UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
MR. C.W. SMITH, MR. GRADY SMITH,	)	
& SMITH'S LAKE CORPORATION,	)	**Docket No. CWA-04-2001-1501**
	)	
Respondents	)	

INITIAL DECISION

By Default Judgment previously entered, Respondents, Mr. C.W. Smith (a/k/a Clarence W. Smith) and Smith's Lake Corporation, jointly and severally, were found to have discharged pollutants into navigable waters without a permit, in violation of Section 301(a) of the Clean Water Act (CWA) (33 U.S.C. §1311(a)), by the removal and redepositing of dredged and/or fill material into wetlands formerly occupied by Lake Carlton in Gwinnett County, Georgia. Pursuant to Subsection 309(g) of the CWA, 33 U.S.C. §§1319(g), a civil administrative penalty in the amount of $137,500 is imposed on these Respondents, jointly and severally, for these violations. Respondent Grady Smith (a/k/a James Grady Smith or James Grady Smith, Sr.) is found not liable.

Before: Susan L. Biro
Chief Administrative Law Judge

Issued: July 15, 2004

Appearances:

For Complainant:
Paul Schwartz, Esq.
William W. Sapp, Esq.
Associate Regional Counsel
United States Environmental Protection Agency, Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

For Respondents:
Richard N. Hubert, Esq.
Cynthia Guerra, Paralegal
Chamberlain, Hrdlicka, White, Williams & Martin
191 Peachtree Street, N.E., 9th Fl.
Atlanta, Georgia 30303

I. PROCEDURAL HISTORY

On November 2, 2000, this action was commenced by the United States Environmental Protection Agency, Region 4 ("Complainant" or "EPA") by the filing of a Complaint under the authority of Section 309(g) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g). The Complaint alleges that Respondents Mr. C.W. Smith, Mr. Grady Smith and Smith's Lake Corporation violated Section 301 of the CWA, 33 U.S.C. § 1311, by discharging dredged and/or fill material into a wetland area formerly occupied by Lake Carlton in Gwinnett County, Georgia, without a permit. The Complaint seeks a civil penalty in an amount up to the maximum of $137,500 allowed under subsection 309(g) of the CWA, 33 U.S.C. §§1319(g).[1]

Respondents failed to file an Answer to the Complaint within the time allotted and, on December 21, 2000, Complainant filed a Motion for Default Judgment. On January 10, 2001, one of the three Respondents, Grady Smith, through counsel, filed a Response to Motion for Default Judgment, to which EPA subsequently replied.[2] Neither of the other two Respondents filed a response to the Default Motion. A Decision and Order on Motion for Default and Order to Show Cause was issued by Susan B. Schub, Regional Judicial Officer (RJO) for EPA Region 4, on April 4, 2001.[3] In that Order, the RJO denied Complainant's Motion for Default Judgment as to Respondent Grady Smith and directed him to file an Answer to the Complaint on or before April 20, 2001. As to Respondents C.W. Smith and Smith's Lake Corporation, the RJO held in abeyance decision on the Motion for Default, giving them an opportunity to "show cause" on or before April 20, 2001, why a default judgment should not be entered against them, and to submit an answer. However, the RJO's Order warned that "[f]ailure by Respondents to comply with this Order will result in entry of default judgment against them."

On April 20, 2001, Grady Smith filed his Answer to the Administrative Complaint. In his Answer, Respondent Grady Smith denied the allegations of violation and raised eight affirmative defenses. Neither of the other two Respondents filed an answer or otherwise responded to the RJO's Order to Show Cause. As a result, on May 24, 2001, the RJO issued an "Order Finding Default with Respect to Liability of Respondents C.W. Smith and Smith's Lake

---

[1] Public Notice of the Proposed Administrative Penalty Assessment and Opportunity to Comment was issued on November 3, 2000. *See*, Public Notice No. 01GA001.

[2] In the Response, Grady Smith stated that he had not responded to the Complaint because the Respondents were awaiting information from EPA relating to their proposed construction of new dams on the site and that counsel he had retained to file the answer withdrew his representation the day before the answer was due. *See*, Respondent's Response to Motion for Default.

[3] The Consolidated Rules of Practice governing this action provide that presiding jurisdiction over administrative complaints originates with the Regional Judicial Officer and is transferred to the Office of Administrative Law Judges only upon the filing of an answer and request for hearing. *See*, 40 C.F.R. §§ 22.3 (*Presiding Officer* defined), 22.4(b) and 22.21 (a).

Corporation." This Order determined that C.W. Smith and Smith's Lake Corporation were in default with respect to liability and forwarded the case to the EPA Office of Administrative Law Judges ("OALJ") for hearing as to the appropriate remedy to be imposed with respect to those Respondents as well as a hearing to determine liability and remedy, if any, as to Respondent Grady Smith.[4]

On July 5, 2001, Administrative Law Judge Stephen J. McGuire was designated to preside over this proceeding and on July 17, 2001, he issued a Prehearing Order in regard thereto. Pursuant to said Order, Complainant and Respondent Grady Smith filed their respective prehearing exchanges.[5] Subsequently, on December 7, 2001, Complainant filed a Motion for Accelerated Decision seeking entry of an order of liability against Respondent Grady Smith and determination of the penalty as to all three Respondents. On that same day, *all three Respondents* filed a "Motion to Dismiss for Lack of Jurisdiction Over the Persons of C.W. Smith, Grady Smith and Smith's Lake Corporation" as well as a "Motion to Dismiss for Lack of Jurisdiction, For Summary Judgment, and Judgment on the Pleadings, Alternatively for a Bifurcated Hearing on the Matter of Jurisdiction, Or, for a Stay of Federal Jurisdiction Pending Outcome of State Proceedings." Responses and replies to the respective motions were filed by the parties. In a lengthy Order dated February 6, 2002, Judge McGuire denied all three motions. In regard to Respondents' Motions, Judge McGuire concluded that service of process had been perfected over all three Respondents and found without merit Respondents' arguments that the action was subject to dismissal either because the discharge area at issue was man-made and/or

---

[4] In declining to enter a determination on penalty as to the two defaulting Respondents, the RJO followed case precedent holding that it is within the discretion of the Presiding Officer to stay the imposition of the penalty as to defaulting Respondents when other Respondents have not defaulted and are still actively litigating the case. *See*, "Order on Motions for Summary Judgment, for Dismissal, and for Default" in *Corporacion para el Desarrollo Economico y Futuro de la Isla Nena*, EPA Docket No. CWA-II-97-61, 1998 EPA ALJ LEXIS 78, at *21-22 (ALJ, Feb. 3. 1998).

[5] Complainant filed its initial Prehearing Exchange on September 17, 2001 and a rebuttal prehearing exchange on November 7, 2001. Complainant amended and supplemented its prehearing exchange on December 6, 2002 and December 19, 2002 and, with leave of this tribunal, again on February 18, 2003. A Motion by Complainant for leave to further supplement its prehearing exchange was denied by Order dated March 11, 2003. Respondent Grady Smith filed his initial prehearing exchange on or about October 17, 2001 and supplemented his initial prehearing exchange on December 30, 2002. A Motion by Respondent to further supplement his prehearing exchange was also denied by the March 11th Order. In addition, the record shows that EPA issued Information Request Letters pursuant to Section 308 of the CWA (33 U.S.C. § 1318) on July 9, 2001 to Respondent Grady Smith, and on September 7, 2001 to both Respondents Grady and C.W. Smith. Grady Smith responded to the Letters on October 1, 2001 and C.W. Smith responded on October 26, 2001. In addition, Respondents apparently submitted to EPA a Freedom of Information Act request in regard to matters at issue in this case.

privately owned, that the government action constituted "an illegal takings of rights in land," that the Federal enforcement action separate and apart from the previous state and/or local government action constitutes "double jeopardy" or unlawful overfiling or is barred by *res judicata*, or that Respondents' discharge activities were exempt from CWA permit requirements.

On June 7, 2002, Respondents C.W. Smith and Grady Smith, "individually and as former shareholders and officers of Smith's Lake Corporation," filed a Motion to Reconsider Judge McGuire's Order of February 6, 2002. In that Motion, Respondents reasserted their position that their activities were exempt from the CWA permitting requirements and/or did not constitute a "discharge" but only "incidental fallback." Complainant filed a Brief in opposition to the Motion and, by Order dated July 29, 2002, Respondents' Motion for Reconsideration was denied due to a lack of support in the record for the factual underpinnings of the arguments raised therein.

This matter was subsequently reassigned from Judge McGuire to the undersigned on February 11, 2003.[6]

On March 10, 2003, Respondents filed a Request to Supplement Prehearing Exchange in which they requested, *inter alia*, to be allowed at hearing to inquire of witnesses and submit documentary evidence bearing upon the issues of whether this action constituted an illegal taking of property under the Fifth Amendment, lack of service of process over Respondent C.W. Smith, and whether their activities constitute *de minimus* disturbance of land not rising to the level of a violation. By Order dated March 11, 2003, Respondents' request in regard to introducing at hearing evidence on illegal taking and service of process was denied based upon the fact that those issues had already been decided in the prior orders issued by Judge McGuire and those legal rulings, therefore, were the "law of the case." However, Respondent Grady Smith was granted leave to introduce at the hearing factual evidence and testimony as to whether he engaged in a discharge in violation of the CWA, *de minimus* or otherwise.

In Atlanta, Georgia, from March 18 through March 21, 2003, a hearing was held on the remaining matters of issue in this action, that of Respondent Grady Smith's liability for the violations alleged, and the appropriate penalty to be imposed upon him and the two other Respondents against whom a default judgment on liability had already been entered in this matter.[7] Complainant and Respondents Mr. C.W. Smith and Mr. Grady Smith appeared at hearing and were represented by counsel. While he had represented the corporate Respondent, Smith's Lake Corporation, in the two Motions to Dismiss previously filed in this action, at the hearing, Richard Hubert, Esquire, counsel for Messrs. Grady Smith and C.W. Smith, explicitly

---

[6] The redesignation was made in anticipation of Judge McGuire's imminent resignation from EPA and reappointment as the Chief Judge of the United States Federal Trade Commission.

[7] Citation to the Transcript of the hearing will be in the following form: "Tr. __."

indicated that neither he, *nor the Smiths,* were representing the corporation at the hearing.[8] Tr. 3.

During the hearing the parties put forward and cross-examined witnesses and introduced documentary evidence. Complainant presented seven witnesses: Robert J. Lord, Lee O. Pelej, Glen R. Pontsler, Kenneth J. Wilkins, Philip Mancusi-Ungaro, David Chastant, and Steve P. Cannon.[9] Respondents testified on their own behalf and also called as their witnesses Robert J. Lord and David Chastant. Tr. 701-02, 717. During the hearing, exhibits numbered 1-23, 26-59, 63-67 were offered by Complainant and admitted into evidence (cited hereinafter as "C's Ex. __") and exhibits numbered 58, 59, 61 (final page only), 65, 70, 71 were offered by Respondents and admitted into evidence (cited hereinafter as "R's Ex. __"). Tr. 1310-12. Further admitted into the record were six Judge's Exhibits (cited hereinafter as "Ct. Ex. __") which consist of a plat as modified by markings of the witnesses during the hearing (Ct. Ex. 1), case decisions as to which official notice was taken (Ct. Exs. 2-5), and the Georgia Dams Act (Ct. Ex. 6).[10] Tr. 704-05, 1314-16.

The transcript of the hearing, consisting of four volumes - one for each day of hearing, was received by the undersigned on April 10, 2003. Complainant filed its Initial Post Hearing Brief on June 2, 2003. A Post Hearing Brief on behalf of *all three* named Respondents was filed on or about July 3, 2003, and Complainant filed its Reply to Respondents' Brief on July 21, 2003. The record closed on July 21, 2003 with the receipt of Complainant's Reply Brief.

II. FACTUAL BACKGROUND

---

[8] Rule 22.17 of the Consolidated Rules of Practice, 40 C.F.R. § 22.17(a) provides that a party may be found in default upon the failure to appear at hearing. Thus, Respondent Smith's Lake Corporation defaulted in regard to the penalty phase determination of this proceeding as well as the liability determination phase of this proceeding. Rule 22.17(c) provides that when a default occurs "[t]he relief proposed in the complaint . . . shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act." 40 C.F.R. § 22.17(c). As indicated by the decision herein, the relief proposed in the Complaint against Respondent Smith's Lake Corporation is not found inconsistent with the record of the proceeding or the Act.

[9] At Complainant's request, administrative subpoenas were issued on February 27, 2003, commanding the appearance at the hearing of witnesses David Chastant, Glen Pontsler, Steve P. Cannon, and Kenneth Wilkens.

[10] The cases as to which administrative notice was taken were: *Smith v. Gwinnett County*, 468 S.E. 2d 151 (Ga. 1997) (Ct. Ex.2); *Smith v. Gwinnett County*, 510 S.E. 2d 525 (Ga. 1999) (Ct. Ex. 3); *Smith v. Gwinnett County*, 516 S.E. 2d 530 (Ga. App. 1999) (Ct. Ex. 4), *Smith v. Gwinnett County*, 568 S.E. 2d 712 (Ga. App. 2002) (Ct. Ex. 5). Tr. 704-05. Administrative notice was also taken at Respondents' request as to the Georgia Uniform Rules of Professional Conduct Rule 3.7. Tr. 792.

A. Pre-Lake Carlton: Respondents' Activities in Regard to Freeman's Lake

Respondents C.W. Smith (a/k/a Clarence W. Smith) and Grady Smith (a/k/a James Grady Smith or James Grady Smith, Sr.) are brothers. On April 12, 1995, the Smith brothers incorporated Respondent Smith's Lake Corporation ("the Corporation").[11] Tr. 1009, C's Ex 1. Shortly thereafter, in the name of the Corporation, the brothers purchased Freeman's Lake in Gwinnett County, Georgia.[12] Tr. 964, 1096, 1100. At the time the Smiths' purchased it, Freeman's Lake was a sixty (60) acre body of water filled to a depth of four feet, situated adjacent to residential housing. Tr. 707.

Allegedly unaware that there were laws restricting lake drainage and that a permit was required to do so, the day after purchasing Freeman's Lake, C.W. Smith decided to drain "five, six inches" off it, purportedly in an effort to deal with water running off the lake and to make a "pretty lake."[13] Tr. 1100-01, Tr. 662. However, finding himself unable to locate the outlet pipe to accomplish the minor drainage, C.W. instead purchased a tractor, broke the dam, and drained the whole lake. Tr. 1100-01, C's Ex. 38. Then he proceeded to ditch and channelize the lake bed. Tr. 1184. Additionally, allegedly at the request of an adjacent landowner, C.W. Smith felled trees surrounding the lake bed. Tr. 1101.

As C.W. Smith acknowledged at the hearing, his activities at Freeman's Lake caused the neighbors around the lake to get "a little upset" and complain to the Gwinnett County authorities. Tr. 1101. As a result, the County authorities investigated the situation and advised C.W. Smith that he needed a permit to conduct such activities.[14] C.W. Smith responded to the County authorities that, based upon *his reading* of the rules and regulations, he did not need a permit and, therefore, he had no intention of applying for one or ceasing his activities on his property at

---

[11] The Smith brothers are the sole officers and shareholders of Smith's Lake Corporation. Tr. 1065-66, C's Exs. 1, 30, 34.

