed the mitigated property and ... you're ripping the other property?'" [Tr., p. 545 (emphasis added)].

[99]Tr., p. 255.

[100]CX 69, ¶ 36; Tr., pp. 254-256. Ms. Goldmann's field notes from her August 28, 1997 visit state: "I ... explained to Mr. Veldhuis the permitting process [and] his requirement to obtain a 404 permit from the Corps... I informed him that there were still wetlands adjacent to the proposed [mitigation] site. He confirmed that he avoided them. I told him that EPA would be starting an investigation regarding the activities conducted to date." (CX 57, p. 1). Ms. Goldmann similarly testified: "[Respondent and I] discussed the activities that were ongoing on fields three and four and a concern regarding a violation under Section 404 of the [CWA] and that proposing to mitigate does not obligate [sic] his need to get a 404 permit. He still needs to comply with the Act." (Tr., p. 256). The term "obligate" in the transcript is apparently a mistaken substitute for the term "obviate."

Wetlands Regulatory Program,[101] performed a wetland delineation on Respondent's fields #3 and #4.[102] Because fields #3 and #4 had already been deep-ripped at the time of Mr. Leidy's delineation, Mr. Leidy could not identify wetlands by looking for the three criteria of hydrology, vegetation, and soils, as was done by Mr. McElhiney on field #5. Rather, Mr. Leidy had to perform an "atypical delineation" to determine whether wetlands had been present on fields #3 and #4 before the deep-ripping.[103] Mr. Leidy explained the "atypical delineation" rationale and methodology as follows:

> Q: And in optimal circumstances, what do you look for when doing a wetland delineation?
> A: You look for positive indicators of wetland hydrology, wetland soils and wetland vegetation.
> Q: Can you do a wetland delineation when the wetlands have been impacted or destroyed?
> A: Yes, you can... They are called atypical delineations... You follow the methodology that is set forth in the Corps of Engineers' Wetland Delineation Manual.
> Q: And in the area of wetland science, is this generally an accepted way to do these delineations?
> A: Yes, it is.
> ...
> Q: Now, what does the guidance ... recommend that you look at when doing an atypical delineation?
> A: ...[B]ecause an area had been disturbed, what you need to do is collect information on the condition of the site prior to the disturbance. And so one of the things you can do is ... get aerial photographs of the site that depict the site prior to the disturbance... In addition, the atypical methodology asks you

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[101]CX 28; Tr., p. 133. Mr. Leidy holds a Bachelor of Science degree in conservation and natural resources, a Master of Science degree in wildland resource science, and is a doctoral candidate in the field of ecology with an emphasis on wetlands ecology. (CX 28; Tr., p. 133). He has published approximately six articles on the subject of wetland science and has taught a course on wetland delineation for the U.S. Army Corps of Engineers (Tr., p. 134). Mr. Leidy has performed over 500 wetland delineations (Tr., p. 137), 50 to 100 of which have been "atypical delineations" (Tr., p. 586), involving the review of approximately 1,000 aerial photographs (Tr., p. 183). The parties to this case have stipulated that Mr. Leidy is an "expert" witness. (CX 69, ¶1).

[102]Tr., p. 138; CX 31; CX 32. The "atypical delineation" (described *infra*) involved examination of historical documents, consideration of adjacent sites, interviewing people familiar with the area, and on-site inspection. (*See, e.g.*, Tr., pp. 140, 306, 372). Although the precise date or dates of "the delineation" is not clear, the delineation process took place between Ms. Goldmann's and Mr. McElhiney's August 28, 1997 site inspection and Ms. Goldmann's and Mr. Leidy's May 16, 2000 site inspection.

[103]Mr. Leidy testified: "Q: What part of the property did you delineate? A: ...fields three and four. ... Q: ...Why was it necessary to do an atypical delineation? A: Because ... in order to do a wetland delineation you need to find positive indicators of wetland plants, wetland hydrology and wetland soils; and when those three indicators become disturbed, one or more of those, you must do an atypical delineation. And the information we received from the Veldhuis site was that that area had been disturbed such that the soils were disturbed, the hydrology had been disturbed, and the vegetation had been removed or disturbed. Q: Do you know how that parcel had been disturbed? ... A: I believe it had been deep ripped." (Tr., pp. 138-139).

> to collect other information about the site that might be available. And one area that is useful ... is if you have information on adjoining or adjacent sites that are similar in geographic makeup or in a similar landscape setting.[104]

Respondent's expert witness Dianne Moore[105] similarly explained the "atypical delineation methodology" and opined that the Corps' 1987 Manual set forth the generally accepted method, testifying:

> ...The atypical method is a part of the ... 1987 Wetland Delineation Manual that the Corps put out which is considered the Bible, if you will, for wetland delineations... In a nutshell an atypical delineation involves compiling any and all information you can possibly find in trying to make sense of it with respect to wetlands... Some of the things are to do an ... on-site inspection, go and look at the site. Look at the Soil Conservation Service [now the NRCS] records. Look at the soil survey... [I]f a person applied for a permit, look at the permit application. It says 'talk to the public. Individuals familiar with the area might provide a good general description...' ... '...Examine any aerial photography and determine whether the area was inundated at the time of the photographic mission...' ... 'Talk to public or local government officials. Look at flood plane management maps...' ...[T]here's the characterization of buried soils... There's a section on look at the National Wetland Inventory maps... So this goes on for about six or seven pages about basically scrounge any and all sources and try to put logically together what you think happened. One thing that I found ... to be particularly useful ... [is] looking at adjacent lands of similar soils that were never touched before and using those to calibrate what you're seeing in old photos of the site prior to it being touched...[106]

In the instant case, Mr. Leidy followed this "atypical delineation methodology" in delineating the wetlands on fields #3 and #4 by examining historical aerial photographs, considering the previous site inspection of field #5, looking at soil surveys and USGS and National Wetland Inventory maps,

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[104]Tr., pp. 137-140. *See also*, Tr., pp. 185-186 (Mr. Leidy): "One of the things that the atypical delineation advises one to do is to look at areas in close proximity or adjacent to the disturbed area, so you can use information on the undisturbed site to reconstruct what conditions may have been like on the disturbed site."

[105]Ms. Moore holds a Bachelor of Science degree in conservation and resource studies and a Master of Science in ecology, fish population dynamics. (RX 1). She is certified by the Wetland Training Institute to perform wetland determinations. (RX 1; Tr., p. 354). Ms. Moore has approximately 10 years of experience in wetland determinations. The parties have stipulated that Ms. Moore is an "expert" witness. (CX 69, ¶ 1).

[106]Tr., pp. 370-372. *See also*, Tr., pp. 582-583 (Mr. Leidy): "Q: Now, you testified on direct that you used the 1987 Corps of Engineers Wetlands Delineation Manual to do your atypical delineation; is that correct? A: Yes. Q: Now, this manual ... recommends that in an atypical situation a delineation be done by looking at aerial photography, on-site inspection, previous site inspection, adjacent vegetation, soil surveys, information from the permit applicant, or I would assume the property owner, the public and a National Wetland Inventory map..."

speaking with individuals familiar with the site,[107] considering adjacent vegetation and adjoining sites of similar soils and geographic characteristics which had not been deep-ripped by Respondent, and by visiting the site and digging pits to examine and characterize buried soils.[108]

First, Mr. Leidy examined aerial photographs of fields #3, #4, and #5 and the surrounding area taken by the Farm Service Agency in 1987 and 1993, both prior to Respondent's deep-ripping.[109] By comparing the NRCS maps (CX 2 and CX 3) and "data forms" (CX 4) for field #5, which had delineated the field #5 wetlands, with the aerial photographs of field #5, Mr. Leidy was able to identify similar features in those same photographs on fields #3 and #4. Mr. Leidy explained in detail the method by which he identified wetland features on fields #3 and #4 in the aerial photographs:

> Now, the way we [knew] where to trace on this [CX 31(transparency)] is ... we had the NRCS data forms for field five ... and the map of the wetlands for field five. And so we were able to determine from that information, coupled with the aerial photographs, where these wetlands were, based on the signature that's on the photo. You can see that there is a textural difference on this photo within field five, and there are also color differences that are caused by surface water, that may ... make these shapes. Different colors and also by different types of vegetation. The vegetation that's darker here is either a different type, or it is green, it is growing. And so based on these signatures and based on my experience with other similar type habitats, vernal pools and vernal swales and drainages, I was able to then come over and look on these photos and find similar features. In other words, these long linear features are drainage areas or drainage swales or vernal swales, and these rounder features here would be ponded areas. You can see the water in them. That would be vernal pools or vernal lake features.[110]

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[107] As explained *infra*, although Mr. Leidy did not speak directly with individuals familiar with the site, Ms. Goldmann did do so and relayed the substance of those conversations to Mr. Leidy.

[108] Tr., pp. 583-586.

[109] Tr., pp. 139-140, 142; CX 29 (1987 photograph); CX 30 (1993 photograph). Mr. Leidy explained that he reviewed other aerial photographs as well in conducting the delineation on fields #3 and #4, including those entered into the record as CX 45 through CX 48, but chose to base the delineation on the photographs entered as CX 29 and CX 30 because: "...we went through various years of photos and picked these photos ... clearly depicting the features as compared to other photos. In addition, we had the information from NRCS on field five for the delineation so I wanted to make sure I had the same photos that they used for comparative purposes." (Tr., pp. 573-574).

[110] Tr., pp. 143-144. *See also*, Tr., pp. 176-177 (Mr. Leidy, referring to the aerial photographs of fields #3, #4 and #5 taken in July, 1993 and entered into the record as CX 45 and CX 46): "...[Y]ou are able, in an aerial photograph, to see differences in texture and color. And ...you can see these ... darker lines embedded in ... all fields, three, four and five. There's ... little circles and different shapes and long linear features. Little circular shapes are vernal pools, generally, and the long linear shapes that ... branch out are ... wetland drainage systems or swales. The dark coloration is caused by ... the soils being ... wetter than surrounding areas; ... by different types of soils that are found within the wetland areas; typically hydric soils... So I am able to discern those by looking at the photograph. I also used the NRCS delineation, the data sheets that they did on field five, to verify the signature

Having identified wetland features in the photographs on fields #3 and #4, Mr. Leidy laid a transparency over the photographs and traced those features.[111] Mr. Leidy then calculated the acreage of each wetland using a "planimeter."[112] These calculations are listed on the tally sheet entered into the record as CX 32.

Second, Ms. Goldmann[113] spoke with individuals familiar with fields #3 and #4. Specifically, Ms. Goldmann spoke with Michael McElhiney of NRCS, Tom Cavanaugh of the Corps, and Respondent Ray Veldhuis, the owner of the property, and then relayed what she had learned from those conversations to Mr. Leidy.[114] As Respondent points out, neither Ms. Goldmann nor Mr. Leidy ever spoke with Mr. Len Van Gaalen,[115] who had owned and farmed the subject property, including deep-ripping,[116] from approximately 1971 until Respondent acquired[117] the property in 1991.[118] However, Respondent did inform Mr. McElhiney of Mr. Van Gaalen's previous ripping,[119]

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that we see on fields three and four."

[111]Tr., p. 143; CX 31.

[112]Tr., p. 145. Mr. Leidy used the planimeter to trace around each of the wetland shapes on the transparency and calculate the area of each shape. The acreage of each shape was determined by calculating the area three to five times with the planimeter and then taking the average of those calculations. (Tr., p. 145).

[113]Although Ms. Goldmann, and not Mr. Leidy, spoke with individuals familiar with fields #3 and #4, Ms. Goldmann and Mr. Leidy worked together to "prepare[] the enforcement case against Respondents." (Complainant's Brief, pp. 11-12). As Complainant explains: "Ms. Goldmann was the lead on the Veldhuis matter: Mr. Leidy did the actual delineation ... on Fields 3 and 4 because of his expertise in the area." (Complainant's Brief, p. 12). Thus, Ms. Goldmann spoke with individuals familiar with the property and relayed the information to Mr. Leidy. *See* Tr., pp. 574-576.

[114]Tr., pp. 328-329 (Ms. Goldmann); Tr., pp. 204-205, 574-576, 583-586 (Mr. Leidy).

[115]*See* Tr., p. 204 (Mr. Leidy): "Q: Did you talk to a Mr. Van Galen [sic], who owned the property for about 21 years before Mr. Veldhuis? A: No." However, as discussed *infra*, Respondent did inform Mr. McElhiney of Mr. Van Gaalen's previous ripping, and Ms. Goldmann spoke directly with Mr. McElhiney and relayed that information to Mr. Leidy. Further, Ms. Goldmann spoke with Respondent on numerous occasions and relayed that information to Mr. Leidy.

[116]Tr., pp. 339-340.

[117]Respondent leased the subject property in 1991 and purchased it in 1993. [Tr., p. 267, ln. 23-24 (Ms. Goldmann); Tr., pp. 340, ln. 23-24, p. 346, ln. 25 - p. 347, ln. 9, p. 348, ln. 10-12 (Mr. Van Gaalen); Tr., p. 500, ln. 5-7, p. 532, ln. 24 (Mr. Veldhuis); CX 69 ("Stipulated Facts"), ¶ 21; CX 64 ("Grant Deed")].

[118]Tr., pp. 340-341. The issue of Mr. Van Gaalen's having deep-ripped the property prior to Respondent's ownership will be addressed in detail, *infra*.

[119]*See* Tr., p. 74 (Mr. McElhiney): "Q: ...Are you aware that ... these particular parcels ... had been ripped before by a prior owner? A: I was told that it had been ripped, yes. Q: And who told you that? A: Mr. Veldhuis did. Q: And did he tell you the prior owner told him that he had ripped it? A: I think that's where the information came from, yes."

and Ms. Goldmann spoke directly with Mr. McElhiney[120] and relayed that information to Mr. Leidy.[121]

Third, Mr. Leidy considered adjacent vegetation and adjoining sites of similar soils and geographic characteristics. Specifically, Mr. Leidy considered the wetland characteristics of field #5 as delineated by Mr. McElhiney prior to Respondent's deep-ripping and an approximately 12-acre area in the northwest corner of field #3 which Respondent did not deep-rip in anticipation of "mitigating" the impacts to field #5.[122] Agreeing with Respondent's expert witness Ms. Moore that "[o]ne thing that [is] ... particularly useful ... [is] looking at adjacent lands of similar soils that were never touched before and using those to calibrate what you're seeing in old photos of the site prior to it being touched,"[123] Mr. Leidy testified:

> We also acquired the wetland delineation sheets that were prepared by the NRCS as part of their delineation of field five [CX 4]... [O]ne area that is useful ... is if you have information on adjoining or adjacent sites that are similar in geographic makeup or in a similar landscape setting. And so we acquired the NRCS data sheets in order [to] get information on wetlands immediately adjacent to fields three and four.[124]

Mr. Leidy further explained:

> ...I was able to determine adjacent vegetation from two sources. One was the NRCS data sheets for field five and used that as a reference material, and also the extreme northwestern portion of fields three and four up by that large reservoir that we had referred to had not been ripped and so there was vegetation at that site.[125]
> Regarding the adjoining field #5, Mr. Leidy testified:
> ...[T]he wetland data sheets [for field #5, CX 4] indicate that there were functioning and existing wetlands on field five... [a]nd because of their close proximity to fields three and four, and because they are basically on the same geomorphic surface, the same type of landscape surface, you would expect that the features immediately

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[120]*See, e.g.*, Tr., p. 328, ln. 25 - p. 329, ln. 2 (Ms. Goldmann); Tr., p. 575, ln. 5-6 (Mr. Leidy); Tr., p. 584, ln. 2-5 (Mr. Leidy); Tr., p. 585, ln. 24 - p. 586, ln. 2 (Mr. Leidy).

[121]See Tr., p. 575 (Mr. Leidy): "Q: Did Ms. Goldmann talk to Mike McElhiney of NRCS? A: That's what she told me. She told me she had, yes. Q: And did she fill you in on the history that [Mr. McElhiney] had given her? A: Yes."

[122]Tr., p. 161, ln. 9-21.

[123]Tr., p. 372 (Ms. Moore).

[124]Tr., pp. 139-140.

[125]Tr., p. 583.

adjacent would have very similar characteristics.[126]

Regarding the un-ripped 12 acres in the northwestern corner of field #3,[127] Ms. Goldmann testified:

> A: ...[T]he area Mr. Veldhuis proposed to mitigate on still supported those wetlands in that corner and it was present at the site visit [on May 16, 2000], the hydrology and soils.
>
> ...
>
> Q: ...[Y]ou took into consideration this area that Mr. Veldhuis was setting aside for mitigation[?]
>
> A: That and field five. ...[I]n terms of aerial photography and history of the site we need to ... see what goes on in the geographic area to assess what occurred on Mr. Veldhuis' property before the wetlands were destroyed.
>
> Q: ...[Y]ou took into consideration this area because you saw it retained water?
>
> A: It had an intact hardpan... It had wetland vegetation and it was inundated... So it met the criteria for a wetland in that corner.[128]

In addition, Mr. Leidy photographed the un-ripped 12-acre portion of field #3 when he and Ms. Goldmann visited the property on May 16, 2000.[129] Regarding the photograph entered into the record as CX 37, Mr. Leidy testified: "...[T]his white material is ... a hard, impermeable layer that forms near the surface. ...[W]hen it is not ripped ... it ponds water. This photo point was taken at the northwestern edge of the Veldhuis parcel where an area hadn't been ripped."[130] Mr. Leidy further explained, regarding CX 38:

> ...[T]his is also in the northwestern portion of the Veldhuis property... This is a photo of ... standing water on top of an unfractured restrictive layer. And you can see the open water... [T]his area would qualify as a jurisdictional wetland... [T]here was positive evidence of wetland plants, the wetland hydrology is there. That's very obvious from the photo with the ponding water. And there were hydric soils also

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[126]Tr., p. 186. *See also*, Tr., pp. 143-144, *quoted supra* (Mr. Leidy explaining his analysis of the aerial photographs of fields #3, #4 and #5 entered into the record as CX 29 and CX 30).

[127]*See* Tr., pp. 161-162: "Q (MS. LA BLANC): And where was this photo [CX 38] taken? A (MR. LEIDY): This is photo point eight [referring to the 'photo points' in Mr. Leidy's field notes from the May 16, 2000 site visit, CX 33 (*see* Tr., p. 157)] ... and this is also in the northwestern portion of the Veldhuis property. ... Q: Had this area been ripped? A: No. ... MR. GNASS: This is where – for everybody's understanding, if I could just say one thing... This is the area that was to be mitigated, which we talked about, regarding field five... THE COURT: That's referenced in the Lippincott document? MR. GNASS: Yes..." The "Lippincott document" includes a "Proposed mit[igation] plan map" which states: "Total Mediation Acres 12.0." (CX 20, p. 3).

[128]Tr., p. 306.

[129]Tr., p. 157; CX 37, CX 38, and CX 39 (slide photographs).

[130]Tr., p. 159.

present here, wetland soils.[131]

Finally, Mr. Leidy described the photograph entered into the record as CX 39:

> ...[T]his is a photo of a vernal pool that is within that northwestern portion of the property that had not been ripped. The restrictive layer is intact within this vernal pool... You can see that the water then ponds on top of the restrictive layer... [I]t then comes to the surface, forming this vernal pool.[132]

Indeed, Respondent's own wetland surveying consultant, Vurl Lippincott,[133] determined that the 12-acre northwestern portion of field #3 contained 3.73 acres of wetlands.[134]

Fourth, Mr. Leidy and Ms. Goldmann visited fields #3 and #4 on May 16, 2000 and dug pits to examine and characterize buried soils.[135] Mr. Leidy walked the entire perimeter of fields #3 and #4.[136] This site visit lasted from four to six hours[137] and was documented by photographs and by Mr. Leidy's field notes.[138] Ms. Goldmann testified that on the May 16, 2000 site visit: "We [were] able to dig pits and identify the restricted layer and identify hydric soils, which is one parameter, and verifying that the site supported wetlands.[139] Mr. Leidy similarly explained: "...I found evidence that a hardpan had been present prior to deep-ripping and it is my professional opinion that the hardpan created hydrologic conditions sufficient to also create hydric soils."[140]

Specifically, Mr. Leidy dug in the un-ripped 12-acre portion of field #3, finding that he "...was only able to dig down four to six inches before the shovel ... hit the hard restrictive layer... [T]he water then ponds on top of the restrictive layer. And in the area where I did not dig, ... it then

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[131]Tr., pp. 160-162.

[132]Tr., p. 162.

[133]*See* Tr, pp. 63-64 (Mr. McElhiney), p. 545 (Mr. Velduis); CX 10; CX 20 (Lippincott maps).

[134]CX 20, p. 3. *See also*, Tr., p. 64 (Mr. McElhiney): "Well, this [CX 20] is a proposed mitigation plan for the loss of wetlands in field five... This was prepared by Vurl Lippincott, a consultant. And I did receive a copy of this along the way, to assure that the soil condition and the hydrology were present, and that it essentially provided a one-to-one restoration or mitigation of wetlands that were converted in field five."

[135]Tr., pp. 149, 157, 199, 305-306, 582-584; CX 33; CX 35 - CX 44.

[136]Tr., p. 175, ln. 7-9.

[137]Tr., p. 199.

[138]CX 33 (field notes); CX 35 - CX 44 (photographs).

[139]Tr., pp. 305-306.

[140]Tr., p. 582.

comes to the surface, forming this vernal pool."[141] Mr. Leidy also dug 18-to-30-inch[142] soil pits in the ripped portions of fields #3 and #4, finding that chunks of the restrictive layer were "...mixed throughout the soil profile."[143] Mr. Leidy therefore opined that the ripping which had broken the restrictive layer had occurred "[f]airly recently" and within the last five years,[144] explaining:

> ...[T]he pieces of the restrictive layer ... are still very sharp-edged. And where they have been fractured, they have not been worn by further weathering over time... In addition, ... if soil sits for a long period of time, there will be a tendency for the silty or smaller particles over time to ... settle out; and you will find ... horizons starting to form in ... their infancy. And I did not find that at this site. I found that the soil was still very, very well stirred and mixed and homogenized. So based on my previous experience in these types of systems that have been deep ripped, it looked to me like the ripping had been fairly recent.[145]

Based on these observations in both the ripped and un-ripped portions of fields #3 and #4, Mr. Leidy concluded that the deep-ripping performed by Respondent in August 1997 had broken the restrictive layer, causing the destruction of wetlands which had previously existed in fields #3 and #4.[146]

Finally, Mr. Leidy considered soil surveys, National Wetland Inventory ("NWI") maps, and United States Geological Survey ("USGS") maps in conducting the wetland delineation on fields #3 and #4.[147]

Based on the foregoing "atypical delineation," Mr. Leidy concluded that prior to Respondent's deep-ripping in August 1997, there had existed 21.58 acres of "jurisdictional wetlands" on fields #3 and #4 consisting of "isolated wetlands" (3.16 acres), "tributaries to waters of the United States" (16.61 acres), and wetlands "adjacent" to such tributaries (1.81 acres).[148] Specifically, referring to the "Polygon #'s" listed on the calculation sheet (CX 32, pp. 1-2) and marked on the maps (CX 31; CX 32, p. 3), Mr. Leidy testified that wetlands number 5-10 and 13-16 were "isolated wetlands" totaling 3.16 acres and that wetlands number 3, 4, and 20 were "adjacent" wetlands

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[141]Tr., p. 162 (Mr. Leidy, describing the photograph entered into the record as CX 39).

[142]Tr., pp. 224, 584.

[143]Tr., p. 164 (Mr. Leidy, describing the photograph of broken hardpan entered into the record as CX 41). *See also*, Tr., p. 165 (describing the photograph of broken hardpan entered into the record as CX 42), and Tr., p. 168 (describing the photograph of broken hardpan entered into the record as CX 44).

[144]Tr., pp. 165, 205.

[145]Tr., pp. 165-166. *See also*, Tr., pp. 205-206.

[146]*See, e.g.*, Tr., p. 202.

[147]Tr., pp. 567-568, 570-571, 583-585; CX 51; RX 2-B.

[148]Tr., pp. 148-149; CX 32.

totaling 1.81 acres.[149] The remaining wetlands number 1, 2, 11, 12, 17-19, and 21 (a-g) were thus found by Mr. Leidy to be "tributaries to waters of the United States" totaling 16.61 acres.[150]

Subsequent to the Supreme Court's decision in *SWANCC*, *supra*, however, Complainant withdrew its allegations regarding the 3.16 acres of "isolated wetlands" for lack of jurisdiction.[151] Further, in light of Mr. Leidy's testimony at hearing that upon further consideration he now believed the "wetland" originally identified as "wetland #6" to actually be an irrigation "spigot,"[152] Complainant withdrew its allegation regarding "wetland #6" which had comprised 0.84 acres, explaining: "The complaint originally listed 16.61 acres of tributaries, but at hearing, upon receipt of new information, [Complainant] ... subtracted wetland six which was .84 acres for a total of 15.77. Transcript at 572."[153] It is noted, however, that Complainant's subtraction of .84 acres from the originally alleged 16.61 acres of "tributaries" is in error because "wetland #6" has *already* been eliminated from the complaint for lack of jurisdiction as an "isolated wetland." That error notwithstanding, the total "tributary" acreage alleged to have been destroyed is now 15.77 acres.

Thus, taking into account the subsequent jurisdictional subtractions (correct and incorrect), Mr. Leidy's "atypical delineation" concluded that prior to Respondent's deep-ripping in August 1997, there had existed 17.58 acres of "waters of the United States" on fields #3 and #4, consisting of 15.77 acres of "tributaries to waters of the United States" [wetlands ## 1, 2, 11, 12, 17-19, and 21 (a-g), minus the mistakenly subtracted .84 acres of wetland #6] and 1.81 acres of wetlands "adjacent" to such tributaries (wetlands ## 3, 4, and 20). Based on the foregoing evidence, I find that Complainant has made a prima facie showing that it accurately delineated 15.77 acres of wetlands which had existed on Respondent's fields #3 and #4 prior to Respondent's deep-ripping.

3) Respondent's Rebuttal Arguments and Expert Testimony

At the hearing, Respondent's expert witness Ms. Moore challenged the accuracy of this atypical delineation on fields #3 and #4 on the grounds that the delineation for field #5 could not be

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[149]Tr., pp. 230-232.

[150]CX 32.

[151]Complaint explained: "... EPA sought ... penalties ... for discharging pollutants to three kinds of waters: isolated waters, tributaries to waters of the U.S., and wetlands adjacent to tributaries. The isolated waters consisted of 3.16 acres of isolated waters used by migratory birds on fields three and four... EPA ... is not seeking a penalty for these 3.16 acres of isolated wetlands which were used by migratory birds in light of the U.S. Supreme Court's holding in *SWANCC*." (Complainant's Brief, pp. 20-21. *See also*, Complainant's Reply Brief, pp. 2-3).

[152]Mr. Leidy testified: "Q: Turning now to the wetland that you have marked as wetland six, having heard the testimony of Mr. Veldhuis and Ms. Moore, have you come to reconsider or reassess the jurisdictional status of this ... number six? A: Yes, I have. I had an opportunity to take another look at six and the aerial photos and the exhibits and having listened to Mr. Veldhuis' testimony I am willing to acknowledge that that probably is a spigot and defer to Mr. Veldhuis' expertise on that particular wetland, number six." (Tr., p. 572).

[153]Complainant's Brief, p. 11, n.7. *See also*, Complainant's Reply Brief, p. 3, n.3.

relied upon to establish wetlands on fields #3 and #4 because the land use practices for these two parcels were consistently different, as were the soil types, and also on the grounds that the National Wetlands Inventory map prepared by the U.S. Fish and Wildlife Service did not show the presence of wetlands on fields #3 and #4.[154] Also, Respondent submits that the wetlands found to be present on fields #3 and #4 by Complainant's atypical delineation are actually upland irrigation or areas of irrigation runoff or canal overflow and not wetlands, and that such is supported by the expert testimony of Ms. Moore[155] and the personal observations of Mr. Veldhuis.[156] Respondent has submitted aerial photographs in support of this argument[157] and points out that Complainant incorrectly identified a spigot as a wetland.[158]

With regard to the aerial photographs, Ms. Moore points out that aerial photographs showed that fields #3 and #4 were more intensively farmed than field #5 and that fields #3 and #4 were irrigated while field #5 involved dry land farming.[159] Ms. Moore's opinion that the aerial photographs indicated that fields #3 and #4 were "double-cropped" and that field #5 contained winter wheat was confirmed by the testimony of Mr. Van Gaalen and Respondent.[160] However, the fact that Mr. Van Gaalen and Respondent had extensively farmed through the wetlands on fields #3 and #4 does not preclude a finding that functioning wetlands existed on those fields. As discussed in detail *infra* in section I.B. ("Wetlands Existed Despite Prior Deep-Ripping by Previous Owner") of this Initial Decision, the question of whether the property at issue was previously farmed, including ripping, is not dispositive here. Further, I note that the map and aerial photographs presented by Respondent depict only that portion of fields #3 and #4 laying south of Taylor Road, while most of the wetlands occurring in those fields lie north of Taylor Road.[161] Finally, Mr. Leidy examined aerial photographs of fields #3, #4, and #5 and the surrounding area taken by the Farm Service Agency in 1987 and 1993, both prior to Respondent's deep-ripping.[162] Mr. Leidy explained that he reviewed other aerial photographs as well in conducting the delineation on fields #3 and #4, including those entered into the record as CX 45 through CX 48, but chose to base the delineation on the photographs entered as CX 29 and CX 30 because: "...[W]e went through various years of photos

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[154]Tr., pp. 393-405. This discussion addresses Respondent's factual challenges to the accuracy of the atypical delineation; to wit, the presence of wetlands, jurisdictional or otherwise. Respondent's "jurisdictional" arguments are fully addressed *infra* in section III ("Jurisdiction") of this Initial Decision.

[155]Tr., pp. 453-454.

[156]Declaration of Ray Veldhuis, ¶ 2 (June 29, 2001).

[157]RX 4; RX 5; RX 6; RX 7.

[158]*See, e.g.*, Respondent's Reply Brief, p. 5, ln. 15. *See also*, Tr., p. 572 (Mr. Leidy).

[159]Tr., pp. 393-411.

[160]Tr., pp. 393-411 (Ms. Moore); Tr., pp. 337-338 (Mr. Van Gaalen); Tr., p. 506 (Mr. Veldhuis).

[161]*See, e.g.*, Tr., pp. 576-577 (Mr. Leidy, regarding the aerial photograph entered as RX 3).

[162]Tr., pp. 139-140, 142; CX 29 (1987 photograph); CX 30 (1993 photograph).

and picked these photos ... clearly depicting the features as compared to other photos. In addition, we had the information from NRCS on field five for the delineation so I wanted to make sure I had the same photos that they used for comparative purposes."[163] The fact that Mr. Leidy initially misidentified a spigot as a wetland and then withdrew this assertion does not impeach his credibility with regard to the entire atypical delineation.

With regard to soil types, Ms. Moore's testimony did not demonstrate that the different soil types indicated relevant differences between field #5 and fields #3 and #4. As explained *infra* in section I.B.2. of this Initial Decision ("Depth of Restrictive Layer"), the significance of the soil types is that they indicate the depth of the restrictive layer. Interpreting the NRCS soil survey map (RX 2-A), Ms. Moore opined that field #5 would have a restrictive layer at 16-30 inches and fields #3 and #4 would have a restrictive layer at 14-45 inches.[164] Complainant also considered the various soil types. Interpreting the "data forms" (CX 4) that had been prepared by NRCS in delineating the wetlands on field #5, Mr. Leidy observed that CX 4, p. 1 recorded the restrictive layer at 17-18 inches; CX 4, p. 13 recorded the restrictive layer at 20-24 inches; and CX 4, p. 23 recorded the restrictive layer at 18-19 inches.[165] Thus, the evidence in the record demonstrates that the restrictive layer on all three fields ranged in depth from approximately 4 to 45 inches. As explained in detail *infra* in section I.B., these parameters do not preclude a finding that the restrictive layer was functional despite Mr. Van Gaalen's prior ripping.[166]

With regard to the National Wetland Inventory map (RX 2-B), again, the map does not include the area north of Taylor Road where most of the wetlands on fields #3 and #4 occurred.[167] Further, Complainant presented the rebuttal testimony of Mr. Leidy that although the National Wetland Inventory map is based upon "very high altitude aerial photography"[168] which can "omit very small wetland features,"[169] the map nevertheless does show at least two wetlands and indicates the presence of others.[170]

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[163]Tr., pp. 573-574.

[164]Tr., pp. 362-366; RX 2-A.

[165]Tr., pp. 589-592; CX 4.

[166]In fact, Ms. Moore's testimony indicates that the restrictive layer underlying fields #3 and #4 (at 14-45 inches) was possibly *deeper* than the restrictive layer underlying field #5 (at 16-30 inches), indicating that the restrictive layer may have been *more* likely to have remained functional despite prior ripping on fields #3 and #4 than it was on field #5, yet Ms. Moore candidly admitted that "I believe that the acreage [of 3.46 acres of jurisdictional wetlands on field #5] is probably pretty good as far as wetland acreage." (Tr., p. 420).

[167]*See, e.g.*, Tr., p. 567 (Mr. Leidy, regarding the NWI map entered as RX 2-B).

[168]Tr., p. 568.

[169]*Id.*

[170]Tr., pp. 570-572.