[12] The Smith brothers testified that they grew up in Gwinnett County, Georgia, near Freeman's Lake which at that time was a "for-pay" fishing pond. Tr. 1095.

[13] The Corporation's purchase of the Lake was financed through a loan of the purchase price ($215,000) made to the Corporation by C.W. Smith, individually, secured by a note and deed of trust. C's Ex. 30. C.W. Smith said that at the time he purchased the 60 acre lake for $215,000, he thought it was "the buy of a lifetime" because the residential land around that area was selling for $10-15,000 per acre. Tr. 1096-97. Nevertheless, he claimed at the hearing that his intent at time of purchase was not to commercially develop the land, but merely to repair the lake and create a job for his brother. Tr. 1098.

[14] Mr. Chastant testified at the hearing that the draining of the lake itself was not illegal, but the *manner* in which it was drained was illegal. Tr. 715.

the Lake.[15] As a result of this difference in opinion, over time, the County issued to the Smiths 37 citations for violations involving the Freeman Lake property. Tr. 1102. Furthermore, this was the start of what proved to be an extremely lugubrious and attenuated legal battle between the Smiths and myriad governmental authorities over the Smiths' activities at Freeman's Lake. Tr. 677, 684, 712.

The legal actions started before the end of 1995, when Gwinnett County filed a petition in the County Court for a temporary restraining order, an interlocutory injunction, and a permanent injunction against the Smith brothers and the Corporation to enjoin them from engaging in any further construction activities on the bed of Freeman's Lake without first obtaining the required engineering studies and land disturbance permits. The temporary restraining order was granted. Following a hearing, the County trial court issued a preliminary injunction prohibiting the Smiths from "'grading, excavating, repairing the dam, cutting, destroying or otherwise harming any of the trees or vegetation located on the [Freeman Lake] property'" until they have received from the County a land disturbance permit. *Smith v. Gwinnett County,* 486 S.E.2d 151 (Ga. 1997) (Ct. Ex. 2).

One month later, the County moved to have the Smiths held in civil and criminal contempt of the preliminary injunction on the basis that they had "continued to dump dirt, concrete, and debris in order to raise the grade of certain portions of the property" and to commercially develop the property. *Id.* However, before the matter came on for hearing, the parties reached an agreement which was memorialized in a Consent Order entered by the Court. *Id.* In the Consent Order, the Smiths agreed that within two weeks they would retain a licensed engineer who would issue a written report on the safe reconstruction of the dam within 30 days thereafter. *Id.* Further, the Order stipulated that the Smiths would begin the repair work on the Lake within 30 days after the engineering report was issued. *See*, Ct. Ex. 2 (*Smith v. Gwinnett County*, 486 S.E.2d 151 (Ga. 1997)).

A number of weeks later, the County moved to have the Smiths held in contempt again, this time in regard to the Consent Order, alleging that they had not complied with the Order and had engaged in activities which violated the preliminary injunction.[16] *Id.* at 152. These activities

---

[15] C.W. Smith testified at the hearing that "I can read the law three or four times, and I think I understand it." Tr. 1097. However, he does not claim to be a lawyer nor does he purport to have any particular education, training or professional experience in environmental laws or regulations. Rather, C.W. Smith admitted that his formal education was limited to obtaining a high school diploma, at least in part because he suffered from learning difficulties which impaired his ability to learn to write and speak. Tr. 1088.

[16] Apparently, the Smiths initially had not hired an engineer to design plans for a new dam at Freeman's Lake, believing that they could engineer it as well themselves. Tr. 689. When the Smiths had an engineer submit plans, they were eventually rejected. Tr. 697-698. In addition, the Smiths, in an attempt to recoup the cost of the plans ($3,000) and impress on the

included intentionally rupturing a residential sewer connection under the lake bed which caused sewage to back up into a neighboring home, and refusing to allow County authorities free access to their property to repair the damage.[17] Tr. 662-63, 677, 680-81. As even Respondents' attorney acknowledged at the hearing of this matter, by this point the County Judge handling the matter, Judge K. Dawson Jackson, had "had enough of this folderol." Tr. 682, 688. As a result, Judge Jackson held the Smiths in criminal contempt of the preliminary injunction and sentenced them to 20 days incarceration and imposed upon each a $500 fine.[18] *Id.* at 153. Judge Jackson also ordered the County to take control of the property, repair the damage and restore the lake within 90 days, and to assess all costs incurred in doing so against the Smiths. Tr. 677-78, 682. *See also*, Ct. Ex. 2.

The Smiths appealed their criminal convictions and Judge Jackson's Order arguing, *inter alia,* that it was an unconstitutional inverse condemnation of their property by the government without just and adequate compensation. Tr. 684; Ct. Ex. 2. The appeal was unsuccessful. The Supreme Court of Georgia held that there was sufficient evidence that the Smiths were guilty of criminal contempt beyond a reasonable doubt and that the injunction did not constitute a taking of the Smiths' property without just and adequate compensation.[19] *Smith v. Gwinnett County*, 486 S.E.2d 151, 153 (Ga. 1997)(Ct. Ex. 2). The Smiths unsuccessfully moved for reconsideration of this decision and then also unsuccessfully petitioned for a writ of certiorari to the United States Supreme Court.[20] *Id.*; *C.W. Smith, et al. v. Gwinnett County*, *Georgia*, 522 U.S. 1047 (1998). *See also*, 29 Stetson L. Rev. 945 (2000).

Eventually, in about 1998, the County completed rebuilding the dam and restoring

---

County that they had "certain rights," made a claim against the County for copyright violation as a result of the County copying and distributing their plans as part of the approval process, an issue which required judicial resolution. Tr. 1117-1119.

[17] The County had to obtain a police escort in order to get onto the Smiths' property to repair the neighbor's sewage pipe. Tr. 680-681.

[18] C.W. Smith testified that he actually spent 22 days in jail on the contempt citation relating to his refusal to allow the County sewer department to come on his property to fix the pipe "without paying him for it." Tr. 1104.

[19] In the appeals decision regarding the Freeman's Lake matter, the Court found that "[e]vidence presented at the hearing demonstrated that defendants graded the land and cleared trees in a buffer area apart from the dam without obtaining a land disturbance permit. It also demonstrated that when confronted with their conduct, the defendants took the position that they could do what they wanted to do with their property." *Smith v. Gwinnett County,* 486 S.E.2d 151, 153 (Ga. 1997).

[20] C.W. Smith stated that he appealed his contempt citation up to U.S. Supreme Court because "I didn't want the government running over me." Tr. 1105-06.

Freeman's Lake. Judge Jackson then ordered the Smiths to pay the costs associated with the restoration, totaling $544,889.89, and advised them that failure to pay the Judgment would result in the appointment of a receiver to take control and sell the property to cover the debt. *See* Ct. Ex. 5 (*Smith v. Gwinnett County*, 568 S.E.2d 712, 712, 713 (Ga. App. 2002)). The Smiths refused to pay the Judgment and a receiver was appointed. Tr. 663-64, 1106. The Smiths then appealed the trial court's order again to the Georgia Supreme Court on the basis of unconstitutional taking without compensation. This appeal was also unsuccessful as was a petition for a writ of certiorari to the United States Supreme Court. *See* Ct. Ex. 3 (*Smith v. Gwinnett County*, 510 S.E.2d 525 (Ga. 1999)); *Smith v. Gwinnett County*, 527 U.S. 1003 (1999). The property was subsequently sold at public auction for $590,000 and the County Court approved the sale. *See* Ct. Ex. 5, at 713-14; Tr. 710.

The Smiths then filed a third appeal with the Supreme Court of Georgia in which they challenged an order of the trial court denying a motion they had filed during the pendency of the prior appeal seeking permission to again drain Freeman's Lake. As before, the Smiths argued that the denial constituted an unconstitutional taking of their property without just and adequate compensation and, as before, their appeal was unsuccessful. *See,* Ct. Ex. 4 (*Smith v. Gwinnett County*, 516 S.E.2d 530 (Ga. App.1999)).

Subsequently, the Smiths filed four more actions in the Georgia courts in regard to Freeman's Lake. *Smith v. Gwinnett County*, 568 S.E.2d 712, 714 (Ga. App. 2002)(Ct. Ex. 5). Two of the actions again involved claims of inverse condemnation. The Gwinnett State Court (Judge Fuller) granted summary judgment in favor of the County in all those actions and awarded the County attorneys fees and costs, finding the Smiths legal actions were "vexatious and frivolous." The Smiths again appealed, unsuccessfully. *Id.* The Georgia Court of Appeals found that the Smiths' position was not based upon any justiciable issue of law or fact and lacked substantial justification. *Id.* The Smiths then moved for reconsideration of the Court of Appeals decision and, being denied that, moved for a writ of certiorari from the Georgia Supreme Court, which was also denied. *Id.*; *Smith v. Gwinnett County*, 2002 Ga. LEXIS 882 (Ga. Oct. 3, 2002).

In addition to the County proceedings regarding Freeman's Lake discussed above, the United States Army Corps of Engineers (COE) and EPA also took an interest in the Smiths' activities regarding the lake and its dam. Tr. 690. In December 1995, COE notified Respondent Grady Smith by letter that the breaching of the dam without authorization constituted a violation of law. Further, COE advised the Smiths that "the entire lake area . . . remains jurisdictional along with all wetlands and stream channels on the site" and that "the placement of dredged or fill material into these areas, including material redeposited during mechanized land clearing or excavation requires prior Department of the Army authorization." C's Ex. 38; Tr. 1107-08. COE also advised the Smiths that "no permits or authorizations can be obtained until the [County] violation is resolved" and "[w]e encourage you to obtain the recommended engineering studies and appropriate local permits and to aggressively pursue resolution of the issues with Gwinnett County and restoration of the lake." *Id.* However, as with the County authorities, C.W. Smith refused to recognize the authority of the COE to limit what he could do on his own

land. Tr. 1110.[21]

As to the EPA, on August 26, 1996, it conducted a site inspection of Freeman's Lake, also concluded that the Smiths' activities in regard thereto had violated the CWA and, therefore, on August 29, 1996, issued to the Smiths an Administrative Order (404-96-20) requiring them to cease all discharge activities in the lake bed and to submit a restoration plan by September 1996. C's Ex. 40. As with the Orders of the County and COE, the Smiths failed to abide by EPA's Order and continued, after it was issued, excavating new ditches and sidecasting material in the lake bed.[22] C's Ex. 41. The issue of the Administrative Order was never resolved.

Inauspiciously, all of the foregoing is mere *prologue* to the Respondents' violative activities at Lake Carlton which are at issue in *this* litigation.

B. Respondents' Activities in Regard to Lake Carlton

In or about February 1997, while the Freeman's Lake litigation was still on-going, the Smith brothers, again through their Corporation, purchased the property at issue *in this case* which consists primarily of the lake bed of Lake Carlton, which is also in Gwinnett County, Georgia, about 25 miles from Freeman's Lake.[23] Tr. 907, 1139, C's Ex. 56, 57. At the time of

---

[21] However, C.W. Smith also testified at the hearing that, at some point, he agreed to fix the dam and refill the lake. Tr. 1109. In connection with repairing the dam, he installed a drainage pipe which he hid in the dirt, so he could drain the lake again in the future after he received a COE letter of compliance. Tr. 1110. The Lake was then filled and COE issued to the Smiths a Letter of Compliance. Tr. 1110. The Letter of Compliance was subsequently withdrawn, however, when a portion of the dam washed out in a flood. Tr. 1112-13.

[22] C.W. Smith testified at the hearing that he did not respond to the Order of EPA on advice of counsel that a response would constitute an admission of guilt. Tr. 1124-25.

[23] The property was purchased by the Corporation in the same manner as Freeman's Lake was purchased, *i.e.*, through a loan by C.W. Smith to the Corporation for $140,000 secured through a note. C's Ex. 34, p.3. The Lake Carlton property consists of a number of separately designated tracts of land. *See*, R's Ex. 61 (Survey of property prepared for Smith's Lake Corporation, dated November 1996, designating seven separate tracts and labeling them "A" to "G"). The largest tract of land is tract "F" encompassing some 55.729 acres of the drained lake bed. *Id.* Tracts "A" and "B" totaling almost 22 acres are diked and filled to create a fishing lake. R's Exs. 61 (survey), 58 (photograph), 59 (photograph); C's Ex. 14. Those three tracts are surrounded by property which has been apparently subdivided into residential lots. R's Ex. 61. In response to EPA's Information Request Letters, the Respondents represented that "All tracts shown on this plat of survey was [sic] acquired by Smith's Lake Corporation on February 6, 1997." *See*, C's Exs. 56, 57. However, in April 1997, the Smith brothers represented to the COE that they were merely the contractors undertaking work on the property, installing a sewer

the purchase, the site was primarily a *lake bed*, rather than a *lake*, because approximately three years prior thereto, in November 1994, the dam creating Lake Carlton was breached by the site's prior owner at the order of the Georgia Environmental Protection Division.[24] Tr. 77; C's Ex. 59.

As in the case with Freeman's Lake, within just a couple of months of the Smiths' purchase of Lake Carlton, COE discovered that unpermitted land disturbance activities were occurring on the site. C's Ex. 3. Specifically, upon inspection on April 11, 1997, COE found that the Smiths had engaged in ditching and extensive earth movement in the lake bed, had breached an existing berm and placed a concrete pipe to drain the previously flooded tributary, had constructed a berm with adjacent ditching of the tributary and drainage alongside, and had added fill along the existing sewer line in drained lake bed. Although the Smiths claimed that the activities were merely for the purpose of installing a new sewer line, COE found that the work being done exceeded what is permitted for such purposes.[25] As with Freeman's Lake, COE advised the Smiths that the construction area was deemed to be wetlands and waters of the United States within the meaning of the CWA, that, as such, permits were required before such

---

line for the actual owner, but that they owned an adjacent parcel. C's Ex. 3. On the other hand, on April 17, 1997, the owner of an adjacent residential development, Mr. Jim York, advised EPA that the Smiths were the property owners from whom he purchased an easement for a sewer line. There is also evidence in the record that C.W. Smith acquired "Tracts I and J" on January 6, 1998 in a quitclaim deed from Saadeh, Inc., which had purchased Tract I approximately one week earlier from Crow's Nest Development, Inc. (Joseph Marchell, president), for $17,000. *See*, C's Ex. 54. In addition, Respondent Grady Smith resides on land adjacent to the site, at 3552 Lake Carlton Road, which was at all times relevant hereto apparently owned by Respondent C.W. Smith, individually, and which is the Corporation's address. Tr. 903, 907. Further, in their Brief, Respondents represent that on an unstated date C.W. Smith bought the company "Lake Carlton, Inc.," from Joseph Marchell which company had among its assets "lands *above* the property line area of the lakebed of Lake Carlton owned by the Smith's Lake Corporation." Respondent's Post-Hearing Brief at 4 (italics added).