Regarding "jurisdictional wetland/drainage versus non-jurisdictional upland irrigation," I acknowledge that at times such distinction may not be easily discernible to a farmer in his or her field.[171] However, here Respondent has not demonstrated that the wetlands at issue were merely farmed ditches to capture irrigation runoff. Rather, the record shows the existence of long-standing wetlands as confirmed by comprehensive delineations. Hydric soils, hydrophytic vegetation, and wetland hydrology were found by site visit and evaluation of aerial photographs, the USGS maps show *natural* drainage ("tributaries"), and some of the aerial photographs show wetlands during winter and spring when irrigation is not typically used. Further, as discussed in detail *infra* in section III.C.2. ("'Artificial' Watercourses") of this Initial Decision, the wetlands at issue here, while possibly containing some irrigation runoff or canal overflow, *are wetlands nonetheless*. The source of the hydrology is not determinative.[172]

In conducting the delineation of fields #3 and #4, Mr. Leidy followed the accepted "atypical delineation methodology" by examining historical aerial photographs, considering the previous site inspection of field #5, looking at soil surveys and USGS and National Wetland Inventory maps, speaking with individuals familiar with the site, considering adjacent vegetation and adjoining sites of similar soils and geographic characteristics which had not been deep-ripped by Respondent, and by

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[171] *See, e.g.*, Tr., p. 390 (Ms. Moore): "Q: Now, farming through an area like that ..., would that be a violation of the Clean Water Act? A: Well, that's a loaded question. Farming through an irrigated swale per se, an irrigated swale could be a jurisdictional wetland that is subject to irrigation or it could be simply a nonjurisdictional uplink topographic draw which is subject to irrigation which makes it appear to be a wetland. So whether or not you'd farm through it, you know, would be violating any laws would depend on which of those two cases were the case." Ms. Moore also stated: "...[A]nything that is impounded or diked and it's adjacent to an area or within an area that's irrigated raises some real big flags to me as far as is this jurisdictional or is it entirely a created feature to capture runoff water. On the National Wetland Inventory map it's identified as being impounded or diked which would imply nonjurisdictional unless there had been some natural wetland there which was somehow enlarged and then a portion of it might be jurisdictional and a portion of it might not. (Tr., pp. 381-382). This statement was echoed by Ms. Goldmann, who testified: "Generally speaking ditches created out of uplands to transport irrigation water are not regulated unless they have been abandoned. But if those ditches occurred in natural drainages, then they are regulated." (Tr., pp. 302-303).

[172] Ms. Moore testified: "...[W]hen I see wet areas along canals or the edges of fields or fence lines where mapped wetlands that are linear extending downslope to these features such as canals and roads, when they broaden out, it really suggests that these areas have been -- that they are impounding water and creating wetlands, if you will, which would be considered nonjurisdictional." (Tr., p. 454). However, Mr. Leidy testified: "Q: What effect does [it] have on the jurisdictional nature of a wetland that some part of the year there's irrigation water in it? A: It has no effect whatsoever because rainwater would normally pond in the low-lying areas, the vernal pool depressions or the vernal swales or drainages. The fact that there's additional water being added during the irrigation season does not change that from being a jurisdictional wetland. All it does is it artificially extends the hydrology. Q: Now, ... the same example with water from a canal either leaking through or coming up from the groundwater into what is a seasonal wetland, would that change the ... jurisdictional nature of the wetland? A: No, it wouldn't. And as an example, ... the Highland [sic] Canal is a legal structure. It is a ... part of the normal circumstances of the site. It exists there and so if there is additional water that augments a wetland feature, a depression, either by seepage or groundwater or overtopping the canal, that does not change the jurisdictional status of that wetland." (Tr., pp. 580-581). *See also, Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001), discussed *infra*.

visiting the site and digging pits to examine and characterize buried soils.[173] Because fields #3 and #4 had already been deep-ripped at the time of Mr. Leidy's delineation, Mr. Leidy did not have the opportunity to identify wetlands by looking for the three criteria of hydrology, vegetation, and soils, as was done by Mr. McElhiney on field #5. The "atypical methodology," while inherently less precise than the "typical delineation" of intact wetlands, is the best and only way to delineate wetlands that have been destroyed. The use of the atypical methodology in this case was necessitated by Respondent's actions.

As a final matter, here, Respondent submits that Mr. Leidy's testimony should be given less weight than that of Ms. Moore. Respondent argues: "It is crystal clear that Diane [sic] Moore spent hours and hours doing her study of the property prior to completing the wetland delineation and used all available sources. As stated she just did not rely, as Mr. Leidy, on aerials and sticking a shovel in the ground."[174] In this regard, I observe that while Mr. Leidy's digging of soil pits to examine and characterize buried soils in both the ripped and un-ripped portions of Respondent's property serves to enhance his understanding of the relevant events, Ms. Moore did not dig soil pits and her opinion was based on the aerial photographs and other exhibits which were included in Complainant's pre-hearing exchange.[175] Further, while Ms. Moore "walked along the fenceline" of Respondent's property from an adjacent property and "[drove] by the property," she "did not walk on the site" and "was never there before it was an orchard."[176] I do not question Ms. Moore's veracity or competence. However, Mr. Leidy's delineation was more comprehensive than was Ms. Moore's, and while Ms. Moore did not consider any materials or information that Mr. Leidy did not also consider, Mr. Leidy did consider information (for example, by "sticking a shovel in the ground") that Ms. Moore did not consider. Therefore, I find Respondent's argument that the testimony of Mr. Leidy should be given less weight than that of Ms. Moore to be unavailing.

B. Wetlands Existed Despite Prior Deep-Ripping by Previous Owner

In a related but distinct argument to that regarding the accuracy or sufficiency of the delineations, Respondent argues that wetlands could not have existed on Respondent's fields #3, #4 or #5 because the property had been previously deep-ripped "at least twice"[177] by the prior owner, Mr. Len Van Gaalen. As Respondent points out, no investigator ever spoke with Mr. Van Gaalen,[178]

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[173]Tr., pp. 583-586.

[174]Respondent's Reply Brief, p. 5, ln. 10-14.

[175]Tr., p. 612.

[176]Tr., p. 484.

[177]*See, e.g.*, Answer, p. 2, ¶¶ 3-4: "...[T]he subject property was extensively farmed for a number of years prior to Respondents' ownership... [T]he 28.8 [sic] acres referenced in the Administrative Complaint is part of a larger parcel which was ripped at least twice prior to Respondents' ownership."

[178]*See, e.g.*, Tr., p. 204 (Mr. Leidy): "Q: Did you talk to a Mr. Van Galen [sic], who owned the property for about 21 years before Mr. Veldhuis? A: No." *See also*, Tr., p. 328, ln. 25 - p. 329, ln. 18 (Ms. Goldmann);

who had owned and farmed the subject property, including deep-ripping,[179] from approximately 1971 until Respondent acquired the property in 1991.[180]

1) Depth of Ripping

Mr. Van Gaalen's testimony indicates that he deep-ripped field #5 multiple times and that he deep-ripped fields #3 and #4 at least once, but that the ripping was focused primarily on field #5. Mr. Van Gaalen first suggested that he deep-ripped all three fields, stating:

> Q: ...[B]efore planting field number 5, how did you prepare the field? ...
> ...
> A: ...[W]e had some standing water ... and so ... we deep-ripped all of this in order for the water to penetrate...
> Q: And how – would you double crop the ones on the right side of the Highland [sic] Canal too, the ones you're looking at with the pivots [fields #3 and #4]?
> ...
> A: Yeah, *we deep-ripped all of this land.*
> Q: Well, when you say "deep-ripped,"what does that mean?
> A: Deep rip we went down *about four feet, four feet six.*
> Q: How is that accomplished?
> A: We had a Cat with a cable rig... and we kept it pretty much going. We had one man and that's all he did was deep-rip that, you know...
> Q: And when you were preparing the fields, did you sometimes notice areas that were wet?
> A: Well, we had some areas which were wet... [and] when we deep-ripped, it would disappear...
> Q: And if you saw them, did you go back over it until they were gone?
> A: That's about it, yes.
> Q: And this was going on in about '71 and the '70s?
> A: The '70s, *all the way through the '70s, you know, the late part of the '70s and the '80s until '90, '91* I think is when we sold out.
> ...

Tr., pp. 575, 583-586 (Mr. Leidy); Tr., pp. 418-419, 575, 584-586 (Ms. Moore) As discussed *infra*, however, Respondent did inform Mr. McElhiney of Mr. Van Gaalen's previous ripping, and Ms. Goldmann spoke directly with Mr. McElhiney and relayed that information to Mr. Leidy. Further, Ms. Goldmann spoke with Respondent on numerous occasions and relayed that information to Mr. Leidy. [Tr., p. 74 (Mr. McElhiney); Tr., pp. 328-329 (Ms. Goldmann); Tr., pp. 575, 583-586 (Mr. Leidy)].

[179]Tr., pp. 339-340.

[180]Tr., p. 340 (Mr. Van Gaalen): "Q: And this [ripping] was going on in about '71 and the 70's? A: The '70s, all the way through the '70s, you know, the late part of the '70s and the '80s until '90, '91 I think is when we sold out." Respondent leased the subject property in 1991 and purchased it in 1993. [Tr., p. 267, ln. 23-24 (Ms. Goldmann); Tr., pp. 340, ln. 23-24, p. 346, ln. 25 - p. 347, ln. 9, p. 348, ln. 10-12 (Mr. Van Gaalen); Tr., p. 500, ln. 5-7, p. 532, ln. 24 (Mr. Veldhuis); CX 69 ("Stipulated Facts"), ¶ 21; CX 64 ("Grant Deed")].

Q: So probably around about 1971 was the first time that occurred?
A: I think it was pretty much I would say the first time...[181]

Mr. Van Gaalen then went on to suggest that only field #5 needed ripping, as fields #3 and #4 were "hilly" and drained "naturally" or through irrigation trenches, explaining:

Q: Now, on this map what's depicted here as little fingers, is this runoff water from those [irrigation] pivots [on fields #3 and #4]?
A: *Those are all natural drains... Most of these hills, they all have natural drains... Everything drains toward the Highland [sic] Canal.*
...
Q: ...[S]o it would be accurate to say then that this area on the east side of the ... Highland [sic] Canal here [fields #3 and #4] is a hilly area?
A: Yes. ... Everything drains from this field here. *We never have no standing water where you shovel a trench or whatever...*
Q: *So [fields] three and four you had no problem with drainage at all?*
A: *No, sir. No, sir.*
Q: And some drain to the east and some drain to the west; is that right?
A: Sometimes I would go through Presilias over here and sometimes if you had a real heavy rain in the winter months, some of this went this way and eventually wound up in Sand Creek over here right on through here. *But this over here, this parcel here, parcel five, we ripped that several times.*[182]

Finally, however, Mr. Van Gaalen clarified that, although he ripped all three fields, the ripping occurred primarily on field #5, testifying:

Q: ...How deep were these [fields] ... ripped?
A: About four to five [feet].
Q: Four, five feet. And ... that would be parcels three, four and five?
A: Yeah, most of these parcels over here because we ... have low problem drainage here. But actually in the beginning ..., after we put the draining in we did quite a bit. *Almost every summer we went through here.*
THE COURT: *The record should reflect he's referring to field five.*
MR. GNASS: Q: *So you ripped field five more than three and four, is that what you're saying?*
A: *Yes.*
Q: *But you ripped all of them, is that what you're saying?*
A: *That's right.*[183]

[181]Tr., pp. 339-341 (emphasis added).

[182]Tr., pp. 341-344 (emphasis added).

[183]Tr., p. 351 (emphasis added).

Thus, Mr. Van Gaalen's testimony indicates that between approximately 1971 and approximately 1991 he deep-ripped field #5 "almost every summer" to a depth of approximately 4-5 feet[184] and deep-ripped fields #3 and #4 at least once to the same depth.[185]

Mr. Van Gaalen never planted trees on the property,[186] however, which would have required that the ground be deep-ripped to a greater depth.[187] Indeed, Respondent testified that, although he had previously ripped the fields, he ripped deeper in order to plant the almond trees, stating in regard to fields #3 and #4:

> Q: ...Was that '96, sir, when you ripped [fields #3 and #4]...?
> A: Ripping for the trees?
> Q: Yes.
> A: Yes, I believe that was '96, the fall of '96.
> Q: Had you previously ripped that yourself?
> A: Yes. ... The previous four or five years.
> ...
> Q: ...And how deep did you rip before '96?
> A: ...[P]robably four feet, something like that.
> Q: And how deep did you rip in '96?
> A: I'd say *probably five feet, maybe – yeah, approximately five feet*.
> Q: So a little deeper for planting trees; is that right?
> A: Yes, yes.[188]

Regarding field #5, Respondent testified that prior to ripping field #5 in 1995 in order to plant

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[184]*But see*, Tr., p. 417 (Ms. Moore): "So routine what I call shallow, ... usually it's a *36-inch* shank that people use for shallow ripping," (emphasis added); Tr., pp. 499-500 (Mr. Veldhuis): "Q: And how deep do you rip generally? A: Generally *three to four feet* would be standard." (Emphasis added).

[185]In so interpreting Mr. Van Gaalen's testimony, I am cognizant of the following testimony given by Respondent: "Q: Did Mr. Van Gaalen tell you – inform you or his son that, in fact, fields three and four had been ripped? A: Yes. Q: Did they tell you how often...? A: Yes, I asked him. I believe it was a yearly practice." (Tr., p. 506). However, I am also cognizant of Respondent's own argument that Mr. Van Gaalen ripped the entire property (fields #3, #4, and #5) "at least twice." (Answer, p. 2, ¶ 4).

[186]Tr., p. 349.

[187]Respondent's expert witness Ms. Moore explained: "Well, there's deep-ripping, there's shallow ripping, there's chiseling and everything in between. But usually for orchards and vineyards where you're planting a permanent crop that's expensive to plant, expensive to maintain, you go to great extents to rip very thoroughly at a good, deep depth, okay? ... [A] lot of my wine grape growers will go a third pass and that's usually to a depth of *six to seven feet*... So routine what I call shallow, not the *six to seven foot* but something using a two and – usually it's a 36-inch shank that people use for shallow ripping... [D]eep-ripping is pretty much standard practice if you're going to plant almonds or vines ..., other nut trees... It's a huge cash investment to put vines or trees and it's a small cash investment to rip to a depth of *six to seven feet*." [Tr., pp. 415-418 (emphasis added)].

[188]Tr., pp. 515-516 (emphasis added).

trees[189] he had ripped field #5 "not that often"[190] to a depth of "probably three feet something, three, four feet,"[191] but Respondent did not specifically state to what depth he ripped field #5 in order to plant trees. Respondent's testimony as a whole implies that he ripped field #5 to "approximately five feet" in 1995; the same depth to which he ripped fields #3 and #4 in 1997 in order to plant trees.

In summary, in light of the foregoing testimony of Ms. Moore, Mr. Van Gaalen, and Mr. Veldhuis, I find that between 1971 and 1991 Mr. Van Gaalen deep-ripped field #5 annually to a depth of 3-5 feet and deep-ripped fields #3 and #4 at least once to the same depth, and that Respondent deep-ripped field #5 and fields #3 and #4 to a depth of 5-6 feet in 1995 and 1997, respectively.[192]

2) Depth of Restrictive Layer

The "restrictive layer," sometimes called the "hardpan,"[193] on Respondent's property was fairly shallow, although not of uniform depth. Mr. Leidy testified that: "...[T]he restrictive layer on the Veldhuis property is critical to maintaining the hydrology of the wetlands on that site. The restrictive layer is very near the surface, or was very near the surface on the Veldhuis property."[194] Mr. Leidy later clarified:

> A: ...[W]hen I visited the site on May 16th, I could see that [the restrictive layer] was very near the surface in the one area that had not been deep ripped.
> Q: And that was how close to the surface...?
> A: *Four to six inches, but it varies.* It will vary in depth over a piece of property. But in the area that had not been deep ripped, it appeared to be within four to six inches of the soil surface, on average.[195]

In fact, Mr. Leidy explained that the photograph entered as CX 37 depicts an "*exposed* restrictive

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[189]Tr., pp. 541-542.

[190]Tr., p. 535, ln. 7.

[191]Tr., p. 535, ln. 11-12.

[192]The record also indicates that in 1996 Respondent deep-ripped some parts of fields #3 and #4 in preparation for the planting of trees. (Tr., pp. 515-516; CX 59).

[193]The "hardpan" is not to be confused with the "claypan." Mr. McElhiney explained: "A claypan is one that there is a dense clay zone that also holds water ... in a shallow nature, within the soil profile. The hardpan usually sits below the claypan." (Tr., p. 80).

[194]Tr., pp. 153-154.

[195]Tr., pp. 207-208 (emphasis added). *See also*, Tr., p. 162 (Mr. Leidy): "And what this photo [CX 39] depicts is a pit that I dug, and I was only able to dig down *four to six inches* before the shovel ... hit the hard restrictive layer." (Emphasis added).

layer ... at the northwestern edge of the Veldhuis parcel where an area hadn't been ripped."[196] Interpreting the "data forms" (CX 4) which had been prepared by NRCS in delineating the wetlands on field #5, Mr. Leidy observed that CX 4, p. 1 recorded the restrictive layer at 17-18 inches; CX 4, p. 13 recorded the restrictive layer at 20-24 inches; and CX 4, p. 23 recorded the restrictive layer at 18-19 inches.[197] Further, interpreting the NRCS soil survey map (RX 2-A), Ms. Moore opined that field #5 would have a restrictive layer at 16-30 inches and fields #3 and #4 would have a restrictive layer at 14-45 inches.[198] Thus, the evidence in the record demonstrates that the restrictive layer on Respondent's property ranged in depth from approximately 4 to 45 inches, or up to nearly 4 feet deep.

Respondent's position is that his deep-ripping in 1995 and 1997 could not have caused a loss of wetlands because Mr. Van Gaalen's previous ripping must have already irreversibly destroyed the restrictive layer and done away with any wetlands that may have existed. Indeed, Ms. Goldmann clearly testified that where deep-ripping actually breaks up the "hardpan," such deep-ripping irreversibly destroys wetlands, explaining:

> A: ...[W]hen you fracture the hardpan and you deep-rip and you fracture the hardpan, these wetlands are gone... [I]t's irreversible.
> Q: Let's say the hardpan was fractured and ripped... and next year somebody does a delineation and says there's wetlands on that property...
> ...
> A: I would say that they're wrong.[199]

However, Ms. Goldmann clarified that deep-ripping does not necessarily break up the hardpan, and it is only the breaking up of the hardpan which is "irreversible:"

> Q: ...[I]s it the deep-ripping or the fracturing of the hardpan that's irreversible?
> A: The fracturing of the hardpan.
> Q: If you ripped down to the hardpan but don't fracture the hardpan, is your action irreversible?
> A: No, because if you don't fracture the hardpan, then the water still perches on the surface and can support a wetland. So what happens if you fracture that hardpan, then all the water goes through and then all the vernal pools are lost. It can't be fixed. You can't take a hardpan and form it back together. That's

[196]Tr., p. 159.

[197]Tr., pp. 589-592; CX 4.

[198]Tr., pp. 362-366; RX 2-A.

[199]Tr., pp. 299-300. *See also*, Tr. , p. 269 (Ms. Goldmann): "So the loss to us was a very important factor to consider and the fact that it's deep-ripped, irreversible. You cannot fix that. Once it's gone, it's deep-ripped and the hardpan's broken up, it cannot be restored."

developed over thousands and thousands of years.[200]

Further, Respondent's expert witness Ms. Moore explained that in order for ripping to destroy wetlands, the ripping must "substantially" break up the hardpan, testifying:

> Generally once the hardpan is ripped – and ripping can be described in many different ways, but if the hardpan is fractured *substantially* – and that could either happen by ... ripping in one direction, then cross-ripping in a second direction and cross-ripping a third direction in one season or it could happen ripping every three years, something like that. If you just look one direction one time and your shank is seven feet apart, you may not *substantially* disrupt the hardpan layer but if – so if you *effectively* break up the hardpan layer, ... wetlands ... no longer hold water.[201]

Ms. Moore elaborated that where the ripping does not "substantially" break up the hardpan, the hardpan can "reconsolidate," stating:

> ...[T]here's deep-ripping, there's shallow ripping, there's chiseling and everything in between... And so ... what happens is the layers tend to sort of *recement* in a *semiconsolidated* hardpan layer that's semi-impervious... Also when orchards are removed ... the whole site is ripped again because of *consolidation* and sort of *refusioning* of the hardpan layer. *You don't get total mixing during some ripping practices.* It depends on how well it was done.[202]

Thus, the question presented is whether the evidence in the record supports Respondent's "affirmative defense"[203] that Mr. Van Gaalen's deep-ripping of the property so "substantially" disrupted the restrictive layer that it "irreversibly" destroyed the wetlands prior to Respondent's deep-ripping in 1995 and 1997. For the reasons discussed below, I find that the evidence in the record does not support such a conclusion.

First, Complainant has established by a preponderance of the evidence that the wetland delineations performed on fields #3, #4, and #5 were thorough and accurate, as discussed above. Whatever farming practices occurred in the past, those delineations found 21.04 acres of "waters of the United States" to have been present prior to Respondent's deep-ripping.[204] Although neither Mr.

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[200]Tr., pp. 327-328.

[201]Tr., p. 368 (emphasis added).

[202]Tr., pp. 415-416 (emphasis added). *See also*, Tr., p. 442 (Ms. Moore): "As far as does the hardpan if it was fractured to some degree, does it tend to resettle? Yes. As far as how fast does that happen, I would expect that to be pretty variable to the soil types."

[203]Answer, p. 2, ¶¶3-4.

[204]Mr. Leidy testified that the aerial photographs of fields #3, #4 and #5 demonstrated that the wetlands in those fields were functional at the time of the photographs despite the farming activities that had occurred on those

Leidy nor Ms. Goldmann spoke directly with Mr. Van Gaalen,[205] Respondent did inform Mr. McElhiney of Mr. Van Gaalen's previous ripping,[206] and Ms. Goldmann spoke directly with Mr. McElhiney[207] and relayed that information to Mr. Leidy.[208] Further, Ms. Goldmann spoke with Respondent on numerous occasions,[209] and relayed that information to Mr. Leidy.[210]

Second, Respondent has not proven by a preponderance of the evidence his affirmative defense that the prior ripping irreversibly destroyed the wetlands. Given that the depth of the restrictive layer ranged from approximately 4 inches to nearly 4 feet deep; that between 1971 and

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fields. (Tr., pp. 183-184). Mr. Leidy further explained:

> "If we assume that the fields had been deep-ripped previously, the wetland features are still evident in the photos... after the other deep-ripping events, those wetlands, whether they were deep-ripped or not, if they meet the three parameters of a wetland, they're still regulated. It just so happens that the last event of deep-ripping on fields three and four not only deep-ripped the area, it filled in the drainages so they're no longer evident. And so my conclusion is regardless of how many times it was deep-ripped before, the photos show that the wetlands have persisted up until the most recent deep-ripping event. They're gone now except for the ... northern portion of the property that was not deep-ripped. There are no drainages that are evident. There are no bed and bank features. There is no hydrophytic vegetation, any of these features, and the water does not pond. The site has been well-drained now. The areas are missing either one or all three of the parameters and so they no longer qualify as a jurisdictional wetland. Those things happened subsequent to the last ripping event." (Tr., pp. 609-610).

See also, Tr., pp. 298-299 (Ms. Goldmann): "...[W]e look at the conditions of this site at the time. And even if there was various land practices going back 35 years, we look at what's out there. What's the reach and extent of waters of the United Sates now? ... [H]ow are they functioning to the best of our knowledge since the area's destroyed by the time we got out there? So we have to use our best professional judgments, talking to NRCS, ... looking at aerial photography and ... making the best determinations since this is atypical and the site is destroyed in making a call. But it's at that time – ... it's what's the condition at the time."

[205]*See, e.g.*, Tr., p. 204 (Mr. Leidy): "Q: Did you talk to a Mr. Van Galen [sic], who owned the property for about 21 years before Mr. Veldhuis? A: No." *See also*, Tr., p. 328, ln. 25 - p. 329, ln. 18 (Ms. Goldmann); Tr., pp. 575, 583-586 (Mr. Leidy).

[206]*See* Tr., p. 74 (Mr. McElhiney): "Q: ...Are you aware that ... these particular parcels ... had been ripped before by a prior owner? A: I was told that it had been ripped, yes. Q: And who told you that? A: Mr. Veldhuis did. Q: And did he tell you the prior owner told him that he had ripped it? A: I think that's where the information came from, yes."

[207]*See, e.g.*, Tr., p. 328, ln. 25 - p. 329, ln. 2 (Ms. Goldmann); Tr., p. 575, ln. 5-6 (Mr. Leidy); Tr., p. 584, ln. 2-5 (Mr. Leidy); Tr., p. 585, ln. 24 - p. 586, ln. 2 (Mr. Leidy).

[208]See Tr., p. 575 (Mr. Leidy): "Q: Did Ms. Goldmann talk to Mike McElhiney of NRCS? A: That's what she told me. She told me she had, yes. Q: And did she fill you in on the history that [Mr. McElhiney] had given her? A: Yes."

[209]*See, e.g.*, Tr., p. 329, ln. 9-21 (Ms. Goldmann); Tr., p. 575, ln. 17-22 (Mr. Leidy); Tr., p. 583, ln. 23 - p. 584, ln. 1 (Mr. Leidy).

[210]*See, e.g.*, Tr., p. 575, ln. 17-22 (Mr. Leidy).

1991 Mr. Van Gaalen deep-ripped field #5 annually to a depth of 3-5 feet and deep-ripped fields #3 and #4 at least once to the same depth; and that Respondent deep-ripped field #5 and fields #3 and #4 to a depth of 5-6 feet in 1995 and 1997, respectively, it is not a necessary conclusion that Mr. Van Gaalen's ripping irreversibly destroyed the hardpan and wetlands.[211]

3) Field #5

Regarding field #5, Respondent's expert witness essentially *agreed* with the NRCS delineation of 3.46 acres of wetlands, testifying:

> Q: So do you ... have an opinion about the delineation of 3.46 acres of jurisdictional wetlands on field five?
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> A: My opinion about the acreage ... is that *I believe that the acreage is probably pretty good as far as wetland acreage*. As far as what types of wetlands they were, I've just got to think that they were ... substantially degraded through farming.[212]

Indeed, Respondent's counsel stated at hearing: "*We're not disputing that there's 3.46 acres* [of wetlands on field #5] and we've testified maybe as to its function and value..."[213] The wetland delineation on field #5 occurred after all of Mr. Van Gaalen's ripping but *before* Respondent ripped the field to plant trees. The delineation was a "typical" delineation involving on-site inspections which identified the three wetland criteria of hydrology, hydric soils, and hydrophytic vegetation according to the Corps' 1987 Wetland Delineation Manual.[214] The conclusions of this delineation are simply not refuted by the asserted hypothesis that previous ripping probably fractured the hardpan, especially in light of Respondent's expert's candid admission that the NRCS delineation

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[211]In January 1999 Respondent provided information to Complainant in response to Complainant's formal request pursuant to Section 308 of the CWA, 33 U.S.C. § 1318. (CX 58; CX 59). I note that when asked to provide a "detailed description of all activities on the subject property, including ... grading, deep-ripping, plowing, [or] dredging ... from the initiation of these activities to the present," (CX 58), Respondent made no mention of "deep-ripping" as part of the activities on the land prior to the "ripping [that] occurred in converting the property from row cropland to preparation for planting of trees." (CX 59). The stated prior activities included only "land clearing, grading, plowing, discing and planting." (CX 59).

[212]Tr., p. 420 (emphasis added). *See also*, Tr., p. 441 (Ms. Moore): "Q: ...[W]e ... opined as well that there was 3.46 ... [acres] vernal pools in that particular area. That vernal pool as it looked back there when the survey was being done, ... is that consistent with property that had been ripped ... as part of a farming operation prior to the delineation...? A: Yes. ... [T]his is consistent with other areas that I've seen that have been ripped to a depth of about three feet where you have some vernal pool and wetland characteristics remaining but they are substantially degraded." *See also*, Tr., pp. 462-465 (Ms. Moore).

[213]Tr., p. 624-625 (emphasis added). *See also*, Respondent's Reply Brief, p. 5, ln. 27-28.

[214]Mr. McElhiney explained: "Q: ... Do you know on ... field five to what extent the hardpan had been disturbed by the prior ripping...? A: The wetland team confirmed, on many occasions, the hardpan or the claypan... Those were concerns – we're confirmed over and over again in the data sheets. The type of ripping that you are talking about did not breach those layers completely." (Tr., p. 80).

was "probably pretty good as far as wetland acreage."

4) Fields #3 and #4

Regarding fields #3 and #4, Mr. Leidy dug 18-30 inch[215] soil pits in the ripped portions of those fields and found that chunks of the restrictive layer were "...mixed throughout the soil profile."[216] Mr. Leidy therefore opined that the ripping which had broken the restrictive layer had occurred "[f]airly recently"[217] and within "a five-year period,"[218] explaining:

> ...[T]he pieces of the restrictive layer ... are still very sharp-edged. And where they have been fractured, they have not been worn by further weathering over time... In addition, ... if soil sits for a long period of time, there will be a tendency for the silty or smaller particles over time to ... settle out; and you will find ... horizons starting to form in ... their infancy. And I did not find that at this site. I found that the soil was still very, very well stirred and mixed and homogenized. So based on my previous experience in these types of systems that have been deep ripped, it looked to me like the ripping had been fairly recent.[219]

Mr. Leidy thus concluded that the deep-ripping performed by Respondent in August 1997 had broken the restrictive layer which caused the destruction of wetlands on fields #3 and #4.[220]

As discussed above, Mr. Leidy's conclusions were based also on aerial photographs. Respondent suggests that Mr. Leidy's interpretation of these photographs could be mistaken because dark "hydric soils" remain dark long after the wetlands have disappeared. For example, Ms. Moore testified that: "Once those soils turn dark because they have been wet for one year, two years or 100 years or 2,000 years, they stay dark. So even if you no longer have a wetland because it's functionally draining, your hydric soils may still be very visually apparent."[221] However, Ms. Moore went on to explain that: "...you would tend not to have a dominance of wetland plants like you have

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[215]Tr., pp. 224, 584.

[216]Tr., p. 164 (Mr. Leidy, describing the photograph of broken hardpan entered into the record as CX 41). *See also*, Tr., p. 165 (describing the photograph of broken hardpan entered into the record as CX 42), and Tr., p. 168 (describing the photograph of broken hardpan entered into the record as CX 44).

[217]Tr., p. 165, ln. 19.

[218]Tr., p. 205, ln. 23.

[219]Tr., pp. 165-166. *See also*, Tr., p. 206.

[220]*See, e.g.*, Tr., p. 202.

[221]Tr., p. 369. *See also*, Tr., p. 442 (Ms. Moore): "...hydric soils – once soils have become hydric due to inundation and due to being in a wetland, ... they maintain the visual characteristics of being hydric soils."

when wet soil conditions exist and the hardpan is not shattered."[222] Mr. Leidy's interpretation of the aerial photographs did include identification of wetland vegetation and hydrology, in addition to hydric soils.[223] Further, as previously discussed, Mr. Leidy's delineation of fields #3 and #4 included identification of wetland hydrology and vegetation, as well as hydric soils, on the un-ripped northwestern portion of field #3,[224] and the NRCS delineation of the adjoining field #5 also included the identification of wetland hydrology and vegetation, as well as hydric soils. Therefore, the fact that hydric soils retain their characteristics, including dark color, long after the disappearance of wetlands is not sufficient to refute Mr. Leidy's "atypical" delineation of fields #3 and #4.

Nevertheless, Ms. Moore concluded that:

> So based on all these factors that this thing was intensively farmed, that it was ripped to that depth, that the soils were shallow, I've got to conclude that there were no jurisdictional waters of the United States on that field [fields #3 and #4] right prior to the conversion to the almond orchard. I believe that they ... had all been eliminated and that some of the dark shadows ... that we're seeing on these aerial photos are simply the hydric soils that are there and that continue to show the dark patterns ... as well as the bright green grass that grows as water is dribbling off irrigated areas and through these topographic draws.[225]

Ms. Moore's conclusion in this regard is based primarily upon her understanding of Mr. Van Gaalen's prior ripping activity, as she explained:

> A: ...especially with respect to the depth of the restrictive layers ... in fields three and four and the history of farming on the site, that this site was regularly ripped at a depth of four to five feet. I wasn't here for Mr. Van Gaalen's testimony but I understand that –
> Q: That's ... the factor I gave you yesterday to consider, right?
> A: Yes. I haven't previously known that we were talking at that great of depths. Regular periodic ripping at a depth of four to five feet when all the restrictive layers are of shallower depth would suggest that the hardpan there has been

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[222]Tr., p. 370.

[223]*See, e.g.*, Tr., p. 144 (Mr. Leidy, in reference to an aerial photograph of field #5 used for comparison to fields #3 and #4): "You can see that there is a *textural difference* on this photo within field 5, and there are also *color differences* that are *caused by surface water*, that may ... make these shapes. Different colors *and also by different types of vegetation. The vegetation that's darker here is either a different type, or it is green, it is growing.*" (Emphasis added).

[224]*See, e.g.*, Tr., p. 306; CX 37; CX 38; CX 39.

[225]Tr., pp. 456-457. *See also*, Tr., p. 466 (Ms. Moore): "Based on a review of all the information that I've had, I don't think that there were any jurisdictional waters of the U.S. there on the site [fields #3 and #4] at that time that it was converted."

substantially turned over, broken up on a regular basis.[226]

However, as discussed above in detail, the evidence in the record indicates that Mr. Gaalen *annually* ripped *field #5* to a depth of 3-5 feet and ripped fields #3 and #4 at least once to the same depth, but that he ripped field #5 to a greater extent than he did fields #3 and #4. The restrictive layer in field #5 was at roughly the same depth as that in fields #3 and #4, but as Ms. Moore opined and Respondent concedes, wetlands were present in field #5 prior to Respondent's deep-ripping in 1995. Significantly, the very fact that Mr. Van Gaalen found it necessary to re-rip field #5 every year for twenty years indicates that the restrictive layer was not destroyed and that wetlands remained functional.[227] As Mr. McElhiney testified: "[The prior ripping] may have bumped into [the restrictive layer] at times, but that would be just a hypothesis. I would presume that ripping would be manipulating some of that, but it was verified in place over and over again in the data sheets."[228]

In summary, where Mr. Van Gaalen reportedly ripped to depths of 3-5 feet, the "hardpan" lay at depths ranging from 4 inches up to nearly four feet, and Respondent ripped to depths of 5-6 feet, although there is testimony that Mr. Van Gaalen ripped the fields prior to Respondent's ownership, the more probative evidence shows that Respondent's, and not Mr. Van Gaalen's, ripping destroyed the hardpan. This conclusion is supported by, among other points discussed *supra*, the fact that Mr. Van Gaalen found it necessary to re-rip annually and Mr. Leidy's findings regarding the "chunks" of hardpan in the 18-30-inch soil pits.[229] Perhaps, also, Mr. Van Gaalen's ripping partially disturbed the hardpan but did not "substantially" disrupt it, and/or it "resettled" or "reconstituted," as described by Ms. Moore. In this regard, I observe that the deep-ripping performed by Respondent was far more extensive than that of Mr. Van Gaalen, as Respondent ripped and "cross-ripped" with multiple passes at different angles[230] and used a "slip plow" that churned up the hardpan.[231] In any event, the

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[226]Tr., p. 455.

[227]I point out that the cost of deep-ripping is substantial and greatly exceeds the cost of discing. For example, on July 8, 1996 Respondent was charged $37.50 per acre for ripping and $14 per acre for discing. (CX 59). Respondent paid $50,000 to deep-rip field #5 in November 1995. (CX 59).

[228]Tr., p. 80.

[229]In *Borden Ranch Partnership v. United States Army Corps of Engineers*, 261 F.3d 810, 816 (9th Cir., 2001), *cert. granted*, 70 U.S.L.W. 3562 (June 10, 2002) (No. 01-1243), the Ninth Circuit noted with approval the district court's reliance upon an expert's soil analysis derived from digging 30-inch soil pits, stating: "The [district] court also relied on the studies of Dr. Lyndon Lee, who ... was able to dig soil pits as far as thirty inches into the soil. By examining the composition of the soil in these pits, Dr. Lee could determine whether the underlying clay layer had been ripped up, consistent with deep ripping. The district court chose to credit this evidence that deep ripping had occurred, and we can find no clear error on this record."

[230]Mr. Veldhuis testified that: "[The deep-ripper] was in the field and we had finished a one-time pass on the whole ranch and was ripping the *second time on another angle*." [Tr., pp. 541-542 (emphasis added)]. *See also*, CX 18, p. 2 (Memorandum from Michael McElhiney to Victor Myers, November 16, 1995): "I visited the site and confirmed that deep-ripping *and cross-ripping* was in progress." (Emphasis added). As Ms. Moore explained: "We've got to differentiate between deep-ripping and moderately deep-ripping and chiseling. If ripping is not effectively done and does not reach down and shatter the hardpan layer *or maybe the ripping is only done on a single pass at six feet apart, the wetland characteristics may not be completely destroyed as they are*

evidence in the record does indeed demonstrate that, whatever came before, at least 21.04 acres of wetlands existed on Respondent's property prior to his ripping of field #5 in 1995 and fields #3 and #4 in 1997. Respondent has not proven by a preponderance of the evidence his affirmative defense that Mr. Van Gaalen's prior ripping of the fields irreversibly destroyed the wetlands.

5) Wetlands Were Not "Prior-Converted Cropland"

Finally, Respondent argues that: "The Administrative Law Judge should dismiss the Complaint because ... [of] EPA's stipulation that they do not exercise jurisdiction over prior converted farm land."[232] This sentence represents the sum total of Respondent's "prior-converted cropland"[233] legal argument, which is not further developed in either of Respondent's briefs. However, Respondent's cross-examination of Ms. Goldmann at hearing implied a general assertion that the wetlands are *per se* "prior-converted cropland" due to Mr. Van Gaalen's prior ripping.[234] This implication reflects an incorrect understanding of the law, and because the wetlands here at issue are not "prior-converted cropland," Respondent's argument in this regard is misplaced. As explained below, while the wetlands at issue may have been "farmed wetland," I need not reach that determination. For purposes of EPA jurisdiction under the CWA, I need only find, and do so find, that the wetlands were not "prior-converted cropland."

The term "prior-converted cropland," however, is not defined by the CWA or the EPA implementing regulations. Rather, the terms "converted wetland," "farmed wetlands," and "prior-converted cropland" arise under the Food Security Act of 1985, 16 U.S.C. §§ 3801, 3821-3824, commonly known as the "Swampbuster Act," and its implementing regulations at 7 CFR, Part 12.

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when you do this two- or three-pass ripping with the big tractors at six feet. [Tr., pp. 441-442 (emphasis added)].

[231]*See* Tr., p. 446 (Ms. Moore): "Most of the ripping that's done for orchards and vineyards and actually the implement that was used on this property is a slip plow ... and it does have a vertical shank, but then it sort [of] hooks forward too. So the shank sort of goes down at a – not a vertical angle but a slight slant and has a little hook and so it does functionally – *as well as cutting through hardpan it flips it* due to this – the angle of the shank." (Emphasis added).

[232]Respondent's Brief, p. 8, *including* ¶ 5.

[233]Although Respondent mistakenly refers, here, to "prior converted *farm* land," both stipulation #16 in the present case (CX 69, ¶ 16) and 33 CFR § 328.3(a)(8), cited in the stipulation, refer to "prior converted *cropland*." (Emphasis added). It is important to use precise terminology in this context because, as discussed below, the relevant distinction is between "prior converted cropland" and "farmed wetlands," [7 CFR § 12.2(a)], with the statute and regulations involved also speaking to "converted wetland" [16 U.S.C. § 3821(a); 7 CFR § 12.2(a)].

[234]*See* Tr., pp. 293-299. Respondent also argued at hearing: "...[W]e don't believe [that Mr. Veldhuis is] that culpable because he's a farmer. He doesn't understand the intricacies of wetlands and the difference between farmed wetlands and prior converted wetlands and I have to go back and read them myself to understand..." [Tr., p. 625 (Mr. Gnass, Closing Argument)]. However, as explained *infra* in section VIII(C)(2) of this Initial Decision (regarding "knowing violations"), Respondent was well informed of the necessity of obtaining "404 Permits" prior to his deep-ripping activities, and his claimed ignorance of such requirements is not persuasive.

The Eighth Circuit in *Gunn v. U.S. Dept. of Agriculture*, 118 F.3d 1233 (8th Cir. 1997), provided a useful explanation of the Act, stating:

> In order to combat the disappearance of wetlands through their conversion into crop lands, Congress passed a law known commonly as "Swampbuster." This law did not make illegal the conversion of wetlands to agricultural use, but did provide that any agricultural production on a converted wetland would cause the farmer to forfeit his eligibility for a number of federal farm-assistance programs. Among the exceptions to the provisions of Swampbuster is one for wetlands that had been converted to agricultural production before December 23, 1985. The farming of such previously converted wetlands does not make the farmer ineligible for benefits. ... The SCS[235] determines whether the land for which a farmer seeks benefits contains wetlands that have been converted for agricultural purposes.[236]

In fact, the "Swampbuster Act" makes ineligible for benefits any person who *either converts a wetland* subsequent to November 28, 1990 [16 U.S.C. § 3821(c)] *or farms on a wetland which had been converted*, such conversion occurring subsequent to December 23, 1985 [16 U.S.C. §§ 3822(a), (d)].[237]

Thus, under the "Swampbuster Act," "...land is either wetland or converted wetland."[238] A "converted wetland" is:

> ...a wetland that has been drained, dredged, filled, leveled, or otherwise manipulated ... for the purpose of or to have the effect of making possible the production of an agricultural commodity without further application of the manipulation described herein...[239]

"Converted wetland," in turn, can be either "farmed wetland" or "prior-converted cropland."[240] The court in *Gunn* described the distinction as follows:

> ...[L]and is either wetland or converted wetland. If significant wetland characteristics remain, the land remains wetland and cannot be converted wetland. *If the drainage or other manipulation has been sufficient to make crops producible, ... the land is*

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[235]The "SCS" referred to in *Gunn* is the "Soil Conservation Service," which is now known as the "Natural Resource Conservation Service" (NRCS).

[236]*Gunn v. U.S. Dept. of Agriculture*, 118 F.3d 1233, 1235 (8th Cir. 1997) (citations omitted).

[237]*See, e.g., Id.* at 1236.

[238]*Id.* at 1238.

[239]7 CFR § 12.2(a). *See also*, 16 U.S.C. § 3821(c), containing parallel language. *See also, Gunn*, 118 F.3d at 1236-1237, n.3.

[240]7 CFR § 12.2(a).

> *best described as "farmed wetland*," a term that does not appear in the statute but that the agency's regulations have adopted. *"Farmed wetland" can continue to be farmed without the loss of benefits, but only so long as the previously accomplished drainage or manipulation is not significantly improved upon, so that wetlands characteristics are further degraded in a significant way*. In the present case, ... the 1992 improvements have done exactly that. They were designed to and have in fact further degraded the wetland characteristics of the farm. It follows that part of the farm is "converted wetland," but that it did not become converted wetland until 1992. This interpretation also accords with the general purpose of the statute – to preserve those wetland characteristics still in existence in 1985.[241]

Although the court in *Gunn*, here, describes the distinction between "converted wetland" and "farmed wetlands," the analysis informs also the distinction between "farmed wetland" and "prior-converted cropland." While "converted wetland" is a statutory term,[242] "farmed wetland" and "prior-converted cropland" are found only in the regulations.[243] The court in *Gunn* characterizes "farmed wetland" *not* as a *type* of "converted wetland,"[244] but rather as an "exception" to "converted wetlands,"[245] without distinguishing "prior-converted cropland" from "farmed wetland." Thus, the court in *Gunn* distinguishes "farmed wetland" from "converted wetland." While I characterize "farmed wetland" and "prior-converted cropland" as two *species* of "converted wetland," this analysis is functionally identical to the *Gunn* characterization of "farmed wetland" as an "exception" to "converted wetland." That is, the *Gunn* court's distinction between "farmed wetland" and "converted wetland" is parallel to my distinction between "farmed wetland" and "prior-converted cropland."[246] As the *Gunn* court explains: "... 'farmed wetlands' ... are, in essence, wetlands that are sometimes dry enough to farm."[247]

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[241] *Gunn*, 118 F.3d at 1238 (emphasis added).

[242] 16 U.S.C. § 3801(a)(6)(A).

[243] 7 CFR § 12.2(a).

[244] Thus, the court found that although the land at issue in *Gunn* had, prior to 1992, been "farmed wetland," it became "converted wetland" in 1992 when the "improvements ... further degraded the wetland characteristics of the farm."

[245] *See, e.g., Gunn*, 118 F.3d at 1237: "...Section 12.32(b), which accords with the exception provided by 16 U.S.C. § 3801(a)(6)(B), explains that a wetland shall not be considered converted just because natural conditions, such as drought, allow a farmer to cultivate certain land, so long as that farming does not 'permanently alter or destroy natural wetland characteristics' – *the farmed-wetlands exception*." (Emphasis added).

[246] This analysis is necessitated by the fact that the *Gunn* court failed to directly address "prior-converted cropland," instead distinguishing between "farmed wetland" and "converted wetland." However, "farmed wetland" and "prior-converted cropland" are two *subsets* of "converted wetland," and for the purposes of Complainant's jurisdiction under the CWA in the present case, I must determine whether the property was "prior-converted cropland."

[247] *Gunn*, 118 F.3d at 1235.

Regarding Complainant's jurisdiction over the wetlands at issue in the instant case under the CWA, the Corps' regulation at 33 CFR § 328.3(a)(8) states:

> Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

Stipulation #16 of the parties to the case before me (CX 69, ¶ 16) is essentially identical to 33 CFR § 328.3(a)(8).[248] Thus, in order to find EPA jurisdiction in this case, for purposes of 33 CFR § 328.3(a)(8) I need only determine that the wetlands were not "prior-converted wetlands" prior to Respondent's deep-ripping activities at issue.

As the court in *Gunn* explained: "The [NRCS] determines whether the land ... contains wetlands that have been converted for agricultural purposes."[249] The NRCS in this case determined that the wetlands at issue were "farmed wetland" and not "prior-converted cropland." The record contains a letter from Mr. McElhiney of NRCS to Ms. Goldmann of EPA, dated March 5, 1999 (entered as part of both CX 21 and CX 60), stating in part: "...[P]lease find enclosed ... Aerial photo with *farmed wetlands (FW)* noted."[250] Attached to CX 60 is indeed a photocopy of an aerial photograph with portions of field #5 delineated as "fw."[251] Also attached to CX 60 is a document entitled, "Highly Erodible Land and Wetland Conservation Determination," signed and dated by Mr. McElhiney on August 15, 1995, listing "3.46 total acres" under item #12, which states:

> Wetlands (W), including abandoned wetlands, or Farmed Wetlands (FW) or Farmed Wetlands Pasture (FWP). Wetlands may be farmed under natural conditions. Farmed Wetlands and Farmed Wetlands Pasture may be farmed and maintained in the same manner as they were prior to December 23, 1985, as long as they are not abandoned.[252]

Nothing is listed under Item #13 of this document, which provides space for:

> Prior Converted Cropland (PC). Wetlands that were converted prior to December 23, 1985. The use, management, drainage, and alteration of prior converted cropland (PC) are not subject to the wetland conservation provisions unless the area reverts to

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[248]The only difference between the stipulation and the regulation is irrelevant, being that the former refers to "the EPA" while the latter refers simply to "EPA."

[249]*Gunn*, 118 F.3d at 1235. *See also*, Tr., p. 69, ln. 13-15 (Mr. McElhiney); Tr., p. 261, ln. 5-7 (Ms. Goldmann); Tr., p. 293, ln. 8-9 (Ms. Goldmann).

[250]CX 21, p. 1 (emphasis added); CX 60, p. 1 (emphasis added).

[251]CX 60, p. 4. *See also*, CX 7, p. 3.

[252]CX 60, p. 3. *See also*, CX 7, p. 2.

wetland as a result of abandonment.[253]

Item #28 of this document provides a space for "remarks," in which is written: *"Farmed wetlands* apparent in fields 3, 4, & 5."[254]

Further, Mr. McElhiney testified:

Q: Did you or anyone at NRCS make a formal determine [sic] that the Veldhuis property was prior converted crop lands?
A: No, we did not.[255]

Ms. Goldmann similarly testified:

Q: ...[H]as NRCS ever determined that the Veldhuis property was a prior converted crop land?
A: To my knowledge NRCS determined that it was not a prior converted crop land.[256]

Thus, the record of this case is clear that, for the purposes of the "Swampbuster Act," the NRCS determined that the wetlands at issue were "farmed wetland" and were not "prior-converted cropland." Although the EPA is "the final authority regarding Clean Water Act jurisdiction"[257] "[n]otwithstanding the determination of an area's status as prior converted cropland by any other Federal agency,"[258] the EPA relied upon the NRCS determination in concluding that its jurisdiction under the CWA is not precluded by 33 CFR § 328.3(a)(8)'s exclusion of "prior converted cropland" from the definition of "waters of the United States." The EPA's conclusion in this regard is reasonable and supported by substantial evidence in the record.

Again, as the court in *Gunn* explained:
If the drainage or other manipulation has been sufficient to make crops producible, ... the land is best described as "farmed wetland," ... [which] can continue to be farmed without the loss of benefits, but only so long as the previously accomplished drainage or manipulation is not significantly improved upon, so that wetlands characteristics

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[253] *Id.*

[254] *Id.* (emphasis added).

[255] Tr., p. 69.

[256] Tr., p. 261.

[257] 33 CFR § 328.3(a)(8).

[258] *Id.*

are further degraded in a significant way.[259]

The court also characterized "farmed wetlands" as "wetlands that are sometime dry enough to farm."[260] Conversely, land is *no longer* "farmed wetlands" (whether it is then classified as "converted wetland" or "prior-converted cropland") if "the previously accomplished drainage or manipulation *is* ... significantly improved upon, so that wetland characteristics are further degraded in a significant way."[261]

In the case here, as explained and supported in detail *supra*, wetlands were clearly present and accurately delineated on Respondent's fields #3, #4, and #5 prior to Respondent's deep-ripping in November 1995 (field #5) and August 1997 (fields #3 and #4). This was so despite the on-going farming on the property, including Mr. Van Gaalen's previous ripping. Indeed, Mr. Van Gaalen testified that he had to re-rip the property "almost every summer"[262] for approximately 20 years.[263] This state of the wetlands meets precisely the definition of "farmed wetland" articulated by the Eighth Circuit in *Gunn* in applying the definition set forth at 7 CFR § 12.2(a). Respondent cites no authority to support its conclusory assertion that the EPA lacks jurisdiction because the property at issue is "prior converted farm land [cropland]." Therefore, the wetlands were not "prior-converted cropland," and EPA's jurisdiction over the wetlands is not precluded by 33 CFR § 328.3(a)(8).[264]

On a related point, the Ninth Circuit in *Borden Ranch Partnership v. United States Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001), *cert. granted*, 70 U.S.L.W. 3562 (June 10, 2002)

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[259]*Gunn*, 118 F.3d at 1238.

[260]*Id.* at 1235.

[261]*Id.* at 1238 (emphasis added).

[262]Tr., p. 351, ln. 9.

[263]Tr., p. 340, ln. 18-24.

[264]As noted *supra*, in order to find that 33 CFR § 328.3(a)(8) does not preclude jurisdiction, I need only find that the wetlands were not "prior converted cropland" and need not determine whether the wetlands were, in fact, "farmed wetland." Although the wetlands *at a minimum* meet the definition of "farmed wetland," I observe that the wetlands might also meet the definition, simply, of "wetlands" (as opposed to "converted wetlands"). The *Gunn* court held that: "...land is either wetland or converted wetland," (*Gunn*, 118 F.3d at 1238), and 7 CFR § 12.2(a) defines a "converted wetland" as: "...a wetland that has been drained, dredged, filled, leveled, or otherwise manipulated ... for the purpose of or to have the effect of making possible the production of an agricultural commodity *without further application of the manipulation* described herein..." [(Emphasis added) (*See also*, 16 U.S.C. § 3821(c), containing parallel language, and *Gunn*, 118 F.3d at 1236-1237, n.3.)]. As Mr. Van Gaalen found it necessary to re-rip the property annually for 20 years, the property *did* require "further application of the manipulation" and therefore arguably did not meet the definition of "converted wetland," thus making it simply "wetland" under *Gunn*. However, I need not reach this issue and find only that the wetlands were not "prior-converted cropland."

(No. 01-1243),[265] specifically considered the practice of deep-ripping, holding, in part, that the deep-ripping there at issue did not come within the "farming exception" articulated by Section 404(f)(1)(A) of the CWA, 33 U.S.C. § 1344(f)(1)(a), which states:

> (1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material – (A) from normal farming ... activities such as plowing, seeding, cultivating, minor drainage, harvesting ..., or upland soil and water conservation practices ... is not prohibited by or otherwise subject to regulation under this section ...

That is, the *Borden Ranch* court found the deep-ripping there at issue to come within the "recapture provision" of 33 U.S.C. § 1344(f)(2), which states that:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

The Ninth Circuit explained that:

> ... "[T]he intent of Congress in enacting the [CWA] was to prevent conversion of wetlands to dry lands," and we have classified "as non-exempt those activities which change a wetland's hydrological regime." In this case, Tsakopoulos's activities were not intended simply to substitute one wetlands crop for another; rather they radically altered the hydrological regime of the ... wetlands. Accordingly, it was entirely proper for the Corps and the EPA to exercise jurisdiction over Tsakopoulos's activities.[266]

Although Respondent in the instant case, which arises within the jurisdiction of the Ninth Circuit, does not explicitly raise the issue of the "farming exception" embodied in 33 U.S.C. § 1344(f)(1)(a), the argument is perhaps implied by Respondent's general assertion that the wetlands were "prior-converted cropland" and/or by Respondent's protestation: "How can anyone state with a straight face that a farmer's sole activity on property is [sic] plowing or ripping his fields is a discharge into navigable waters[?]"[267] As explained *supra*, Respondent's deep-ripping here at issue destroyed the hydrological functioning of the wetlands in order to plant almond trees, a new and different crop requiring a deeper root system than previous crops. Respondent's deep-ripping

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[265] *Borden Ranch* is considered in greater detail *infra* in section II ("'Deep-Ripping' Deposits Dredged or Fill Material") of this Initial Decision.

[266] *Borden Ranch*, 261 F.3d at 816 (citation omitted) (*quoting United States v. Akers*, 785 F.2d 814, 822 (9th Cir. 1986).

[267] Respondent's Reply Brief, p. 6.

activities therefore do not come within the "farming exception" for the same reasons that Tsakopoulos' deep-ripping activities did not come within the "farming exception" in *Borden Ranch*.

Further, the language and test in *Borden Ranch* ("...activities were not intended simply to substitute one wetlands crop for another; rather they radically altered the hydrological regime of the ... wetlands"[268]) closely parallel those in *Gunn* ("...but only so long as the previously accomplished drainage or manipulation is not significantly improved upon, so that wetlands characteristics are further degraded in a significant way"[269]), and the underlying rationale of the CWA informing *Borden Ranch* ("'[T]he intent of Congress in enacting the [CWA] was to prevent conversion of wetlands to dry lands,'"[270]) closely parallels that of the "Swampbuster Act" informing the court's decision in *Gunn* ("...the general purpose of the statute – to preserve those wetland characteristics still in existence in 1985."[271]). Thus, to the extent that *Borden Ranch* may inform the "prior-converted cropland versus farmed wetland" issue, that case supports a finding that the jurisdiction of the EPA is not precluded by 33 U.S.C. § 328.3(a)(8).

For the foregoing reasons, I find that the wetlands here at issue were not "prior-converted cropland," and EPA's jurisdiction over the wetlands is not precluded by 33 CFR § 328.3(a)(8).

II. Deep-Ripping Deposited Dredged or Fill Material

Alternatively, Respondent next contends that even if wetlands were present, Respondent did not place dredged or fill material into such wetlands by deep-ripping the fields. Respondent argues:

> How can anyone state with a straight face that a farmer's sole activity on property is [sic] plowing or ripping his fields is a discharge into navigable waters[?] ... There was no evidence presented that any material from [Respondent's] operations caused a deposit into Sand Creek... Nobody in their right mind understands that a point source is a plow.[272]

This position fails in light of the controlling Ninth Circuit decision in *Borden Ranch Partnership v. United States Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001), *cert. granted*, 70 U.S.L.W. 3562 (June 10, 2002) (No. 01-1243).

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[268]*Borden Ranch*, 261 F.3d at 816.

[269]*Gunn*, 118 F.3d at 1238.

[270]*Borden Ranch*, 261 F.3d at 816.

[271]*Gunn*, 118 F.3d at 1238.

[272]Respondent's Reply Brief, p. 6. *See also*, Answer, p. 2, ¶ 2: "...[N]o dredged or fill materials were deposited into jurisdictional wetlands."

In *Borden Ranch*, a farmer[273] named Angelo Tsakopoulos owned land that contained "significant hydrological features including vernal pools, swales, and intermittent drainages"[274] which "depend[ed] upon a ... 'restrictive layer' or 'clay pan' ..." for their existence.[275] In order to plant vineyards and orchards, Mr. Tsakopoulos deep-ripped the land without a permit issued under the CWA. The Corps sought civil penalties and Mr. Tsakopoulos challenged the authority of the Corps and EPA to regulate deep-ripping.

Mr. Tsakopoulos first argued that "deep ripping cannot constitute the 'addition' of a 'pollutant' into wetlands, because it simply churns up soil that is already there, placing it back basically where it came from."[276] The court rejected this argument. Recognizing that "activities that destroy the ecology of a wetland are not immune from the Clean Water Act merely because they do not involve the introduction of material brought in from somewhere else,"[277] the court held that:

> ...[B]y ripping up the bottom layer of soil, the water that was trapped can now drain out. While it is true, that in so doing, no new material has been "added," a "pollutant" has certainly been "added." Prior to the deep ripping, the protective layer of soil was intact, holding the wetland in place. Afterwards, that soil was wrenched up, moved around, and redeposited somewhere else... We therefore conclude that deep ripping ... can constitute a discharge of a pollutant under the Clean Water Act.[278]

Similarly, in the case at bar, Respondent's deep-ripping of fields #3, #4, and #5 destroyed the ecology of the wetlands and would not be immune from the CWA even if it had not involved the introduction of material brought in from somewhere else. In this regard, I note that Mr. Leidy testified that Respondent's deep-ripping did destroy the hydrological functioning of the wetlands, as he explained:

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[273] *Borden Ranch*, 261 F.3d at 819, n.1 (Gould, J., *dissenting*).

[274] *Id.* at 812.

[275] *Id.*

[276] *Id.* at 814.

[277] *Id.* at 814-815, *citing Rybachek v. U.S. EPA*, 904 F.2d 1276 (9th Cir. 1990) (holding that "placer mining" which involves removing material from a stream bed, sifting out the mineral, and returning the material to the stream bed was an "addition of a pollutant"); *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000) (holding that "sidecasting" of dredged material back into the wetland from whence it came constituted the "addition of a pollutant"); and *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983) (holding that the word "addition" may be reasonably understood to include "redeposit.").

[278] *Id.* at 815. The *Borden Ranch* court distinguished deep-ripping from "incidental fallback," which the D.C. Cir. held not to be regulable under the CWA in *National Mining Assoc. v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998). The *Borden Ranch* court explained: "Here, the deep ripping does not involve mere incidental fallback, but constitutes environmental damage sufficient to constitute a regulable redeposit." *Borden Ranch*, 261 F.3d at 815, n.2.

Q: And did you actually see evidence, on the Veldhuis property itself, that the hydrology had changed?

A: Yes. ... [B]y fracturing the hardpan, the restrictive layer, you will change the hydrology, because the water will now be able to drain through the soil profile and will no longer be perched on the surface. In addition, ... there's evidence on the aerial photographs that there was ponding water on the site in different locations. And when I went back for the field visit on May 16th of 2000, those areas were no longer there. Those depressions were no longer there. The hardpan had been ripped and there was nowhere for water to pond.[279]

Thus, Respondent's deep-ripping activities would be regulable under the CWA even if they had not deposited into the wetlands material which had originated at another location.

Further, the record of this case *does* contain evidence that "fill material" was "added" to wetlands. Mr. Leidy testified that deep-ripping can move or "drag" material from upland areas into wetlands, and that the deep-ripping in this case had, if fact, so deposited material into the wetlands on Respondent's property, as evidenced by a comparison of the historical aerial photographs with Mr. Leidy's personal observation of the property during his May 16, 2000 site visit. Mr Leidy testified:

A: ...[A]s the heavy equipment moves across the landscape, with the deep ripping blade down, it has a tendency to move the surface soil, by mechanized means, from high lying areas to lower lying areas. So ... from an upland area, as it moves down into a depression, into a wetland, it will drag ... earthen material into that low lying area.
Q: So does deep ripping move or deposit soil?
A: Yes, it does.
Q: And if there were wetlands in the area, would it move or deposit soil into those wetlands?
A: Yes, it could."[280]

Mr. Leidy further testified:

Q: ...[D]oes deep ripping deposit fill material in wetlands?
A: Yes, it does.
Q: ...Can you see evidence of ... deposits of fill material into wetlands on this property?

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[279]Tr., p. 171. *See also*, Tr., p. 202 (Mr. Leidy): "Well, the most obvious example [of CWA violations] would be the entire filling and loss of a wetland area through deep ripping activities. In other words, replacing an area of water of the United States, a wetland, with a dry land, so the wetland no longer existed. ... On the site, that I saw – the area was deep ripped and that resulted in the filling of wetlands, yes. ... The result of the deep ripping caused the discharge of dredged or fill material into regulated waters."

[280]Tr., p. 153.

A: Yes, I did. ... [T]he evidence was in areas that I had mapped as wetland off the aerial photographs. I went to those areas and I could see where the deep ripper had redistributed the soil that was in place. In other words, it had picked it up, moved it, mixed it all together, then redeposited it... And it also had mechanically moved soils from adjacent upland areas as it moved, and drug them into the wetland area. And I could see that also.[281]

Ms. Moore also testified that the "slip plow" used by Respondent to deep-rip in this case employs a "hooked" shank that not only "cuts" the hardpan but also "flips" it, explaining:

> Most of the ripping that's done for orchards and vineyards and actually the implement that was used on this property is a slip plow ... and it does have a vertical shank, but then it sort [of] hooks forward too. So the shank sort of goes down at a – not a vertical angle but a slight slant and has a little hook and so it does functionally – as well as cutting through hardpan it flips it due to this – the angle of the shank.[282]

Mr. Tsakopoulos next argued in *Borden Ranch* that a "plow" could not be a "point source" as defined by Section 502(14) of the CWA.[283] The Ninth Circuit found this argument to be without merit, holding that:

> The statutory definition of "point source" ... is extremely broad, and courts have found that "bulldozers and backhoes" can constitute "point sources," *Avoyelles*, 715 F.2d at 922. In this case, bulldozers and tractors were used to pull large metal prongs through the soil. We can think of no reason why this combination would not satisfy the definition of a "point source."[284]

Indeed, courts have consistently held "point sources" to include construction vehicles such as bulldozers, backhoes, draglines, dump trucks, and other earthmoving equipment.[285]

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[281]Tr., pp. 169-170.

[282]Tr., p. 446. In this regard, I note also that Respondent has stipulated that: "The term 'point source' ... includ[es] bulldozers, plows, and other equipment which are used to move or place soils and other materials in a manner that deposits such materials *or turns over and redeposits* such materials within waters of the United States." (CX 69, ¶ 11) (emphasis added).

[283]Section 301(a) of the CWA, 33 U.S.C. § 1311(a), states that: "Except as in compliance with ... [Section 404 of the CWA (33 U.S.C. § 1344)], the discharge of any pollutant by any person shall be unlawful." Section 502(12) of the CWA [33 U.S.C. § 1362(12)] defines "discharge of a pollutant" to include: "...any addition of any pollutant to navigable waters *from any point source*..." (Emphasis added). Section 502(14) of the CWA [33 U.S.C. § 1362(14)] defines "point source" to mean: "...any discernible, confined and discrete conveyance ... from which pollutants are or may be discharged."

[284]*Borden Ranch*, 261 F.3d at 815 (citation omitted).

[285]*See, e.g., Concerned Area Residents for Environment v. Southview Farm*, 34 F.3d 114, 118 (2nd Cir. 1994), and cases cited therein. *See also, United States v. Lambert*, 915 F.Supp. 797, 802, n.8 (S.D.W.Va. 1996),

In the case before me, Respondent deep-ripped fields #3, #4, and #5 to a depth of 5-6 feet using a "D-11"[286] deep-ripper in November 1995 (field #5) and August 1997 (fields #3 and #4) in order to plant almond trees. Prior to this ripping, Respondent deep-ripped the fields to a shallower depth of approximately 3 feet in order to re-plant oats using a "Stiger tractor,"[287] which is an apparently smaller tractor than the one used in preparation for the almond trees and "has the capability of ripping three to four feet,"[288] and which Respondent described as "a very large tractor"[289] with "eight wheels."[290] The record of this case contains a photograph of a deep-ripper at CX 34 with an approximately 8 foot[291] long shank, although the specific machine depicted at CX 34 is not the deep-ripper actually used by Respondent in this case.[292]

The deep-ripping at issue in *Borden Ranch* was described as "...a procedure ... in which four- to seven-foot long metal prongs are dragged through the soil behind a tractor or a bulldozer."[293] The "D-11" deep-ripper used by Respondent in this case clearly comes within the definition of a "point source" contemplated by Section 502(14) of the CWA, 33 U.S.C. § 1362(14), as interpreted by *Borden Ranch* and the other precedent cited above.

On June 10, 2002, the Supreme Court granted a writ of certiorari to Petitioners in *Borden Ranch*.[294] Petitioners in that case primarily contend that the Ninth Circuit's decision to subject deep-ripping to regulation under Section 404 of the CWA is at odds with the decision of the D.C. Circuit in *National Mining Ass'n. v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998), to exempt from "404 regulation" "incidental fallback"[295] of native materials from dredge buckets during

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and cases cited therein.

[286]CX 69, ¶¶ 27, 34; Tr., p. 553.

[287]Tr., p. 535.

[288]Tr., p. 536.

[289]Tr., p. 536 (Mr. Veldhuis): "Q: It's a very large tractor, correct? A: Correct."

[290]Tr., p. 535.

[291]Tr., p. 155, ln. 14.

[292]Tr., p. 155.

[293]*Borden Ranch*, 261 F.3d at 812.

[294]*Borden Ranch Partnership v. United States Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001), *cert. granted*, 70 U.S.L.W. 3562 (June 10, 2002) (No. 01-1243).

[295]The Petitioners in *Borden Ranch* explain that "incidental fallback" "...occurs when material is dredged from a water, and some of it falls back off the dredge bucket into the same general location..." *Borden Ranch Partnership v. United States Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001), *petition for cert. filed*, 70 U.S.L.W. 3562 (Feb. 22, 2002) (No. 01-1243) [hereinafter Petition for Cert.], p. 17 (citation omitted). The court in

aquatic dredging operations. The Petitioners in *Borden Ranch* argue that: "Had petitioners' plowing occurred in the D.C. Circuit, the result in this case would have been different - under *National Mining* deep plowing would not be held a "discharge" subject to Section 404's permit requirements. In the Ninth Circuit, under *Borden Ranch*, it is."[296] The case at bar arises in the Ninth Circuit and not in the D.C. Circuit. Therefore, I must follow the Ninth Circuit's holding in *Borden Ranch* and do not speculate on whether the U.S. Supreme Court might find a conflict between *Borden Ranch* and *National Mining*.

Further, I note that *Borden Ranch* has been cited with approval in cases arising in the Ninth Circuit before the petition for certiorari was filed,[297] *and also* in the Seventh Circuit *subsequent* to the filing of the *Borden Ranch* petition for certiorari.[298] Those cases continue to hold that "activities having as their very design movement and excavation of soil and sediment"[299] are subject to the permitting requirements of Section 404 of the CWA. Here, Respondent's deep-ripping was just such an activity, having as it's purpose, design and actual effect the complete draining and elimination of the wetlands at issue. Such activity simply is not analogous to the situation in which "...material is dredged from a water, and some of it falls back off the dredge bucket into the same general

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National Mining similarly described "incidental fallback" as "...the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back." *National Mining Ass'n. v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1404 (D.C. Cir. 1998).

[296]Petition for Cert., *supra* note 295, p. 19.

[297]*See, e.g.*, *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001): "We have held ... that the movement of contamination that *does* result from human conduct is a 'disposal' [under Section 107(a)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607(a)(2)]... Similarly, under the [CWA], the movement of soil in the context of an agricultural activity called 'deep ripping' ... can be a 'discharge' of pollutants into wetlands." *Carson Harbor*, 270 F.3d at 877, *including* n.4 (citing *Borden Ranch*, 261 F.3d at 814-815) (emphasis in original). *See also, Colvin v. United States*, 181 F.Supp.2d 1050 (C.D.Cal 2001): "...[I]t is well established that bulldozers and similar vehicles may be 'point sources' under the CWA when they are ... utilized to spread waste." *Colvin*, 270 F.3d at 1056 (citing *Borden Ranch*, 261 F.3d at 815).