[24] In late 1994, the State of Georgia determined that a major section of the dam creating Lake Carlton had eroded away and, pursuant to the Georgia State Dams Act, ordered the lake drained. C's Ex. 58. At that point, the lake's then owner, Mr. Marchell, was advised by COE that if he entered into a contract to repair the dam within two years of the breach, he was not required to obtain a CWA section 404 permit. If, however, the dam was not repaired within that time span, an "after-the-fact permit would need to be applied for and that the wetlands in the drained lake may serve as some compensatory mitigation." C's Ex. 59; Tr. 84, 86. Mr. Marchell chose not to repair the dam while he owned it, although at some point apparently a fishing concession which operated at the Lake built a dike in part of the old lake bed and re-impounded several acres of water for a commercial fishing lake. C's Ex. 9.

[25] Mr. Mancusi-Ungaro testified at the hearing that in 1996, in a conversation with the Smiths, they indicated to him that they planned to develop building lots on the lake bed of Lake Carlton. Tr. 642.

work was undertaken in the area, and that by failing to acquire the necessary permits they were in violation of the CWA. Therefore, COE asked the Smiths to stop work. The Smiths' reply to this, as noted in the COE report, was to indicate to the COE inspector that they " . . . do not think they are doing anything in violation . . ." and they "did not comment when I told them to stop work." *Id.* The next day, pursuant to a Memorandum of Agreement between COE and EPA regarding federal enforcement of CWA section 404, COE referred the matter of the Respondents' activities at Lake Carlton to EPA, stating that, "[d]ue to the nature and circumstances of the violations involved, they have been determined to be flagrant violations by repeat violators." C's Ex. 2; Tr. 87.

In response to COE's referral, the following day, on April 17, 1997, Robert (Bob) Lord, an EPA inspector, conducted an inspection of the Lake Carlton lake bed. Mr. Lord was accompanied during the inspection by Jim York, the developer of the new adjacent subdivision, who advised EPA that around March 1, 1997, he had arranged with the Smith Brothers, as the owners of Lake Carlton, to have them build a sewer line across their property to tie the subdivision into an existing County sewer main. Mr. York further advised EPA that the Smiths had started construction on the sewer line around March 10, 1997. During his inspection, Mr. Lord observed that there had been considerable excavation of ditches in the lake bed and sidecasting of soil, that a small stream had been rerouted, and that two roads had been constructed or rebuilt across the lake bed. Consistent with the COE inspector, Mr. Lord also concluded that much of the work done in the lake bed appeared unrelated to installation of a sewer line. Further, he noted that there were no erosion control measures at the site "despite the acute need for such measures." C's Ex. 4, 5 (photographs taken during inspection); R's Ex. 70, 71; Tr. 97-102, 105-107, 110.

As a result of its inspection, on April 22, 1997, EPA issued Findings of Violation and an Order for Compliance. The substance of the findings were that by their unpermitted activities on the site of the Lake Carlton lake bed, discharging dredged or fill material (pollutants) into waters of the United States, the Smiths had violated section 301(a) of the CWA. C's Ex. 6. They were ordered to cease activities and notify the Agency within 48 hours that they had done so. C's Ex. 6, 7 (delivery receipt for Order dated April 23, 1997). The Smiths never responded to the Order. Tr. 113.

On April 30, 1997, Gwinnett County notified the Smiths that it had observed extensive grading along a sewer outfall line and in the area of the lake bed, that such land disturbance without a permit constituted a violation of County regulations, and that they needed to submit proper plans and paperwork and obtain a permit for such activities. C's Ex. 44. The County further warned that if no contact is made or no action is taken within seven days, it would be forced to issue a citation. *Id.*

On May 16, 1997, almost a month after the Order for Compliance had been issued, Bob Lord and others from EPA, including Phillip Mancusi-Ungaro, conducted another inspection at the Lake Carlton site. During this inspection, Messrs. Lord and Mancusi-Ungaro observed newly dug ditches and additional material on the road in the lake bed. In addition, based upon

the level of soil disturbance and the disappearance of the stockpiled pipes, Mr. Lord concluded that the sewer pipe had been installed under the lake bed. Again, no erosion or sediment control measures were observed. C's Ex. 4, 8 (photographs taken during inspection); Tr. 118.

Almost a year later, in late April of 1998, Glen Pontsler, a Gwinnett County inspector, twice observed Respondent C.W. Smith personally operating a backhoe to dig and grade channels to drain the lake bed of Lake Carlton. C's Ex. 45, 46.

About a week after that, on May 7, 1998, Bob Lord reinspected the Lake Carlton site and found that the central stream running through the property, Brushy Fork Creek, had been channelized, with dredged material sidecasted. In addition, several small lateral ditches had been dug in what Mr. Lord deemed an effort to drain the wetland. He also found an access road was under construction, possibly partially in the lake bed. C's Ex. 9, 10 (photographs taken May 7, 1998); Tr. 123-124, 127-128. He observed that the piles of sidecast spoil material that ran along the channelized stream were up to ten feet wide; others along the smaller lateral ditches were four feet wide. Tr. 123.

In response to this additional work in the lake bed, on May 13, 1998, EPA issued a second Administrative Order to the Smith brothers again requiring them to cease their violative activities. Furthermore, the Order required Respondents to prepare a jurisdictional delineation of all wetlands in the boundaries of the former Lake Carlton and develop a restoration plan within 30 days of receiving the Order. C's Ex. 11; Tr. 130-131. The Smiths also chose not to reply to this Order or comply with any of its requirements. Tr. 131.

The day after the second EPA Compliance Order was issued, on May 14, 1998, Bob Lord again inspected the Lake Carlton lake bed. C's Ex. 12 (photographs); Tr. 131, 136-137. During this inspection, Mr. Lord found that additional work had been done on the dirt road along the fringe of the western side of the lake. Tr. 133. It appeared to him that part of this road was in the lake bed, and thus in what he believed to be jurisdictional waters. Tr. 133. He also observed C.W. Smith operating a piece of heavy equipment near the portion of the lake bed called the "catfish pond." Tr. 135. When Mr. Lord attempted to wave Mr. Smith down so as to speak with him about his activities on the property, C. W. Smith drove within ten feet of him, and while looking right at Mr. Lord, drove right on by without stopping. Tr. 135.

On that same date, May 14, 1998, the Gwinnett County Attorney, M. Van Stephens II, sent C.W. Smith a lengthy and detailed letter formally advising him of the County inspector's findings and explaining how such activities at Lake Carlton, without a permit, constituted a violation of County regulations. C's Ex. 46. The letter mentioned that it was the policy of the County to notify individuals of violations before issuing citations and the County hoped that Mr. Smith would cease his activities in the lake bed until he had submitted the necessary plans and obtained the necessary permits. *Id.* It further advised Mr. Smith that the County, State and Federal regulations regarding such activities have as their primary purpose the protection of public health, safety and welfare and that his activities have the potential for needlessly injuring persons and property in the area. *Id.* Further, in the letter, the County attorney noted the fact

that Mr. Smith was well aware of the need for a permit for such activities, having litigated the issue in the Freeman Lake case. *Id.*

The next day, on May 15, 1998, Mr. Pontsler, the County inspector, again inspected the lake bed and took photographs showing the ditching and channelization in the lake bed. C's Ex. 47.

Approximately seven months later, on December 4, 1998, Bob Lord conducted an aerial flyover of the lake bed of Lake Carlton during which he collected information to assist him in confirming the jurisdictional nature of the lake bed and to confirm earlier observations he had made about ditching and channelizing. C's Ex. 13; Tr.140. By observing and photographing the lake bed from the air, Mr. Lord was able to document the extensive system of primary and secondary ditches in the lake bed, as well as the sidecasting that accompanied both. Tr. 141-42. With this information to supplement his ground observations, Mr. Lord calculated that there were approximately 5,000 feet of primary ditches and 50,000 square feet of sidecast material alongside those ditches. C's Ex. 14; Tr. 142-43. He also calculated that there were 4,500 linear feet of secondary ditches with 20,000 square feet of sidecasted material alongside those ditches. C's Ex. 14; Tr. 143. He determined that the total area impacted by the sidecasted material was a little over one and a half acres of land. Tr. 148.

On January 21, 1999, EPA sent a letter to the Smith brothers and the Corporation requesting access to the lake bed to do a jurisdictional determination. C's Ex. 15. The Smiths did not respond to the letter. Tr. 151. As a result, although it was not required to do so, EPA decided to obtain an administrative warrant before accessing the lake bed.[26] Tr. 151.

On February 23, 1999, Bob Lord and other EPA representatives, accompanied by Grady Smith, over a period of 3½ hours, performed a reconnaissance survey of the Lake Carlton lake bed. C's Ex. 17. They took pictures and soil samples, and observed the soils, plants and hydrology. Based upon their examination, EPA concluded that "most of the site is likely a jurisdictional wetland." EPA decided to revisit the site in May to obtain more definitive information regarding the plants and hydrology. C's Ex. 17, 18, 19, 20, 21.

EPA conducted the follow up inspection of the property in the presence of the Smith brothers on May 28, 1999. EPA noted that the observations made that day confirmed the Agency's prior determination that "virtually the entire former lake bed is jurisdictional wetlands." C's Ex. 22, 23.

By Quitclaim Deed in lieu of foreclosure dated June 10, 2000, Smith's Lake Corporation

---

[26] The CWA provides that an authorized representative of the Administrator has the "right of entry to, upon or through premises in which an effluent source is located." 33 U.S.C. § 1318(a)(B)(i). This provision applies to, *inter alia*, inspections carried out under the 404 permitting program. *Id.* at § 1318(a).

purportedly transferred ownership of the Lake Carlton property from the Corporation to C.W. Smith, individually.[27] C's Ex. 43. The Smiths assert that, concomitantly, they surrendered their stock back to the Corporation and resigned from the Board as officers, effectively dissolving the Corporation.[28] C's Ex. 34; Tr. 907. Thereafter, the property was sold by C.W. Smith to the Silver Branch Co., Inc., taking back a mortgage thereon to cover the purchase price of $150,000. C's Ex. 34, p. 11-12. Silver Branch Co., Inc., is owned by C.W. Smith's daughter and granddaughter, who are also Grady Smith's nieces.[29] C's Ex. 34, p. 13.

On November 2, 2000, EPA filed the Administrative Complaint initiating this action alleging that Respondents' prior activities in regard to Lake Carlton violated the CWA.

The record also contains some information on Respondents' subsequent activities and events in relation thereto.[30] Specifically, the record indicates that on November 15, 2000, Grady Smith had over 500 truckloads of fill dirt dumped in and around the Lake Carlton lake bed. C's Ex. 48, 50; Tr. 591-92; Tr. 596; Tr. 1028; Ct. Ex. 1. The Gwinnett County inspector who observed the dumping advised Grady Smith that his activities constituted a violation of County land disturbance regulations and therefore he had to cease his activities until he acquired a land disturbance permit. Tr. 595. Grady Smith responded "hell, no" (tr. 595) and he was cited that day (Citation No. P-1-9006) for grading without a permit, filling right of way and filling the lake. C's Ex. 53; Tr. 596. On June 7, 2002, after a bench trial, Grady Smith was found guilty of

---

[27] The validity of this transfer appears somewhat uncertain since the record indicates that Respondent Grady Smith resigned his corporate position on June 9, 2000, *the day before* he signed the deed on behalf of the Corporation transferring the property to C.W. Smith individually. *See*, C's Ex. 34.

[28] However, no articles of dissolution for the Corporation were ever filed with the State of Georgia. C's Ex. 34, p. 12.

[29] Despite the close familial ties and the fact that he held a mortgage from the company, C.W. Smith claimed at the hearing to know very little about the Silver Branch Corporation. For example, he did not know if his daughter was president of the company or if the company had a treasurer, what the stock split arrangement was between his daughter and granddaughter, or if there are other shareholders. C.W. Smith also stated that he did not know if anyone from the Silver Branch Corporation *ever* visited Lake Carlton, *i.e.* before or after purchasing it. He did represent that he had been paid in full for the property, however. Tr. 1240-41, 1243. Moreover, in that the Respondents requested during the hearing (three years after the purported sale) that, in lieu of a monetary penalty, this Tribunal impose a remedy imposing on the Smiths the requirement to restore the property as a lake (tr. 1322-23), the bone fides of this sale transaction is questionable.

[30] It is noted, however, that these post-Complaint activities are not violations as to which Complainant seeks to hold Respondents liable in that at no point did Complainant move to amend the Complaint or conform the pleadings to the evidence adduced at hearing.

the charges listed in the Citation, including filling the lake and grading without a permit, and was sentenced to 30 days in jail. C's Ex. 52, 53.

EPA, having been notified of the dirt dumping activities, on November 16, 2000 again inspected the site and observed "additional discharge of fill material into wetlands or other waters of the U.S." Specifically, EPA observed the newly dumped dirt as well as "considerable new mechanical clearing with substantial movement of soil," in the old lake bed, that lateral and parallel ditches had been rechannelized as had Bushy Fork Creek which "is now a deeply entrenched ditch with six foot vertical side walls leading up to piled side cast material." Two backhoes and a large grader/scraper were observed sitting on the site. C's Ex. 26, 28; Tr. 800, 810.

In addition, on November 17, 2000, Gwinnett County filed suit against the Smith brothers in regard to their unpermitted land disturbance activities at Lake Carlton. On November 20, 2000, the Superior Court for Gwinnett County issued a temporary injunction and temporary restraining order enjoining the Smiths from clearing, grading, filling and construction activities on the property until all required engineering studies and permits have been obtained. In connection with its issuance thereof, the County Court found that the Respondents' activities created an immediate threat of irreparable harm to the public in that they altered the flood plain and polluted the drinking water supply with soil and debris. C's Ex. 50. On March 5, 2001, after two days of hearing held in December 2000, and a Court site view of the property, the County Superior Court (Judge James W. Oxendine) issued an interlocutory injunction against the Smiths. C's Ex. 50. In the lengthy Order, Judge Oxendine found that Grady Smith had directed the hauling and placement of over 600 truckloads of dirt on the subject property adjacent to the Lake Carlton roadbed "and within the Lake Carlton lakebed." *Id.* at 3. Further, without obtaining the necessary permits or doing the required engineering studies, the Smith brothers "engaged in grading activities . . . wherein the dirt was dumped within the Lake Carlton lakebed and the dirt was graded . . .with mechanical equipment." *Id.* at 14. The Court did not find merit in Grady Smith's assertion that the dirt was intended for landscaping, particularly since half of the dirt was dumped on the other side of the lake away from Grady Smith's residence. *Id.* at 11. Moreover, the Court found that "two major streams traverse the Lake Carlton property, one from the north and one from the west and both flow out through the bottom," and that the streams are part of the Big Haynes Creek Watershed which provides drinking water for Rockdale County, Georgia. *Id.* at 4. By engaging in the land disturbance activities, the Court found that the Smiths had violated several Gwinnett County Ordinances and regulations designed to prevent soil erosion and sedimentation and avoid negatively impacting water quality, "all to the detriment of the health, safety and welfare of the community." *Id.* On August 22, 2001, Judge Oxendine issued a Final Order in the matter permanently enjoining the Smiths from engaging in any land disturbing activity on the Lake Carlton property until the requisite permits are obtained and the engineering studies completed. C's Ex. 55.

III. VIOLATIONS ALLEGED

The Complaint filed in this action on November 2, 2000, asserts in a single count that Respondents violated CWA section 301 (33 U.S.C. § 1311) by, "[b]eginning in March 1997 . . . us[ing] a backhoe or similar types of equipment to discharge dredged and/or fill material into the Discharge Area during the construction of ditches with the side cast of excavated material into wetlands, stream rerouting, land clearing and road construction . . . " The "Discharge Area" is generally described in the Complaint as the lake bed area formerly occupied by Lake Carlton and somewhat more specifically defined on a map attached as Exhibit A thereto.

IV. DISCUSSION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

The stated objective of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In order to achieve this objective, section 301(a) of the CWA essentially prohibits the *"discharge of any pollutant* by any person" except with a permit issued under section 404. EPA is authorized to assess administrative penalties against violators of the Act. 33 U.S.C. § 1319(g). Given that it is undisputed that Respondents never obtained a section 404 permit in connection with their activities at Lake Carlton (Answer ¶ 8), and that judgment on the issue of liability has already been entered against Respondents C.W. Smith and Smith's Lake Corporation by default, the issue of liability remaining in the instant case is whether Respondent Grady Smith's activities conducted between March 1997 and November 2, 2000 constitute the "*discharge of any pollutant*" within the meaning of section 301 of the Act.

The phrase "*discharge of a pollutant*" is defined by Section 502(12) of the Act, in pertinent part, as: "any *addition* of any *pollutant* to *navigable waters* from any *point source* . . ." 33 U.S.C. § 1362(12) (italics added). Each of those italicized terms, in turn, have their own meaning for CWA purposes.

"*Pollutant*" is defined in the Act as including "dredged spoil." CWA § 502(6), 33 U.S.C. § 1362(6). The term "dredged spoil" includes material that is excavated or dredged from a wetland. *Slinger Drainage, Inc.*, 8 E.A.D. 644 (EAB 1999); *United States v. Wilson,* 133 F.3d 251, 259 (4th Cir. 1997); *United States v. Deaton,* 209 F.3d 331, 335 (4th Cir. 2000), *cert. denied,* 124 S. Ct. 1874 (2004). Topsoil, gravel, sand and road construction material manipulated and deposited into the wetland are also "pollutants" under the Act. *United States v. Hummel*, 2003 U.S. Dist. LEXIS 5656, *25 (N.D. Ill. 2003) (dirt and vegetation removed from wetland constituted dredged spoil and a CWA pollutant upon redepositing in wetland); *Slagle v. United States*, 809 F. Supp. 704, 707 (D. Minn. 1992) (soil and rock are pollutants under the CWA); *United States v. Larkins*, 657 F. Supp. 76, 85 (W.D. Ky. 1987) (earth and organic materials used as fill are pollutants under the CWA).

The term "*addition*" in the CWA has long been defined by the Courts as including the *redeposit* of materials excavated or dredged from a wetland or water body, such as that which occurs during sidecasting, where soil is excavated from a wetland to create a ditch and piled or

cast aside of the ditch.[31] *Deaton, supra* ("sidecasting constitutes the "discharge" of a pollutant); *United States v. Bay-Houston Towing Co., Inc.,* 33 F. Supp. 2d 596, 606 (E.D. Mich. 1999) (same)*; American Mining Congress v. U.S. Army Corps of Engineers*, 951 F. Supp. 267, 270 n. 4 (D.D.C. 1997) ("'[s]idecasting' . . . ha[s] always been subject to § 404"); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923-924 (5th Cir. 1983) (land clearing activities which included leveling indigenous materials in a wetland constitutes addition and discharge of a pollutant under the CWA); *United States v. Sinclair Oil Co.,* 767 F. Supp. 200, 202 (D. Mont. 1990) (redistribution of river cobble and other indigenous riverbed materials to maintain the river channel constitutes "addition" and "discharge"); *Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F.3d 810, 814-815 (9th Cir. 2001), *aff'd*. 537 U.S. 99 (2002) (deep ripping soil, which loosens, aerates, and horizontally moves soil constitutes discharge of a pollutant under the CWA).[32]

A "*point source*" is defined in the CWA as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Bulldozers, backhoes, dump trucks, and other earth moving equipment have all been held to be "point sources." *See e.g., United States v. Tell,* 615 F. Supp. 619, 622 (E.D. Va. 1983), *aff'd,* 769 F.2d 182 (4th Cir. 1985), *rev'd on other grounds,* 481 U.S. 412 (1987) (bulldozer and dump truck); *Avoyelles Sportsman's League v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983)(bulldozer and backhoe); *United States v. Lambert,* 915 F. Supp. 797 (S.D. W. Va. 1996)(crane, earthmoving equipment).

There is overwhelming evidence in the record, both documentary and testimonial, supporting the fact that, through a point source such as a backhoe or bulldozer, a pollutant, primarily dredged spoil, was added or discharged into the lake bed of Lake Carlton between

---

[31] While "sidecasting"- the intentional placement of removed soil back into wetlands - is regulated, "incidental fallback" is exempt from regulation. *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1404-05 (D.C. Cir. 1998) (while some forms of redeposit may be legally regulated, "incidental fallback," where material is removed from water and "a small portion of it happens to fall back," does not constitute "addition" of a pollutant); *United States v. Hallmark Construction Company*, 30 F. Supp. 2d 1033, 1037 (N.D. Ill. 1998) (excavation in wetland to construct pond involved "incidental fallback" and was not subject to regulation as a "discharge").

[32] Courts have noted that such activities often result in a disturbance of the "physical and biological integrity of the Nation's waters," contrary to the objective of the CWA as stated in Section 101 of the Act, 33 U.S.C. § 1251(a). *See, e.g., Avoyelles,* 715 F.2d at 923 (interpreting "addition" to include "redeposit" is consistent with such purposes of the CWA); *MCC of Florida,* 772 F.2d at 1506 (activity "clearly disturbs the 'physical and biological integrity' of the subject areas"); *Deaton,* 209 F.3d at 336 ("When a wetland is dredged . . . and the dredged spoil is redeposited in the water or wetland, pollutants that had been trapped may be suddenly released" and it "threatens to increase the amount of suspended sediment, harming aquatic life").

March 1995 and November 2000. *See e.g.* C's Ex 3 (April 11, 1997 site inspection report noting COE inspector observed ditching and extensive earth movement, the placement of a concrete drainage pipe, the construction of a berm, and the addition of fill, activities which the Smiths attributed to their installation of a sewer line tie-in during the prior four weeks). Glen Pontsler, a Development Inspector for Gwinnett County, Georgia, testified at the hearing that, on April 29, 1998, he observed C.W. Smith operating "a backhoe digging down in the lake bed" to deepen the main channel into which the channels from the center of the lake ran. Tr. 552-556, Ct. Ex. 1, C's Ex. 45. Mr. Pontsler also observed at that time spoil piles, *i.e.* dirt piles made from the material removed by the backhoe and sidecasted, that is placed on the side of the ditch. Tr. 557, 581, *see also* Tr. 524 (testimony of Lee Pelej defining a spoil pile).[33] Upon reinspection of the site two weeks later, on May 15, 1998, Mr. Pontsler testified that he observed "fresh excavation." Tr. 576, 581-82. Specifically, he saw that many channels in the lake bed, channels over 50 feet in length, had "been cleared and opened up," and a large backhoe, the same type of equipment he had observed Mr. C.W. Smith operating previously, was sitting on the site. Tr. 561-63, 580-83, C's Ex. 47. As before, he further observed spill dirt and spoil piles running along the entire length of the ditch to the center of the lake bed, a distance of "200 feet maybe." Tr. 564, 581.[34]

Mr. Robert Lord, an environmental scientist and a wetlands program manager with EPA (Tr. 61-62), testified at the hearing to observing the site on at least five occasions after Respondents acquired it and on each of those occasions he saw new evidence of the discharge of dredged and fill material into the lake bed caused by the use of "heavy equipment," like a bulldozer or backhoe. Tr. 107, 109-10. Specifically, Mr. Lord testified that on April 17, 1997, he saw evidence of the "construction of ditches" in the stream bed, "general mechanical land clearing disturbance with sidecasted material throughout the area," portions of berms which had been recently reworked, and "spoil," *i.e.* sidecasted material, placed adjacent to both sides of ditches. Tr. 97-98, 109-10. C's Ex. 4, 5. He was advised at that time by an adjacent landowner that the Smiths had done the work. Tr. 101. When Mr. Lord next observed the site on May 16, 1997, he concluded that additional land disturbing activity had taken place. Tr. 121. Such additional activity included enlargement of the roads or dikes, more ditching and routing of streams, and completion of the sewer line installation. Tr. 118; C's Ex. 8. Upon revisiting the site a year later, on May 7, 1998, Mr. Lord said he "observed a considerable amount of new ditch construction with side casted material." Tr. 123. He said at that point there were smaller lateral ditches with four-foot-wide (at the base) spoil piles on the western half of the lake bed and a

---

[33] Mr. Pontsler testified that during that inspection he "walked down into the lake bed, kind of walked around the top of a tree that was lying down, and I was going to issue him [C.W. Smith] an erosion control violation letter." However, C.W. Smith noted an error in the letter in that it was addressed to Grady Smith, rather than C.W. Smith, and "suggested" to Mr. Pontsler that he be more accurate, threatening to sue him, personally, for such errors. Tr. 557-60, C's Ex. 45.

[34] Mr. Pontsler took photographs this time to document his observations of the backhoe and the excavated dirt from the ditching on the site. Tr. 561-62, 579; C's Ex. 47.

large central ditch transversing the center of the lake from the north to the south accompanied by an 8-10 feet wide spoil pile. Tr. 123, 128; C's Ex. 9, 10. He said the construction activity had created a system of ditches which all tied together and drained out to a breach in the dam. *Id.* On May 14, 1998, Mr. Lord observed and documented the construction of a road along the western shoreline of the lake going into the lake bed, with sidecasted material as well as an additional disturbance on the northwest corner of the lake. Tr. 132-33, 136; C's Ex. 12. He also observed a backhoe, which was stationary, and Mr. C.W. Smith on a bulldozer driving off the road. Tr. 135, 137. Mr. Lord inspected the site again in September 1998, and at that time observed additional lateral ditch enlargement and construction on the western side of the old lake bed. Tr. 138.

Mr. Lord also testified that on December 4, 1998, he participated in an aerial flyover of the site to document the configuration of the ditches, during which he observed a complex of ditch construction throughout the lake bed accompanied by sidecasted material. Tr. 139-40, C's Ex. 13. At that time he saw 5,000 linear feet, eight foot wide "primary ditches," with sidecasted material approximately 10 feet wide paralleling the ditches, as well as 4,500 linear feet of secondary ditches which were four feet wide, with sidecasted material with a footprint five feet wide paralleling them. Tr. 141-43. He conservatively estimated that at that point the sidecasted material consisted of a total of approximately 70,000 square feet or 1½ acres. Tr. 143, 145, 148; C's Ex. 14.

Mr. Lee Pelej, an EPA Regional wetlands jurisdictional expert, testified at the hearing that in May 1999, he observed on the Lake Carlton lake bed site that there were machine made, large spoil piles, *i.e.,* material taken from a ditch or another source piled on the ground, adjacent to the ditches. Tr. 524-25, 540-41.

Mr. Kenneth Wilkens, Gwinnett County's Chief Development Officer, testified at the hearing that he participated in an overflight of the site in the summer of 2000 and at that time observed the streams and channels which had been dug through the lake bed and the "disturbed area," where the spoil was cast to the side. Tr. 600-02; C's Ex. 49.

Respondents have not contested and, in fact, acknowledged at hearing and in their Post Hearing Brief, that Respondent C.W. Smith used a backhoe to channelize the streambeds and dig ditches in the lake bed.[35] Tr. 1006, 1165, 1187-88, 1191, 1210-12, 1216; Respondents' Post Hearing Brief at 14.

Thus, there is more than ample evidence in the record to support a finding that pollutants

---

[35] In fact, C.W. Smith testified at the hearing that he owns at least three backhoes, including one his wife gave to him for Christmas, at least two tractors, a front-end loader, a track hoe and that he enjoys "moving dirt." Tr. 1182-83, 1187, 1231. He stated he traveled on weekends from his home to Lake Carlton to "play in the dirt" every chance he got, staying in a vacant home he owned adjacent to the Lake. Tr. 1259-63.

were added through a point source at the Lake Carlton lake bed site, as alleged in the Complaint. However, those findings alone are insufficient to impose liability for a CWA violation on Respondent Grady Smith, individually. For that, Complainant must also show that Lake Carlton constitutes "navigable waters" and that Respondent Grady Smith was a person responsible for the activities. It is these two elements of the violation which Respondents vigorously challenge in this case. Respondents' Post Hearing Brief at 19.

A. <u>Navigable waters</u>

"Navigable waters" is defined in Section 502(7) of the CWA as ". . . the waters of the United States." 33 U.S.C. § 1362(7). In turn, the phrase "waters of the United States" is defined by EPA's regulations at 40 C.F.R. §§ 230.3(s) and 232.2 (CWA 404 Program Definitions), and in the Army Corps of Engineers' regulations at 33 C.F.R. § 328.3(a), as including:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (2) All interstate waters including interstate wetlands;
>
> (3) All other 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 including any such waters:
>
>> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
>>
>> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>>
>> (iii) Which are used or could be used for industrial purposes by industries in interstate commerce;
>
> (4) All impoundments of waters otherwise defined as waters of the United States under this definition;
>
> (5) Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;
>
> (6) The territorial sea;
>
> (7) Wetlands adjacent to waters . . . identified in paragraphs (s)(1) through (6) of this section. . . .

40 C.F.R. § 230.3(s).[36]

The term *"wetlands"* as used in the above provision is defined 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." 40 C.F.R. § 232.2 (italics added).

<u>1. Is the Lake Bed of Lake Carlton a Wetland</u>?

The Complaint alleges that Respondents' property wherein the discharges occurred "is located adjacent to Brushy Fork Creek and tributaries in the area formerly occupied by Lake Carlton." Complaint ¶ 1. Further, Complainant asserts that the discharge area is "wetlands," and, prior to Respondent's activity, was a "water of the United States as defined in Section 502(7) of the CWA, 33 U.S.C. §1362(7) and 40 C.F.R. § 122.2." Complaint ¶¶ 3, 7.

Respondents argue in their Brief that the discharge area consists of the drained lake bed of Lake Carlton and that it is not a wetland. Specifically, Respondents assert that the "normal condition" of the lake bed is submerged beneath the surface of the lake itself and its current condition is only temporary due to the dam breach compelled by the county. Respondents' Post Hearing Brief at 20. Respondents note that in the definition of "wetland," the phrase "under normal circumstances" is a statutory shield which, according to the COE Wetlands Delineation Manual, is to prevent the purposeful or inadvertent alteration of an area into one that does not meet the wetlands criteria. *Id.* Respondents assert that allowing EPA and COE to delineate the property as wetlands without regard to whether the criteria were met under "normal circumstances" would allow the EPA and COE to expand their jurisdiction beyond that granted by Congress.

In reply, Complainant states that the property has been renaturalized as a wetland following the state-mandated breach ten years ago, in 1994, citing the COE Manual (C's Ex. 16). In addition, it notes that the term "waters of the U.S." includes impoundments.