[298]*See Greenfield Mills, Inc. v. O'Bannon*, 189 F.Supp.2d 893 (N.D. Ind. Mar. 11, 2002). The court in *Greenfield Mills* held that the opening of a flow control gate at a fish hatchery, causing sediment to be deposited in a river, did not require a "404 Permit" because the churning or movement of soil was "...*entirely incidental* to a maintenance activity that had *no purpose of excavating and redepositing* soil downstream." *Greenfield Mills*, 189 F.Supp.2d at 912 (emphasis added). The court in *Greenfield Mills* carefully distinguished the facts there at issue, however, from those at issue in *Borden Ranch*, explaining: "Where the Plaintiffs [sic] claim fails ... is in their failure to show any active removal or excavation of the sediment in the present case and its 'redeposit' into the Fawn River as was the case in *Borden*, *Deaton*, and *Rybachek*. Indeed, *each of these cases involved activities having as their very design movement and excavation of soil and sediment. Under such circumstances, these cases clearly support the proposition that the purposeful active dredging of waterbeds by mechanized devices and a removal and replacement of the materials already present in the wetland is an 'addition of a pollutant.'* *Greenfield Mills*, 189 F.Supp.2d at 912 (emphasis added and in original).

[299]*Greenfield Mills*, 189 F.Supp.2d at 912.

location..."[300]

Under *Borden Ranch*, Respondent's deep-ripping at issue in the instant case can and did require a permit under Section 404 of the CWA because it destroyed the ecology of the wetlands at issue, and the "D-11" deep-ripper used by Respondent was a "point source" within the meaning of Section 502(14) of the CWA. *Borden Ranch* is controlling in this case which arises in the Ninth Circuit, and while the Supreme Court has granted the petition for certiorari in *Borden Ranch*, the Ninth Circuit's decision in that case remains controlling in the matter before me. Thus, Respondent's deep-ripping activities would be regulable under the CWA even if they had not deposited into the wetlands material which had originated at another location. Moreover, the record of this case *does* contain evidence that "fill material" was "added" to the wetlands; to wit, Mr. Leidy's testimony that the deep-ripping in this case had in fact dragged material from outside of the wetlands and deposited it into the wetlands, as evidenced by a comparison of the historical aerial photographs with Mr. Leidy's personal observation of the property during his May 16, 2000 site visit, and also Ms. Moore's testimony that the angular-shanked "slip plow" used by Respondent not only "cut" the hardpan but also "flipped" the broken pieces.

For the foregoing reasons, assuming that the wetlands at issue are "waters of the United States," I find that Respondent's deep-ripping of field #5 in November 1995 and fields #3 and #4 in August 1997 did require a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344.

III. Jurisdiction

Respondent next contends that even if wetlands did exist as delineated by Complainant and Respondent's deep-ripping did place dredged or fill material into such wetlands, Complainant nevertheless lacks jurisdiction over such activity in light of the recent Supreme Court decision in *SWANCC, supra*. In this regard, Respondent asserts that any wetlands which may have existed on the property were "isolated" and therefore not "waters of the United States," being neither navigable nor "adjacent" to any "navigable water,"[301] and that Complainant asserts jurisdiction based solely upon the "Migratory Bird Rule" which was held invalid by *SWANCC*. Specifically, Respondent argues:

> All alleged wetlands on field 5 were isolated wetlands. Jurisdiction of field 5 was exclusively invoked under the "Migratory Bird Rule," ... which was thrown out by the U.S. Supreme Court in *SWANCC*. All wetlands on [fields] 3 and 4 except for the one which is referred to as 21 in exhibit 31 are isolated wetlands and jurisdiction on such

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[300] Petition for Cert., *supra* note 295, p. 17 (citation omitted).

[301] *See, e.g.*, Respondent's Brief, pp. 4-5: "None of the waters are waters of the United States because of their isolated nature. ... [T]here was no empirical evidence that any waters from the site ever reaches [sic] the waters of the United States or more importantly, navigable waters." *See also*, Respondent's Reply Brief, p. 3: "There is nothing on the Veldhuis property that is adjacent to or abuts navigable waters."

were [sic] proscribed under *SWANCC*.[302]

Respondent further contends that, in light of *SWANCC*, even if the wetlands are assumed to be hydrologically connected to navigable waters, such connection is too attenuated to render the wetlands "adjacent" to navigable waters because the distances and/or number of tributary connections involved are too great,[303] because some tributaries may have been of human construction,[304] and because the connection is by "intermittent creeks" which, subsequent to the *SWANCC* decision, cannot be considered "tributaries."[305] Respondent also suggests that SWANCC fundamentally diminishes federal jurisdiction in general.[306]

Respondent's reading of *SWANCC* is overly broad and its position concerning jurisdiction is unavailing. The wetlands here at issue are "adjacent" to "tributaries" to "navigable waters," and as such Complainant does have jurisdiction over the wetlands under the large body of precedent existing prior to the Supreme Court's decision in *SWANCC*, and *SWANCC* does not alter that analysis as applied to the facts of the case before me.

Although *SWANCC* did invalidate certain Corps wetland regulations comprising the "Migratory Bird Rule," those invalidated regulations are no longer implicated in this case. As explained *supra*, the complaint originally alleged that Respondent deep-ripped 3.46 acres of "jurisdictional wetlands" adjacent to tributaries to navigable waters on field #5, and also that

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[302]Respondent's Brief, p. 4. *See also*, Respondent's Brief, p. 6: "...[T]he jurisdiction on field 5 was entirely based on the Migratory Bird Rule (testimony of Goldman [sic], pages 268, 269). The jurisdiction on 3 and 4 was almost exclusive [sic] based on the Migratory Bird Rule, except for the area depicted in exhibit 31 as Item 21." Respondent has mischaracterized Ms. Goldmann's testimony at Tr., pp. 268-269. There, Ms. Goldmann discussed use of the wetlands by migratory waterfowl only as one of a number of factors she considered when calculating the nature, circumstances, extent and gravity of the alleged violation. Ms. Goldmann did not state that federal jurisdiction over the wetlands was premised upon the "Migratory Bird Rule."

[303]*See, e.g.*, Respondent's Reply Brief, p. 2: "It is quite a stretch of the imagination to achieve 'navigable waters' on this isolated parcel of farm land miles from either the San Joaquin River or the Merced River." *See also*, Respondent's Brief, p. 4: "The subject property is located miles from any 'navigable' 'waters.'"

[304]*See, e.g.*, Tr., p. 213 (Mr. Gnass): "Did you make a distinction between what are ... waters that were created by activities on the site, like the creation of a canal, versus natural wetlands?"

[305]*See, e.g.*, Respondent's Reply Brief, p. 6: "Subsequent to *SWANCC*, the case of *Rice v. Harken* (2001) 250 Fed.3d 264 [sic]. In pertinent part, the court determined ... [that] [u]nder *SWANCC* a body of water is jurisdictional only if it is 'actually navigable or is adjacent to an open body of navigable water.' Intermittent creeks are not sufficiently linked to an open body of navigable water to warrant Clean Water Act protection..." [Citation omitted in original].

[306]*See, e.g.*, Respondent's Reply Brief, p. 6: "Fortunately our Supreme Court in *SWANCC* brought common sense to the interpretation of the Clean Water Act. The Clean Water Act as interpreted in this case by EPA had nothing to do with clean water. It had everything to do with irrelevant environmental policy issues. However, *SWANCC* changed those erroneous interpretations." *See also*, Respondent's Brief, p. 3: "This concern for preserving the Federal/State balance led the [C]ourt [in *SWANCC*] to resurrect the historic concept of navigation as a foundation for jurisdiction under the Clean Water Act."

Respondent deep-ripped 21.58 acres of "jurisdictional wetlands" on fields #3 and #4,[307] such "wetlands" consisting of 3.16 acres of "isolated wetlands" over which jurisdiction was based upon the "Migratory Bird Rule," 16.61 acres of "tributaries to navigable waters," and 1.81 acres of wetlands "adjacent" to such tributaries. However, subsequent to the decision in *SWANCC*, Complainant withdrew its allegations regarding the 3.16 acres of "isolated wetlands" on fields #3 and #4 for lack of jurisdiction.[308] Further, in light of testimony given at hearing by Mr. Leidy that the "wetland" originally identified as "wetland #6" on field #4 is actually an irrigation "spigot,"[309] Complainant withdrew its allegation regarding "wetland #6" which Complainant believed had comprised 0.84 acres of "tributaries to navigable waters,"[310] so that the total "tributary" acreage alleged to have been destroyed is now 15.77 acres. Thus, the total acreage of "waters of the United States" currently alleged to have been deep-ripped is 21.04 acres, consisting of 3.46 acres of "adjacent wetlands" on field #5, 15.77 acres of "tributaries to navigable waters" on fields #3 and #4, and 1.81 acres of "adjacent wetlands" on fields #3 and #4.[311] Complainant does not rely upon the "Migratory Bird Rule" to claim jurisdiction over these 21.04 acres, stating in the complaint that:

> The drainage swales and the intermittent drainages on the Veldhuis property are tributaries to the San Joaquin River which is tributary to the Pacific Ocean. These drainage swales and intermittent drainages are waters of the United States within the meaning of CWA Section 502(7). 33 U.S.C. Section 1362(7). As a tributary of a water of the United States, the drainage swales, intermittent tributaries and the adjacent wetlands, including vernal pools adjacent to the tributaries, are themselves

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[307]Complaint, p. 8, ¶ 29.

[308]*See* Complainant's Brief, pp. 20-21, *including* n.13 (regarding wetlands number 5 through 10 and 13 through 16). *See also*, Complainant's Reply Brief, pp. 2-3.

[309]Tr., p. 572.

[310]Complainant explained: "The complaint originally listed 16.61 acres of tributaries, but at hearing, upon receipt of new information, [Complainant] ... subtracted wetland six which was .84 acres for a total of 15.77. Transcript at 572." (Complainant's Brief, p. 11, n.7. *See also*, Complainant's Reply Brief, p. 3, n.3.). Complainant's subtraction of wetland #6 from the "tributary" acreage appears to be in error, as the allegation regarding wetland #6 was already withdrawn as an "isolated" wetland.

[311]More specifically, referring to the "Polygon #'s" listed on the calculation sheet (CX 32, pp. 1-2) and marked on the maps (CX 31; CX 32, p. 3), Mr. Leidy testified that wetlands number 5-10 and 13-16 were "isolated wetlands" totaling 3.16 acres and that wetlands number 3, 4, and 20 were "adjacent" wetlands totaling 1.81 acres. (Tr., pp. 230-232). The remaining wetlands number 1, 2, 11, 12, 17-19, and 21 (a-g), were thus found by Mr. Leidy to be "tributaries to waters of the United States" totaling 16.61 acres. (CX 32). Following Complainant's withdrawal of allegations regarding the 3.16 acres of "isolated wetlands" and 0.84 acres of "tributaries" (*i.e.*, wetland #6), Complainant currently alleges that prior to Respondent's deep-ripping in 1997 there had existed 17.58 acres of "waters of the United States" on fields #3 and #4, consisting of 15.77 acres of "tributaries to waters of the United States" [wetlands # 1, 2, 11, 12, 17-19, and 21 (a-g), minus the mistakenly subtracted .84 acres of wetland #6] and 1.81 acres of wetlands "adjacent" to such tributaries (wetlands # 3, 4, and 20). All the original allegations regarding 3.46 acres of "vernal pools" on field #5 remain unchanged as those wetlands are all alleged to have been "adjacent" to tributaries to waters of the United States and therefore do not rely on the "Migratory Bird Rule" for jurisdiction.

waters of the United States within the meaning of CWA Section 507(7). 33 U.S.C. Section 1362(7).[312]

Thus, federal jurisdiction over the 21.04 acres of wetlands alleged to have been deep-ripped is not premised upon the "Migratory Bird Rule," but rather upon "adjacency" to navigable waters. Before considering whether Complainant has demonstrated that the wetlands are in fact adjacent to tributaries to navigable waters in this case, it is necessary to determine what, if any, effect the *SWANCC* decision has upon that consideration.

A. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*

In *SWANCC*, the petitioner wished to dispose of solid waste at "an abandoned sand and gravel pit with excavation trenches that had evolved into permanent and seasonal ponds,"[313] and so had applied to the Corps for a permit under Section 404(a) of the CWA, 33 U.S.C. § 1344(a), to fill some of the ponds. Although the site contained no "wetlands" as defined at 33 CFR § 328.3(b), the site did provide habitat for birds which migrated across state lines. Therefore, the Corps asserted jurisdiction under the "Migratory Bird Rule," a rule which had attempted to "clarify" the Corps' jurisdiction under Section 404 of the CWA.

Under Section 404 of the CWA, the Corps may issue permits "...for the discharge of dredged or fill material into the navigable waters..." The term "navigable waters" is defined by Section 502(7) of the CWA, 33 U.S.C. § 1362(7), to mean "...the waters of the United States." In 1974, the Corps defined "waters of the United States" to include: "...those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce."[314] This definition essentially parallels the Corps' current definition found at 33 CFR § 328.3(a)(1).[315] Then in 1977 the Corps added language defining "waters of the United States" to include: "...isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce."[316] This definition essentially parallels the Corps' current

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[312]Complaint, p. 5, ¶ 16.

[313]*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. at 159, 121 S.Ct. at 676 (quotation from the *Syllabus*).

[314]33 CFR § 209.120(d)(1) (1974), *quoted* in *SWANCC*, 531 U.S. at 168, 121 S.Ct. at 680.

[315]33 CFR § 328.3(a)(1) (1999) defines "waters of the United States" to include: "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide..."

[316]33 CFR § 323.3(a)(5) (1978), *quoted* in *SWANCC*, 531 U.S. at 168-169, 121 S.Ct. at 681.

definition found at 33 CFR § 328.3(a)(3).[317] In 1986, the Corps attempted to "clarify" the extent of its jurisdiction under 33 CFR § 328.3(a)(3), stating that such jurisdiction extended to intrastate waters "...[w]hich are or would be used as habitat by ... migratory birds which cross state lines."[318] This 1986 clarification of 33 CFR 328.3(a)(3) is the Corps' "Migratory Bird Rule" and is based upon the theory that the degradation of non-navigable, *isolated* "intrastate" wetlands frequented by migratory birds impacts "interstate commerce" in that millions of Americans spend billions of dollars annually to hunt or watch migratory birds.[319]

The Court in *SWANCC* held that: "...33 CFR § 328.3(a)(3) (1999), as clarified and applied to petitioner's balefill site pursuant to the 'Migratory Bird Rule,' 51 Fed.Reg. 41217 (1986), exceeds the authority granted to [the Corps] under § 404(a) of the CWA."[320] The Court also held that the Corps' "Migratory Bird Rule" was not entitled to *Chevron*[321] deference as an administrative interpretation of Section 404(a) because Section 404(a) was clear and unambiguous, and because the rule raised significant constitutional questions such as whether Congress could grant such power under the Commerce Clause consistent with established principles of federalism.[322] However, while the Court denied *Chevron* deference because it *recognized* the "Commerce Clause question," the Court declined to *answer* the "Commerce Clause question," explaining:

> We are asked to decide whether the provisions of § 404(a) may be fairly extended to these waters, and, if so, whether Congress could exercise such authority consistent with the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3. We answer the first question in the negative and therefore *do not reach the second*.[323]

Further, in holding that the Corps' jurisdiction did not extend to "nonnavigable, isolated,

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[317]33 CFR § 328.3(a)(3) (1999) defines "waters of the United States" to include: "...waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce..."

[318]51 Fed.Reg. 41217 (1986).

[319]*See SWANCC*, 531 U.S. at 166, 121 S.Ct. at 679, n.2.

[320]*SWANCC*, 531 U.S. at 174, 121 S.Ct. at 684.

[321]*Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

[322]The Court held: "We find § 404(a) to be clear, but even were we to agree with respondents, we would not extend *Chevron* deference here." *SWANCC*, 531 U.S. at 172, 121 S.Ct. at 683. The Court explained: "Permitting respondent to claim federal jurisdiction ... [under] the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use... We thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation, and therefore reject the request for administrative deference." *SWANCC*, 531 U.S. at 174, 121 S.Ct. at 684 (citation and footnote omitted).

[323]*SWANCC*, 531 U.S. at 162, 121 S.Ct. at 677-678 (emphasis added).

intrastate waters" based upon the "Migratory Bird Rule,"[324] the Court also acknowledged the continuing vitality of its holding in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985), that the Corps does have "404 jurisdiction" over wetlands which are "adjacent" to "navigable waters," including wetlands adjacent to tributaries to navigable waters.[325] The Court emphasized that the rationale underlying *Riverside Bayview* was "...the significant nexus between the wetlands and '*navigable waters*'..."[326] That is, while "isolated" wetlands which provide habitat for migratory birds may indeed affect "interstate commerce," they do not do so by providing navigable channels for interstate commerce, such "navigability" being at the heart of Section 404(a)'s jurisdictional grant.[327] This "navigation" rationale driving *SWANCC* was well-stated by the court in *United States v. Buday*, 138 F.Supp.2d 1282 (D.Mont. 2001), in determining that *SWANCC* did not affect the application of 33 CFR §§ 328.3(a)(1), (2), or (5):

> In determining whether [the "Migratory Bird Rule"] conformed to Congress' intent in the [CWA], the Court [in *SWANCC*] emphasized the rationale for Congress' Commerce Clause power over the "waters of the United States": their use or potential for use as channels of interstate or foreign *navigation*... The Court struck the [Migratory Bird Rule] ... because it premised Congress' power on the effects that a water body could have on interstate commerce... Even though the Court did *not* strike any part of 33 C.F.R. § 328.3(a)(3), the decision raises serious questions about the continued viability of that subsection... But this Court need not solve these puzzles. 33 C.F.R. § 328.3(a)(3) is based on a different inflection of the theory of Congress' powers over the waters of the United States [than the other subsections of 33 CFR §§ 328.3(a)]. Subsection (a)(3) focuses on the *effects* that "intrastate waters ..." could have on interstate commerce, not on their use as *channels* for interstate commerce... The other subsections of the same regulation focus on the use or potential use of water as a channel for interstate commerce, and the Supreme Court has found those subsections consistent with Congress' intent in the [CWA] and with the Commerce Clause. In short, those subsections relate directly to navigability, the

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[324]*SWANCC*, 531 U.S. at 166, 121 S.Ct. at 679.

[325]The Court in *SWANCC* explained: "In [*Riverside Bayview*], we held that the Corps had § 404(a) jurisdiction over wetlands that actually abutted on a navigable waterway. In so doing, we noted that the term 'navigable' is of 'limited import' and that Congress evidenced its intent to 'regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term.'" *SWANCC*, 531 U.S. at 167, 121 S.Ct. at 680 (citation omitted).

[326]*SWANCC*, 531 U.S. at 176, 121 S.Ct. at 680 (emphasis added).

[327]Regarding the genesis of the statutory focus upon "navigability," *see SWANCC*, 531 U.S. at 177, 121 S.Ct. at 685-686 (Stevens, J., *dissenting*): "Federal regulation of the Nation's waters began in the 19th century with the efforts targeted exclusively at 'promot[ing] water transportation and commerce.' This goal was pursued through the various Rivers and Harbors Acts, the most comprehensive of which was the RHA of 1899. Section 13 of the 1899 RHA, commonly known as the Refuse Act, prohibited the discharge of 'refuse' into any 'navigable water' or its tributaries, as well as the deposit of 'refuse' on the bank of a navigable water 'whereby navigation shall or may be impeded or obstructed' without first obtaining a permit from the Secretary of the Army." (Citations and footnote omitted).

absence of which concerned the Court in (*SWANCC*).[328]

Thus, while the Court in *SWANCC* did hold that Section 404(a) does not grant the Corps jurisdiction over wetlands that are *in no way* connected with "navigable waters" and which affect interstate commerce *only* in that they provide migratory bird-related recreational opportunities, the Court did *not* alter existing jurisprudence regarding wetlands whose effect upon interstate commerce is due to *some* connection with "navigable" waters.[329] The Court did not devolve commerce clause jurisdiction which is predicated on navigability[330] or require a closer nexus between wetlands and such waters for "adjacency." As such, pre-*SWANCC* wetland case law which is not based on 33 CFR § 328.3(a)(3) *as applied by* the "Migratory Bird Rule" is unchanged by *SWANCC*.[331]

To the extent that Respondent in this case suggests that *SWANCC* has signaled a fundamental shift in the "interpretation of the Clean Water Act,"[332] that argument is unavailing.[333] As the court explained in *United States v. Interstate General Company*, 152 F.Supp.2d 843 (D.Md. 2001), *SWANCC* is a narrow holding:

The Government [in *Interstate General*] ... relied solely on their primary theory of the

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[328]*U.S. v. Buday*, 138 F.Supp.2d 1282, 1286-1288 (D.Mont. 2001) (citations and footnotes omitted) (emphases in original).

[329]Further, the Court did not even foreclose federal jurisdiction over "*isolated* wetlands ... that are *not* part of a tributary system to ... interstate or navigable waters of the United States, the degradation or destruction of which *could affect interstate commerce*" [33 CFR § 328.3(a)(3) (emphasis added)], where the effect upon interstate commerce is due to something other than use by migratory birds. That is, as the court in *Buday* recognized, the Court in *SWANCC* "did *not* strike any part of 33 C.F.R. § 328.3(a)(3)," [*Buday*, 138 F.Supp.2d at 1287 (emphasis in original)], but only Section 328.3(a)(3) "as clarified and applied to petitioner's balefill site pursuant to the Migratory Bird Rule..." (*SWANCC*, 531 U.S. at 174, 121 S.Ct. at 684). Thus, the question remains as to whether "isolated" intrastate wetlands may still be regulated under 33 CFR § 328.3(a)(3), even if they do not affect "navigable" waters, if their destruction could have some effect (other than harming recreational opportunities associated with migratory birds) upon interstate commerce.

[330]Indeed, the Court did not diminish commerce clause jurisdiction *generally* under Section 404. Inasmuch as the Court found that Congress did not grant the jurisdiction claimed by the "Migratory Bird Rule," the Court explicitly did not reach the question of "whether Congress *could* exercise such authority consistent with the Commerce Clause..." *SWANCC*, 531 U.S. at 162, 121 S.Ct. at 677-678 (citation omitted) (emphasis added). *See also, Rancho Viejo, LLC v. Norton*, 2001 WL 1223502, *9 (D.D.C., Aug. 20, 2001): "In *SWANCC*, the Corps had interpreted § 404(a) of the (CWA) to confer federal authority over an abandoned sand and gravel pit. The Supreme Court, however, held that the Corps had exceeded its authority under the (CWA). *But the Court in SWANCC resolved the issue on statutory grounds, thus avoiding 'the significant constitutional and federalism questions raised...*'" (Citations omitted) (emphasis added).

[331]*See* notes 329 and 330, *supra*.

[332]Respondent's Reply Brief, p. 6, ln. 14-18.

[333]*See* notes 329 and 330, *supra*. Moreover, the recent acts of terrorism, including bio-terrorism, readily illustrate the necessary role of the Federal Government in events that occur locally. Interpretation of the term "waters of the United States" should be informed by such role.

> case (the adjacency/abutting land theory of tributaries impacting on navigable waters) which involved 33 CFR § 328.3(a)(1), (a)(5), and (a)(7). The *SWANCC* case is a narrow holding in that only 33 CFR § 328.3(a)(3), as applied to the ... Migratory Bird Rule, is invalid... Because the Supreme Court only reviewed 33 CFR § 328.3(a)(3), it would be improper for this Court to extend the *SWANCC* Court's ruling any farther than they clearly intended.[334]

I similarly find it improper to extend the *SWANCC* holding beyond 33 CFR § 328.3(a)(3) as clarified and applied by the "Migratory Bird Rule." As jurisdiction over the 21.04 acres in the case at bar is not premised upon CFR § 328.3(a)(3) or the "Migratory Bird Rule," *SWANCC* does not control this case. Paragraph 16 of the complaint, which was filed prior to issuance of the *SWANCC* decision,[335] alleges that the "drainage swales and intermittent drainages ... are tributaries to the San Joaquin River" and that the "adjacent wetlands, including vernal pools adjacent to the tributaries, are themselves waters of the United States..."[336] Further, although Respondent cites Ms. Goldmann's testimony at pages 268-269 for the proposition that "jurisdiction on field 5 was entirely based on the Migratory Bird Rule,"[337] Respondent has mischaracterized Ms. Goldmann's testimony, which pertained to the use of the wetlands by migratory waterfowl only as one of a number of factors she considered when calculating the nature, circumstances, extent, and gravity of the alleged violation. Ms. Goldmann did not suggest that federal jurisdiction over the wetlands was premised upon the "Migratory Bird Rule." In addition, following issuance of *SWANCC*, Complainant withdrew its allegations regarding the 3.16 acres of "isolated wetlands" over which jurisdiction had been premised on the "Migratory Bird Rule." Thus, Complainant asserts jurisdiction over the 21.04 acres of wetlands remaining subject to the complaint upon navigability; specifically, on the language paralleling 33 CFR §§ 328.3(a)(1) (waters susceptible to use in interstate or foreign commerce, including those subject to the ebb and flow of the tide),[338] 33 CFR § 328.3(a)(5) (tributaries to such waters), and 33 CFR § 328.3(a)(7) (wetlands adjacent to such waters).[339]

As Complainant does not base jurisdiction in this case upon the "Migratory Bird Rule," such jurisdiction being premised instead upon navigability, and the Supreme Court's decision in *SWANCC* is a narrow holding invalidating only the "Migratory Bird Rule" without restricting "Commerce

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[334]*United States v. Interstate General Company*, 152 F.Supp.2d 843, 847 (D.Md. 2001) (citations omitted).

[335]The complaint in this case was filed September 30, 1999.

[336]Complaint, ¶ 16.

[337]Respondent's Brief, p. 6.

[338]33 CFR § 328.3(a)(1) embodies the Corps' 1974 definition of "navigable waters" [33 CFR § 209.120(d)(1) (1974)] that the Court in *SWANCC* specifically endorsed.

[339]Complaint, p. 3, ¶ 8. The court in *United States v. Interstate General Company*, 152 F.Supp.2d 843 (D.Md. 2001) found that *SWANCC* was narrowly tailored to 33 CFR § 328.3(a)(3) and did not affect 33 CFR §§ 328.3(a)(1), (5), or (7). *Interstate General*, 152 F.Supp.2d at 847.

Clause jurisdiction" based upon "navigability,"[340] the *SWANCC* decision does not affect this case.

B. Wetlands Are Adjacent to Tributaries to Navigable Waters

Thus, the real issue is whether the impacted wetlands on Respondent's property are adjacent to tributaries to navigable waters. In this regard, Respondent first contends that the wetlands are not "jurisdictional waters" because Complainant has not demonstrated a hydrological connection between the wetlands and tributaries to navigable waters (*i.e.*, "adjacency"). Second, Respondent asserts that even if the wetlands are hydrologically connected to navigable waters, any such connection is too attenuated to establish jurisdiction because the distances and/or number of tributary connections involved are too great;[341] because some tributaries may be of human construction;[342] and/or because the connection is by "intermittent creeks" which, subsequent to the *SWANCC* decision, cannot be considered "tributaries."[343] Applying the law as interpreted in both pre- and post-*SWANCC* cases to the record before me, for the reasons discussed below, I find that Complainant has demonstrated a surface water connection between the wetlands on Respondent's property and either Sand Creek[344] or the San Joaquin or Merced Rivers,[345] and that this finding is not precluded by the distances or number of tributary connections involved, the intermittency of the connection, or the fact that some tributaries may have been of human construction.

1) Adjacency to Tributaries

The Corps regulation at 33 CFR § 328.3(c) states: "The term *adjacent* means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-

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[340] *See* notes 329 and 330, *supra*.

[341] *See, e.g.*, Respondent's Reply Brief, p. 2: "It is quite a stretch of the imagination to achieve 'navigable waters' on this isolated parcel of farm land miles from either the San Joaquin River or the Merced River." *See also*, Respondent's Brief, p. 4: "The subject property is located miles from any 'navigable' 'waters.'"

[342] *See, e.g.*, Tr., p. 213, ln. 17-20 (Mr. Gnass).

[343] *See, e.g.*, Respondent's Reply Brief, p. 6: "Subsequent to *SWANCC*, the case of *Rice v. Harken* (2001) 250 Fed.3d 264 [sic]. In pertinent part, the court determined ... [that] [u]nder *SWANCC* a body of water is jurisdictional only if it is 'actually navigable or is adjacent to an open body of navigable water.' Intermittent creeks are not sufficiently linked to an open body of navigable water to warrant Clean Water Act protection..." [Citation omitted in original].

[344] Mr. McElhiney testified that Sand Creek is "a jurisdictional water of the United States," (Tr., p. 39), and Respondent did not argue to the contrary. Mr. McElhiney's knowledge of the jurisdictional status of Sand Creek is based upon the fact that he assisted the Sand Creek Flood Control District in obtaining a "404 Permit" to maintain Sand Creek. (Tr., p. 39, ln. 1-4; Tr., p. 77, ln. 16 - p. 78, ln. 1).

[345] The San Joaquin River and the Merced Rivers are navigable-in-fact waterways. (*See, e.g.*, Tr., pp. 194-195).

made dikes or barriers, natural river berms, beach dunes, and the like are 'adjacent wetlands.'"[346]

The Supreme Court in *United States v. Riverside Bayview Homes, supra*, held that the Corps does have "404 jurisdiction" over wetlands which are "adjacent" to "navigable waters" or their tributaries.[347] In holding that the Corps' jurisdiction did not extend to "nonnavigable, isolated, intrastate waters" based on the "Migratory Bird Rule,"[348] the Court in *SWANCC* acknowledged the continuing vitality of this holding in *Riverside Bayview*.[349] Thus, the *Riverside Bayview* Court's consideration of "adjacency" is worth quoting here at length:

> ...[T]he Corps has determined that wetlands adjacent to navigable waters do as a general matter play a key role in protecting and enhancing water quality:
>
> > "The regulation of activities that cause water pollution cannot rely on ... artificial lines ... but must focus on all waters that together form the entire aquatic system. Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system.
> >
> > "For this reason, the landward limit of Federal jurisdiction under Section 404 must include *any adjacent wetlands that form the border of* ***or*** *are in reasonable proximity to other waters of the United States*, as these wetlands are part of this aquatic system." 42 Fed. Reg. 37128 (1977).
>
> ... In view of the breadth of the federal regulatory authority contemplated by the [CWA] itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgement that adjacent wetlands may be defined as waters under the Act.

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[346] *See also*, 40 CFR § 230.3(b), setting forth identical language. *See also*, Stipulations of the parties at CX 69, ¶ 18.

[347] "Waters of the United States" include waters that are tributary to navigable waters. 40 CFR § 122.2. *See, e.g., Idaho Rural Council v. Bosma*, 143 F.Supp.2d 1169, 1178 (D.Idaho 2001).

[348] *SWANCC*, 531 U.S. at 166, 121 S.Ct. at 679.

[349] The Court in *SWANCC* explained: "In [*Riverside Bayview*], we held that the Corps had § 404(a) jurisdiction over wetlands that actually abutted on a navigable waterway. In so doing, we noted that the term 'navigable' is of 'limited import' and that Congress evidenced its intent to 'regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term.'" *SWANCC*, 531 U.S. at 167, 121 S.Ct. at 680 (citation omitted). *See also, Idaho Rural Council v. Bosma*, 143 F.Supp.2d 1169, 1178 (D.Idaho 2001): "The Ninth Circuit defines waters of the United States broadly. Though the Supreme Court [in *SWANCC*] has recently articulated its unwillingness to read the term 'navigable' entirely out of the CWA, it also made clear that waters of the United States include at least some waters that are not navigable in the classical sense, such as non-navigable tributaries and streams. *See Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 31 U.S. 159, 121 S.Ct. 657, 682, 148 L.Ed.2d 576 (2001)." (Citation omitted).

> *This holds true even for wetlands that are not the result of flooding or permeation by water having its source in adjacent bodies of open water*. The Corps has concluded that wetlands *may affect the water quality* of adjacent lakes, rivers, and streams *even when the waters of those bodies do not actually inundate the wetlands. For example, wetlands that are not flooded by adjacent waters may still tend to drain into those waters*. In such circumstances, the Corps has concluded that wetlands may serve to filter and purify water draining into adjacent bodies of water, and to slow the flow of surface runoff ... thus preventing flooding and erosion. *In addition, adjacent wetlands may "serve significant biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic ... species."* In short, the Corps has concluded that wetlands adjacent to lakes, rivers, streams, or other bodies of water may function as *integral parts of the aquatic environment even when moisture creating the wetlands does not find its source in the adjacent bodies of water*... [W]e therefore conclude that a definition of "waters of the United States" encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act.[350]

Although the wetlands at issue in *Riverside Bayview* "actually abut[ted] on a navigable waterway,"[351] the Court's reasoning does not suggest that "actual abutment" is necessary to a finding of "adjacency." Spatially, the regulatory language approved by the Court authorized jurisdiction over wetlands that *either* "form the border" of other waters of the United States (*i.e.*, actual abutment) *or* that are "in reasonable proximity" to such waters.[352] Due to "the inherent difficulties of defining precise bounds to regulable waters," "adjacency" by "reasonable proximity" is to be determined by whether such reasonably proximate wetlands form an "integral part of the aquatic environment;" when the wetlands are "part of [the] aquatic system" of the proximate waters of the United States. Such a hydrological connection, in turn, exists even where the wetlands are not fed by the "waters of United States" but nevertheless affect the quality of such waters by serving to "filter and purify" water draining from the wetland into the navigable water, preventing flooding or erosion by slowing surface runoff, or serving biological functions "including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic ... species."

Such a hydrological nexus was found, for example, in *U.S. v. Banks*, 115 F.3d 916 (11th Cir. 1997). There, the wetlands at issue were "at least one-half mile from either of two navigable water channels,"[353] were separated from the navigable waters by "a fifty foot wide paved, elevated

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[350] *Riverside Bayview Homes*, 474 U.S. 121 at 133-135 (citations omitted) (emphases added).

[351] *Id.* at 135.

[352] Again, 33 CFR § 328.3(c) states that: "The term *adjacent* means bordering, contiguous, *or* neighboring." (Emphasis added).

[353] *U.S. v. Banks*, 873 F.Supp 650, 658 (S.D.Fla. 1995).

street,"[354] and were connected by surface water only "in times of storms, such as hurricanes."[355] The court nevertheless found the wetlands to be "adjacent" to the navigable waters, explaining:

> Experts testified that a hydrological connection exists between Banks' lands and Pine and Bogie Channels. This connection was primarily through groundwater, but also occurred through surface water during storms. The court also found *ecological adjacency based on the water connections and the fact that the lots serve as habitat for birds, fish, turtles, snakes and other wildlife*.[356]

Such a hydrological connection was also found in *Idaho Rural Council v. Bosma*, 143 F.Supp.2d 1169 (D.Idaho 2001), a case that took the *SWANCC* decision into consideration. In that case, the plaintiffs alleged that the defendants were discharging pollutants into Butler and Walker Springs, which were not navigable waters but were, according to the plaintiffs, "waters of the United States" by virtue of their connection with Clover Creek, which was clearly a "water of the United States." Observing that "Walker Spring runs into a pond, *across a pasture and then into the Northside Canal, which runs into Clover Creek* at some point downstream... [and] Butler Spring discharges into Clover Creek, *at least seasonally, by means of a head gate*,"[357] the court concluded that: "Butler and Walker Springs are sufficiently connected through surface water to Clover Creek as to fall within the definition of waters of the United States."[358]

In the case here, as discussed *supra*, Mr. McElhiney determined that 3.46 acres of "adjacent wetlands" were present on field #5, and Mr. Leidy determined that 1.81 acres of "adjacent wetlands" had been present on fields #3 and #4.

Regarding fields #3 and #4, Mr. Leidy testified that these wetlands were adjacent to drainage channels which flowed into the Highline Canal and/or the Turlock Canal,[359] which were tributary to either the San Joaquin River or the Merced River,[360] which were themselves navigable waters.[361] Mr. Leidy described in detail, using the USGS maps entered as CX 51 and CX 52, the paths taken by water draining from the 1.81 acres of "adjacent wetlands" on Respondent's property into the

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[354] *Id. See also, U.S. v. Banks*, 115 F.3d 916, 920-921 (11th Cir. 1997).

[355] *U.S. v. Banks*, 873 F.Supp at 658.

[356] *U.S. v. Banks*, 115 F.3d at 921 (emphasis added). *See also, United States v. Tilton*, 705 F.2d 429 (11th Cir. 1983).

[357] *Idaho Rural Councel v. Bosma*, 143 F.Supp.2d 1169, 1179, n.4 (D.Idaho 2001) (emphasis added).

[358] *Id.* at 1179.

[359] Tr., pp. 191-195.

[360] Tr., pp. 193-194, 222-223.

[361] Tr., pp. 194-195. In addition, the parties have stipulated that "[t]he San Joaquin River is a tributary to the Pacific Ocean." (CX 69, ¶ 23).

Highline and Turlock Canals, testifying as follows:

> The boundary is sort of that square, then you come about halfway up the next section, you will see a little dotted line... *That is denoted as an intermittent drainage by the [USGS] on their topographical maps.* That is within the combined areas of fields three and four. That drainage sort of runs in a northwesterly direction towards the Highline Canal. It crosses under the Highline Canal and *then enters a ... drainage ditch* up here by these ... structures. And then it continues, turns up, and then takes a left and heads in a generally westerly, southwesterly direction, and we are moving on to the next topographic map again here... and works its way down and *enters the Turlock Canal*... In addition, there's another pathway by which waters can be tributary. All along the Highline Canal ... there's those little pipes that go through levee and into the Highline Canal. There are a number of those that drain this whole western portion of ... fields three and four. And so water that runs off of three and four goes *through those drainage pipes and into the Highline Canal*... So there are two fairly evident routes where waters on this site are tributary to other waters.[362]

Thus, assuming for the moment that the Highline and Turlock Canals flow into navigable waters, Mr. Leidy described two hydrological connections between the 1.81 acres of "adjacent wetlands" on fields #3 and #4 and navigable waters. First, water flows from the wetlands into an "intermittent drainage" identified on the USGS map (CX 51) on fields #3 and #4, then flows into a "drainage ditch," then flows into the Turlock Canal. Alternatively, water flows from the wetlands through a "drainage ditch" or "drainage swale" on fields #3 and #4,[363] and then into "drainage pipes," directly emptying into the Highline Canal which transects Respondent's property. Therefore, the "tributaries" to which the wetlands are "adjacent" are either the "intermittent drainage" located on fields #3 and #4 [identified on the USGS map (CX 51) by the dotted line], or the "drainage ditch/swales" located on fields #3 and #4, described by Mr. Leidy, that flow into the drainage pipes shown in the photographs at CX 35 and CX 36.

Mr. Leidy explained that his finding of "adjacency" was derived from his examination of aerial photographs and from his site visit, and was based upon the physical proximity of the wetlands to the tributaries, a strong likelihood of hydrological connection, and a biological connection evinced by the

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[362]Tr., pp. 192-194 (emphasis added). Further, the record contains two photographs of the drainage pipes taken during Mr. Leidy's site visit on May 16, 2000. (CX 35; CX 36). Mr. Leidy testified, regarding these photographs: "This [CX 35] is a photo of a drainage pipe that runs from the west side of fields three and four through the levee adjacent to the Highline Canal and into the Highline Canal... This [CX 36] is another photo of another drainage pipe that is on the western edge of fields three and four that runs from the land-ward side ... of the levee through the levee and into the Highline Canal. (Tr., pp. 158-159). *See also*, Tr., pp. 199-200.

[363]Mr. Leidy elaborated: "Q: ...There is a drain, right, going into the Highline Canal...? A: That was a drain that drains areas in fields three and four into the Highline Canal. Q: And how far into three and four does that drain go? A: That is the beginning of the drain. *And then there is a drainage ditch, if you will, or drainage swale area that comes towards this bottom of the photo ... and then ... they run different distances back into – towards the fields three and four.*" [Tr., pp. 199-200 (emphasis added)].

fact that the wetlands served as habitat for migratory birds.[364] The hydrological connection between the 1.81 acres of "adjacent wetlands" on fields #3 and #4 and the "tributaries to navigable waters" described by Mr. Leidy clearly satisfies the requirements for "adjacency" under 33 CFR § 328.3(c) and 40 CFR § 230.3(b) as interpreted and applied by the courts, as discussed above.

Regarding field #5, Mr. McElhiney testified that the 3.46 acres of wetlands were adjacent to Sand Creek, which is itself a "water of the United States"[365] and runs through the southwestern portion of field #5.[366] Mr. McElhiney explained the hydrological connection as follows:

> Q: How are Sand Creek and those wetland areas related?
> A: ... In this landscape there's usually an intermittent stream that is dissecting through a swale type of position. And ... we have these intermittent wetlands, these vernal pool[s] ..., that when they overflow, they overflow to another pool in a lower elevation, to another pool in a lower elevation, ... and eventually they end up in an intermittent stream. In this case it would be Sand Creek.
> ...
> Q: ...[W]ould you say that the wetlands and Sand Creek are hydrologically connected?
> A: I have no reason to doubt that these pools ... did not [sic] overtop and run downhill, and Sand Creek is downhill ... and would receive waters from them.[367]

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[364]Specifically, Mr. Leidy testified as follows: "A: My definition of adjacent is close physical proximity to a tributary water. And that there may be ... a strong likelihood that it is either some sort of biological or hydrologic connection to the adjacent water and the tributary. Q: And this strong likelihood, you noticed this on the site when you were there that one day ... ? ... A: That is my opinion based on the aerial [photographs], and the fact that I observed migratory birds in this unripped portion of the site up here [in the northwestern portion of field #3]. And so ... it would be reasonable to expect that birds that used a tributary portion here, or used any of that adjacent wetlands, or these tributary wetlands here, could also use this wetland, because it is in such close physical proximity. And that would be the biological link between the wetlands. Q: So if ... our U.S. Supreme Court throws out the migratory bird rule, how would you then classify this wetland ... [b]ecause my understanding is you used ... three items from the aerial. You used close proximity, strong likelihood in hydrologic conditions of adjacen[cy] and observed migratory birds? A: Mm-hmm. Q: So would that still make it a jurisdictional wetland? A: Yes, because adjacent wetlands don't require migratory birds to be adjacent. It is just additional evidence to support ... that they are ... [b]iologically [connected]." (Tr., pp. 232-235).

[365]Mr. McElhiney testified that Sand Creek is "a jurisdictional water of the United States," (Tr., p. 39), and Respondent did not argue to the contrary. Mr. McElhiney's knowledge of the jurisdictional status of Sand Creek is based upon the fact that he assisted the Sand Creek Flood Control District in obtaining a "404 Permit" to maintain Sand Creek. (Tr., p. 39, ln. 1-4; Tr., p. 77, ln. 16 - p. 78, ln. 1).

[366]*See, e.g.*, CX 2; CX 51. *See also*, Tr., pp. 38-39.

[367]Tr., pp. 37-39. *See also*, Tr., p. 84 (Mr. Leidy): "Q: So to the extent that there's more water than vernal pools can hold, then it might eventually make it into Sand Creek, other than that it will not; is that correct? A: That is correct, yes."

Mr. Van Gaalen similarly testified that: "...sometimes if you had a real heavy rain in the winter months, some of this went this way and eventually wound up in the Sand Creek over here."[368] The hydrological connection between the 3.46 acres of "adjacent wetlands" on field #5 and the "waters of the United States" described by Mr. McElhiney clearly satisfies the requirements for "adjacency" under 33 CFR § 328.3(c) and 40 CFR § 230.3(b) as interpreted and applied by the courts, as discussed above.

2) Surface Water Connection to Navigable Waters

The next question is whether Complainant has demonstrated a surface water connection between the "tributaries" on Respondent's property and the navigable waters of the San Joaquin or Merced Rivers. This discussion speaks both to the "tributaries" to which the 1.81 acres of "adjacent wetlands" on fields #3 and #4 are adjacent and to the 15.77 acres of "tributary wetlands" identified as "drainage swales and intermittent drainages"[369] which Mr. Leidy found to have been on fields #3 and #4.[370] I find that Complainant has demonstrated such a connection.

The distinction in the present case between "adjacent" and "tributary" wetlands is a fine one. The "tributaries" to which the "adjacent" wetlands are "adjacent" appear to comprise a portion of the "tributary wetlands" themselves, so that the same testimony describes the hydrological connection of both types of wetlands to the "navigable waters" of the San Joaquin and Merced Rivers. Regarding the 15.77 acres[371] of "tributary wetlands," Mr. Leidy explained:

> ...[T]hose areas that were either directly connected to a tributary that ran into another tributary of a water of the United States, were counted as tributaries. So, for instance ... these are all drainage swales or drainages, and they are all connected physically and hydrologically, because you start from a higher portion of the property and water runs this way. So they are the connections to a tributary. But then, in addition, there are wetland features all along this portion of the Highline Canal, that would be a tributary by virtue of being connected through drainage pipes to the Highline Canal, which then goes, as I had shown earlier, as a tributary. So those areas, in my judgment, were considered tributary waters.[372]

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[368]Tr., p. 344.

[369]Complaint, p. 8, ¶ 29.

[370]The 3.46 acres of "adjacent wetlands" on field #5 are adjacent to Sand Creek.

[371]As explained *supra*, although Mr. Leidy originally delineated 16.61 acres of "tributary wetlands" on fields #3 and #4 (*see, e.g.*, Tr., p. 208), Complainant later subtracted 0.84 acres from this amount in light of Mr. Leidy's subsequent finding that "wetland #6" was actually an "irrigation spigot," so that the total acreage of "tributary wetlands" currently alleged to have been deep-ripped is 15.77 acres.

[372]Tr., pp. 208-209.

As discussed *supra*, Mr. Leidy described, using the USGS maps entered as CX 51 and CX 52, two different surface water connections between the wetlands on fields #3 and #4 and the Turlock or Highline Canals. First, water flows from the wetlands into an "intermittent drainage" identified on the USGS map (CX 51) on the fields, then flows into a "drainage ditch," and then flows into the Turlock Canal. Alternatively, water flows from the wetlands through "drainage swales" on the fields, then into "drainage pipes," and then directly into the Highline Canal which transects Respondent's property.

Regarding the first path, once the water reaches the Turlock Canal, Mr. Leidy described its journey as follows:

> And the Turlock main canal, then, if you follow this in a generally southerly direction, ... crosses [Santa Fe Avenue]... Then down south, and off this topographic map and onto this one... We are now onto the Turlock ... quadrangle. And ... the Turlock main canal ... heads in a southerly direction, all the way down until where you see this bifurcation... [I]t ... goes either south, by drainage ditches or canals, to the Highline Canal; and then Highline Canal eventually winds its way down here to the Merced River. Or alternatively, it will enter the ... lateral number six and head in a westerly direction ... over to where it will join the San Joaquin River. [373]

Regarding the second path, once the water enters the Highline Canal via the "drainage ditches," Mr. Leidy described its journey as follows:

> ...[T]he Highline Canal ... then heads in a southerly direction, crosses Monte Vista [Avenue], and turns westerly again, southerly direction, and ... runs down sort of this edge of the map... It eventually comes down to here, and ... this is a different quad because we are off that quad – and the Highline Canal again comes down this way and hits the Merced River.[374]

Mr. Leidy further testified that the San Joaquin and Merced Rivers are navigable waters,[375] a point which Respondent does not contest.[376]

In holding that "wetlands adjacent a creek that flowed into a creek that flowed into a river that was navigable a further *190 miles* downstream are waters of the United States,"[377] the court in *United States v. Buday*, 138 F.Supp.2d 1282 (D.Mont. 2001) (a case decided subsequent to the

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[373] Tr., p. 193.

[374] Tr., p. 194. *See also*, Tr., pp. 208-209.

[375] Tr., pp. 194-195, 222.

[376] *See also*, CX 69, ¶ 23: "The San Joaquin River is a tributary to the Pacific Ocean."

[377] *United States v. Krilich*, 152 F.Supp.2d 983, 992, n.13 (N.D.Ill. 2001) (emphasis added) [*summarizing United States v. Buday*, 138 F.Supp.2d 1282 (D.Mont. 2001)].

SWANCC decision) explained:

> In *Riverside Bayview*, the Court endorsed the Corps' explanation of its inclusion of wetlands in "waters of the United States":
>
> > The regulation of activities that cause water pollution ... must focus on all waters that together form the entire aquatic ecosystem. Water moves in hydrologic cycles, and the pollution of this part of the aquatic system ... will affect the water quality of the other waters within that aquatic system.
>
> 474 U.S. at 133-34, 106 S.Ct. 455. Using this reasoning, it makes sense to believe that Congress intended to subject Fred Burr Creek to federal jurisdiction, because the Creek affects the overall health of the Clark Fork River and, ultimately, the Columbia River.[378]

Similarly, here, Complainant has demonstrated that the "tributaries" on Respondent's property to which the "adjacent wetlands" are adjacent, as well as the "tributary wetlands" themselves, are hydrologically connected to the San Joaquin and Merced Rivers, and the wetlands are therefore subject to federal jurisdiction under the CWA.

C. Connection Not Too Attenuated

Respondent next argues, however, that even if the wetlands are hydrologically connected to navigable waters, any such connection is too attenuated to establish jurisdiction. This is so, Respondent suggests, for three reasons: 1) the distances and/or number of tributary connections involved are too great, 2) some tributaries may be of human construction, and/or 3) the connection is by "intermittent creeks" which, subsequent to the *SWANCC* decision, cannot be considered "tributaries." These arguments are contradicted by the relevant case law.

1) Distances and Number of Tributary Connections

First, Respondent suggests that the distance between the wetlands on Respondent's property and the San Joaquin and Merced Rivers,[379] combined perhaps with the number of tributaries required

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[378] *United States v. Buday*, 138 F.Supp.2d 1282, 1290 (D.Mont. 2001) (footnote omitted).

[379] *See, e.g.*, Respondent's Reply Brief, p. 2: "It is quite a stretch of the imagination to achieve 'navigable waters' on this isolated parcel of farm land miles from either the San Joaquin River or the Merced River." *See also*, Respondent's Brief, p. 4: "The subject property is located miles from any 'navigable' 'waters.'"

to reach the navigable rivers,[380] renders the connection, as a legal matter, too attenuated.[381] The question here, then, is whether the wetlands may be considered "adjacent" to a navigable water where the wetlands are either adjacent to a tributary (the "intermittent drainage") to a tributary (the "drainage ditch") to a tributary (the Turlock Canal) to a navigable-in-fact waterway (San Joaquin River) approximately 20 miles distant from the wetlands, or adjacent to a tributary (the "drainage swales") to a tributary (the "drainage pipes") to a tributary (the Highline Canal) to a navigable-in-fact waterway (the Merced River) approximately 15 miles distant from the wetlands.[382] This question is answered in the affirmative.

In this regard, the court in *United States v. Krilich*, 152 F.Supp.2d 983 (N.D.Ill. 2001), provides a useful summary of recent case law:

> Cases subsequent to *SWANCC* have not limited the definition of waters of the Unites States to those immediately adjacent to navigable (in the traditional sense) waters. *See Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001) (irrigation ditches that connect to streams that flow to navigable waters are waters of the United States); *Interstate General*, 152 F.Supp.2d at 844, 846 (wetlands that are adjacent to nonnavigable creeks that connect to a navigable river via at least six miles of intermittent streams and drainage ditches are waters of the United States); *Idaho Rural Council v. Bosma*, 143 F.Supp.2d 1169, 1172-74, 1177-79 & n.4 (D.Idaho 2001) (spring that runs into pond that drains across a pasture into a canal that flows to a creek, that is either navigable or flows into a navigable river, is a water of the United States); *United States v. Buday*, 138 F.Supp.2d 1282 (D.Mont. 2001) (wetlands adjacent a creek that flowed into a creek that flowed into a river that was navigable a further 190 miles downstream are waters of the United States); *Aiello v. Town of Brookhaven*, 136 F.Supp.2d 81, 119 & n. 30 (E.D.N.Y. 2001) (pond and creek that emptied into lake that flows into navigable bay are waters of the United States).[383]

The reason for courts' reluctance to limit "adjacency" based upon distance or number of

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[380] *See, e.g.*, Tr., p. 209 (Mr. Gnass): "Q: ...And they are tributary waters, because if you follow it through the – kind of the grapevine path that you described earlier, eventually it either makes the Merced River or the San Joaquin River, and that's what makes it tributaries?"

[381] This argument is inextricably intertwined with Respondent's other arguments regarding jurisdiction, particularly the argument that Complainant has not met its burden of establishing, as a factual matter, a hydrological connection between the wetlands and navigable waters. This Initial Decision has already found that the hydrological connection was adequately demonstrated. Respondent's argument that such a connection is, as a legal matter, simply too attenuated, has been broken out separately, here, for ease of analysis.

[382] These distances are rough approximations based upon Mr. Leidy's testimony at Tr., pp. 191-195 and the maps entered as CX 51 and CX 52. However, the legal analysis and my conclusions would not be altered even if the distances were substantially greater. As discussed *supra*, the wetlands on field #5 are adjacent to Sand Creek, a body of water on Respondent's property which Respondent does not contest is a "water of the United States."

[383] *United States v. Krilich*, 152 F.Supp.2d 983, 992, n.13 (N.D.Ill. 2001).

tributary connections is two-fold: 1) pollutants which reach waters of the United States are equally damaging to those waters regardless of whether they enter the hydrological system near or far from those waters, and 2) any judicial attempt to draw a jurisdictional line based upon such consideration would tend to be arbitrary and unworkable. The court in *U.S. v. Buday* well articulated this rationale:

> Distance seems to be the most compelling reason to distinguish Fred Burr Creek from other tributaries that have been found to be subject to federal jurisdiction. The Clark Fork ... runs for about 350 miles within the state. Fred Burr Creek is roughly 15-20 miles long... Flint Creek ... extends about 30 miles. From the Mountain Valley subdivision to the Clark Fork, it is about 35-40 miles... [I]t is probably another *190 miles* to the point where the Clark Fork is ... navigable-in-fact. But ... *the distances that waters travel ... do not provide solid ground on which to build distinctions of ... jurisdiction*. *Riverside Bayview Homes* implicitly recognized this problem: "In view of the breadth of federal regulatory authority contemplated by the Act ... and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act." 474 U.S. at 134, 106 S.Ct. 455. By extension, just as wetlands adjacent to navigable waters fall under the Act, *tributaries that are distant from but connected to navigable waters are ecologically capable of undermining the quality of the navigable water*.[384]

Respondent draws this Tribunal's attention, however, to the post-*SWANCC* decision in *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), stating:

> Subsequent to *SWANCC*, the case of *Rice v. Harken* (2001) 250 Fed.3d 264 [sic]. In pertinent part, the court determined ... [that] [u]nder *SWANCC* a body of water is jurisdictional only if it is "actually navigable or is *adjacent to an open body of navigable water*." Intermittent creeks are not sufficiently linked to an open body of navigable water to warrant Clean Water Act protection..."[385]

Thus, Respondent's citation to *Rice v. Harken* concerns the "adjacency" issue addressed here and the "intermittency" issue addressed *infra*.

In *Rice v. Harken*, the plaintiffs alleged that the respondent had discharged oil into "navigable waters" in violation of the Oil Pollution Act (OPA) of 1990, 33 U.S.C. §§ 2701-2720. As the court determined that the term "navigable waters" had the same meaning under both the OPA and the CWA, the court considered the *SWANCC* decision, opining:

> Under [*SWANCC*], it appears that a body of water is subject to regulation under the

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[384] *U.S. v. Buday*, 138 F.Supp. at 1291 (emphasis added).

[385] Respondent's Reply Brief, p. 6 (emphasis added) (citation omitted in original).

> CWA if [it] is actually navigable or is adjacent to an open body of navigable water... Nevertheless, under this standard the term "navigable waters" is not limited to ... very large bodies of water. If the OPA and CWA have identical regulatory scope, the district's conclusion that the OPA cannot apply to *any* inland waters was erroneous. However, the district court's reluctance to apply an Act targeted at disasters like the Exxon Valdez oil spill to Harken's dry land operations in the Texas Panhandle is certainly understandable.[386]

The court concluded:

> ...[W]e hold that a generalized assertion that covered surface waters will eventually be affected by remote, gradual, natural seepage from the contaminated groundwater is insufficient to establish liability under the OPA... The *only evidence* in the record that any protected body of water is threatened ... is [a] *general assertion* that eventually the groundwater under the ranch will enter the Canadian River. The *ground water ... is, as a matter of law, not protected by the OPA*. And, the Rices have failed to produce evidence of a *close, direct and proximate link* between Harken's discharges of oil and any resulting *actual, identifiable oil contamination* of a particular body of natural surface water...[387]

The Fifth Circuit's holding in *Rice v. Harken* does not instruct my consideration of the instant case for three reasons. First, *Rice v. Harken* dealt with the OPA, and the court was clearly concerned with the purposes of that Act to address large-scale oil spills such as occurred when the Exxon Valdez oil tanker ran aground in Prince William Sound, Alaska in 1989. This focus of the OPA is very different from that of the CWA, which focuses upon "all waters that together form the entire aquatic system."[388] Second, *Rice v. Harken* dealt with groundwater contamination, which is regulated differently than is surface water under the CWA. Although some courts have held that "groundwater contamination" of surface waters must be demonstrated by showing *actual* contamination,[389] such "actual, identifiable contamination" need *not* be shown in order to establish jurisdiction over wetlands with *surface* water connection to navigable waters. As the court observed

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[386] *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001) (emphasis in original). The court in *U.S. v. Interstate General Co.*, 152 F.Supp.2d. 843, 848 (D.Md. 2001), has commented: "The Court is aware that there is a difference of opinion with regards to the application of *SWANCC* as applied to the CWA. *See United States v. Buday*, 2001 WL 363702 (D.Mont). *cf. D.E. Rice v. Harken Exploration Company*, 250 F.3d 264, 2001 WL 422051 (5th Cir. 2001)."

[387] *Rice v. Harken*, 250 F.3d at 272 (emphasis added).

[388] *Buday*, 138 F.Supp.2d at 1290 (*quoting Riverside Bayview*, 474 U.S. at 133-134, 106 S.Ct. 455).

[389] *See, e.g., Idaho Rural Council v. Bosma*, 143 F.Supp.2d 1169, 1180 (D.Idaho 2001): "...[T]he CWA extends federal jurisdiction over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States. This does not mean, however, that plaintiff's burden is light. As Judge Van Sickle explained in *Washington Wilderness Coalition*: '*... It is not sufficient to allege groundwater pollution, and then to assert a general hydrological connection between all waters. Rather, pollutants must be traced from their source to surface waters*, in order to come within the purview of the CWA.'" (Emphasis added).

in *United States v. Buday*: "...[T]he government need not establish jurisdiction by proving that the pollutant actually reached the navigable water."[390] The "generalized assertion" in *Rice v. Harken* concerning the connection between the contaminated groundwater and covered surface water (as well as the "general hydrological connection between all waters" asserted in *Idaho Rural Council v. Bosma*[391]) was found to be insufficient because it did not show "actual" contamination by *groundwater* seepage. Complainant in the present case, however, need not do so because the wetlands at issue are connected by surface water tributaries. Third, and relatedly, the court in *Rice v. Harken* observed that "[t]he *only evidence in the record* ... [was] Drake's general assertion that eventually the groundwater ... [would] enter the Canadian River."[392] In contrast, the record before me contains multiple instances of specific testimony and exhibits that support Complainant's assertion that water from the tributaries on Respondent's property does reach the San Joaquin and Merced Rivers via the Turlock and Highline Canals.

Thus, I find that neither the distances involved nor the number of tributary connections required to connect the wetlands to navigable waters precludes a finding of "adjacency" as a matter of law.

2) "Artificial" Watercourses

Second, Respondent suggests that even if the wetlands are hydrologically connected to navigable waters, federal jurisdiction under the CWA does not attach because some tributaries may be of human construction.[393]

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[390] *United States v. Buday*, 138 F.Supp.2d at 1289 (citation omitted). *See also, U.S. v. Ashland Oil & Trans. Co.*, 504 F.2d 1317, 1329 (6th Cir. 1974); *Headwaters*, 243 F.3d at 534; *Eidson*, 108 F.3d at 1342, n.7. To the extent that Respondent suggests that no violation could have occurred where no dredged or fill material is shown to have actually entered a navigable-in-fact waterway (*See, e.g.*, Respondent's Reply Brief, p. 6: "There was no evidence presented that any material from [Respondent's] operations caused a deposit into Sand Creek." *See also*, Respondent's Reply Brief, pp. 2-3: "The only evidence of any deposit identified by EPA in the Record were deposits on farmland which are not waters of the United States..."), such suggestion is misplaced.

[391] *See* note 389, *supra*.

[392] *Rice v. Harken*, 250 F.3d at 272 (emphasis added).

[393] *See, e.g.*, Tr., pp. 200-201: "Q: Are there manmade drainages that are located in the fields? A: Not that I was aware of, no. Q: Did you know ... whether or not the drainages ... were natural or whether or not they had been created? ... A: Well, there was ... evidence of natural drainages, and there was evidence of also some trenching, I believe, or manmade drainages. In addition, it looked like the natural drainages had been somewhat impacted by farming activities." *See also*, Tr., pp. 213-214: "Q: ...Did you make a distinction between what are ... waters that were created by activities on the site, like the creation of the canal, versus natural wetlands? A: ...[W]e ... determine[d] which features on the site would qualify as a wetland under the 1987 Corps delineation manual. Q: So ... it didn't matter how it was created, if it qualified, it qualified? You didn't make a distinction? A: If it meets the mandatory criteria, then it would qualify." *See also*, Tr., pp. 225-226: "Q: ...[A]re ditches waters of the United States? A: They can be. Q: Are there ditches on this property that are waters of the United States? A: I believe there are some manmade features on fields three and four that qualified as a water of the United States." *See also*, Respondent's Reply Brief, p. 2: "It is Respondent's position [that] to apply the

Respondent's suggestion in this regard is without merit. As observed by the Eleventh Circuit in *U.S. v. Eidson*, 108 F.3d 1336 (11th Cir. 1997):

> There is no reason to suspect that Congress intended to regulate only the natural tributaries of navigable waters. Pollutants are equally harmful to this country's water quality whether they travel along man-made or natural routes. The fact that bodies of water are "man-made makes no difference..." ... Consequently, courts have acknowledged that ditches and canals, as well as streams and creeks, can be "waters of the United States" under § 1362(7).[394]

This holding in *Eidson* is not affected by *SWANCC*. As discussed earlier, *SWANCC* spoke only to the "Migratory Bird Rule" and did not affect "404 jurisdiction" based on "navigability."[395] Moreover, the continuing authority of *Eidson* and it's holding regarding "man-made tributaries" was explicitly acknowledged in the controlling post-*SWANCC* decision of *Headwaters, Inc. v. Talent Irrigation Dist., supra*, where the Ninth Circuit, citing *Eidson*, upheld a district court determination that "irrigation canals were 'waters of the United States' because they are tributaries to the natural streams with which they exchange water."[396] The *Headwaters* court continued:

> Our conclusion is not affected by the Supreme Court's recent limitation on the meaning of "navigable waters" in [*SWANCC*]... The irrigation canals in this case are not "isolated waters" such as those that the Court [in *SWANCC*] concluded were outside the jurisdiction of the [CWA]. Because the canals receive water from natural streams and lakes, and divert waters to streams and creeks, they are connected as

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arguments articulated by EPA in this proceeding will require landowners to acquire a permit to place rain gutters on their residences." [Regarding this last quotation, I note that Mr. Leidy specifically addressed this very question at hearing, explaining that rain gutters would not require permits as "waters of the United States" under the CWA. (Tr., p. 214, ln. 25)].

[394] *U.S. v. Eidson*, 108 F.3d 1336, 1342 (11th Cir. 1997) (citations omitted). *See also, United States v. Velsicol Chemical Corp.*, 438 F.Supp. 945, 947 (W.D.Tenn. 1976) (sewers); *United States v. Holland*, 373 F.Supp. 665, 673 (M.D.Fla. 1974) (mosquito canals); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001) (irrigation canals).

[395] *See* notes 329 and 330, *supra*.

[396] *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001). In the present case, Mr. Leidy similarly testified: "Q: What effect does [it] have on the jurisdictional nature of a wetland that some part of the year there's irrigation water in it? A: It has no effect whatsoever because rainwater would normally pond in the low-lying areas, the vernal pool depressions or the vernal swales or drainages. The fact that there's additional water being added during the irrigation season does not change that from being a jurisdictional wetland. All it does is it artificially extends the hydrology. Q: Now, ... the same example with water from a canal either leaking through or coming up from the groundwater into what is a seasonal wetland, would that change the ... jurisdictional nature of the wetland? A: No, it wouldn't. And as an example, ... the Highland [sic] Canal is a legal structure. It is a ... part of the normal circumstances of the site. It exists there and so if there is additional water that augments a wetland feature, a depression, either by seepage or groundwater or overtopping the canal, that does not change the jurisdictional status of that wetland." (Tr., pp. 580-581).

tributaries to other "waters of the United States."[397]

Other post-*SWANCC* decisions have similarly cited *Eidson* with approval.[398]

Thus, to the extent that the tributaries to which the wetlands are adjacent in the case at bar are of human construction, such "artificiality" does not eliminate the watercourses as "tributaries" for purposes of jurisdiction under Section 404(a) of the CWA.[399]

3) "Intermittent" Watercourses

Third, Respondent argues that even if the wetlands are hydrologically connected to navigable waters, federal jurisdiction does not attach because the connection is by "intermittent creeks" which, subsequent to the *SWANCC* decision, cannot be considered "tributaries." Specifically, Respondent argues:

> Subsequent to *SWANCC*, the case of *Rice v. Harken* (2001) 250 Fed.3d 264 [sic]. In pertinent part, the court determined ... [that] [u]nder *SWANCC* a body of water is jurisdictional only if it is "actually navigable or is adjacent to an open body of navigable water." *Intermittent creeks are not sufficiently linked to an open body of navigable water to warrant Clean Water Act protection...*"[400]

As discussed in detail *supra* regarding "Distances and Number of Tributary Connections," the Fifth Circuit's holding in *Rice v. Harken* does not control the instant case, as the facts and issues in *Rice v. Harken* are clearly distinguishable from those at issue here. Further, *Rice v. Harken* simply does not stand for the proposition that "intermittent creeks are not sufficiently linked to an open body of navigable water to warrant Clean Water Act protection."[401]

Indeed, whether the flow of water is continuous or occasional is not material to a determination of whether a watercourse is "tributary" to a navigable water. Again, as observed by the Eleventh Circuit in *Eidson*:

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[397] *Headwaters*, 243 F.3d at 533.

[398] *See, e.g., U.S. v. Buday*, 138 F.Supp.2d 1282, 1289 (D.Mont. 2001); *Aiello v. Town of Brookhaven*, 136 F.Supp.2d 81, 119 (E.D.N.Y. 2001).

[399] This legal determination does not ignore the distinct and sometimes difficult factual determination of whether a wetland consists of non-jurisdictional upland irrigation or jurisdictional natural drainage or a combination thereof; a distinction which may not be easily discernible to a farmer in his or her field. (*See* discussion at pp. 37-38 of this Initial Decision, including note 171, *supra*).

[400] Respondent's Reply Brief, p. 6 (emphasis added) (citation omitted in original).

[401] In addition, the case before me does not arise within the jurisdiction of the Fifth Circuit.

> ...[T]here is no reason to suspect that Congress intended to exclude from "waters of the United States" tributaries that flow only intermittently. Pollutants need not reach interstate bodies of water immediately or continuously in order to inflict serious environmental damage.[402]

Thus, to the extent that the tributaries to which the wetlands are adjacent in the case at bar flow only "occasionally" or during heavy rainfall, such "intermittence" does not eliminate the watercourses as "tributaries" for purposes of jurisdiction under Section 404(a) of the CWA.[403]

D. Summary of Jurisdiction

For the foregoing reasons, I find that Complainant does have jurisdiction over the 21.04 acres of destroyed wetlands at issue in this case. Complainant does not base jurisdiction over any of the 21.04 acres of wetlands currently at issue on the "Migratory Bird Rule," but rather upon the wetlands' status as "adjacent" or "tributary" to navigable waters, and Complainant has carried its burden of proving that the wetlands were, in fact, adjacent or tributary to navigable waters. These hydrological connections are not rendered insufficient by the distances or number of tributary connections involved, the fact that some of the tributaries may have been of human construction, or the possibly "intermittent" flow of water through some of the connections. Contrary to Respondent's assertion, this analysis is not altered by the Supreme Court's decision in *SWANCC*.