As indicated above, by the time Respondents purchased the Lake Carlton property in or about February1997, most of it was a lake bed, and not a lake, and had been for approximately three years, ever since the prior owner had breached the dam in 1994. Tr. 77; C's Ex. 58. In April 1997, the COE inspected the property and made a delineation determining the site as it

---

[36] The definition of "waters of the United States" at 40 C.F.R. § 232.2 is identical, except that the subparts of the definition are not numbered. For clarity, Section 230.3(s) (located in the Guidelines for Specification of Disposal Sites for Dredged or Fill Material), with its numbered subparts, is quoted and referenced herein. Parallel language regarding the jurisdiction of the COE over "waters of the United States" is found at 33 C.F.R. § 328.3(a).

then existed was a "wetland," subject to its jurisdiction as such under section 404.[37] C's Ex. 3. In making such a determination, the COE was required to consider the changed condition of the property, in that the COE Manual provides that where alterations to a property have occurred, "it is necessary to determine whether alterations to an area have resulted in changes that are now the 'normal circumstances.' The relative permanence of the change and whether the area is now functioning as a wetland must be considered." C's Ex. 16, p. 74. Thus, by determining the lake bed to be jurisdictional "wetlands," the COE determined that such state had become the "normal circumstances" for the property.

EPA also conducted a wetlands delineation in response to Respondents' land disturbing activities on the property and their claim that the property was not wetlands. Mr. Pelej testified that he inspected the Lake Carlton lake bed on February 23 and May 5, 1999.[38] Tr. 523-524; C's Ex. 23. During the May inspection, he walked all around the lake bed and noticed the entire site was dominated by "solid wetland plants," which are facultative wet and obligate wet plants, including willows, alders, and small green ash. Tr. 522, 524-526. His inspection report noted that dominant species observed included obligate wet plant species, "tear thump" (polygonum saggitatum), soft rush (juncus effusis), sedges (carexlurida), arrowhead (saggitaria sp.), and black willow (salix nigra). C's Ex. 23. The only non wet plants were on spoil piles adjacent to ditches and the outer perimeter of the lake bed. Tr. 524; C's Ex. 23. He also saw at the northern end of the site standing water, *i.e.,* water at the top of the soil, and he described the ground as "so boggy, so water-saturated that it became treacherous walking on the surface of it. And I sank down a couple of times past my knees." Tr. 533. Mr. Pelej concluded from looking at the plants that, left alone, the area would eventually become a highly environmentally valuable bottomland hardwood forest through plant succession. C's Ex. 23; Tr. 530. Therefore, based upon his observations, Mr. Pelej opined that, except for spoil piles created by the land disturbing activity, all of the lake bed of Lake Carlton met the parameters for a wetland and qualified as jurisdictional wetland under the CWA. Tr. 535, 536-37, 550-51.

Mr. Lord testified at the hearing that based on his observations on April 17, 1997 of the

---

[37] The COE and EPA are jointly charged with administering the CWA section 404 regulatory program. *See*, CWA § 404, 33 U.S.C. § 1344 (setting forth respective responsibilities of the Secretary of the Army and Administrator of EPA).

[38] Mr. Pelej testified at the hearing that he has a bachelors of science degree in botany and for the past ten years he has been employed by EPA as a "regional wetland jurisdictional expert." In this position, he has performed at least 300 wetlands delineations. In addition, he has provided extensive training on wetlands delineations to COE and EPA staff. Prior thereto, for a period of nine years, he held a variety of positions with COE and in those positions personally performed at least 200 wetlands delineations and supervised hundreds more. He was previously qualified as an expert witness in two Federal Court cases. Based upon his education, training and experience, over the objection of Respondents, he was qualified in this proceeding as an expert in wetlands delineations. Tr. 500-16.

soil characteristics and texture and degree of saturation in the soils, he agreed with the COE's determination that the area where the sewer line had been installed and other land disturbing activity had occurred was a jurisdictional wetland.[39] Tr. 105, 108. On field visits to the site on February 23, 1999, and May 28, 1999 he observed wetland plants in the lake bed, including willows, juncus and polygonum. Tr. 155, 180, 186-87; C's Ex. 21, 22. He described areas of standing surface water, "mushy" soils which indicated that they were saturated, and hummocks. Tr. 156, 158, 187. He testified that he photographed and evaluated soil plugs for color and depth of inundation. Tr. 156, 158-59; C's Ex. 18. According to his testimony, when he compared the color of the plugs with the Munsell soil chart, he determined that the soil was hydric. Tr. 159-61, 163, 183-85. The photographs showed small orange areas in the soil plugs which, he explained, indicated oxidation around root channels, which indicates saturation for a considerable period of time. Tr. 159-60; C's Ex. 18, 21. He testified that the soil plugs showed that the upper 12 inches of the soil was saturated. Tr. 180; C's Ex. 21. Further, Mr. Lord noted that a U.S. Fish and Wildlife Service national wetlands inventory map which showed Lake Carlton as an impounded lake, also evidenced an area south of the dam, which could be a reference site. That reference area indicated that before impoundment, the lake area was Palustrine (fresh water) forested wetland. Tr. 166-67, 175; C's Ex. 19. Based upon this and his observations, Mr. Lord opined that the lake bed met the three parameters of wetland soils, wetland hydrology, and a predominance of wetland plants and therefore met the definition of a wetland under the CWA. Tr. 196-97; C's Ex. 21.

Respondents did not introduce any expert testimony challenging or contradicting the Complainant's experts' opinions that, at all times relevant to the violations alleged herein, the property at issue was wetlands. The only testimony Respondents proffered in support of their assertion that the lake bed did not contain wetlands were their own layman's impressions of the property, in that neither Grady Smith nor C.W. Smith has any particular education, training or experience with regard to wetland delineation or any field of science related thereto. In fact, C.W. Smith dismissed the very idea of performing wetlands delineations, characterizing it as "hocus pocus science." Tr. 1254. When asked why he did not believe the Lake Carlton site to be wetlands, he testified that he does not understand the term "aquatic," but that he saw pine trees growing in certain parts of the lake bed and little willow sprouts and that "I don't think pine trees grows in what's wetlands, but I might be wrong." Tr. 1146. C.W. Smith also testified that when he purchased the site it had only a few little trees on it and very little vegetation, and noted that beaver dams on the site had backed up the water and flooded the area. Tr. 1158, 1159. He

---

[39] Mr. Lord testified that he has a master's degree in water resource science and has completed the course work for a Ph.d. in Public Health. He has received training in wetlands delineation from the COE, specifically in soil identification, stream function and stream biology. His jobs included serving as EPA's regional wetlands coordinator and wetlands program manager and a Geogia State limnologist studying the biology, chemistry and physics of lakes. Based upon his education, training and experience, over Respondents' objection, he was qualified as an expert on the nature and function of wetlands, streams and other water bodies, including lakes and in the delineation of wetlands for section 404 jurisdiction. Tr. 61-74.

admitted, however, that, at times, eighty percent (80%) of the lake bed was flooded with water. Tr. 1214. Additionally, he admitted to digging ditches in the lake bed to dry it out so he could operate mechanical equipment on it. Tr. 1216. Nevertheless, based upon his knowledge of the site, C.W. Smith opined that he did not think the lake bed of Lake Carlton was a "wetland." Tr. 1148-49. Considering all his testimony in this case, Mr. C.W. Smith's opinion concerning whether his property contained wetlands seems in large part based upon his opinion expressed at the hearing that if "[i]t's got no water on it, then you should be able to do what you want to," and that "they [the government] cannot in common language tell you what wetlands are." Tr. 1142, 1147.

Upon consideration, I find the evidence and testimony establishes that the property at issue contained and consisted of "wetlands" as that term is defined in the CWA during the relevant period.

2. Is Lake Carlton a "Water of the United States"?

The next issue is whether the wetland site at issue here is governed by the CWA; that is, whether the wetland is "jurisdictional." The facts of this case suggest two alternative bases upon which the wetlands of Lake Carlton are covered by the Act. First, the wetland is "jurisdictional" under 40 C.F.R. § 230.3(s)(3)(i) and (7) because it is adjacent to an intrastate lake that is or could be used by interstate or foreign travelers for recreational or other purposes.[40] Alternatively, the wetland is "jurisdictional" under 40 C.F.R. § 230.3(s)(1), (5), and (7) because the wetland is adjacent to tributaries to waters which are or could be used by interstate or foreign travelers for recreational or other purposes and to waters which are subject to the ebb and flow of the tide.[41]

a. Jurisdiction under Section 230.3(s)(3)

As noted above, "waters of the United States" include:

> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), . . . wetlands, . . . or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
>
> > (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
> >
> > (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;

---

[40] *See also*, 33 C.F.R. § 328.3(a)(3).

[41] *See also*, 33 C.F.R. § 328.3(a)(1), (5), and (7).

* * * *

(7) Wetlands adjacent to waters . . . identified in paragraphs (s)(1) through (6) of this section. . . .

40 C.F.R. § 230.3(s).

At the hearing, Respondent Grady Smith testified that the almost 22 acre body of water[42] remaining on a portion of the Lake Carlton site, referred to by various witnesses as the "catfish pond" or "catfish lake," is used by interstate travelers for recreational purposes. Specifically, he stated as follows, in pertinent part:

> Q: Who comes to fish in that fish pond?
>
> A: I call them crazy. They pay seven dollars a day to fish . . . .
>
> Q: It is just people from the local community that come to fish there?
>
> A: No. I've had people come in and they fly in there from Minnesota. They call me. . . . they say, you still got them lakes down in there? I say, yeah, come on down. . . . Come down when you get off your flight and fish. I don't charge them. But they come down from Minnesota.
>
> Q: So people sort of come far and wide to fish in your catfish pond?
>
> A: Yes. And they fish, I mean, some of them Friday, Saturday and Sunday.

Tr. 1060-61. Grady Smith further testified that "catfish are hauled in" from Tennessee and "put in the lake" and that fishing tournaments are held in the lake. Tr. 1059-60, 1061. Mr. Lord confirmed that the reimpounded portion of Lake Carlton was a paid fishing lake stocked with "trophy catfish." Tr. 456-57, 458. He further testified that in a directory published by the Georgia Department of Natural Resources, Lake Carlton was listed as a "paid fishing area lake," "So people could come from far and wide . . . across the state of Georgia, possibly from across the southeast if they were in the area." Tr. 457.

It is noted that "waters of the United States" includes intrastate *lakes* and *natural ponds*

---

[42] A plat of the Lake Carlton site shows that areas marked "Tract A" and "Tract B" are "pond" areas, that they cover 11.523 acres and 10.333 acres respectively, and that they are adjacent to "Tract F," an area covering 55.729 acres described as the "dry lake bed." Rs' Ex. 61.

the use, degradation or destruction of which could affect interstate commerce. The record does not establish that the "catfish *pond*" is a *natural* pond, but suggests that it was man-made. Tr. 925, 930. However, neither the term "lake" nor "pond" is defined in the EPA's regulations. The Corps of Engineers has defined the term "lake" in its regulations governing Section 404 permits, at 33 C.F.R. Part 323, as including "a standing body of open water created by artificially blocking or restricting the flow of a river, stream or tidal area." 33 C.F.R. § 323.2(b). The record indicates that the "catfish pond" was created by building a dam across Brushy Fork Creek, and therefore the "catfish pond" meets that Corps of Engineers' definition of a lake. Tr. 919-922, 930. The Corps' Part 323 regulations do not include a definition of the term "pond," so it is appropriate to refer to the common meanings of the terms in a dictionary to distinguish them. The dictionary definition of "pond" is "a body of water usu[ally] smaller than a lake and larger than a pool either naturally or artificially confined," and the definition of "lake" is "a considerable inland body of standing water, an expanded part of a river, a reservoir formed by a dam, or a lake basin intermittently or formerly covered with water." Webster's Third New International Dictionary 1265, 1762 (2002). The dictionary distinguishes a lake from a pond on the basis of size. The record shows that the "catfish pond" is of significant size, covering almost 22 acres, and that it is of sufficient depth necessary to support the existence of very large fish, some in excess of 100 pounds.[43] C's Ex. 9; Tr. 1061; R's Ex. 61; *see,* n. 42, *supra*. Therefore the "catfish pond" is not merely a "pond" but is a "lake," in and of itself, within both the Corps of Engineers' definition, and the common meaning, of the term "lake."

Thus, the undisputed testimony and evidence show that the "catfish pond" was a lake that "[was] or could be used by interstate or foreign travelers for recreational or other purposes;" and that the use, degradation or destruction of the lake could affect interstate or foreign commerce; and therefore, the "wetlands adjacent to those waters," *i.e.* adjacent to the "catfish pond," are "waters of the United States" within the jurisdiction of the CWA under 40 C.F.R. § 230.3(s)(3).

Respondents argue that the Lake Carlton lake bed is not "waters of the United States" considering the decision of the U.S. Supreme Court in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"). In that case, the Court held invalid the COE's "Migratory Bird Rule" which purported to "clarify" the COE's jurisdiction under 33 C.F.R. § 328.3(a)(3) - the COE regulation paralleling 40 C.F.R. § 230.3(s)(3) at issue here. However, the "Migratory Bird Rule" is not relied upon as a basis for jurisdiction in this case, and the facts of this case are clearly distinguishable from those in the *SWANCC* case.

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, and so had applied to the COE for a permit under Section 404 of the CWA to fill some of the ponds. *SWANCC*, 531 U.S. at 159. Although the site contained no "wetlands" as defined by 33 C.F.R.

---

[43] The record does not reflect the exact depth of the "catfish pond," however, C.W. Smith testified that "you need four foot of water in a lake to have good fish habitat." Tr. 1177.

§ 328.3(b), the site did provide habitat for migratory birds, so the COE asserted jurisdiction under its "Migratory Bird Rule" which it had issued in 1986 in an attempt to "clarify" the extent of its jurisdiction under 33 C.F.R. § 328.3(a)(3), "without following the notice and comment procedures outlined in the Administrative Procedures Act, 5 U.S.C. § 553." *SWANCC*, 531 U.S. at 164, n.1. Under that Rule, COE stated that its CWA jurisdiction extended to intrastate waters "...[w]hich are or would be used as habitat by ... migratory birds which cross state lines." 51 Fed. Reg. 41217 (1986). This Rule was based upon the theory that the degradation of non-navigable, isolated intrastate wetlands used as habitat by migratory birds impacts interstate commerce in that millions of Americans cross state lines and spend billions of dollars annually to hunt or watch migratory birds. *SWANCC*, 531 U.S. at 166, n.2.

There was no evidence in *SWANCC* that anyone crossed state lines for recreational purposes in regard to the site at issue, and the Court determined that for jurisdiction it was not sufficient to demonstrate that the destruction of migratory bird habitat would have an aggregate effect on interstate commerce because *in general in the United States,* many people cross state lines and spend money for hunting and birdwatching. Therefore, the Supreme Court in *SWANCC* held that: "...33 C.F.R. § 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 COE] under § 404(a) of the CWA." *SWANCC*, 531 U.S. at 174. However, the Court did *not* invalidate any portion of 33 C.F.R. § 328.3(a)(3) itself, but instead invalidated the Rule which purported to *clarify* the codified regulation, so that regulation and its parallel regulation at issue here (40 C.F.R. § 230.3(s)(3)) remain valid and applicable regulations. *United States v. Buday*, 138 F. Supp. 2d 1282, 1287 (D. Mont. 2001).

In the present case, the evidence shows that that portion of the former "Lake Carlton" which is a lake itself, *i.e.* the "catfish pond," actually drew people across state lines to engage in recreational activities on the lake, *i.e.* fishing, and so that body of water falls squarely within the regulation itself defining "waters of the United States." The *SWANCC* decision therefore has no effect on the determination that the wetlands adjacent to thereto are also "waters of the United States" under 40 C.F.R. §§ 230.3(s)(3)(i) and 230.3)(s)(7).

<u>b. Jurisdiction under Section 230.3(s)(1), (5), and (7)</u>

In the alternative, the wetlands of Lake Carlton may be found to be navigable waters by virtue of their connection to other navigable waters. At the hearing, the undersigned specifically invited the parties to address the issue of the connection between the wetlands on the site and "navigable waters." Tr. 8-9. The undisputed testimony shows that the property at issue is adjacent to Brushy Fork Creek, which flows through the property and which was previously dammed to form Lake Carlton. Tr. 458-59. The creek flows 5 to 7 miles from Lake Carlton to join with Big Haynes Creek. Tr. 461. Big Haynes Creek flows approximately twenty miles before it empties into the Yellow River. Tr. 462. The Yellow River empties into Lake Jackson which is ten miles long, which then empties into the Ocmulgee River. Tr. 462. The Ocmulgee River travels approximately 100-150 miles before it empties into the Altamaha River. Tr. 463.

The Altamaha River, in turn, flows into the Atlantic Ocean. Tr. 465.

The Atlantic Ocean, subject to the ebb and flow of the tide, is clearly a "water of the United States" under 40 C.F.R. § 230.3(s)(1). Mr. Lord testified that the Altamaha River and the Ocmulgee River up to Macon are commercially navigable under the Corps of Engineers definition, and that upstream from Macon, the Ocmulgee River and Lake Jackson are used for recreational navigation and commercial fishing. Tr. 463-66. The Ocmulgee River has been found to be "undeniably a navigable water" by a federal district court in Georgia under the Oil Pollution Act and the Clean Water Act. *See, United States v. Jones*, 267 F. Supp. 2d 1349, 1357 (M.D. Ga. 2003). The Altamaha River has been held by the Fifth Circuit to be subject to federal jurisdiction as a "navigable" water of the United States under the Federal Power Act, defined by the court as a river which in its natural or improved condition is used or is suitable for use for transportation of persons or property in interstate or foreign commerce. *Georgia Power Co. v. Federal Power Comm'n*, 152 F.2d 908, 914 (5th Cir. 1946). Therefore, and because the Ocmulgee River flows into the Altamaha River, there is no question that the latter is a "water of the United States" under the CWA. Lake Jackson appears to be a "water of the United States" under 40 C.F.R. § 230.3(s)(3)(i) and (ii) ("waters: (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes or (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce") or, by virtue of the fact that it may be an impoundment of the Ocmulgee River, under 40 C.F.R. § 230.3(s)(4)("All impoundments of water otherwise defined a waters of the United States under this definition"). In any event, the tributaries to the Ocmulgee River, namely, Lake Jackson, Yellow River, Big Haynes Creek, and Brushy Fork Creek are also "waters of the United States," under 40 C.F.R. § 230.3(s)(5) ("[t]ributaries of [such] waters").

The fact that Brushy Fork Creek flows into three other water bodies before it reaches the Ocmulgee River does not render it any less a "water of the United States." In *United States v. Ashland Oil and Transportation Co.,* it was held that a tributary which flows into several other bodies of water before flowing into one which is navigable-in-fact is still a "water of the United States," consistent with the U.S. Constitution's commerce clause (U.S. Const. Art 1, § 8, cl. 3). *United States v. Ashland Oil and Transportation Co.,* 504 F.2d 1317 (6th Cir. 1974) (discharge of oil into a small tributary to a creek which itself is a tributary to another creek, which flows into a river, which in turn is a tributary to another river which is navigable in fact, is a discharge into "navigable waters of the United States;" Congress has authority under interstate commerce powers to prohibit such discharge); *United States v. Jones*, 267 F. Supp. 2d 1349 (M.D. Ga. 2003) (holding a tributary thrice removed from a navigable water body, the Ocmulgee River, is a jurisdictional water). Man-made ditches and canals that are tributaries to interstate waters or waters that are in fact navigable have also been held to be "waters of the United States." *United States v. Eidson*, 108 F.3d 1336, 1342 (11th Cir. 1997), *cert. denied,* 522 U.S. 899 (1997) (discharge into a storm sewer that drains into a storm drainage ditch, which flows into a drainage canal that empties into a creek which is a tributary to Tampa Bay is a discharge into a "water of the United States"); *United States v. TGR Corp.*, 171 F.3d 762 (2d Cir. 1999) (discharge into drain that flows into a storm water discharge system which flows into a waterway that is channeled in some places and that flows into a navigable creek, is a discharge into a "water of

the United States"). Intermittent tributaries have been held to be "waters of the United States." *Quivira Mining Company v. U.S. EPA*, 765 F.2d 126 (10th Cir. 1985), *cert. denied,* 474 U.S. 1055 (1986) (creek and arroyo are "waters of the United States" despite fact that they have surface water connection with navigable waters only at times of heavy rainfall); *United States v. The Texas Pipe Line Company*, 611 F.2d 345 (10th Cir. 1979) (small unnamed tributary of a creek which itself is a tributary of another creek, which is a tributary of a navigable river, is "navigable water" although there was no evidence that the creeks were flowing at the time of discharge).

In *Ashland*, the Sixth Circuit explained, in part, the rationale for its holding as follows:

> It would, of course, make a mockery of those [interstate commerce] powers if [Congress'] authority to control pollution was limited to the bed of the navigable stream itself. The tributaries which join to form the river could then be used as open sewers as far as the federal regulation was concerned. The navigable part of the river could become a mere conduit for upstream waste. Such a situation would have a vast impact on interstate commerce. . . . Pollution control of navigable streams can only be exercised by controlling pollution of their tributaries.

504 F.2d at 1326, 1327. As recognized by Congress and quoted by the Supreme Court, "water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." S. Rep. No. 92-414 at 77 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742-43, (quoted in *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 133 (1985)).

Such a source includes wetlands adjacent to navigable or interstate waters or their tributaries, and therefore, the regulatory definition of "waters of the United States" includes such wetlands. *Riverside Bayview,* 474 U.S. at 129; 40 C.F.R. § 230.3(s)(7). Specifically, the term "*adjacent*" is defined in 40 C.F.R. § 230.3(b) and 33 C.F.R. § 328.3(c) as "bordering, contiguous, or neighboring," and includes "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like."

In *Riverside Bayview*, the Supreme Court quoted with approval the language in the preamble to the regulation, that Federal jurisdiction under the CWA includes "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), (quoted in *Riverside Bayview*, 474 U.S. at 134). In that case, the Supreme Court held that an area of wetland that is part of a larger wetland that actually abuts waters that are in fact navigable is a "water of the United States," whether or not the wetland is actually inundated by the adjacent waterway. 474 U.S. at 134-35. As long as the wetland is "adjacent" to a water used or formerly used in interstate commerce or a tributary thereof, the interstate commerce nexus is established. *United States v. Pozsgai*, 999 F.2d 719, 733 (3rd Cir. 1993), *cert. denied,* 114 S.Ct. 1052 (1994); *Slagle v. United States,* 809 F. Supp. 704, 709 (D. Minn. 1992) (wetland on shore of lake hydrologically connected to a river which feeds into another lake which connects to an interstate

river). A wetland is "contiguous" and thus "adjacent" to another water of the United States if there is a direct surface water connection to it. *United States v. Lee Wood Contracting, Inc.,* 529 F. Supp. 119, 121 (E.D. Mich. 1981). A wetland has been held "adjacent" to a navigable water where a hydrological connection existed primarily through groundwater, but also through surface water during storms. *United States v. Banks,* 115 F.3d 916, 921 (11th Cir. 1997), *cert. denied,* 522 U.S. 1075 (1998). A pond and surrounding wetland has also been held to be "adjacent" to a navigable water where they were separated from the river by a man-made levee and a distance of from fifty to a few hundred feet, where there was no surface hydrological connection, but only an underground aquifer hydrological connection to the river. *Northern California River Watch v. City of Healdsburg*, No. C-01-04686 WHA, 2004 U.S. Dist. LEXIS 1008, at *28 (N.D. Cal., Jan. 23, 2004). However, it has also been held that wetlands without a direct or indirect surface water connection to interstate waters, navigable waters or interstate commerce, are not "adjacent to" other waters of the United States. *United States v. Wilson,* 133 F.3d 251, 258 (4th Cir. 1997).

As to Respondents' request to interpret the *SWANCC* opinion very broadly to apply to the present case, the Court in *SWANCC* acknowledged the continuing vitality of its holding in *Riverside Bayview* that the COE does have "404 jurisdiction" over wetlands which are "adjacent" to "navigable waters," including wetlands adjacent to tributaries to navigable waters.[44] Further, the Supreme Court recently denied *certiorari* in three cases in which the circuit courts declined to interpret *SWANCC* very broadly. *See, Newdunn Associates, LLP. v. U.S. Army Corps of Engineers*, 124 S.Ct. 1874, 2004 US LEXIS 2567 (Apr. 5, 2004); *Deaton v. United States*, 124 S.Ct. 1874, 2004 US LEXIS 2568, (Apr. 5, 2004); *Rapanos v. United States*, 124 S.Ct. 1875, 2004 US LEXIS 2571 (Apr. 5, 2004), *reh'g denied,* 124 S. Ct. 2407, 2004 US LEXIS 3815 (May 24, 2004).

In *Treacy v. Newdunn Associates, LLP*, 344 F.3d 407 (4th Cir. 2003), *cert. denied*, *Newdunn Associates, LLP. v. U.S. Army Corps of Engineers*, *supra*, the court held that a man-made ditch under an interstate highway was a "tributary" for purposes of COE jurisdiction under the CWA, since water from the ditch flowed into traditional, navigable waters. The Court further held that a sufficient nexus existed between the wetland and navigable-in-fact waters for federal jurisdiction, where water flowed intermittently from the wetlands through a series of natural and man-made waterways, crossing under an interstate highway, and eventually finding its way 2.4 miles later to traditional navigable waters.

In *United States v. Deaton*, 332 F.3d 698, 702 (4th Cir. 2003), *cert. denied*, *Deaton v. U.S.*, *supra* ("*Deaton II*"), the court held that Federal jurisdiction existed over wetlands adjacent to a "roadside" ditch, which flowed into various natural and man-made tributaries until reaching

---

[44] 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 (citation omitted).

navigable-in-fact waters eight miles away. The court in *Newdunn* summarized the *Deaton* holding as follows:

> In *Deaton*, the Corps claimed authority to regulate wetlands bordering a "roadside ditch" that took "a winding, thirty-two mile path to the Chesapeake Bay." [*United States v. Deaton*, 332 F.3d 698, 702 (4th Cir. 2003)]. Along the way to the Bay, water flowed from the Deaton's wetlands to the roadside ditch, and then into a "culvert" on the other side of the road. *Id.* Water from the culvert drained into a second ditch, which flowed into Beaverdam Creek. Beaverdam Creek was "a direct tributary of the Wicomico River, which [was] navigable." *Id.* The distance from the Deaton's wetlands to a navigable-in-fact river was approximately eight miles. The *Deaton* court upheld the Corps' exercise of jurisdiction over all of these waters, finding that "the Corps's regulatory interpretation of the term 'waters of the United States' as encompassing nonnavigable tributaries of navigable waters does not invoke the outer limits of Congress's power or alter the federal-state framework." *Id.* at 708. In dismissing a Commerce Clause challenge to the Corps' regulations, the *Deaton* court summarized Congress' well-articulated purpose for crafting the CWA and concluded, "The Corps has pursued this goal by regulating nonnavigable tributaries and their adjacent wetlands. This use of delegated authority is well within Congress's traditional power over navigable waters." *Id.* at 707. In sum, the Corps' unremarkable interpretation of the term "waters of the United States" as including wetlands adjacent to tributaries of navigable waters is permissible under the CWA because pollutants added to any of these tributaries will inevitably find their way to the very waters that Congress has sought to protect.

Newdunn Associates, LLP, 344 F.3d at 416-17.

In *United States v. Rapanos*, 339 F.3d 447 (6th Cir. 2003), *cert. denied*, *Rapanos v. U.S.*, *supra*, the court found an ample nexus between wetlands owned by the defendant and navigable waters, establishing jurisdiction under the CWA, where the wetlands were 11-12 miles from the navigable waters, the wetlands were connected to a man-made drain which flowed into a creek, the creek flowed into a river which was navigable, and the river eventually flowed into the Saginaw Bay and Lake Huron.

Petitioners for *certiorari* in *Deaton*, *Newdunn*, and *Rapanos* relied on a "split in the circuits," in that the Fifth Circuit has read *SWANCC* more broadly than has any other Circuit. *See Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001); *In re Needham*, 354 F.3d 340 (5th Cir. 2003). The Fifth Circuit appears to stand alone, however, in its broad interpretation of *SWANCC* and its opinions are not binding on the determination of whether the lake bed at issue is a "water of the United States."

Regarding Respondents' arguments concerning the requisite "significant nexus" between

the wetlands and navigable waters, as referenced by the Court in *SWANCC*, [45] the court in *Deaton* directly addressed the question of how far the coverage of "tributaries" extends under 33 C.F.R.
§ 328.3(a)(5) (which parallels 40 C.F.R. § 230.3(s)(5)), finding that federal jurisdiction extended to "*any branch* of a tributary system that eventually flows into a navigable body of water." *Deaton*, 332 F.3d at 711 (emphasis added). The court explained:

> The regulation, 33 C.F.R. § 328.3(a)(5), defines "waters of the United States" to include tributaries of navigable waters. The Deatons argue that it is wrong to read the regulation to reach all branches of a system that eventually flow into a navigable waterway. They contend that the term "tributary" in the regulation refers only to a nonnavigable branch that empties directly into a navigable waterway. Thus, they say, the roadside ditch is not a tributary of the navigable Wicomico River. ... The Corps asserts ... that "tributaries" in the regulation means "*all tributaries," not just "'short' or 'primary' tributaries*." ... In the preamble to a prior generation of CWA regulations, the agency wrote that "Corps jurisdiction ... would extend to ... *all tributaries (primary, secondary, tertiary, etc)* of navigable waters." 40 Fed. Reg. 31,320 (1975) (emphasis added). ... Although the Corps has not always chosen to regulate all tributaries, it has always used the word to mean the *entire tributary system*, that is, *all of the streams whose water eventually flows into navigable waters*. *Cf. Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001) (considering "tributary" to reach all branches of a system without referring to Corps's interpretation). Because the Corps's longstanding interpretation of the word "tributary" has support in the dictionary and elsewhere, it is not plainly erroneous. Nor is it inconsistent with the regulation. ... In short, the word "tributaries" in the regulation means what the Corps says it means. ... [J]urisdiction extends to *any branch of a tributary system* that eventually flows into a navigable body of water...

Deaton, 332 F.3d at 710-711 (emphases added and removed).