IV. Complainant is Not Estopped from Imposing a Penalty

Respondent next contends that Complainant "... is estopped from seeking relief sought based on erroneous or misleading statements and/or conduct of government employees or agents."[404] Respondent's "estoppel" theory is that:

> ... based on statements and conduct of ... government employees ..., Respondents were led to believe that if ... jurisdictional wetlands existed on the subject parcel, such could be mitigated by Respondents setting aside approximately 12 acres of land ... [and] Respondents [did] set aside 12 acres of otherwise possible [sic] farmable land

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[402] *Eidson*, 108 F.3d at 1342 (footnote omitted) [citing *Quivira Mining Co. v. U.S. EPA*, 765 F.2d 126, 130 (10th Cir. 1985) (upholding regulation because "during times of intense rainfall, there can be a surface connection between tributary and navigable-in-fact streams), and *U.S. v. Phelps Dodge Corp.*, 391 F.Supp. 1181, 1187 (D.Ariz. 1975) (holding that "waters of the United States" include "normally dry arroyos" from which water could flow to public waters)]. *Eidson* was cited with approval post-*SWANCC* in *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d at 534, for the proposition that: "Even tributaries that flow intermittently are 'waters of the United States.'" *See also, U.S. v. Buday*, 138 F.Supp.2d at 1289.

[403] *See also*, Tr., pp. 580-581 (Mr. Leidy) (quoted *supra* note 396).

[404] Answer, p. 3, ¶ 7.

for purposes of addressing this issue.[405]

I find Respondent's estoppel argument to be without merit.

Sometime between September 9, 1996 and August 8, 1997,[406] Mr. McElhiney suggested to Respondent that Respondent perform mitigation for the destruction of wetlands in field #5, recommending a surveying consultant, Vurl Lippincott, who could prepare the mitigation plan. Respondent did hire Mr. Lippincott who did prepare a mitigation plan.[407]

On August 8, 1997, Ms. Goldmann, in response to receiving Respondent's file from the Corps and having been notified by the Corps and NRCS that Respondent was plowing fields #3 and #4, spoke with Respondent by telephone.[408] Ms. Goldmann informed Respondent that he may be in violation of the CWA and advised Respondent to cease all plowing activity. Ms. Goldmann's notes of the conversation state: "Mr. Veldhuis said was still going to mitigate at the 12 + acre site & confirmed he was going to plant almonds & was preparing land."[409] Ms. Goldmann did not respond to Respondent's proposed mitigation plan during this conversation, nor did she suggest to Respondent that such proposed mitigation would eliminate the necessity of obtaining a "404 permit" for Respondent's activities on fields #3, #4 and/or #5.[410]

On August 28, 1997, Ms. Goldmann and Mr. McElhiney visited the property and met with Respondent. Ms. Goldmann explained to Respondent the need to obtain a "404 permit" before deep-ripping wetlands and informed Respondent that wetlands still existed on fields #3 and #4. Respondent stated that he intended to perform mitigation for the 3.46 acres of wetlands which had been deep-ripped on field #5. At that time, Ms. Goldmann believed such mitigation to be a viable option and did not advise Respondent not to proceed with such mitigation.[411]

In December 1998, Ms. Goldmann telephoned Respondent in order to determine why

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[405]Answer, p. 3, ¶¶ 8-9. Although paragraphs 7-9 on page 3 of Respondent's Answer state that they set forth three "separate affirmative defenses," they appear to collectively articulate Respondent's "estoppel" theory.

[406]Respondent testified that his conversation with Mr. McElhiney in which Mr. McElhiney suggested that Respondent perform the 12-acre mitigation (Tr., p. 544, ln. 13-21) took place after Respondent received the letter from Lisa Clay, Corps Assistant District Counsel (Tr., p. 543, ln. 24 - p. 544, ln. 6) and before he first received a telephone call from Ms. Goldmann (Tr., p. 545, ln. 14-16). The letter from Ms. Clay was sent on September 9, 1996 (CX 26; CX 69, ¶ 32; Tr., pp. 116-117, 128-129), and Ms. Goldmann first telephoned Respondent on August 8, 1997 (CX 69, ¶ 35; CX 56; Tr., p. 251).

[407]*See* Tr, pp. 63-64 (Mr. McElhiney), p. 545 (Mr. Veldhuis); CX 20 (Lippincott maps).

[408]CX 69, ¶35; Tr., p. 249, ln. 9; Tr., p.252, ln. 6-9.

[409]CX 56, p. 1.

[410]CX 69, ¶35; CX 56; Tr., pp. 251-253.

[411]CX 69, ¶ 36; CX 57; Tr., pp. 254-256.

Respondent had not replied to the November 13, 1998 "Request for Information."[412] During this conversation, Ms. Goldmann did advise Respondent not to pursue his proposed plan to utilize approximately 12 acres in the northwestern corner of field #3 to "mitigate" the destruction of 3.46 acres of wetlands on field #5. Ms. Goldmann testified:

> Q: Did Mr. Veldhuis ever tell you that he wasn't willing to mitigate his impact of the 3.46 acres in wetlands?
> A: No, he did not tell me he was never willing to do it.
> Q: And when you were out to the site, the area in which you set out is still there, correct? It's not planted[?]
> ...
> A: Yes, ... it's still there... It was not planted.
> ...
> Q: ... Did you ever tell Mr. Veldhuis not to pursue mitigation on that site or to stop during a telephone conversation with him?
> A: It was in a telephone conversation. When I did not receive the 308 response, I contacted Mr. Veldhuis and asked him why ... I hadn't received the response. We discussed that and then he said he still had every intention of mitigating, but I told him not to. I just didn't think it was fair to require him to do that at that time because we initiated a formal enforcement investigation and in all fairness I told him to hold that in abeyance...
> Q: So are we holding it against him because ... we're holding it in abeyance?
> A: No, not at all... I just felt it wouldn't be a fair investment on his part not knowing the outcome of this investigation and it was not appropriate to pursue at this time.
> Q: So the fact it's not mitigated yet, that was not part of your consideration of the penalty?
> A: The fact is that ... Mr. Veldhuis had several opportunities to work with NRCS regarding mitigation but he had not done that and at that time I said, "Please do not conduct any work until – we're going to initiate a formal enforcement investigation and in the investigation our penalty is based on what the impacts to waters of the United States are."[413]

Respondent never submitted the mitigation plan prepared by Mr. Lippincott to either the Corps or EPA and, indeed, never submitted any application for a 404 permit.[414] The 12 acres set

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[412]Tr., pp. 278, 326.

[413]Tr., pp. 323-325. *See also*, Tr., pp. 326-327 (Ms. Goldmann): "... I spoke with [Respondent] on the phone and Mr. Veldhuis said he still planned on mitigating which was what he had originally committed to back in 1995. And because we were initiating the formal investigation, I just felt that it wouldn't be fair to ask him to invest in that not knowing the outcome of this investigation." *See also*, Tr., p. 546 (Mr. Veldhuis): "And that's when [Ms. Goldmann] called later ... and suggested that I do nothing with the mitigated property so nothing has been done. It's staked out and no work has been done on that."

[414]Tr., p. 126; CX 69, ¶ 39.

aside for mitigation remain un-ripped.[415] Respondent has not performed any mitigation.[416]

The Environmental Appeals Board (EAB) in *B.J. Carney Industries, Inc.*, 7 E.A.D. 171 (EAB 1997), provided a useful statement of the law of estoppel. There, the EAB explained:

> "When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined." *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 60 (1984). For that reason, "it is well settled that the Government may not be estopped on the same terms as any other litigant." *Id.* A party seeking to estop the government bears a heavy burden of demonstrating the traditional elements of estoppel and some "affirmative misconduct" on the part of the government. *United States v. Hemmen*, 51 F.3d 883, 892 (9th Cir. 1995). This means that "a party asserting equitable estoppel against the United States must demonstrate that there was affirmative misconduct upon which the party reasonably relied to its detriment." *In re Wego Chemical & Mineral Corp.*, 4 E.A.D. 513, 522 (EAB 1993).[417]

Respondent in the present case argues that: "The fact that Respondent was being punished because of mitigation being held in abeyance was wrong. (See testimony of Ms. Goldman [sic] at 326)."[418] Respondent's statement of the facts, here, is wrong. First, there is no evidence that Respondent's failure to submit his proposed mitigation plan to the Corps or the EPA was based on any statements made by government officials prior to the commencement of EPA's enforcement action, even though Respondent's failure to act, along with his failure to obtain a Section 404 Permit, may have prompted the Corps to refer the case to the EPA. Second, Ms. Goldmann's testimony does not indicate that she increased the penalty due to Respondent's "holding the mitigation in abeyance."[419] To the contrary, Ms. Goldmann candidly explained why she instructed Respondent to "hold the mitigation in abeyance" and clearly testified that the penalty had *not* been enhanced due to Respondent's having followed her instructions.[420]

Complainant's written "Penalty Justification"[421] explains, regarding the "degree of culpability"

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[415]Tr., pp. 323, 546.

[416]Tr., pp. 67-68, 127-127, 253, 546.

[417]*B.J. Carney Industries, Inc.*, *supra*.

[418]Respondent's Reply Brief, p. 3, ln. 25-27.

[419]Page 326 of the transcript does not support the proposition for which it is cited by Respondent.

[420]*See, e.g.*, Tr., p. 325: "Q: So are we holding it against him because ... we're holding it in abeyance? A: No, not at all."

[421]CX 61, p. 5.

factor, that: "...there should be an upward penalty adjustment of $5,000 due to the Respondents' lack of cooperation with NRCS, the Corps, and EPA. In conclusion, the penalty includes a $5,000 upward adjustment for culpability."[422] One factor included in the "culpability" consideration was Respondent's failure to follow through with repeated promises to perform the mitigation. As Complainant explains: "In instances when NRCS was able to contact Mr. Veldhuis, he promised to pursue the mitigation, but did not. Mr. Veldhuis also agreed to mitigate in a discussion with EPA in the field in August 1997, but took no subsequent action."[423] Thus, the $5,000 "degree of culpability" factor does to some degree reflect Respondent's failure to mitigate. However, the penalty enhancement addresses Respondent's lack of cooperation with the NRCS, Corps, and EPA in promising to mitigate but failing to do so *up to* the point at which Ms. Goldmann finally advised Respondent that the enforcement action could no longer be avoided.[424] The penalty was *not* enhanced due to Respondent's "holding the mitigation in abeyance" as Ms. Goldmann finally advised.[425]

The gravamen of Respondent's "estoppel" argument, however, does not appear to be that the penalty was increased due to Respondent's failure to mitigate, but rather that Mr. McElhiney and/or Ms. Goldmann led Respondent to believe that he could deep-rip his fields, including the wetlands, without a 404 Permit if he performed (or promised to perform) the mitigation.[426] This is clearly not the case. Ms. Goldmann specifically informed Respondent that "mitigation" would not obviate the need for a 404 Permit.[427] Mr. McElhiney also specifically informed Respondent of the need for a 404

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[422]CX 61, p. 10.

[423]CX 61, pp. 9-10.

[424]This point is echoed by Ms. Goldmann's testimony in which she explains: "Q: So the fact it's not mitigated yet, that was not part of your consideration of the penalty? A: The fact is that ... Mr. Veldhuis had several opportunities to work with NRCS regarding mitigation but he had not done that and at that time I said, "Please do not conduct any work until – we're going to initiate a formal enforcement investigation and in the investigation our penalty is based on what the impacts to waters of the United States are." (Tr., p. 325).

[425]The "culpability" component of the penalty will be more fully addressed *infra*.

[426]While the former argument actually goes only to the amount of the penalty calculation, the latter argument goes to whether Complainant should be "estopped" from alleging liability altogether.

[427]*See, e.g.*, Tr. p. 253 (Ms. Goldmann): "Q: Did you tell Mr. Veldhuis that if he mitigated he would not have to get a 404 permit for field five? A: No, I did not. Q: And did you tell Mr. Veldhuis that if he mitigated he wouldn't have to get a 404 permit for fields three and four? A: No, I did not." Further, Ms. Goldmann's field notes from her August 28, 1997 visit state: "I ... explained to Mr. Veldhuis the permitting process [and] his requirement to obtain a 404 permit from the Corps... I informed him that there were still wetlands adjacent to the proposed [mitigation] site. He confirmed that he avoided them. I told him that EPA would be starting an investigation regarding the activities conducted to date." (CX 57, p. 1). Ms. Goldmann similarly testified: "[Respondent and I] discussed the activities that were ongoing on fields three and four and a concern regarding a violation under Section 404 of the [CWA] and that proposing to mitigate does not obligate [sic] his need to get a 404 permit. He still needs to comply with the Act." (Tr., p. 256). The term "obligate" in the transcript is apparently a mistaken substitute for the term "obviate."

Permit on numerous occasions,[428] including the fact that "mitigation" would not obviate the need for a 404 Permit,[429] and in fact twice prepared a 404 Permit application on Respondent's behalf.[430] Respondent has failed to demonstrate that Complainant's conduct in this case rises to the level of "affirmative misconduct" necessary to meet the heavy burden of estopping the government. Therefore, Respondent's "estoppel" argument is rejected and Complainant is not estopped from imposing a penalty in this case.

V. Respondent has not been Subjected to "Selective Prosecution"

Respondent next contends that "...there exists selective prosecution or treatment."[431] Although Respondent's specific theory in this regard is not clear, Respondent argues: "Especially [sic] since every other farm in the area has been allowed to engage in similar farming practice as that of Respondent, with no harassment from the agencies."[432] Ms. Moore testified in this regard as follows:

> Q: Do you feel [that Complainant is] trying to make an example here?
> A: I strongly believe that that's the case and I'd like to qualify that with this is a huge problem as far as the laws that govern wetlands and activities that are going on. I very firmly feel that this is an example that would then be applied to other farmers.[433]

Thus, Respondent perhaps suggests that Complainant has inappropriately brought this enforcement action against Respondent in order to deter others from violating the CWA.

Ms. Goldmann testified as follows regarding Complainant's decision to pursue the enforcement action against Respondent:

> Q: So ... how do you determine which farm that you want to claim jurisdiction over?
> A: We don't claim jurisdiction on farms. We claim jurisdiction on waters of the

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[428] *See, e.g.*, CX 7; Tr., p. 40; CX 8; Tr., p. 42; CX 9; Tr., p. 44; CX 10; Tr., p. 45; CX 11; Tr., p. 47; CX 69, ¶ 29.

[429] *See* Tr., p. 62 (Mr. McElhiney): "Q: ...[D]id you ever tell Mr. Veldhuis that if he performed this mitigation plan, he wouldn't need a 404 application? A: No. I said that it needed to accompany the application to the [Corps], and that ... he would still need to get clearance from the [Corps]."

[430] CX 12; Tr., pp. 48-49; CX 13; Tr., p. 52.

[431] Answer, p. 3, ¶ 10.

[432] Respondent's Brief, p. 7.

[433] Tr., pp. 481-482.

United States.

Q: So how do you determine – I mean, there's a lot of farms in San Joaquin Valley... [H]ow do we protect against disparage treatments among farmers being there are so many drains, there are so many ditches and there are so many hills in this valley?

A: All I can say is that ... we follow the federal regulations in identifying what are waters of the United States.[434]

This testimony does not evince any improper prosecutorial motivation.

While "deterrence" of violations by persons other than Respondent was, in fact, one of the purposes of the $50,400 "nature, circumstances, extent and gravity" component of the penalty proposed in this case,[435] such "deterrence" is a proper purpose of enforcement. Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), sets forth the statutory penalty assessment criteria, stating in pertinent part that:

> ...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) resulting from the violation, and such other matters as justice may require.[436]

Complainant in this case addressed and analyzed each of these statutory factors through the guidance of two EPA "Penalty Policy" documents: "A Framework for Statute-Specific Approaches to Penalty Assessments" (CX 62) and the "Policy on Civil Penalties" (CX 63) (*hereinafter* collectively referred to as "the Penalty Policy"). That Penalty Policy states:

> The first goal of penalty assessment is to deter people from violating the law. Specifically, the penalty should persuade the violator to take precautions against falling into noncompliance again (specific deterrence) and dissuade others from

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[434]Tr., pp. 304-305.

[435]*See, e.g.*, Tr., p. 19 (Ms. La Blanc): "EPA also considered ... the deterrent effect of a penalty." *See also*, Tr., p. 269 (Ms. Goldmann): "And also deterrence was important, that this was not acceptable." *See also*, CX 61 ("Penalty Justification"), pp. 6-7: "EPA, Region 9 looked to ... the desired deterrent effect both to this violator and to other similar violators." *See also*, CX 61, pp. 8-9: "In addition, EPA considered it important in this matter to calculate a substantial gravity component to the penalty which will establish a credible deterrent against the fill of vernal pool wetlands and drainages in the Central Valley... This $60,000 [now reduced to $50,400] penalty assessment accounts for the seriousness of the harm ... and the need to send a deterrent message both to Respondents and to similarly situated individuals in the Central Valley to protect its vernal pool resources." *See also*, Complainant's Brief, p. 31: "In calculating this [nature, circumstances, extent and gravity] portion of the penalty, Ms. Goldmann also considered the deterrent effect that bringing an enforcement action would have, both on Mr. Veldhuis, and in the area."

[436]The penalty assessment criteria will be more fully addressed *infra*. 33 U.S.C. § 1319(g)(3) is addressed here for the limited purpose of discussing the "deterrence" aspect of the proposed penalty assessment.

> violating the law (general deterrence). Successful deterrence is important because it provides the best protection for the environment. In addition, it reduces the resources necessary to administer the laws by addressing noncompliance before it occurs. If a penalty is to achieve deterrence, both the violator and the general public must be convinced that the penalty places the violator in a worse position than those who have complied in a timely fashion.[437]

The court in *U.S. v. Municipal Authority of Union Township*, 929 F.Supp. 800 (M.D.Pa. 1996), similarly explained:

> The Clean Water Act's penalty provision is aimed at deterrence with respect to both the violator's future conduct (specific deterrence) and the general population regulated by the Act (general deterrence). *Student Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc.*, 19 Envtl.L.Rep. 20903, 20904, 1989 WL 159629, *3 (D.N.J. April 6, 1989) (citing *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*, 611 F.Supp. 1542, 1557 (E.D.Va. 1985) (subsequent history omitted)). The goal of deterrence requires that a penalty have two components. First, it must encompass the economic benefit of noncompliance... Second, the penalty must include a punitive component... Without the second component, those regulated by the Clean Water Act would understand that they have nothing to lose by violating it.[438]

Indeed, the Supreme Court, citing legislative history involving the Penalty Policy, has observed that: "The legislative history of the [CWA] reveals that Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties."[439]

Thus, to the extent that Complainant in the present case has included in the proposed penalty some amount aimed at deterring people other than Respondent from violating the CWA by "making an example" of Respondent, such deterrence is an entirely appropriate goal of the penalty assessment under the CWA. Further, Respondent has not produced any evidence whatsoever of any improper motivation on the part of Complainant, or even suggested a theory of what such an improper motivation might be, in support of Respondent's "affirmative defense"[440] of "selective prosecution." Therefore, I find that there is no evidence of improper "selective prosecution or treatment" in this case.

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[437]CX 63, p. 3.

[438]*U.S. v. Municipal Authority of Union Township*, 929 F.Supp. 800, 806 (M.D.Pa. 1996) (citation omitted).

[439]*Tull v. United States*, 481 U.S. 412, 422, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987) [*citing* 123 Cong. Rec. 39191 (1997) (remarks of Sen. Muskie citing EPA memorandum outlining enforcement policy)]. *See also, U.S. v. Gulf Park Water Co., Inc.*, 14 F.Supp.2d 854, 862-863 (S.D.Miss. 1998); and *Kelly v. U.S. E.P.A.*, 203 F.3d 519, 523 (7th Cir. 2000).

[440]Answer, p. 3, ¶ 10.

VI. The Complaint is not Barred by the Statute of Limitations

Respondent next contends that: "As a sixth and separate affirmative defense to the Administrative Complaint herein, the Administrative Permit action is barred by Statute of Limitations."[441] This statement represents the sum total of Respondent's "statute of limitations" defense, which is not mentioned in either of Respondent's briefs and was not argued at hearing. Nevertheless, I understand Respondent to be referring to 28 U.S.C. § 2462, which is the "...general statute of limitations, applicable ... to the entire federal government in all civil penalty cases, unless Congress specifically provides otherwise."[442] In relevant part, 28 U.S.C. § 2462 states that: "...an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued..." The claim "first accrues" on the date of the violations giving rise to the penalty.[443]

In the present case, the "claim first accrued" when Respondent first deep-ripped field #5 on or about November 6, 1995.[444] The action for the enforcement of the civil penalty was commenced when the complaint was filed on September 30, 1999. The action for the enforcement of the civil penalty was therefore commenced within five years from the date when the claim first accrued and is not barred by the statute of limitations at 28 U.S.C. § 2462.

VII. No "Regulatory Taking" has Occurred

Finally, Respondent contends that Complainant's proposed action to enforce the CWA would work a Fifth Amendment "taking" of Respondent's property without just compensation. Respondent posits:

> It is not too difficult to determine by inference this enforcement action is none other than an attempt to take property of Respondent through enforcement under the guise of the migratory bird rule... If there is a penalty it should be a penalty on EPA for engaging in the attempt to take property without just compensation. (Page 269-274 of the Record, testimony of Ms. Goldman [sic].)[445]

Again, these statements represent the sum total of Respondent's "takings" argument which is not developed beyond the bare assertion. Respondent cites no authority to support its position.

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[441] Answer, p. 3, ¶ 6.

[442] *3M Company v. Browner*, 17 F.3d 1453, 1461 (D.C. Cir. 1994) (citation omitted).

[443] *Id.* at 1460-1463. The court in *3M Company* explained: "A claim normally accrues when the factual and legal prerequisites for filing suit are in place." *Id.* at 1460 (citations omitted).

[444] CX 69, ¶¶ 26-27.

[445] Respondent's Reply Brief, p. 4.

Contrary to Respondent's assertion, the testimony of Ms. Goldmann at pages 269-274 of the hearing transcript does not support Respondent's position. Nevertheless, having considered the facts of the case at bar in light of the "regulatory takings" jurisprudence,[446] I find that imposition of the $103,070 civil administrative penalty proposed by Complainant in this case would not work a "regulatory taking" of property without just compensation in violation of the Fifth Amendment to the United States Constitution.

VIII. Penalty Calculation

Respondent was required by Section 301(a) of the CWA, 33 U.S.C. § 1311(a), to obtain permits under Section 404 of the CWA, 33 U.S.C. § 1344, prior to deep-ripping fields #3, #4, and #5, and Respondent's deep-ripping of those fields without first obtaining such permits constituted the discharge of pollutants into waters of the United States from a point source without a permit in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), as charged in the complaint.

Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), states that: "Whenever ... the Administrator finds that any person has violated section 1311 ... of this title, ... the Administrator ... may ... assess a class I ... or a class II civil penalty under this subsection." Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), states that: "The amount of a class II civil penalty ... may not exceed $10,000 per day for each day during which the violation continues; except that the maximum amount of any class II civil penalty under this subparagraph shall not exceed $125,000." Under 40 CFR Part 19 ("Adjustment of Civil Monetary Penalties for Inflation"), promulgated pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, the $10,000 daily maximum and the $125,000 total maximum penalties apply to violations occurring on or before January 30, 1997.[447] For violations occurring after January 30, 1997, the applicable daily and total maximum civil penalties are $11,000 and $137,500, respectively.[448]

Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), establishes the criteria to be used in determining the amount of the penalty, stating:

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

Complainant in this case addressed and analyzed each of these statutory penalty factors

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[446] *See, e.g., Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed.2d 529 (2001), and cases discussed therein.

[447] 40 CFR § 19.2.

[448] 40 CFR § 19.4, *including* Table 1.

through the guidance of two EPA "Penalty Policy" documents: the "Policy on Civil Penalties - EPA General Enforcement Policy #GM-21" (CX 63), and "A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties - EPA General Enforcement Policy #GM-22" (CX 62) (*hereinafter* collectively referred to as "the Penalty Policy"). Under the Administrative Procedure Act, 5 U.S.C. §§ 551-559, which governs these proceedings, where a penalty policy addresses each of the statutory penalty factors, an agency "act[s] permissibly by offering to show its reliance on the Penalty Policy in order to establish, thereby, that the penalty it [is] recommending ... indeed take[s] each of the statutorily prescribed factors 'into account.'"[449] The penalty policy is not unquestioningly applied as if the policy were a rule with "binding effect."[450] However, pursuant to the "Rules of Practice" at 40 CFR § 22.27(b), which also govern these proceedings, the Administrative Law Judge is required to consider civil penalty guidelines issued under the Act and to state specific reasons for deviating from the amount of the penalty recommended to be assessed by the complainant. In *Tull v. United States*, 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987), the Supreme Court observed:

> When Congress enacted the 1977 amendments to the Clean Water Act, it endorsed the EPA's then-existing penalty calculation policy. 123 Cong. Rec. 39190-39191 (1977) (remarks of Sen. Muskie). This policy was developed to guide EPA negotiators in reaching settlements with violators of the Act. The policy instructed negotiators to consider a number of factors: the seriousness of the violations, the economic benefits accrued from the violations, prior violations, good-faith efforts to comply with the relevant requirements, and the economic impact of the penalty.[451]

Under the Penalty Policy, Complainant first calculated a "Preliminary Deterrence Amount" by adding together the "economic benefit" resulting from noncompliance and the "Gravity Component" of the penalty.[452] The "Gravity Component" entails consideration of the statutory criteria of the "nature, circumstances, extent and gravity of the violation."[453] Under the Penalty Policy,

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[449]*In re Employers Insurance of Wausau and group Eight Technology, Inc.*, 6 E.A.D. 735, 736-737 (EAB 1997) (quotation from Syllabus); *See also, In re Woodcrest Manufacturing, Inc.*, 7 E.A.D. 757, 774 (EAB 1998) (*holding* that proof of a complainant's adherence to the applicable penalty policy can legitimately form a part of the complainant's prima facie penalty case and ultimately be considered in assessing the appropriateness of the penalty).

[450]*Employers Insurance of Wausau and group Eight Technology, Inc.*, 6 E.A.D. at 762 (*see* generally, 6 E.A.D. at 755-762). *See also, In re DIC Americas, Inc.*, 6 E.A.D. 184, 189 (EAB 1995); *In re Pacific Refining Co.*, 5 E.A.D. 607, 613 (EAB 1994).

[451]*Tull v. United States*, 481 U.S. at 422-423, n.8.

[452]*See, e.g.*, CX 63, p. 8.

[453]Specifically, CX 62 lists the "gravity factors" as follows: "actual or possible harm" (including "amount of pollutant," "toxicity of the pollutant," "sensitivity of the environment," and "the length of time a violation continues"), "importance to the regulatory scheme," "availability of data from other sources," and "size of violator." (CX 62, pp. 14-15). Further, as discussed *supra*, the "gravity component" also entails some amount aimed at deterring future violations by the Respondent or other similarly situated individuals.

Complainant then applied certain "Adjustment Factors" to the "Preliminary Deterrence Amount."[454] These "Adjustment Factors" included "Degree of Willfulness and/or Negligence" (*i.e.*, "culpability"),[455] "Degree of Cooperation or Non-cooperation,"[456] "History of noncompliance," "Ability to Pay," and "Other unique factors."[457] Therefore, the "Penalty Policy" relied upon by Complainant in this case to calculate the proposed penalty does take into consideration each of the statutorily prescribed penalty factors.[458]

As explained in the written "Penalty Assessment" (CX 61), based on the procedure described above as set forth in the Penalty Policy, Complainant originally proposed a penalty of $121,750. This amount represented the sum of $56,750 for "economic benefit," $60,000 for "nature, circumstances, extent and gravity of the violation," and $5,000 for "culpability."[459] However, as explained *supra*, Complainant subsequently withdrew it's allegations regarding 4 of the original 25.04 acres of jurisdictional waters alleged to have been destroyed (3.16 acres of "isolated wetlands" and .84 acres of "tributaries" on fields #3 and #4). That is, Complainant withdrew its allegations regarding 16% of the original 25.04 acres. Therefore, Complainant amended its proposed penalty amount to reflect a 16% reduction of both the "economic benefit" component (from $56,750 to $47,670) and the "nature, circumstances, extent and gravity" component (from $60,000 to $50,400), both of which were based on total acreage. Complainant did not amend the proposed penalty of $5,000 for "culpability" because that component was not based on total acreage. As such, Complaint currently proposes a total penalty of $103,070. This amount represents the sum of $47,670 for "economic benefit," $50,400 for "nature, circumstances, extent and gravity of the violation," and $5,000 for "culpability." This proposed penalty assessment is less than the statutory maximum set forth at Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), and 40 CFR Part 19.[460]

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[454]*See, e.g.*, CX 62, p. i; CX 63, p. 8; Tr., p. 266, ln. 8-10. In *Port of Oakland and Great Lakes Dredge & Dock Co.*, 4 E.A.D. 170, 199 (EAB 1992), the EAB adhered to the general methodology in GM-22 of first calculating a "preliminary deterrence amount" based upon "economic benefit" and "gravity" of the violation, and then adjusting it upward or downward based on other factors.

[455]The "culpability" factor entails consideration of the following: "How much control the violator had over the events constituting the violation," "the forseeability of the events constituting the violation," "whether the violator took reasonable precautions," "whether the violator knew or should have known of the hazards associated with the conduct," "the level of sophistication within the industry in dealing with compliance issues and/or the accessibility of appropriate control technology," and "whether the violator in fact knew of the legal requirement which was violated." (CX 62, p. 18).

[456]The "degree of cooperation" factor entails consideration of the following: "Prompt reporting of noncompliance," "prompt correction of environmental problems," and "delaying compliance." (CX 62, pp. 19-21).

[457]*See, e.g.*, CX 62, pp. i, 17-24; CX 63, p. 8.

[458]*See also*, Tr., pp. 262-263.

[459]CX 61, p. 5.

[460]*See also*, CX 61, p. 6, n.6, regarding a possible alternative method of penalty calculation involving the "per day" maximum penalties which would have resulted in a proposed assessment of the statutory maximum

For the reasons discussed below, I find that the proposed penalty assessment of $47,670 for "economic benefit" is reasonable and appropriate in this case. However, due to the lack of evidence of "invertebrate habitation" of the vernal pools, the proposed "gravity component" shall be reduced by 35% from $50,400 to $32,760. Further, due to the degree of culpability on the part of Respondent, the proposed amount for the "culpability" factor is adjusted upward 50% from $5,000 to $7,500. Therefore, I find that a penalty assessment in the amount of $87,930 is reasonable and appropriate and shall be assessed against Respondent in this case.

A. Economic Benefit

Complainant proposes a penalty of $47,670 to represent the amount Complainant determined to be the "economic benefit or savings ... resulting from the violation." This amount was calculated by multiplying the price per acre originally paid by Respondent for the property at issue by the number of acres of wetlands destroyed by deep-ripping.[461] That is, Complainant first determined from a "Grant Deed" and "Stanislaus County Property Records" entered as CX 64 that Respondent originally paid $2,270 per acre for the property, and Respondent stipulated orally at hearing to the accuracy of this figure.[462] Complainant then multiplied this number by the number of acres of wetlands that Respondent would have had to have purchased in order to mitigate the wetlands which were destroyed by deep-ripping, had Respondent obtained a "404 Permit" and mitigated at a one-to-one ratio.[463] As Ms. Goldmann explained, this is a conservative estimate of the economic savings realized by foregoing the mitigation which would have been required had Respondent complied with the law, because Respondent may well have actually had to mitigate at a 2-to-1 ratio, and in any event he would have had to purchase more than 21.04 acres of *property* in order to mitigate 21.04 acres of *wetlands.*[464]

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penalty.

[461]Tr., p. 266; CX 61, p. 5.

[462]*See* Tr., pp. 267-268: "MS. LA BLANC: ...[W]hat was the amount per acre that you calculated [Respondent] paid for fields three and four in 1993? MS. GOLDMANN: $2,270 per acre. MR. GNASS: Your Honor, maybe to speed this part up, we are not objecting to the amount that she calculated that they paid per acre for the land. We don't have any problem with this exhibit so we're not – ."

[463]Tr., pp. 266, 282-283; CX 61, p. 5. Complainant originally multiplied $2,270 per acre by 25 acres of destroyed wetlands (rounding down from the 25.04 acres originally alleged) to arrive at an economic benefit component of $56,570. Since Complainant subsequently withdrew its allegations regarding 4 acres of wetlands, or 16% of 25 acres, Complainant reduced the economic benefit component by 16% to $47,670. Thus, this figure is actually slightly lower than the more precise calculation of (21.04 acres) x ($2,270 per acre) = $47,760.80.

[464]Tr., pp. 282-283. The "conservative" nature of Ms. Goldmann's estimate is supported by the testimony of Respondent's expert witness Ms. Moore that, in her experience, $37,000 might be an appropriate cost of "mitigation" for only three acres of "pristine" wetlands, or $12,333 per acre (Tr., pp. 425-426, 492), and that $10,000 might be an appropriate cost of mitigation for 3.46 acres of "degraded" wetlands, or $2,890 per acre (Tr., p. 427, ln. 2, 6, 14-16; Tr., p. 465, ln. 22-23). Although, as discussed *infra*, the wetlands here at issue were

Respondent does not contest the fact that he originally paid $2,270 per acre for the subject property,[465] nor does Respondent contest the proposition that Respondent would have had to mitigate the 21.04 acres of destroyed wetlands (assuming 21.04 acres of wetlands were destroyed) at a ratio of at least one-to-one had Respondent applied for and acquired a "404 Permit" prior to deep-ripping his fields.[466] Respondent does contest, however, the methodology by which Complainant calculated the statutorily mandated penalty component of "economic benefit," arguing: "It appears that the penalty was not calculated correctly... [W]e have ... established by the affidavit [of Mr. Veldhuis] ... that there was no economic benefit to [Respondent] in converting the land from annual crops to trees."[467] The "Declaration"[468] of Mr. Veldhuis, in turn, states:

> Since these trees have been planted, the Almond Industry has had an over supply of product, the price has dropped and there is no economic benefit to the planting of trees for the property. As a matter of fact, the cost incurred in the planting and preparation of the land for the planting of trees is greater than the increase in value from the planting of trees.[469]

Thus, Respondent contends that the "economic benefit" component of the penalty should reflect the actual "profit" (or lack thereof) realized by Respondent as a result of the conduct which constituted the violation.