---

[45] The court in *United States v. Hummel*, 2003 U.S. Dist. LEXIS 5656 (N.D. Ill. 2003), explained: "In assessing whether bodies of water amount to navigable waters, courts have seized upon the Supreme Court's statement in *SWANCC* that 'it was the *'significant nexus'* between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*.' *SWANCC*, 531 U.S. at 167 (emphasis added); *See, e.g.*, *Lamplight Equestrian Center*, No. 00C-6486, 2002 U.S. Dist. LEXIS 3694 (N.D. Ill. Mar. 8, 2002). In other words, the party asserting the Corps' jurisdiction over a particular body of water must establish a 'significant nexus' between the body of water and a navigable water. If the complaining party cannot demonstrate such a connection, then the body of water cannot be included among those waters protected by the CWA."

Regarding "significant nexus," the court in *United States v. Krilich*, 152 F. Supp. 2d 983 (N.D. Ill. 2001), also provides a useful summary of some post-*SWANCC* 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).

United States v. Krilich, 152 F. Supp.2d 983, 992, n.13 (N.D. Ill. 2001) (emphasis added). More recently, the same court again summarized "significant nexus" case law in light of *SWANCC* in *United States v. Hummel*, No. 00-C-5184, 2003 U.S. Dist. LEXIS 5656 (N.D. Ill., Apr. 7, 2003), explaining:

> Many courts, both before and after *SWANCC,* have found connections to navigable waters similar to the present case sufficient to establish jurisdiction. *See Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001) (man-made irrigation canals that emptied into streams flowing to navigable waters); *United States v. Eidson*, 108 F.3d 1336 (11th Cir. 1997) (sewer drain flowing to drainage ditch to drainage canal that emptied into a tributary of Tampa Bay); *United States v. TGR Corporation*, 171 F.3d 762 (2nd Cir. 1999) (drain to storm waters discharge system to tributary of navigable water); *United States v. Ashland Oil and Transp. Co.*, 504 F.2d 1317 (6th Cir. 1974) (unnamed tributary flowing through three other waterways before reaching a navigable river); *United States v. Rueth Development Corporation*, 189 F. Supp. 2d 874 (N.D. Ind. 2002) (wetland "which has an affect" on flows to ditch which ultimately led to navigable river); *United States v. Buday*, 138 F. Supp.2d 1282 (D. Mont. 2001) (tributary **235 miles** from navigable water); *United States v. Lamplight Equestrian Center, Inc.*, 2002 WL 360652 (N.D.Ill. 2002) (non-continuous meandering drainage swale that carried water off the property to a tributary of a tributary of a navigable water). In sum, cases both before and after *SWANCC* have found that a body of water need not have a direct connection to navigable water, but may be linked through other connections two or three times removed

> from the navigable water and still fall within the Corps' jurisdiction.

Hummel, 2003 U.S. Dist. LEXIS at *6 (emphasis added).

The reason for courts' reluctance to limit "adjacency" based upon distance or number of tributary connections appears to be 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*.

U.S. v. Buday, 138 F. Supp. at 1291 (emphasis added).

It is concluded that Brushy Fork Creek is a "water of the United States" under 40 C.F.R. § 230.3(s)(5). The next question is whether, under the case law cited above, the wetland on Respondents' property is "adjacent to" the creek and thus "waters of the United States." This question is easily answered in the affirmative, as undisputed testimony and evidence shows that the wetland on Respondents' property borders Brushy Fork Creek.

The uncontroverted evidence and testimony establishes that the lake bed of Lake Carlton is a wetland which is supported by, drains into and is immediately adjacent to Brushy Fork Creek. In its natural state, the wetland on Respondent's property would operate as a sponge and a filter, absorbing and retaining sediments and pollutants, cleansing and slowing the flow of water from upland areas to the creek. Tr. 215-16, 531-32, 537-38.

Thus, it is clear from the record that based upon its "adjacency" to "waters of the United

States," the wetland on Respondent's property is a "navigable water" within the meaning of CWA section 502(7).

B. Respondent Grady Smith's Liability

Section 301(a) of the CWA prohibits "the discharge of any pollutant by *any person*." 33 U.S.C. § 1311. Section 309 provides that administrative penalties may assessed against *"any person"* who has violated section 301 of the Act. 33 U.S.C. § 1319(g). The question is whether Respondent Grady Smith is a "person" who "discharge[d] . . . any pollutant" and thereby violated the CWA. In support of its claim that Respondent Grady Smith is individually liable for the CWA violations which occurred at Lake Carlton, Complainant alleges that he (Grady Smith) is responsible not only for his own actions, but those of the defaulting Respondents (C.W. Smith and Smith's Lake Corporation) as well, positing a number of theories therefor. Respondent Grady Smith's personal actions and these theories are discussed below.

1. Grady Smith's Personal Actions

The record is replete with evidence tying Respondent C.W. Smith, individually, and through his actions, the Respondent Corporation, to the violations. It is clear that C.W. Smith was the driving force behind the Corporation purchasing the Lake Carlton property and it was he who made the purchase possible by providing the money therefor. Tr. 1063, 1230. Further, it was C.W. Smith's plan to refill the lake with water by creating smaller lakes and dams. C.W. Smith "began . . by using his backhoe to channelize the streambeds in the lakebed . . . and to dig ditches which he believed would create an appropriate fish habitat . . .". Respondent's Post Hearing Brief at 14. It was also C.W. Smith's idea to dig ditches in the lake bed in order to dry out the land enough to scrape the lake bed and deepen the lake by using heavy equipment called a "pan," for the ditches to collect sediment, and for construction of a drain pipe. Tr. 1216-20. It was C.W. Smith who owned the earth moving equipment (tr. 1055-56, 1231-32) and it was C.W. Smith who personally dug the ditches and sidecasted the fill in the wetland. Tr. 1006, 1063, 1064, 1230.

On the other hand, the factual evidence of record tying the personal actions of Respondent Grady Smith to the violations alleged is slim. The record shows that Grady Smith shared his brother's declared goal of restoring Lake Carlton's lake bed to a lake. Tr. 943-44; C's Ex. 32, 34. However, there is no evidence that he initiated or shared the idea of undertaking the type of mechanized earthmoving activities his brother deemed necessary and expedient to achieve this goal. Tr. 1033-34, 1215-22. Rather, he seemed to merely accept and reconcile himself to the fact that his brother was going to engage in such activities and rationalize that they were acceptable because the eventual outcome would be positive. Specifically, at the hearing Grady Smith stated " I don't think side casting is a good idea," and "I never told [C.W.] that it was a good idea," but said that "it's okay because, when you cover it up in water, it'll make good fish habitat" because the ditches create a deep channel and a high spot. Tr. 1033. On the other hand, Grady Smith admitted acting as the "mouthpiece" for his brother, participating in meetings

and site inspections with EPA and the Corp of Engineers, and expressing his support for building dams and restoring the lake, and his opposition to filling in the ditches. Tr. 938-41, 1035-36; C's Ex. 17, 22. Grady also expressed the brothers' shared opinion that the digging should not be subject to federal regulation if they were going to restore water to the lake. Tr. 1034-35.

In addition, as Complainant acknowledges in its post hearing brief, there is no direct evidence that Grady Smith ever personally engaged in any activity, such as ditching and sidecasting with a backhoe or other mechanized equipment in the lake bed of Lake Carlton. Complainant's Post Hearing Brief at 3. Grady Smith testified that it was his brother, and not himself, who dug all the ditches and channels on the property, which testimony was not contradicted. Tr. 1006. In fact, the only evidence of digging activity by Grady Smith, or on his behalf, is that Grady Smith and Phil Barnes, who Grady hired, at some point dug ditches in the lake bed using hand shovels, and removed beaver dams, trash and tree limbs. Tr. 909, 957-58, 1007, 1202, 1224-25, 1229, 1244. However, even as to this non-mechanized digging activity, when asked who decided to ditch in the lake bed, C.W. testified, "I think I told him, get a shovel down here and break them beaver dams. So I guess I made the decision." Tr. 1229. Moreover, Grady Smith's other activities with regard to altering the property consisted merely of checking the oil and fuel in the equipment and using the equipment to "bush hog" (mow) around the sewer line, dig a ditch (or to have someone else dig a ditch) for a water line from the street to Grady's house, and to "cut the front yard" of a house in the area to divert water.[46] Tr. 1021-25, 1245-47. In addition, C.W. Smith testified that his brother brought him food and took care of him when he stayed in the bait shop or in another house at Lake Carlton for the weekend. Tr. 1261. He testified further that Grady Smith brought him water when he was digging, and told him to get off the equipment and have lunch or come in when it was dark. Tr. 1262. The record does not indicate whether Grady Smith fueled equipment specifically for C.W. Smith to use for ditching in the lake bed, or even if he did, whether it was on his own initiative or on C.W. Smith's instruction. The evidence does not establish that Grady's mowing activity, "bush hogging," was for the purpose of enabling or assisting C.W. Smith to sidecast in the lake bed.

Upon consideration of the evidence, I find that Grady Smith did not personally discharge any pollutants and his activities were not a substantial factor in *causing* others to discharge any pollutants. Unlike Respondent C.W. Smith, there is simply no evidence in the record that Grady Smith personally engaged in any activity, such as ditching and sidecasting with a backhoe or other mechanized equipment, or that he caused his brother to engage in such acts, which would make him clearly subject to liability for a violation under the CWA.

2. <u>Aiding and Abetting Theory</u>

---

[46] Grady indicated at the hearing that he never moved dirt with mechanized equipment, and never directed anyone to move dirt with such equipment. Tr. 909, 936. However, the credibility of this testimony is suspect in light of his admission that he operated a front-end loader on a tractor and that he "cut the front yard of a house." Tr. 1025.

Complainant asserts in its brief that although he "did not operate C.W.'s backhoe when the machine was sidecasting excavated wetland soils in the lakebed, Grady assisted in the overall work in the lakebed to such an extent that he should be held directly liable." Complainant's Post Hearing Brief at 22.

In seeking to hold Respondent Grady Smith liable in this action, Complainant analogizes the actions of Grady Smith to those of a co-defendant criminally charged with "aiding or abetting" environmental violations, citing *United States v. Colvin*, 246 F.3d 676 (Table), 2000 U.S. App. LEXIS 33616, 2000 WL 1868218 (9th Cir. 2000).[47] Complainant's Brief at 23. In *Colvin*, a co-defendant was charged under 18 U.S.C. § 2 with the federal crime of aiding and abetting a criminal violation of the CWA (33 U.S.C. §§ 1311 and 1319(c)) by discharging pollutants into navigable waters without a permit.[48] *Colvin,* 246 F.3d 676. The Court stated that in order to convict the co-defendant of the crime of aiding and abetting, the government had to demonstrate that the co-defendant: 1) had the specific intent to facilitate the crime by another; 2) had the requisite underlying intent of the specific offense, and 3) participated in the commission of the underlying offense. *Colvin*, 2000 U.S. App. LEXIS 33616 *4-5. The Court held that by directing trucks where to dump the waste and accepting the freight bills, the co-defendant participated in the commission of the underlying offense - discharging pollutants without a permit. *Id.* at *5. Knowing that the other defendant would spread the waste in navigable waters, and having been warned by a government official that the dumping and spreading should cease, the Court found the requisite mental state to hold the co-defendant liable for aiding and abetting was also shown. *Id.*

However, this is not a criminal case, but a civil/administrative one. As the Supreme Court noted in *Central Bank of Denver v. First Interstate Bank of Denver,* 511 U.S. 164 (1994), Congress has not enacted a civil equivalent of 18 U.S.C. § 2 for suits by the government for civil

---

[47] With regard to the *Colvin* decision, the Court stated that "[t]his disposition is not appropriate for publication and may not be cited to or by the courts of this circuit . . . . " *Colvin,* 2000 U.S. App. LEXIS 33616 n. 1. The Rules applicable to this proceeding, however, contain no specific limitation with regard to citing unpublished cases as authoritative precedent.

[48] Section 2 of Title 18 U.S.C. provides that -

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

This section is applicable to entire United States criminal code. *Breeze v United States,* 398 F.2d 178, 183 (10th Cir. 1968).

penalties or injunctive relief or for suits by private parties, and that provision cannot be used to imply a civil cause of action for aiding and abetting where the text of the statute does not provide for it. *Id.,* 511 U.S. at 176-77, 182 (holding no civil cause of action exists under Section 10(b) of the Securities and Exchange Act for aiding and abetting a manipulation or deceptive act in connection with the sale of securities). *See also*, *Pennsylvania Ass'n of Edwards Heirs v. Rightenour*, 235 F.3d 839, 841 (3d Cir. 2000) (relying upon Central Bank to hold that plaintiff could not maintain a claim of aiding and abetting an alleged RICO violation), *cert denied*, 534 U.S. 816 (2001).

Unlike other statutes, the text of the CWA does not provide for civil or administrative aiding and abetting liability. *E.g. compare* CWA, 33 U.S.C. §§ 1311(a), 1319(g) ("Any person") *with* Commodity Exchange Act, 7 U.S.C. § 25(a)(1) ("Any person . . . . who violates this Act *or who willfully aids, abets, counsels, induces, or procures the commission of a violation of this Act* shall be liable for actual damages.") (Emphasis added). Moreover, Complainant has not cited any legislative history suggesting that Congress intended to include aiding and abetting liability for civil or administrative CWA violations. Thus, the aiding and abetting theory cannot be used to hold Respondent Grady Smith liable under the CWA.

3. Grady as a Corporate Officer Theory

In its Briefs, Complainant also attempts to pin liability upon Respondent Grady Smith for the actions of the Corporation or its other officer (C.W. Smith) by asserting that as the President and CEO of Smith's Lake Corporation, Grady Smith had a fiduciary duty to ensure that its officers did not violate the law. Complainant's Post-Hearing Brief at 25; Complainant's Post-Hearing Reply Brief at 4.

A corporation is presumptively a separate and distinct entity from its shareholders, directors and officers. *El Salto. S.A. v. PSG Co.*, 444 F.2d 477 (9th Cir. 1971); *Thomas v. Peacock*, 39 F.3d 493, 499 (4th Cir. 1994), *rev'd on other grounds*, 516 U.S. 349 (1996). Generally, only the officers of a corporation who personally participate in tortious acts may be held personally liable for the torts of the corporation, under principles of limited liability of corporate officers. *Escude Cruz v. Ortho Pharmaceutical Corp,* 619 F.2d 902, 907-08 (1st Cir. 1980) (to establish liability of a corporate officer for a corporation's tort, evidence must show direct personal involvement by the corporate officer in some decision or action which is causally related to the plaintiff's injury; officer may be liable for being the "guiding spirit" behind the wrongful conduct); *Lobato v. Pay Less Drug Stores*, 261 F.2d 406, 408-09 (10th Cir. 1958) (corporate officer or agent may be personally liable for a corporation's tort where he directs or participates actively in the commission of a tortious act or any act from which a tort necessarily follows or may reasonably be expected to follow); *Zubik v. Zubik*, 384 F.2d 267, 274-76 (3d Cir. 1967) (corporate founder, who was elderly and in ill health, did not participate sufficiently in negligent acts of improper mooring of vessels and failure to move them to be liable in admiralty, where he was merely present in the immediate area of the accident, had information about the impending ice flow which caused the accident, gave advice to corporate employees and officers, and asked an experienced employee if everything was all right); *Mozingo v. Correct*

Manufacturing Co., 752 F.2d 168, 173-74 (5th Cir. 1985) (in products liability case, defendant's failure to pursue plaintiff's questions regarding product safety is not personal participation in a tort; he did not direct manufacture of the units and appeared to have little or nothing to do with their production). This theory also has been applied to cases involving violations of statutes. *State of Texas v. American Blast Fax, Inc.,* 164 F. Supp.2d 892, 897 (W.D. Tex. 2001) (applying tort principles, corporate officer is liable for violations of Telephone Consumer Protection Act if he directly participated in or authorized the violation, although acting on behalf of the corporation).