Respondent's proposed methodology for determining the economic benefit component of the penalty is rejected. Such methodology is not in accord with established law. Respondent's approach would also be unworkable because courts and tribunals would be faced with the impossible task of attempting to divine the ultimate "profit" reaped. Such an inquiry would entail, for example, prognosticating upon the state of the "almond market" over the life of the trees (approximately 15 to

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degraded and were not "pristine," Complainant's estimated cost of mitigation of $2,270 per acre is only 18.4% of Respondent's expert's estimate of "pristine" wetland mitigation costs and is even $620 per acre less than Respondent's expert's estimate for "degraded" wetlands.

[465]*See* Tr., pp. 267-268.

[466]*See, e.g.*, Tr., p. 625, ln. 2-3 (Mr. Gnass): "So 3.46 [acres of impacted wetlands on field #5] my client knows somewhere along the way we mitigate it. We pay for it. We have to do something."

[467]Respondent's Reply Brief, p. 3. *See also*, Complainant's Reply Brief, p. 4: "The value placed on vernal pools was not by proper methodology."

[468]Although Respondent's counsel describes the proffered document entitled "Declaration of Ray Veldhuis" as an "Affidavit," the document is not notarized. However, I assume for the purposes of this "economic benefit" discussion that Respondent has not thus far earned a "profit" on his almond tree endeavor. This assumption is supported also by the testimony of Ms. Moore at Tr., pp. 469-470 regarding the "almond market" in general.

[469]Declaration of Ray Veldhuis (June 29, 2001).

20 years),[470] along with the potential output of the trees and investment in their health and harvest over that period.[471] In addition, Respondent's approach is self-serving and inaccurate. For example, profit is usually defined as "[t]he return received ... after meeting all operating expenses."[472] Expenses could include items such as depreciation and employee compensation, which would artificially reduce the economic benefit derived by Respondent. Further, Respondent's methodology would not take into account any appreciated value of the property resulting from Respondent's violations.[473] Finally, Respondent's suggested methodology would discourage compliance with the law, because while a person who followed the law by obtaining a permit and performing mitigation would incur the costs of mitigation regardless of the ultimate profitability of their endeavor, a person who ignored the law and did not perform mitigation would incur such costs (in the form of the "economic benefit" penalty reflecting the cost of mitigation) *only* to the extent that such costs were met or exceeded by the person's ultimate profits. Such a rule would provide every incentive to forego compliance with the law, avoiding financial risk by paying for mitigation only if the endeavor ultimately turns out to be a success.

Rather, as the court explained in *U.S. v. Smithfield Foods, Inc.*, 191 F.3d 516 (4th Cir. 1999): "...[E]conomic benefit is assessed to keep violators from gaining an unfair competitive advantage by violating the law. This is accomplished by including as part of the penalty *an approximation of the amount of money the violator has saved by failing to comply* with its permit."[474] The EAB similarly stated in *B.J. Carney Industries*: "...[T]he calculation of the economic benefit from avoiding compliance ... [begins] with determining what timely compliance would have cost."[475] Thus, the methodology employed by Complainant in the instant matter, calculating economic benefit by estimating what mitigation would have cost, is an appropriate method of determining "economic benefit."

Further, as the court explained in *U.S. v. Gulf Park Water Co.*: "The determination of economic benefit does not require an elaborate evidentiary showing. A reasonable approximation of the economic benefit reaped from the defendants' noncompliance is sufficient."[476] The EAB has similarly stated:

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[470]Tr., pp. 416, 418.

[471]*See, e.g.*, Tr., pp. 469-470 (Ms. Moore).

[472]Webster's II New Riverside University Dictionary 939 (1988).

[473]I observe that although Respondent claims that there was "no economic benefit to the planting of trees," (Declaration of Ray Veldhuis, p. 1), he repeated his planting of almond trees on fields #3 and #4 two years after the initial planting on field #5.

[474]*U.S. v. Smithfield Foods, Inc.*, 191 F.3d 516, 529 (4th Cir. 1999) (emphasis added) (citation omitted).

[475]*B.J. Carney Industries, Inc.*, 7 E.A.D. 171, 209-210 (EAB 1997) (footnote omitted). *See also, U.S. v. Gulf Park Water Co., Inc.*, 14 F.Supp.2d 854, 863 (S.D.Miss. 1998), *discussing Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*, 611 F.Supp. 1542, 1558 (E.D.Va. 1985).

[476]*U.S. v. Gulf Park Water Co., Inc.*, 14 F.Supp.2d at 863 (citations omitted).

> ...[A] complainant need not show with precision the exact amount of the economic benefit enjoyed by the respondent. It is sufficient that the complainant establish a "reasonable approximation" of the benefit. The legislative history of section 309(g)(3) of the Clean Water Act clearly supports this standard: "The determination of economic benefit ... will not require an elaborate or burdensome evidentiary showing. *Reasonable approximations of economic benefit will suffice*." S. Rep. No. 99-50, at 25 (1985) (emphasis supplied). ... This standard, however, does not mean that wholly unsubstantiated guess work or broad, conclusory statements lacking any reasonable foundation are sufficient to demonstrate an economic benefit. A complainant must provide, on the record, a reasoned explanation of how the "reasonable approximation" of economic benefit was derived."[477]

Here, Ms. Goldmann provided a "reasoned explanation" of how the "reasonable approximation" of economic benefit was derived, as discussed *supra*.[478] Ms. Goldmann calculated the approximate[479] amount of money Respondent saved by failing to comply with the CWA (*i.e.*, the avoided cost of mitigation), which calculations were based on the price per acre originally paid by Respondent and the acreage of destroyed wetlands. The price per acre was substantiated by the "Grant Deed" and "Stanislaus County Property Records" entered into the record as CX 64, and Respondent stipulated orally at hearing to the accuracy of this figure.[480] The acreage of destroyed wetlands was based on the wetland delineations performed by Mr. McElhiney and Mr. Leidy which, as explained in detail *supra*, were supported by substantial evidence in the record. Therefore, I find that Complainant has carried its burden of demonstrating that an "economic benefit" component of the penalty in the amount of $47,670 is appropriate in this case.

B. Nature, Circumstances, Extent, and Gravity (the "Gravity Component")

Complainant proposes a penalty of $50,400 to account for the "nature, circumstances, extent and gravity of the violation." This "gravity component" entails consideration of the "actual or possible harm" associated with the violation, the "importance of the violation to the regulatory scheme," and "deterrence" of future violations by the respondent or other similarly situated individuals.[481] Specifically, Complainant explained that it:

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[477] *B.J. Carney Industries, Inc.*, 7 E.A.D. 171, 217-218 (EAB 1997) (footnote and citations omitted) (emphasis in original). *See also, U.S. v. Municipal Authority of Union Township*, 929 F.Supp. 800, 806 (M.D.Pa. 1996): "It would eviscerate the [CWA] to allow violators to escape civil penalties on the ground that such penalties cannot be calculated with precision."

[478] *See* Tr., pp. 266-268, 282-283; CX 61, p. 5.

[479] As noted *supra* at note 464, this "approximation" is a conservative one.

[480] Tr., pp. 267-268.

[481] *See, e.g.*, CX 62, pp. 14-15; CX 61, pp. 6-9; Complainant's Brief, p. 28.

> ... looked to the environmental importance of the wetlands destroyed, the location of these wetlands, EPA's interest in preserving this increasingly rare habitat, the acreage of wetlands destroyed, the irreversibility of Respondents' actions, and the desired deterrent effect both to this violator and to other similar violators... [Complainant] considered, in mitigation, that these wetlands were degraded by farming activities and probably had moderate functional value.[482]

The "deterrence" factor has been fully addressed *supra* in section V of this Initial Decision (regarding "selective prosecution"), which analysis will not be reiterated here. As previously determined, deterrence is an appropriate goal of enforcement under the CWA and Complainant's proposed penalty in this case reasonably reflects that objective. However, for the reasons discussed below regarding the lack of evidence of "invertebrate habitation" of the vernal pools, the "gravity component" of the proposed penalty shall be reduced by 35% from $50,400 to $32,760.

1) Actual or Possible Harm

The "actual or possible harm" considered by Complainant in determining the "gravity component" of the proposed penalty falls roughly into two broad categories: "water quality" harm and "biological" harm. Both types of harm in this case were "irreversible" due to the complete destruction of the restrictive layer or "hardpan."[483]

a.) Water Quality Harm

Regarding the harm done to "water quality" by Respondent's deep-ripping, Ms. Goldmann testified:

> ...[W]e considered ... water quality benefits that wetlands provide and we are concerned about the loss of water quality benefits as a result of the activity. What wetlands do is they increase residence time for water and that allows the removal of pollutants and that ... cannot occur if the wetlands are destroyed.[484]

Mr. Leidy similarly explained:

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[482]CX 61, pp. 6-7.

[483]*See, e.g.*, Tr. p. 269 (Ms. Goldmann): "So the loss to us was a very important factor to consider and the fact that it's deep-ripped, irreversible. You cannot fix that. Once it's gone, it's deep-ripped and the hardpan's broken up, it cannot be restored." *See also*, Tr., p. 318 (Ms. Goldmann): "Once you rip wetlands, they're irreversible. Harm is done to vernal pools. They're eliminated if there is a restrictive layer that is fractured." *See also*, Tr., pp. 327-328 (Ms. Goldmann): "So what happens if you fracture that hardpan, then all the water goes through and then all the vernal pools are lost. It can't be fixed. You can't take a hardpan and form it back together. That's developed over thousands and thousands of years." *See also*, CX 61, p. 7.

[484]Tr., p. 269. *See also*, CX 61, p. 8.

> ...[T]he wetlands on the Veldhuis property ... performed a couple of very important functions... Specifically, wetlands cycle compounds and elements that ... flow into them from adjacent upland areas and ... they are sort of the kidneys of the landscape. They sort out pollutants and help slow the water down as it moves from an upland landscape into low lying areas. The vegetation in the wetlands and the soils ... and the micro-topography in the drainages will slow the water down ... [which] increases the residence time that it sits there. It allows basic biotic and abiotic ... processes to occur to help clean the water.[485]

Mr. Leidy elaborated:

> And so if you increase the rate of percolation through the soil [by destroying the wetland], it is less time for those ... things to work on the polluted water and make it clean. You can actually send contaminated water ... into the groundwater table by increasing percolation rates... When [wetlands] are removed..., the water keeps going until it enters other areas and streams without being treated, so those contaminants would move downstream.[486]

Mr. Leidy further explained: "...[A]nother function of vernal pools and swales is to store water ... from storms and release it slowly over time. So it would have a water storage function. You could equate that with flood control, which is a value that we have. It is not a function, it's a value."[487]

I attach no significance to Respondent's contrary assertions that water quality actually improves when wetlands are deep-ripped because water can then percolate through the ground more quickly.[488]

b.) Biological Harm

Regarding the "biological" harm done by Respondent's deep-ripping, Ms. Goldmann testified:

> ...[T]his land lies within the Pacific [Flyway] which is an important migratory route for waterfowl. ...[D]uring migration, they land in this area and ... use [it] for resting and

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[485]Tr., pp. 181-182. Mr. Leidy's comments in the quoted passage refer both to fields #3 and #4 (Tr., p. 182, ln. 23-24) and to field #5 (Tr., p. 183, ln. 2).

[486]Tr., pp. 218-219.

[487]Tr., p. 220. *See generally*, Tr., pp. 216-221.

[488]*See, e.g.*, Memorandum from William E. Gnass to Regional Hearing Clerk, EPA, Region 9 (June 26, 2000).

> forage... [T]hey take the aquatic invertebrates and they eat them and that provides calcium and protein and that gives them the strength for production and to continue their migratory route. So it's a very important habitat for not only waterfowl, but other wildlife.[489]

Mr. Leidy similarly explained:

> ...[T]he wetlands on the Veldhuis property ... performed a couple of very important functions: The first one of those would be as habitat to migratory birds, resident birds, and also small mammals, snakes and reptiles. The parcels in question ... are along what is known as the Pacific flyway, which is an important migratory corridor for migratory birds ... [which] are known to use wetlands along the Pacific flyway for resting, feeding and ...breeding.[490]

c.) Degraded Nature of Wetlands

The quality of both the "biological" and "water quality" functions of the wetlands at issue had been degraded by farming practices occurring prior to Respondent's deep-ripping. Ms. Moore provided a detailed explanation of the "degraded" nature of the wetlands, testifying:

> ...[T]he wetlands on field five ... are of ... moderate function in value or of even less than moderate, approaching being very low quality. "Degraded" would be a term that I would use. ...[V]ernal pools subjected to winter wheat farming ... over the years ... keep getting shallower and you get fewer plant species and the wetland functions and values are of a very shallow vernal pool in the middle of a winter wheat field. Doesn't do much for what you consider important functions in value to vernal pools. The likelihood of it to support shrimp, the likelihood of it to be used by waterfowl. ... The plant diversity in a degraded or very heavily-farmed wetland could be as little as three species of which maybe one of them is a Central Valley vernal pool species wherein as in these deep vernal pools that have been subjected to either no farming or maybe one or two crops of winter wheat back in the depression, they could support

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[489]Tr., p. 269. *See also*, CX 61, pp. 7-8. *See also*, CX 65 ("Concept Plan for Waterfowl Wintering Habitat Preservation," U.S. Fish and Wildlife Service, May, 1978) and CX 66 ("Concept Plan for Waterfowl Wintering Habitat and Preservation - An Update - Central Valley," U.S. Fish and Wildlife Service, September, 1987), relied upon by Ms. Goldmann in calculating the "gravity component" of the proposed penalty regarding biological harm. (Tr., pp. 272-273).

[490]Tr., pp. 181-182. Mr. Leidy's comments in the quoted passage refer both to fields #3 and #4 (Tr., p. 182, ln. 23-24) and to field #5 (Tr., p. 183, ln. 2). *See also*, Tr., p. 216 (Mr. Leidy); CX 65; CX 66; and CX 4, p. 1 (wetland delineation data form, field #5, stating in part: "heavy waterfowl use ... [approximately] 60 Mallards at this pool...").

20, 25 plant species of which the majority of them are needam vernal pool species.[491]

Ms. Moore also explained, however, as did both Mr. Leidy and Ms. Goldmann,[492] that although the wetlands were degraded, they nevertheless retained some wetland function and value.[493]

Complainant took into consideration the "degraded" nature of the wetlands when calculating the "gravity component" of the proposed penalty. The written "Penalty Assessment" (CX 61) states: "In calculating the penalty, [Complainant] considered, in mitigation, that these wetlands were degraded by farming activities and probably had moderate functional value."[494] Regarding field #5, Mr. McElhiney testified as follows:

> Q: ... Is [the prior ripping] why the conclusion is that these wetlands ... are of moderate or of marginal value?
> A: Well, degraded ... is the term that I may have used in preparing the 404 permit application. Because certainly the landscape has been smoothed, to a certain degree, with these normal farming practices, yes...
> ...
> Q: And those were marginal vernal pools; is that correct?
> A: Degraded.[495]

Ms. Goldmann also testified as follows:

> Q: ...[D]id you consider this property to be in pristine condition when you calculated the penalty?
> A: No, I did not.
> Q: What ... type of condition did you consider this property to be in?

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[491]Tr., pp. 421-423. *See also*, Tr., pp. 420, 425, 438-442, 470, 471, 475 (Ms. Moore, regarding the "degraded" quality of the wetlands).

[492]Mr. Leidy testified that the aerial photographs of fields #3, #4 and #5 demonstrated that the wetlands in those fields were functional at the time of the photographs despite the farming activities which had occurred on those fields. (Tr., pp. 183-184). Mr. Leidy further explained: "If we assume that the fields had been deep-ripped previously, the wetland features are still evident in the photos... And so my conclusion is regardless of how many times it was deep-ripped before, the photos show that the wetlands have persisted up until the most recent deep-ripping event." (Tr., pp. 609-610). *See also*, Tr., pp. 298-299 (Ms. Goldmann): "...[E]ven if there was various land practices going back 35 years, we look at what's out there. What's the reach and extent of waters of the United Sates now? ... [H]ow are they functioning to the best of our knowledge since the area's destroyed by the time we got out there? So we have to use our best professional judgments, talking to NRCS, ... looking at aerial photography and ... making the best determinations since this is atypical and the site is destroyed in making a call."

[493]*See, e.g.*, Tr., pp. 420, 470.

[494]CX 61, p. 7.

[495]Tr., pp. 74-75.

A: In moderate condition.
Q: And why did you consider it moderate?
A: Because there had been a history of farming practices on the property so I took that into consideration.
Q: Were there, nevertheless, valuable wetland functions despite the farming history?
A: Yes, there definitely are. There were and I evaluated it and calculated the penalty based on consideration of how the site was functioning. When there's farmed wetlands, you will get some degradation in ... [biological] diversity ..., but nonetheless other functions still occur.[496]

Thus, although the wetlands were "degraded," they still retained some wetland values and performed some wetland functions, and Complainant took their degradation into consideration when calculating the "gravity component" of the proposed penalty. However, Complainant placed some importance upon the existence of "invertebrates" such as shrimp in the vernal pools, and the record does not support a finding that shrimp in fact existed in the pools.

Complainant's "Penalty Assessment" states: "Undoubtedly, aquatic invertebrates inhabiting these wetlands were destroyed during the unauthorized activity... Invertebrates are important sources of protein and calcium needed for migration and reproduction of migratory birds."[497] Ms. Goldmann similarly testified:

> ...[Migratory waterfowl] take the aquatic invertebrates and they eat them and that provides calcium and protein and that gives them the strength for production and to continue their migratory route. So it's a very important habitat for not only waterfowl, but other wildlife.[498]

However, Mr. Veldhuis testified as follows, regarding the wetland delineation performed by Mr. McElhiney's team in February, 1995:

> ...I guess I asked the question, "Well, what are vernal pools?" And [Mr. McElhiney] explained to me, "That's where the fairy shrimp live." And he ... said that he could bring out a biologist ... to examine the vernal pools and ... I said that I'd like for him

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[496]Tr., p. 276. *See also*, Tr., pp. 316-317 (Ms. Goldmann): "Q: Well, when you say "moderate function," what does that mean? A: It wasn't pristine. It wasn't trashed and it wasn't pristine so we said it was moderate... They actually had function. They provided quality water function. They provided habitat and – functions and so they're important and that's what we took into consideration. But they were not pristine. There's ... reduction and diversity of plants and animals and we take that into consideration." *See also*, Tr., p. 297 (Ms. Goldmann): "...[W]hen you have farmed wetlands ... you may have a reduction in diversity of plants and animals and that was taken into consideration on this when ... evaluating ... the site."

[497]CX 61, p. 7.

[498]Tr., p. 269. *See also*, Tr., p. 41 (Mr. McElhiney, regarding "Endangered Fairy Shrimp, Longhorn Fairy Shrimp, Vernal Pool Tadpole Shrimp and Vernal Pool Fairy Shrimp"). *See also*, CX 8, p. 2.

> to do that. So they came out with a team of three or four people and marked some of the areas... – and my talking with the, I guess, biologists ... I was kind of curious as to what a fairy shrimp looked like and if they found any, and to my knowledge they didn't.[499]

Thus, while Complainant appears to have looked for shrimp in the vernal pools, Complainant has presented no evidence of the existence of such shrimp and the testimony of Mr. Veldhuis suggests that in fact none were found. Further, Ms. Moore testified that invertebrates such as shrimp were unlikely to have lived in the wetlands at issue, opining:

> We could talk about shrimp too. I mean, the chances of shrimp being in a degraded wheat field vernal pool are much reduced due to the length of time ... and the seasons when the pool is inundated. Shrimp need water for a certain period of time to complete their life cycle. In a farmed field the vernal pool tends to pond water for a shorter duration of time. They may not pond water till so late in the year that had shrimp eggs been in the soil, they wouldn't hatch. If they hatched, there wouldn't be a long enough wet period for them to reproduce.[500]

In view of the foregoing, I find that the wetlands at issue were degraded but had served some important wetland functions prior to Respondent's deep-ripping, and that Complainant considered such degradation in calculating the "actual or possible harm" aspect of the "gravity component" of the proposed penalty, but that Complainant incorrectly ascribed importance to the existence of invertebrates such as shrimp in the vernal pools, which existence is not supported by the record.

2) Importance to Regulatory Scheme

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[499]Tr., p. 540. *See also*, Tr., p. 553, ln. 8-9 (Mr. Veldhuis).

[500]Tr., pp. 423-424. *See also*, Tr., p. 440 (Ms. Moore): "The chances of vernal pool invertebrates being there would be greatly reduced by the fact that these pools would be very shallow, would be holding water for shorter periods in the winter. May not hold water until the cooler part of the winter has even passed and shrimp need both cold temperatures and water to hatch." *See also*, Tr., pp. 472-474 (Ms. Moore): "...[T]here's some statements in [Complainant's "Penalty Assessment"] that say ... that these wetlands were of marginal ... value and then later on there's these statements like 'Undoubtedly aquatic invertebrates inhabiting these wetlands were destroyed during the unauthorized activity.' And undoubtedly I have no reason to believe that shrimp were in these degraded wetlands... So my assessment of the pools based on the depth and the fact that they're in a field and sort of consistent with the statement earlier in the page, these wetlands had moderate functional value. All of a sudden we have undoubtedly shrimp and shrimp are important to birds who are eating them and so I – it's a big reach and it seems internally inconsistent in this document."

Also considered by Complainant in the context of the "gravity component" of the proposed penalty were factors going to the "importance of the violation to the regulatory scheme."[501] In this regard, Complaint took two factors into consideration. First, Complainant considered that the Central Valley of California and Stanislaus County in particular had historically lost and were continuing to loose a great deal of important wetland ecosystems.[502] Second, Complainant took into consideration the fact that the San Joaquin and Merced Rivers, to which the wetlands at issue were hydrologically connected, are both listed as "water quality impaired" under Section 303(d) of the CWA, 33 U.S.C. § 1313(d), due to agricultural pollutants.[503]

The Supreme Court in *United States v. Riverside Bayview Homes, Inc.*, *supra*, observed that:

> Section 404 originated as part of the Federal Water Pollution Control Act Amendments of 1972, which constituted a *comprehensive* legislative attempt "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101, 33 U.S.C. § 1251. This objective incorporated a *broad, systemic view* of the goal of maintaining and improving water quality: as the House Report on the legislation put it, "the word 'integrity' ... refers to a condition in which the natural structure and function of *ecosystems* [are] maintained." H.R. Rep. No. 92-911, p. 76 (1972). Protection of *aquatic ecosystems*, Congress recognized, demanded broad federal authority to control pollution, for "*[w]ater moves in hydrologic cycles* and it is essential that discharge of pollutants be controlled at the source." S. Rep. No. 92-414, p. 77 (1972).[504]

The Court in *Riverside Bayview* therefore endorsed the Corps' determination that "adjacent wetlands" were "waters of the United States," stating:

> The regulation of activities that cause water pollution ... must focus on *all waters that together form the entire aquatic system*. Water moves in hydrologic cycles, and the pollution of this part of the aquatic system ... will affect the water quality of the other waters within that aquatic system.[505]

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[501] *See* CX 62, p. 14; CX 61, p. 6-7: ("...[Complainant] looked to ... EPA's interest in preserving this increasingly rare habitat..."); Complainant's Brief, p. 29.

[502] Ms. Goldmann testified: "[The] Central Valley of California has lost approximately 90 percent of their wetlands historically. In a recent 1998 study by Dr. Bob Holland he stated that Stanislaus County was losing vernal pool complexes at about 1.2 percent a year. So the losses of this extremely rare and important habitat are a very high concern to EPA." (Tr., pp. 268-269).

[503] *See* Tr., pp. 274-275; CX 67 ("1998 California 303(d) List and TMDL [Total Maximum Daily Load] Priority Schedule"), pp. 6, 8.

[504] *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. at 132-133 (emphasis added).

[505] *Id.* at 133-134, *quoting* 42 Fed. Reg. 37128 (1977) (emphasis added).

As illustrated by the Court's observations and holding in *Riverside Bayview*, the fact that Respondent's deep-ripping further contributed to already great losses of important wetland ecosystems in the Central Valley of California and Stanislaus County, and the fact that Respondent's deep-ripping destroyed wetlands which otherwise would have provided "water quality" functions and had been hydrologically connected to the "water quality impaired" San Joaquin and Merced Rivers, were appropriate factors for consideration under the rubric of the "importance of the violation to the regulatory scheme" of the CWA. Thus, it was proper for Complainant to consider these factors in the context of the "gravity component" of the proposed penalty.

3) Summary of "Gravity Component"

In calculating the "gravity component" of the proposed penalty,[506] Complainant considered the "deterrent effect" of the proposed penalty, the "importance of the violation to the regulatory scheme" of the CWA, and the "actual or possible harm" caused by the violations. Complainant's proposed penalty appropriately and reasonably considered the "deterrent effect" of the penalty on both Respondent and other similarly situated individuals. Complainant also properly accounted for the "importance of the violation to the regulatory scheme" of the CWA by considering the impact of the violations on the continuing overall loss of wetlands in the California Central Valley and Stanislaus County, as well as the impact of the violations on the San Joaquin and Merced Rivers which, due to agricultural pollutants, are listed as "water quality impaired" under Section 303(d) of the CWA, 33 U.S.C. § 1313(d). Regarding the "actual or possible harm" caused by the violations, the wetlands at issue performed important "water quality" and "biological" functions before they were destroyed by Respondent's deep-ripping. Although the wetlands were of a "degraded" quality prior to Respondent's deep-ripping, Complainant did take such degradation into consideration. However, Complainant assigned some importance to the existence of invertebrates such as shrimp in the vernal pools, and the record does not support a finding that such invertebrates in fact existed. Therefore, Complainant's proposed "gravity component" of the penalty of $50,400 shall be reduced by 35% to $32,760.

C. Degree of Culpability

Under the Penalty Policy, having determined the "preliminary deterrence amount" of the penalty ("economic benefit" plus "gravity"), Complainant then applied the "adjustment factor" of "Degree of Willfulness and/or Negligence" (*i.e.*, "degree of culpability") to the "preliminary deterrence amount."[507] The "culpability" factor entails consideration of, among others, the following

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[506] Again, under the "Penalty Policy," the "gravity component" and the "economic benefit component" together form the "preliminary deterrence amount" of the penalty, which is then adjusted upward or downward based upon the remaining statutorily prescribed penalty factors listed in Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3).

[507] *See, e.g.*, CX 62, p. i; CX 63, p. 8; Tr., p. 266, ln. 8-10. *See also, Port of Oakland and Great Lakes Dredge & Dock Co.*, 4 E.A.D. 170, 199 (EAB 1992). The consideration of "culpability" goes only to the penalty

elements: "How much control the violator had over the events constituting the violation" and "whether the violator knew of the legal requirement which was violated."[508]

Complainant proposes an upward penalty adjustment of $5,000 to account for Respondent's "culpability" in this case, explaining:

> This factor evaluates the violator's experience with the Section 404 permitting requirements and degree of control over the violative conduct. It is abundantly clear that Respondents knew they were required to apply for a permit and had the ability to do so. Thus, [Complainant] determined that, given Respondents' deliberate choice not to comply with the law, the penalty should be adjusted upward to reflect Respondents' culpability.[509]

Ms. Goldmann similarly testified:

> In this case I took into account [regarding "culpability"] the fact that Mr. Veldhuis knew about his responsibilities under Section 404 of the [CWA]. He knew about them prior to the activity in field five. He was well aware of them based on his activities on fields three and four.[510]

In addition to Respondent's knowing disregard of the "Section 404" Permit requirements, Complainant also bases it's proposed "culpability" penalty on Respondent's failure to perform mitigation after having repeatedly promised to do so,[511] Respondent's failure to respond fully to a

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calculation and not to the determination of liability. Civil administrative actions brought pursuant to Section 301(a) of the CWA are subject to strict liability. 33 U.S.C. §§ 1311(a), 1319(g). Knowledge or negligence are not necessary to establish liability. *See, e.g., Kelly v. U.S. Environmental Protection Agency*, 203 F.3d 519, 522 (7th Cir. 2000)].

[508]CX 62, p. 18.

[509]CX 61, p. 9 (citation omitted). *See also*, Complainant's Brief, pp. 32-33.

[510]Tr., p. 277. *See also*, Tr., pp. 319-320 (Ms. Goldmann): "Q: You stated that on the culpability factor that Mr. Veldhuis knew about his responsibilities. That is something you acquired in talking with somebody else; is that right? ... A: It was basically the written documentation produced by NRCS to Mr. Veldhuis ... and I spoke with NRCS and Mike McElhiney and he discussed his many conversations with Mr. Veldhuis and Mr. Veldhuis also had the letters from the Corps that was sent to them ... prior to fields three and four being deep-ripped. Q: And you said well aware on three and four. What evidence do you base this fact [on]? A: I base that on the documentation provided by Mike McElhiney ... on fields five and information saying he needed a 404 permit and ... the fact that Mr. ... McElhiney assisted Mr. Veldhuis in applying for an after-the-fact permit for fields five and, again, the Corps of Engineers' correspondence to Mr. Veldhuis in 1996."

[511]*See, e.g.*, CX 61, pp. 9-10: "In instances when NRCS was able to contact Mr. Veldhuis, he promised to pursue the mitigation, but did not. Mr. Veldhuis also agreed to mitigate in a discussion with EPA in the field in August, 1997, but took no subsequent action."

"Request for Information" under Section 308 of the CWA, 33 U.S.C. § 1318 ("308 Request"),[512] and Respondent's failure to comply with the Corps' April 1, 1996 "Cease and Desist Order" (CX 24).[513]

Respondent contends that he did not knowingly violate the CWA because he is simply unfamiliar with wetland permitting[514] and because Respondent misunderstood Mr. McElhiney to say that although Respondent could not level field #5 for a "dairy" without a permit, he could nonetheless deep-rip field #5 for an orchard of trees without a permit.[515] Respondent further contends that Complainant should be "estopped" from imposing a penalty for Respondent's failure to perform the mitigation because Respondent was directed by Ms. Goldmann to "hold the mitigation in abeyance."[516] Finally, Respondent suggests that he should not be penalized for failing to comply with the "308 Request" because any such failure was that of Respondent's counsel, and not that of Respondent himself.[517]

For the reasons discussed below, Complainant's proposed assessment of a $5,000 upward penalty adjustment in consideration of Respondent's culpability shall be increased by 50% to $7,500. Respondent's arguments regarding culpability are unavailing.

1) Facts Going to "Culpability"

On December 8, 1994, Michael McElhiney (NRCS) visited the property and met with Respondent.[518] Respondent testified that during that visit: "...Mr. McElhiney ... showed me a map and said that these were vernal pools and that we should stop all earth moving and ... I asked the question, '...what are vernal pools?' And he explained to me, '[t]hat's where the fairy shrimp live.'"[519] Mr. McElhiney similarly testified regarding this visit: "And at that time I was requested to assist him through this process. First to educate him on what the rules and the laws were that were out there, and that there had been a USDA base acreage associated with the Farm Service

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[512]*See* CX 61, p. 10: "Respondents' recalcitrance is further evidenced by the incomplete response to the EPA's November 13, 1998 Section 308 letter." *See also*, Tr., p. 277 (Ms. Goldmann): "And I also took into consideration [regarding the "culpability" factor] an incomplete 308 response."

[513]*See, e.g.*, CX 61, p. 10: "In addition, Mr. Veldhuis failed to respond to a Corps cease and desist letter."

[514]*See, e.g.*, Respondent's Reply Brief, p. 6; Tr., p. 540, ln. 24; p. 548, ln. 23; p. 625, ln. 5-9.

[515]*See, e.g.*, Tr., p. 541, ln. 6-12; p. 542, ln. 10-17; p. 553, ln. 13-19.

[516]*See* Answer, p. 3, ¶¶ 7-9; Respondent's Reply Brief, p. 3, ln. 25-27; Tr., pp. 323-327 (Ms. Goldmann); Tr., p. 546 (Mr. Velduis).

[517]*See, e.g.*, Tr., p. 320, ln. 14 - p. 321, ln. 14.

[518]Tr., pp. 81-82; CX 8, p. 2.

[519]Tr., pp. 539-540.

Agency..."[520] Mr. McElhiney elaborated: "And at every visit I tried to educate him and provide him information."[521] Mr. McElhiney testified that, in general:

> ...I was very clear with Mr. Veldhuis, and educated him about wetland conditions that existed on his property. And was very clear about the activities that would either put him into a noncompliance situation with USDA, or would be considered a violation of the [CWA], with the [Corps]. And provided him the resources – background information, the attachments, and went over those with him and offered our assistance and provided a map.[522]

On December 13, 1994, Mr. McElhiney sent a letter to Respondent by both facsimile and regular mail which stated, in part: "Karen [Shaffer, U.S. Army Corps of Engineers] told me that you need to obtain a Section 404 permit from the US Army Corps of Engineers before you level this property [ASCS Tract #2375, Field #5]."[523] On December 16, 1994, Mr. McElhiney mailed a letter to Respondent to which was attached, among other items, "Instructions for Preparing a Department of Army [Section 404] Permit Application and Form 4345."[524] On February 19, 1995, Mr. McElhiney mailed a letter to Respondent which stated, in part, that: "...the delineation map of wetlands on your property ... [will be] completed in the near future,"[525] and provided names and contact information for two "consultants" who were qualified to assist Respondent with the process of applying for a "404 Permit."[526] From December 1994 through March 1995, the NRCS performed a "wetland delineation" on Respondent's field #5, and a report of that delineation was provided to Respondent by Mr. McElhiney when they met on May 19, 1995.[527] On August 10, 1995, Mr. McElhiney sent by facsimile a letter to Respondent which stated, in part: "**Please do NOT begin leveling without a Section 404 Permit from the US Army Corps of Engineers**... I have left two messages on your answering machine ... regarding my concern for your apparent decision to land-level this field. I sincerely hope you have a 404 Permit."[528] On August 12, 1995, Mr. McElhiney completed a hand-written draft "404 Permit" application on behalf of Respondent and sent the

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[520]Tr., p. 82.

[521]Tr., p. 86.

[522]Tr., pp. 98-99.

[523]CX 8, p. 2 (underlining in original); Tr., pp. 41-42.

[524]CX 9; Tr., pp. 43-44.

[525]CX 10.

[526]CX 10; Tr., p. 45.

[527]Tr., pp. 24-25, 81, 184-185; CX 2; CX 3; CX 11.

[528]CX 11, p. 1 (underlining and bold type in original); Tr., p. 47.

application by facsimile to Respondent for Respondent's review.[529] On August 15, 1995, Mr. McElhiney completed a type-written draft "404 Permit" application on behalf of Respondent and sent the application by facsimile to Respondent for Respondent's review. That facsimile cover page explained that: "I need you to review the typed copy of the 'Application for Department of the Army Permit.' I have compiled the rest of the data needed to submit the application to the Corps of Engineers. We need to get together to review and sign this application ASAP."[530] In August 1995, Mr. McElhiney and Mr. Chuck Jachens, an NRCS Engineer, completed a "Conceptual Mitigation Plan for Loss of Wetlands" which was to be submitted with the "404 Permit" application prepared by Mr. McElhiney on behalf of Respondent.[531] Mr. McElhiney met with Respondent and "went over" the draft "404 Permit" application and the "mitigation plan."[532] On August 15, 1995, Mr. McElhiney mailed a letter to Respondent which stated, in part: "FIELD #5 has 3.46 acres of Wetlands (vernal pools)...," and directed Respondent to "CONTACT OUR OFFICE BEFORE ANY LEVELING OR DEEP RIPPING ACTIVITIES BEGIN." Attached to this letter was a copy of a document entitled "HIGHLY ERODIBLE LAND AND WETLAND CONSERVATION DETERMINATION" and a map of Respondent's property showing the delineated wetlands on field #5.[533] This "Highly Erodible Land Determination" also noted: "Farmed wetlands apparent in fields 3, 4 & 5."[534]

Respondent did not contact the NRCS before deep-ripping field #5 on or about November 6, 1995.[535]

On November 6, 1995, Mr. McElhiney (NRCS) telephoned Respondent and informed him that his deep-ripping activities were in violation of Section 404 of the CWA.[536] On November 17, 1995, NRCS completed and mailed to Respondent a revised "Highly Erodible Land and Wetland Conservation Determination" which reiterated that there were 3.46 acres of wetlands on field #5 and

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[529]CX 12; Tr., pp. 48-49.

[530]CX 13, Tr., p. 52.

[531]Tr., pp. 58-59; CX 19. This "Mitigation Plan" was never implemented and the land was subsequently deep-ripped on or about November 6, 1995. (Tr., p. 59).

[532]Tr., p. 62 (Mr. McElhiney): "...I met with Mr. Veldhuis at his ranch and went over all of the paperwork with him – the draft 404 permit application and the mitigation plan – and provided him copies." *See also*, Tr., p. 540 (Mr. Veldhuis): "...Mr. McElhiney then said that I had to fill out a 404 permit. And he filled it out and brought it over to me..." *See also*, Tr., p. 553 (Mr. Veldhuis): "...Mr. McElhiney suggested to me that I do a 404 permit, make out a 404 permit. Actually he made it out."

[533]CX 7, p.1 (capitalization in original); CX 69, ¶25; Tr., p. 40. Respondent did receive this letter. (CX 59, p. 7; Tr., p. 259).

[534]CX 7, p. 2.

[535]Tr., p. 553, ln. 23 (Mr. Veldhuis); CX 69, ¶¶26-27

[536]CX 69, ¶28; CX 18, p. 2.

directed Respondent to "contact NRCS before any additional ripping or leveling."[537]

On January 22, 1996, Tom Cavanaugh (Corps) sent a certified letter to Respondent which stated, in part:

> Information received from the [NRCS] indicates that approximately 3.46 acres of wetlands have been filled ... [and] that you have placed this material. Our jurisdiction in this area is under Section 404 of the [CWA]. A Department of the Army permit is required prior to discharging dredged or fill materials into waters of the United States... Since [such a] permit has not been issued authorizing this discharge, this work has been done in violation of the [CWA]... Until this violation has been resolved, you should refrain from any further work involving these illegally converted waters of the United States.[538]

On April 1, 1996, Mr. Cavanaugh sent a "Cease and Desist Order" to Respondent by certified mail which stated in part:

> You are *hereby directed to cease and desist* from any additional work involving these illegally converted waters... In order to avoid further legal action, *you must, immediately, cease activities* associated with the installation of the orchard on the illegally converted area and either submit a permit application or your plans to restore the area to its pre-project condition."[539]

On or about September 9, 1996, Lisa Clay (Corps Assistant District Counsel) sent a letter by certified mail to Respondent, stating in part:

> ...[O]ur Regulatory Office advised you ... that your work violated the Clean Water Act and directed you to cease all activities in wetlands. To date, you have continued to perform work in the delineated wetland area... Because of your continued violation ... your case will be referred to the U.S. Attorney ... unless you respond within 30

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[537]CX 69, ¶29; CX 18, p. 4; Tr., p. 105 (Mr. McElhiney). Although the Stipulated Facts at CX 69, ¶29 state that the "Revised Highly Erodible Land and Wetland Conservation Determination" was completed and sent to Respondent on November 15, 1995, that document was actually completed and mailed on November 17, 1995. [CX 18, p. 4; Tr., p. 105, ln. 12 (Mr. McElhiney)]. The "Revised Determination" was only "requested" on November 15, 1995. (CX 18, p. 4).

[538]CX 23, pp. 1-2; CX 69, ¶30. Although the letter is written for the signature of Art Champ, Chief of the Corps' Sacramento District Regulatory Branch, the letter was written by Tom Cavanaugh. (Tr., p. 112). Respondent did receive this letter. (CX 25; Tr., p. 116).

[539]CX 24, p. 2 (emphasis added); *See also*, Tr., pp. 113-114; CX 69, ¶31. Respondent did receive this letter. (CX 25; Tr., p. 116). Although the "Cease and Desist Order" was signed by Art Champ, the letter was written by Mr. Cavanaugh. (Tr., p. 113).

days...[540]

On or about August 8, 1997, Respondent's contractor deep-ripped fields #3 and #4.[541]

On August 8, 1997, Elizabeth Goldmann (EPA) spoke with Respondent by telephone and informed Respondent that he may be in violation of the CWA and advised Respondent to cease all activity on fields #3, #4, and #5.[542] On August 28, 1997, Ms. Goldmann and Mr. McElhiney visited the property and met with Respondent. Ms. Goldmann explained to Respondent the need to obtain a "404 permit" before deep-ripping wetlands and informed Respondent that wetlands still existed on fields #3 and #4, and Respondent stated that he intended to perform mitigation for the 3.46 acres of wetlands which had been deep-ripped on field #5.[543]

At no time did Respondent ever apply for a permit pursuant to Section 404 of the CWA, 33 U.S.C. § 1344,[544] or implement the mitigation.[545]

2) "Knowing" Violations

In the face of this overwhelming evidence that Respondent was repeatedly informed of the necessity of obtaining a "404 Permit" by the Natural Resource Conservation Service, the U.S. Army Corps of Engineers, and the U.S. Environmental Protection Agency, and the evidence that Mr. McElhiney went to great lengths to assist Respondent in the process of obtaining a "404 Permit," Respondent contends that he was unaware of such a requirement prior to deep-ripping field #5 in November 1995 or fields #3 and #4 in August 1997, arguing:

> Part of the penalty ... pertained to [Respondent's] knowingly discharging into waters of the United States. How can anyone state with a straight face that a farmer's sole

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[540]CX 26, p. 1; *See also*, Tr., pp. 116-117, 128-129; CX 69, ¶32. Although Respondent asserts that he does not recall receiving this letter (Tr., p. 117, ln. 15-17, p. 118, ln. 24-25), and the record does not contain a certified mail receipt (Tr., p. 119, ln. 3-4), I find persuasive the testimony of Lisa Clay that she mailed the letter by certified mail. (Tr., p. 129, ln. 13-16). In addition, Respondent's testimony indicates that he received this letter: "MR. VELDHUIS: ...Then I believe it was the first part of '96 ... I got a letter form the [Corps], a registered letter that stated that I was discharging into wetlands... So that's what my thinking was when I got the letter from Mr. Cavanaugh that I'm discharging into wetlands... And then I got another letter ... I think I got another one from his assistant if I'm not mistaken who was here on Monday... MR. GNASS: Mr. Cavanaugh? MS. LA BLANC: Actually, it was the attorney. THE COURT: Right, district counsel." (Tr., pp. 542-544).

[541]CX 69, ¶¶33-34.

[542]CX 69, ¶35; CX 56; Tr., pp. 251-253.

[543]CX 69, ¶ 36; CX 57; Tr., pp. 254-256.

[544]CX 69, ¶39; Tr., p. 256.

[545]*See, e.g.*, Tr., pp. 59, 67-68, 127-127, 253, 546.

> activity on property is [sic] plowing or ripping his fields is a discharge into navigable waters[?] ... Nobody in their right mind understands that a point source is a plow. And if you put the plow in your field that you are now by moving a speck of dirt you are now polluting the waters of the United States, if such occurs in a mud puddle in the middle of a field.[546]

More precisely, Respondent offers two reasons why he did not "knowingly" violate the CWA: first, because Respondent is simply unfamiliar with wetland permitting,[547] and second, because Respondent misunderstood Mr. McElhiney when Mr. McElhiney informed Respondent that he could not level field #5 for a "dairy" without a permit, mistakenly believing that Mr. McElhiney meant that Respondent could nonetheless deep-rip field #5 for an orchard of trees without a permit.[548]

a.) Respondent's Asserted Ignorance of the Law

Regarding Respondent's asserted ignorance of the law, Respondent argues: "...[W]e don't believe he's that culpable because he's a farmer. He doesn't understand the intricacies of wetlands or ... the difference between farmed wetlands and prior converted wetlands..."[549] Indeed, Respondent testified: "...Mr. McElhiney then said that I had to fill out a 404 permit. And he filled it out and brought it over to me and I says, 'Well, what do I need a 404 permit for?' I had never heard of one before."[550]

Whether or not Respondent had ever heard of a "404 Permit," he certainly had the sophistication to understand from the numerous notices from various federal agencies and the tireless efforts of Mr. McElhiney to inform, educate, and assist Respondent, that such a permit was necessary. Further, Respondent was, at the time of hearing, a current Director of the national group "Dairy Farmers of America," had been the President of the approximately 1,300-member "Western United Dairymen," and had, in fact, had previous personal experience with the CWA, as Respondent testified:

> Q: Now, you have been in this dairy industry ... for many years.[551] You hold

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[546]Respondent's Reply Brief, p. 6.

[547]*See, e.g.*, Tr., p. 540, ln. 24; p. 548, ln. 23; p. 625, ln. 5-9.

[548]*See, e.g.*, Tr., p. 541, ln. 6-12; p. 542, ln. 10-17; p. 553, ln. 13-19.

[549]Tr., p. 625. Ms. Goldmann testified, however: "Q: To your knowledge has NRCS ever determined that the Veldhuis property was a prior converted crop land? A: To my knowledge NRCS determined that it was not a prior converted crop land. Q: Did you ever tell Mr. Veldhuis that his property was prior converted crop land? A: No, I did not." (Tr., p. 261).

[550]Tr., p. 540.

[551]Respondent has been in the farming business for approximately 50 years. (Tr. p. 83, ln. 7).

some national office; is that correct?

A: Oh, I'm a director of DFA, Dairy Farmers of America, which covers the United States.

...

Q: You were the past president of Western United Dairymen; is that correct?

A: That is correct. ... It just covers California, 20 – no maybe 1,800 dairymen in the state of California. No, 1,300. I'm sorry, about 1,300.

Q: Have you had problems in the past complying with regulations of various government agencies...?

A: About 15 years ago ... at the home ranch we're located in the Merced River and ... we were -- well, lets just say charged with discharging into the waters of the Merced River and then we worked out a program with Regional Water Control and releveled some fields and put in some ponds to hold the water and put in some pumps and so far we've been – have not received any violations.[552]

Respondent's argument that he was unaware of the necessity of obtaining a "404 Permit" prior to his deep-ripping of field #5 in November 1995 or fields #3 and #4 in August 1997 is simply not credible.

b.) Respondent's Asserted "Misunderstanding"

Respondent further argues that he misunderstood Mr. McElhiney to say that although Respondent could not level field #5 for a "dairy" without a permit, he could nonetheless deep-rip field #5 for an orchard of trees without a permit. Respondent explained:

A: ...Mr. McElhiney then said that I had to fill out a 404 permit. And he filled it out and brought it over to me and I says, 'Well, what do I need a 404 permit for?' I had never heard of one before. And he said ... the permit had to be filled out because these are now wetlands and that had to go to the Army Corps of Engineers... And I said, "Well, can I put trees in it?" Because I thought, well, all this is because of the land leveling operation that we were doing. And I understood Mr. McElhiney to say, "Yes, you could put trees in it."

Q: You couldn't build a dairy but you could put trees in it; is that what you understood?

A: That was my understanding. ... So I checked with Dave Wilson Nursery and I could get trees for 200 acres. This was about now in June... And so I ordered trees ... and put down a half of the amount of money as a deposit and then I got ahold of Mr. Price, who does the ripping. ... Then ... several weeks went by ... and Mr. Price, his equipment was in the field and we had finished a one-time pass on the whole ranch and was ripping the second time on another

[552]Tr., pp. 547-548.

angle.

Q: When you say "whole ranch," you're talking about field five?

A: ...Yes, field five. And we were about one day from finishing the second pass and Mr. McElhiney came out there and says, "Ray, what are you doing? ... [Y]ou don't have a 404 permit." And I says, "Well, I understood last time I talked to you that I could put trees in. The permit was for a, well, dairy – or leveling I should say. And he says, "No, no, no, no." And so I realized then I was wrong and but we finished it and the trees were paid for – ... $50,000 was put down and so we went ahead and replanted it.[553]

Respondent's argument in this regard is not persuasive for the same reasons Respondent's asserted general ignorance of law is not persuasive. Indeed, Respondent's argument is disingenuous. Respondent was well informed of his obligations under the CWA by Mr. McElhiney prior to deep-ripping field #5 in November 1995.[554] Further, even assuming *arguendo* that Respondent "misunderstood [Mr. McElhiney] at that time,"[555] Respondent nevertheless admits that *after* realizing his "mistake," "...the trees were paid for ... so we went ahead and replanted [field #5]."[556] Respondent's misguided investment does not excuse his continued knowing violation. In addition, Respondent's argument that he initially misunderstood Mr. McElhiney in 1995, even if true, does not excuse his knowing violations when deep-ripping fields #3 and #4 in August 1997.[557]

Accordingly, I find that Respondent's argument that he misunderstood Mr. McElhiney to say that Respondent could not level field #5 for a "dairy" without a permit but could nonetheless deep-rip field #5 for an orchard of trees without a permit is not persuasive that Respondent did not knowingly violate the CWA.

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[553]Tr., pp. 540-542. *See also*, Tr., p. 553 (Mr. Veldhuis): "...Mr. McElhiney suggested to me that I do a 404 permit, make out a 404 permit. Actually he made it out. And I looked at it as being directed to the animal confinement area that they were in the process of doing. But at some point in there I asked Mr. McElhiney if I could ... plant trees on this property and he said yes. That was my understanding. *But ... from later conversation with him he said, 'Yes, but you need a 404 permit.' So I misunderstood him at that time*." (Emphasis added).

[554]*See, e.g.*, Tr., pp. 98-99 (Mr. McElhiney): "...I was very clear with Mr. Veldhuis, and educated him about wetland conditions that existed on his property. And was very clear about the activities that would either put him into a noncompliance situation with USDA, or would be considered a violation of the [CWA], with the [Corps]. And provided him the resources – background information, the attachments, and went over those with him and offered our assistance and provided a map."

[555]Tr., p. 553, ln. 19 (Mr. Veldhuis).

[556]Tr., p. 542, ln. 15-17 (Mr. Veldhuis).

[557]*See, e.g., Kelly v. U.S. EPA, supra*, at 522: "...[E]ven if knowledge was required for a violation [under Section 404 of the CWA], the run-in with the feds in 1990 made [the respondents] ... aware that putting material in the swale was a no-no. Their sob story about being ignorant of the federal regulations might have been credible the first time, but they obviously chose with, at best, their eyes wide shut, to disregard the law the second time around."

3) Failure to Perform Promised Mitigation

As discussed in detail *supra* in section IV of this Initial Decision, Respondent further argues that Complainant should be "estopped" from imposing a penalty for Respondent's failure to perform the mitigation because Respondent was directed by Ms. Goldmann to "hold the mitigation in abeyance."[558] As explained *supra*, this argument is without merit. Ms. Goldmann candidly explained why she instructed Respondent to "hold the mitigation in abeyance"[559] and clearly testified that the penalty had *not* been enhanced due to Respondent's having followed her instructions.[560] Complainant's consideration of Respondent's failure to mitigate in the context of the "degree of culpability" factor reflects Respondent's lack of cooperation with NRCS, the Corps and EPA in promising to mitigate but failing to do so *up to* the point at which Ms. Goldmann finally advised Respondent that the enforcement action could no longer be avoided.[561] The proposed "culpability" factor appropriately and reasonably reflects such lack of cooperation regarding mitigation. The penalty was *not* enhanced due to Respondent's "holding the mitigation in abeyance" as Ms. Goldmann finally advised in December 1998.

4) Failure to Comply with the "308 Request"

Respondent also suggests that he should not be penalized for failing to fully comply with Complainant's "Request for Information" pursuant to Section 308 of the CWA, 33 U.S.C. § 1318 ("308 Request"), because any such failure was that of Respondent's counsel and not that of Respondent himself.[562] This argument is unavailing.

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[558]*See* Answer, p. 3, ¶¶ 7-9; Respondent's Reply Brief, p. 3, ln. 25-27; Tr., pp. 323-327 (Ms. Goldmann); Tr., p. 546 (Mr. Veldhuis).

[559]*See* Tr., pp. 323-325 (Ms. Goldmann). *See also*, Tr., pp. 326-327 (Ms. Goldmann): "... I spoke with [Respondent] on the phone [in December 1998] and Mr. Veldhuis said he still planned on mitigating which was what he had originally committed to back in 1995. And because we were initiating the formal investigation, I just felt that it wouldn't be fair to ask him to invest in that not knowing the outcome of this investigation."

[560]*See, e.g.*, Tr., p. 325: "Q: So are we holding it against him because ... we're holding it in abeyance? A: No, not at all."

[561]Ms. Goldmann explained: "Q: So the fact it's not mitigated yet, that was not part of your consideration of the penalty? A: The fact is that ... Mr. Veldhuis had several opportunities to work with NRCS regarding mitigation but he had not done that and at that time I said, "Please do not conduct any work until – we're going to initiate a formal enforcement investigation and in the investigation our penalty is based on what the impacts to waters of the United States are." (Tr., p. 325).

[562]*See, e.g.*, Tr., pp. 320-321: "MR. GNASS: And you assessed part of the penalty based on my incomplete response [to the '308 request']; is that right? My culpability? MS. GOLDMANN: Your client's culpability. MR. GNASS: Well I'm the one who drafted it. MS. GOLDMANN: It's you client's response that we're concerned with and it was not complete. ... MR. GNASS: You don't have a problem with an attorney representing a client ... regarding a letter in response, do you? MS. GOLDMANN: No, I don't."

On November 13, 1998, Complainant mailed to Respondent the "308 Request" which explained that a written response must be submitted within 15 days of receipt and that such response must be signed and include a specific sworn "certification."[563] On January 15, 1999, Respondent mailed to Complainant a response to Complainant's "308 Request."[564] This response was timely submitted in light of numerous deadline extensions granted by Complainant.[565] However, the response did not include some required documentation, to wit: "The correspondence from the Corps of Engineers to Mr. Veldhuis was missing."[566] This response also failed to include the requisite sworn certification.[567]

Respondent's failure to comply with the "308 Request" might have been more accurately characterized as a "Degree of Cooperation / Non-cooperation" factor rather than a "Degree of Willfulness and/or Negligence" factor under the Penalty Policy,[568] which might have addressed the concerns of Respondent's counsel that Respondent was being penalized for the actions of his counsel. In any event, however, both the "willfulness/negligence" and the "cooperation/non-cooperation" factors under the Penalty Policy go to the statutory penalty criteria of "culpability," and Respondent's failure, through counsel or otherwise, to adequately respond to the "308 Request" is an appropriate consideration under the "culpability" factor of Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3). Complainant's proposed "culpability" factor reasonably reflects Respondent's failure to fully comply with the "308 Request" in this case.

5) Failure to Comply with the "Cease and Desist Order"

Finally, as noted *supra*, Complainant also bases it's proposed "culpability" penalty on Respondent's failure to comply with the Corps' April 1, 1996 "Cease and Desist Order" (CX 24).[569]

On April 1, 1996, Tom Cavanaugh (Corps) sent a "Cease and Desist Order" to Respondent by certified mail which stated in part:

> You are *hereby directed to cease and desist* from any additional work involving these illegally converted waters... In order to avoid further legal action, *you must*,

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[563]CX 69, ¶ 37; CX 58; Tr., pp. 257, 278-279.

[564]CX 59.

[565]Tr., pp. 278-279.

[566]Tr., p. 279. *See also*, Tr., pp. 320-321 (Ms. Goldmann): "We didn't have ... NRCS correspondence, Corps correspondence and as I recall just some details on the site."

[567]Tr., p. 279; CX 59.

[568]CX 62, pp. 17, 19.

[569]*See, e.g.*, CX 61, p. 10.

> *immediately, cease activities* associated with the installation of the orchard on the illegally converted area and either submit a permit application or your plans to restore the area to its pre-project condition."[570]

On or about September 9, 1996, Lisa Clay (Corps) sent a letter by certified mail to Respondent, stating in part:

> ...[O]ur Regulatory Office ... directed you to cease all activities in wetlands. To date, you have continued to perform work in the delineated wetland area... Because of your continued violation ... your case will be referred to the U.S. Attorney ... unless you respond within 30 days...[571]

Respondent did not respond to the "Cease and Desist Order," and Respondent's contractor deep-ripped fields #3 and #4 on or about August 8, 1997.[572]

Respondent did fail to comply with the Corps' April 1, 1996 "Cease and Desist Order" by deep-ripping fields #3 and #4 in August 1997. Respondent does not offer any argument regarding his failure to comply with the Cease and Desist Order. In this case, Complainant appropriately and reasonably based its proposed "culpability" factor in part upon such failure.

In light of Respondent's knowing violations of the CWA, failure to perform promised mitigation, failure to adequately comply with Complainant's "Request for Information" under Section 308 of the CWA, and failure to comply with the Corps' Cease and Desist Order, I find that the proposed $5,000 upward penalty adjustment does not reasonably or appropriately reflect Respondent's degree of culpability in this matter. Rather, I am compelled to find that the proposed penalty adjustment for Respondent's degree of culpability be increased by 50% from $5,000 to $7,500.[573]

D. Remaining Statutory Penalty Criteria

1) Ability to Pay

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[570]CX 24, p. 2 (emphasis added); *See also*, Tr., pp. 113-114; CX 69, ¶31. Respondent did receive this letter. (CX 25; Tr., p. 116). Although the "Cease and Desist Order" was signed by Art Champ, the letter was written by Mr. Cavanaugh. (Tr., p. 113).

[571]CX 26, p. 1; *See also*, Tr., pp. 116-117, 128-129; CX 69, ¶32. Respondent did receive this letter. [Tr., p. 129 (Ms. Clay); Tr., pp. 542-544 (Mr. Veldhuis)].

[572]CX 69, ¶¶33-34.

[573]40 CFR § 22.27(b) authorizes the Administrative Law Judge (ALJ) to "assess a penalty different in amount from the penalty proposed by complainant," but the ALJ's Initial Decision must set forth "the specific reasons for the increase or decrease."

Respondent does not challenge the penalty assessment based upon his ability or inability to pay. As Complainant explains in the written "Penalty Justification:"

> [Complainant] has not adjusted the proposed penalty based on inability to pay. [Respondent] ... has never submitted information on this subject. Respondents failed to raise inability to pay in their answer and have not subsequently provided EPA with notice or information regarding inability to pay.[574]

Complainant has the burden of showing that the proposed penalty is appropriate and such showing must be made by a preponderance of the evidence. 40 CFR § 22.24, states:

> (a) The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate. Following complainant's establishment of a prima facie case, respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the burdens of presentation and persuasion for any affirmative defenses.
>
> (b) Each matter of controversy shall be decided by the Presiding Officer upon a preponderance of the evidence.

The EAB has consistently held that the complainant, pursuant to 40 C.F.R. § 22.24, bears the burden of proving that the proposed penalty is appropriate after considering all of the applicable statutory penalty factors,[575] but that such consideration "does not mean that there is any specific burden of proof with respect to any individual factor."[576] Rather, the "complainant's burden focuses on the overall appropriateness of the proposed penalty in light of all the statutory factors, rather than any particular quantum of proof for individual statutory factors."[577]

Regarding the specific factor of a respondent's "ability to pay," the EAB in *New Waterbury* construed the complainant's burden as requiring that the complainant:

> ...must as part of its prima facie case produce some evidence regarding the respondent's *general* financial status from which it can be *inferred* that the

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[574]CX 61, p. 10.

[575]*See, e.g., In re B.J. Carney Industries, Inc., supra,* at 217; *In re Employers Insurance of Wausau and Group Eight Technology, Inc., supra,* at 756; *In re James C. Lin and Lin Cubing, Inc.*, FIFRA Appeal No. 94-2, 5 E.A.D. 595, 599 (EAB, Dec. 6, 1994); *In re New Waterbury, Ltd.*, TSCA Appeal No. 93-2, 5 E.A.D. 529, 538 (EAB, Oct. 20, 1994).

[576]*New Waterbury, supra,* at 539.

[577]*In re Woodcrest Manufacturing, Inc.*, EPCRA Appeal No. 97-2, 7 E.A.D. 757, 773 (EAB, July 23, 1998) (emphasis removed) (citation omitted).

respondent's ability to pay should not affect the penalty amount." [578]

The Board explained:

> [Complainant] will need to present some evidence to show that it considered the respondent's ability to pay a penalty. [Complainant] need not present any *specific* evidence to show that the respondent *can pay* ... the assessed penalty, but can simply rely on some *general* financial information regarding the respondent's financial status which can support the *inference* that the penalty assessment need not be reduced. Once the respondent has presented *specific* evidence to show that ... it cannot pay any penalty, the [Complainant] ... must respond either with the introduction of additional evidence to rebut the respondent's claim or through cross examination it must discredit the respondent's contentions.[579]

Thus, although there is no "particular quantum of proof" for establishing a respondent's ability to pay, it is incumbent upon the complainant to come forward with "some general evidence" from which a respondent's ability to pay can be "inferred." That is, the complainant need not present "specific" evidence that the respondent "can pay," but only "general" evidence that the complainant "considered" the issue.[580] Once this prima facie case is established, however, the respondent, in order to rebut the inference, must present "specific" evidence that it "cannot pay."

In the instant case, Complainant specifically considered Respondent's ability to pay the proposed penalty.[581] The record of this case contains the "Grant Deed" and attached "Stanislaus County Property Records" which indicate that in May 1993, Respondent paid $1,384,000 for the 609

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[578] *New Waterbury*, *supra*, at 541 (emphasis in original) (citation omitted). In *New Waterbury*, the EAB noted that inability to pay a proposed penalty is not an affirmative defense because the statute governing that proceeding, TSCA, requires the EPA to consider this factor as one of several factors in establishing the appropriateness of the penalty. *New Waterbury*, *supra*, at 540. The EAB also found that inability to pay is more appropriately characterized as a "potential mitigating consideration in assessing a civil penalty" rather than as a defense which would preclude imposition of a penalty. *Id.* In the case at bar, the applicable penalty policy does require consideration of ability to pay. (CX 15).

[579] *Id.* at 542-543 (emphasis in original) (citation omitted).

[580] The EAB in *New Waterbury* elaborated that the complainant need not "specifically and separately prove that a respondent has the funds necessary to pay a proposed penalty before a penalty can be assessed" (*New Waterbury*, *supra*, at 539), as the issue "is not whether the respondent can, in fact, pay a penalty, but whether a penalty is *appropriate*." [*Id.* (emphasis in original)].

[581] CX 61, p. 10; Tr., p. 329, ln. 19 - p. 330, ln. 6 (Ms. Goldmann).

acres comprising fields #3 and #4.[582] Field #5 comprises approximately another 217 acres,[583] and Respondent appears to own at least one other farm.[584] This evidence supports the inference that Respondent has the ability to pay the proposed penalty. Therefore, Complainant's prima facie case that it "considered" the penalty factor of "ability to pay" has been established and the burden of proof shifts to Respondent to present "specific" evidence that it cannot pay the proposed penalty. Respondent has not presented any evidence or argument to rebut the inference that Respondent has the "ability to pay" the proposed penalty.[585] Therefore, I find that Complainant carried its burden of proof as to the statutory penalty factor of ability to pay the proposed penalty.

2) Prior History of Violations

Complainant explains in the written "Penalty Justification" that: "[s]ince a single enforcement action is being brought for two episodes of violations, 1995 and 1997, and there is no known prior history of violations, EPA did not adjust the penalty for prior history of violations."[586] Complainant in this case appropriately considered the statutory penalty factor of "prior history of violations."

3) Other Matters as Justice May Require

Complainant explains in the written "Penalty Justification" that: "[Complainant] has made no adjustments to the penalty for 'other matters as justice may require.'"[587] Respondent has proffered no evidence to support an adjustment on the basis of this penalty factor. Complainant in this case appropriately considered the statutory penalty factor of "other matters as justice may require."

E. Summary of the Penalty Calculation

In summary, Complainant proposes a total penalty of $103,070, representing the sum of $47,670 for "economic benefit," $50,400 for "nature, circumstances, extent and gravity," and $5,000 for "culpability." I find that the proposed assessment for "economic benefit" is reasonable and

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[582]Ms. Goldmann testified that these were the figures upon which she relied in determining the "price per acre" of approximately $2,270 per acre for purposes of calculating the "economic benefit component" of the proposed penalty. (Tr., pp. 267-268). Respondent stipulated to the accuracy of this calculation. (Tr., p. 268, ln. 3-8).

[583]CX 7, p. 8 (attached map); CX 8, p. 2.

[584]*See* Tr., p. 548 (Mr. Veldhuis): "...[A]t the home ranch we're located in the Merced River..."

[585]*See, e.g.*, Tr., p. 329, ln. 22 - p. 330, ln. 3 (Ms. Goldmann).

[586]CX 61, p. 9.

[587]CX 61, p. 10.

appropriate, but that the proposed "gravity component" should be reduced by 35% to $32,760 and the amount for the "culpability" factor should be increased by 50% to $7,500, so that a total penalty of $87,930 shall be assessed.

Regarding "economic benefit," Ms. Goldmann provided a "reasoned explanation" of how the "reasonable approximation" of economic benefit was derived by calculating the approximate amount of money Respondent saved by failing to obtain a "404 Permit" and perform the concomitant mitigation, which calculations were based on the price per acre originally paid by Respondent and the acreage of destroyed wetlands. This method of calculating "economic benefit" is endorsed by judicial precedent. In contrast, Respondent's proposed methodology based on "actual profitability" is not considered an accurate reflection of the true economic benefit derived by Respondent and would discourage compliance with the CWA. The price per acre and acreage of destroyed wetlands were supported by substantial evidence in the record. Therefore, Complainant carried its burden of demonstrating that an "economic benefit" penalty of $47,670 is reasonable and appropriate in this case.

Regarding "nature, circumstances, extent, and gravity," Complainant's consideration of the "deterrent effect" on both Respondent and other similarly situated individuals is endorsed by judicial precedent and was reasonable in this case. Complainant also properly accounted for the "importance of the violation to the regulatory scheme" of the CWA by considering the impact of the violations on the continuing overall loss of wetlands in the California Central Valley and Stanislaus County, as well as the impact of the violations on the San Joaquin and Merced Rivers which, due to agricultural pollutants, are listed as "water quality impaired" under Section 303(d) of the CWA, 33 U.S.C. § 1313(d). Regarding the "actual or possible harm" factor of the "gravity component," although the wetlands were "degraded" prior to Respondent's deep-ripping, they nevertheless performed important "water quality" and "biological" functions, and Complainant did take such degradation into consideration. However, Complainant assigned some importance to the existence of invertebrates such as shrimp in the vernal pools, and the record does not support a finding that such invertebrates in fact existed. Therefore, the proposed "gravity component" shall be reduced by 35% from the proposed $50,400 to an assessed amount of $32,760.

Regarding "culpability," Complainant's proposed $5,000 upward adjustment in light of Respondent's knowing violations, failure to perform promised mitigation, failure to adequately comply with the "308 Request," and failure to comply with the Corps' Cease and Desist Order is found to not adequately reflect Respondent's degree of culpability in this matter. Rather, this proposed amount is increased 50% to $7,500 to more accurately reflect Respondent's degree of culpability. Such increased amount is readily supported by substantial evidence in the record.

Regarding "ability to pay," Complainant considered Respondent's ability to pay the proposed penalty, and there is evidence in the record from which Respondent's ability to pay can be inferred. Respondent presented no evidence or argument to rebut this inference. Complainant has carried its prima facie burden of proof as to the penalty factor of ability to pay.

Regarding the remaining statutorily prescribed penalty factors, Complainant specifically considered Complainant's "prior history of violations" (or lack thereof) and "other matters as justice

may require" and did not adjust the penalty upward or downward on those bases. Complainant's consideration of these penalty factors was appropriate and reasonable in this case.

Accordingly, a total penalty of $87,930 is assessed against Respondent in this case.

ORDER

1. Respondents Ray and Jeanette Veldhuis are assessed a civil administrative penalty in the amount of $87,930.

2. Payment of the full amount of this civil penalty shall be made within thirty (30) days of the effective date of the final order by submitting a cashier's check or a certified check in the amount of $87,930, payable to "Treasurer, United States of America," and mailed to:

   EPA Region 9
   (Regional Hearing Clerk)
   P.O. Box 360863M
   Pittsburgh, PA 15251

3. A transmittal letter identifying the subject case and EPA docket number (CWA-9-99-0008), as well as Respondents' name and address, must accompany the check.

4. If Respondents fail to pay the penalty within the prescribed statutory period after the entry of the Order, interest on the civil penalty may be assessed. 31 U.S.C. § 3717; 40 CFR § 13.11.

Appeal Rights

Pursuant to Sections 22.27(c) and 22.30 of the Rules of Practice, 40 CFR §§ 22.27(c) and 22.30, this Initial Decision shall become the Final Order of the Agency unless an appeal is filed with the Environmental Appeals Board (EAB) within thirty (30) days after service of this Order, or the Environmental Appeals Board elects, *sua sponte*, to review this decision.

_____
Barbara A. Gunning
Administrative Law Judge

Dated: _____
Washington, D.C.