In cases against corporations charged with violations of environmental statutes, courts have applied a similar standard in determining the liability of corporate officers. *United States v. USX Corp.,* 68 F.3d 811, 824-25 (3d Cir. 1995) (corporate officers and shareholders are liable if they actually participated in liability-creating conduct under Comprehensive Environmental Response, Compensation and Liability Act; control of a corporation alone is not a basis for imposing liability on a corporate officer for actions of other corporate officers); *United States v. Pollution Abatement Services of Oswego, Inc.,* 763 F.2d 133, 135 (2d Cir. 1985) (civil liability may be imposed on corporate officers who were involved in or directly responsible for corporation's violations of Rivers and Harbors Act), *cert. denied sub nom Miller v. United States*, 474 U.S. 1037 (1985); *United States v. Northeastern Pharm. & Chem. Co.,* 810 F.2d 726, 745 (8th Cir. 1986) (corporate officers "can be held individually liable if they were personally involved in or directly responsible for corporate acts in violation of RCRA [Resource Conservation and Recovery Act];" corporation's president and major shareholder held liable as the individual in charge of and directly responsible for all of the corporation's operations and had ultimate authority to control the disposal of hazardous substances), *cert. denied,* 484 U.S. 848 (1987).

As to the CWA, while Congress specified that a "responsible corporate officer" is included as a "person" who may be liable for *criminal* violations under Section 309(c)(3),[49] Congress did not provide in the statute for "responsible corporate officer" liability for *civil* or administrative CWA violations. However, at least one court has found this discrepancy in the statute insignificant, noting, "The rationale for holding corporate officers criminally responsible for acts of the corporation, which could lead to incarceration, is even more persuasive where only civil liability is involved, which at most would only involve a monetary penalty." *Franklin v. Birmingham Hide and Tallow Co.,* 1999 U.S. Dist. LEXIS 22489 (N.D. Ala. 1999) (motion for dismissal denied where president and CEO responsible for day to day operations with ultimate authority to determine what steps to take to comply with its NPDES permit could be held

---

[49] *See, United States v. Brittain*, 931 F.2d 1413, 1419-20 (10th Cir. 1991)(for criminal liability under Section 309(c)(3) of the CWA, willfulness or negligence of officer is imputed to him by virtue of his position of responsibility in the corporation; conviction upheld where evidence showed specific conduct which allowed the illegal discharge to occur, where he had primary operational responsibility for the facility, physically observed permit violations, was informed that violations were prone to occur, and instructed employees not to report violations to EPA).

individually liable) (quoting *United States v. Hodges X-Ray, Inc.,* 759 F.2d 557, 561 (6th Cir. 1985)). In a CWA case involving civil liability of a corporation and its corporate officers, the court reflected the tort theory, holding that officers can be liable for violations of the CWA "where they participated in or were responsible for the violations, even when the individuals purport to act through a corporate entity." *United States v. Gulf Park Water Company*, 972 F. Supp. 1056, 1063 (S.D. Miss. 1997). At issue was the liability of the corporation, its manager and its officer/shareholder/on-site manager, for its wastewater treatment facility having discharged effluent without a permit. The court considered the officer's and manager's actual hands-on control over the operations of the facility, responsibility for on-site management, correspondence with regulatory bodies, personal involvement in the decision to discharge the effluent, and knowledge of discharging without a permit, to be sufficient for imposing liability. *Id.* In a civil CWA case involving the filling of wetlands in violation of Section 301 of the CWA, the agent/representative for the corporate defendant was held liable on the basis that he directed and paid for the filling of wetlands, disregarding a cease and desist letter from the Corps of Engineers. *United States v. Ciampitti*, 583 F. Supp. 483 (D. N.J. 1984).

The testimony and evidence shows that Grady Smith was the chief executive officer (CEO), president, chief financial officer, and registered agent of Smith's Lake Corporation from 1998 until June 2000, when he resigned as an officer. C's Ex. 1, 30; Tr. 1011-12. He also was a corporate shareholder, owning at least 50 percent of the shares of the corporation.[50] Tr. 1007-1009; C's Ex. 30. In his August 10, 2001 Response to EPA's Request for Information, Grady Smith states that his role as to the corporation was as "local administrator of the affairs of the corporation . . . in that he was the only officer . . . locally situated to attend to the affairs of the corporation," but that he "was subject to the direction and control of C.W. Smith." C's Ex. 30, at 2. Grady Smith testified that his duties were to renew the corporation each year, ensure taxes were paid on the property, and serve as a point of contact. Tr. 962, 1012. However, Grady Smith asserted in his Answer (at 1, 3) that he did not own, control or have any authority to act or refrain from acting as relates to the lake bed, and has not personally undertaken in any individual capacity, or as representative of any capacity, any activity relating to the discharge area.

Grady Smith's mere position of authority in the Corporation does not indicate that he may be held personally liable for any discharge of pollutants by Smith's Lake Corporation in violation of the CWA. The evidence does not show that Grady Smith personally directed, caused, participated in or controlled the sidecasting activity. The facts that he was president, CEO and shareholder of Smith's Lake Corporation, and that he acquiesced in C.W. Smith's sidecasting, participated in meetings and inspections with regulatory bodies, and was aware that they were alleging violations for activities in the lake bed, is not sufficient to impose liability on Respondent Grady Smith for the Corporation discharging pollutants in violation of the CWA.

---

[50] In response to separate Section 308 Information Requests, the Smith brothers both indicated to EPA that eventually Grady Smith came to own 90 percent of the shares of the Corporation, however Grady Smith testified at the hearing that their statements in this regard were erroneous. C's Exs. 30, 34; Tr. 1007-09.

It is concluded that Grady cannot be held personally liable as a corporate officer for any discharge of pollutants by Smith's Lake Corporation.

4. Piercing the Corporate Veil Theory

In the alternative, Complainant asks this Tribunal to hold Respondent Grady Smith personally liable for the Corporation's illegal discharge of pollutants in the lake bed of Lake Carlton by piercing the corporate veil of Smith's Lake Corporation. In support of this, Complainant argues that Grady Smith was president and CEO of a sham corporation and should not be allowed to escape liability by seeking shelter behind a corporation that was merely the alter ego of the Smith brothers. Complainant's Post Hearing Brief at 25.

Courts are cautious in piercing the corporate veil because corporations are formed to encourage individuals to engage in commercial enterprises on a scale that they might be reluctant to attempt (due to liability concerns) as an individual. *Pardo v. Wilson Line of Washington Inc.*, 414 F.2d 1145, 1149 (D.C. Cir. 1969). Therefore, generally courts will only disregard the corporate entity and hold individual shareholders and officers liable for the acts of the corporation to prevent fraud or unfairness. *Id.* Further, the burden of proof is on the party seeking to impose individual liability on a shareholder to demonstrate that some injustice or inequity will result from recognition of the shield of the corporate entity. *United States v. Van Diviner*, 822 F.2d 960, 965 (10th Cir. 1987); *United States v. Standard Beauty Supply Stores, Inc.,* 561 F.2d 774, 777 (9th Cir. 1977).

However, to impose liability on a corporate officer by piercing the corporate veil, it is not necessary to find that he actually participated in the tort or violation of law. A federal common-law doctrine of piercing the corporate veil under the alter ego theory has been stated as a two part test: "(1) whether there was such unity of interest and lack of respect given to the separate identity of the corporation by it shareholders that the personalities and assets of the corporation are distinct, and (2) would adherence to the corporate fiction sanction a fraud, promote injustice, or lead to an evasion of legal obligations" or "circumvent a statute." *NLRB v. Greater Kansas City Roofing*, 2 F.3d 1047, 1052, 1053 (10th Cir. 1993). The second prong includes circumstances where recognition of the corporate entity would defeat an overriding public policy or shield someone from liability for a crime. *Bangor Punta Operations v. Aroostook Railroad Co.,* 417 U.S. 703, 713 (1974); *Zubik v. Zubik,* 384 F.2d 267, 273 (3d Cir. 1967). Similarly, Georgia courts pierce the corporate veil "in situations where the parties involved have themselves disregarded the separateness of legal entities by a commingling and confusion of properties, records, control, etc." and apply the doctrine "to remedy injustices which arise where a party has over extended his privilege in the use of a corporate entity in order to defeat justice, perpetuate fraud or to evade contractual or tort responsibility." *Spier v. Krieger*, 509 S.E.2d 684, 688, 690 (Ga. App. 1998); *Heyde v. Xtraman, Inc.,* 404 S.E.2d 607, 610 (Ga. App. 1991).

In determining whether the first prong has been met, the trial court engages in a "highly fact sensitive inquiry," examining whether the plaintiff has introduced, in any of the following ways, evidence showing (1) whether a corporation is operated as a separate entity; (2) commingling of funds and other assets; (3) failure to maintain adequate corporate records or

minutes; (4) the nature of the corporation's ownership and control; (5) absence of corporate assets and undercapitalization; (6) use of a corporation as a mere shell, instrumentality or conduit of an individual or another corporation; (7) disregard of legal formalities and the failure to maintain an arms-length relationship among related entities; and (8) diversion of corporate funds or assets to noncorporate uses. *Van Diviner*, 822 F.2d at 965.

Applying these factors to the instant case, there is evidence that the identities and assets of C.W. Smith and Smith's Lake Corporation were not differentiated. C.W. Smith admittedly directed all actions of the Corporation. Respondents' Post Hearing Brief at 5. There was commingling of funds in that no corporate checking account existed into which corporate income was paid and out of which corporate expenses were paid. Tr. 1227-28. Rather, Grady Smith testified that the rent received on the bait shop on the property owned by the Corporation was paid directly to C.W. Smith. Tr. 1059-60. Further, C.W. "was personally responsible for the payment of taxes and any expenses related to the property." Respondents' Post Hearing Brief at 5; Tr. 1227-28. There is no evidence that corporate records, such as by-laws, corporate minutes, stock certificates, *et cetera*, for Smith's Lake Corporation, were ever created or maintained - there were no such corporate records offered into evidence, although the Smiths testified that such records existed at one time and were lost in a fire. Tr. 1068-69, 1228-29. Moreover, while C.W. Smith testified that he thought they wrote corporate minutes a few times, Grady Smith testified that the Corporation never had official meetings, and no corporate minutes were presented. Tr. 1068, 1228. Additionally, the Corporation was clearly undercapitalized. The money initially received by the Corporation for operations was a loan from C.W. Smith that was completely expended on purchasing the property. Tr. 907, 964, 1230. The earthmoving equipment used by the Corporation was owned by C.W. Smith, without any compensation or agreement for compensation therefor in place, and the Corporation had no assets other than the property. Tr. 1231-32; Respondents' Post Hearing Brief at 5. Persons hired by the Corporation were paid by the Smiths personally. Tr. 1225. There is no evidence that the Corporation ever distributed dividends. Testimony indicates that Smith's Lake Corporation "lost" the lake bed property in lieu of foreclosure to C.W. Smith, who then transferred the property to Silver Branch Corporation, owned by C.W. Smith's daughter and granddaughter who are also Grady Smith's nieces. Tr. 1005-06, 1239-40. Concommitantly, the Smith brothers allegedly resigned their corporate positions and surrendered their stock, although there is no documentary evidence of this, and dissolved the Corporation, although they admittedly never filed the requisite articles of dissolution with the State corporate authorities necessary to accomplish this. C's Ex. 34, p. 12; Tr. 1067.

However, it has been noted that "lack of formalities in a closely-held or family corporation has often not been found to have as much consequence" especially where an outside party attempts to pierce the corporate veil of such a corporation. *Zubik,* 384 F.2d at n. 4; *see also, United States v. Sebring Homes Corporation*, 879 F. Supp. 894, 900 (N.D. Ind. 1984) (court declined to pierce corporate veil although the corporation was undercapitalized and its entire initial capital base and loans came from its officers). In *Zubik*, the Third Circuit found that the founder of a small family corporation kept his personal money in the corporation, mixed corporate and personal finances, leased equipment to the corporation without a written lease, failed to produce some minutes of corporate meetings, was the "last word" in the corporation,

gave advice to his sons that ran the business, and was "a spectator" as to daily operations. Nevertheless, the court declined to pierce the corporate veil to hold him individually liable in admiralty. 384 F.2d at 272. The court stated, "Once fraud or injustice demand piercing the corporate veil, then the intertwining of personal affairs with a family corporation can provide additional grounds for arguing that the defendant cannot be heard to complain. In such cases, the failure of various corporate formalities either contributes to the fraud involved or strengthens the argument for injustice by holding the individual in effect estopped." 384 F.2d at 274.

Furthermore, it is only when the shareholders' act of disregarding the corporate identity *causes* the injustice or inequity or constitutes the fraud that the corporate veil may be pierced. *Greater Kansas City Roofing*, 2 F.3d at 1053. For a shareholder to be held individually liable, he must have "shared in the moral culpability or injustice that is found to satisfy the second prong of the test." *Id.* In *Greater Kansas City Roofing,* the Tenth Circuit found that the sole shareholder, officer and director of a corporation who failed to comply with corporate formalities and commingled personal and corporate assets was not individually liable for judgment against the corporation for its unfair labor practices under an alter ego theory of piercing the corporate veil where she did not use the corporate status to perpetrate a fraud, evade obligations under the labor laws or circumvent them. 2 F.3d at 1055.

Moreover, only an officer or shareholder who is the corporation's alter ego may be personally liable. As stated by the Tenth Circuit, "only the assets of the particular shareholder who is determined to be the corporation's alter ego are subject to attachment." *Cascade Energy & Metal Corp v. Banks,* 896 F.2d 1557, 1577 (10th Cir. 1990) (*quoting* 3A William F. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 41.20 at 413 (1988 Supp.)*, cert. denied,* 498 U.S. 849 (1990).

In the present case, Smith's Lake Corporation is clearly a small, closely held, family corporation run by two brothers who did not comply with corporate formalities. While the record suggests that C.W. Smith could be the alter ego of Smith's Lake Corporation, the testimony and evidence does not suggest that Respondent Grady Smith is an alter ego of the Corporation. Grady Smith testified, when asked whether as president, CEO and shareholder of Smith's Lake Corporation, he did not feel he should ask his brother to stop, he replied, "I didn't feel like I could ask him to stop. He put all the money into the corporation. I'm just a figurehead down here in Georgia." Tr. 1027. Moreover, the legal obligation at issue is compliance with the CWA, and the evidence does not show any relationship between the lack of corporate formalities and the sidecasting activity performed by C.W. Smith. The evidence also does not show that Grady Smith used Smith's Lake Corporation to evade CWA obligations or to circumvent the CWA. Therefore the record does not support piercing the corporate veil to hold Grady Smith liable for the discharge of pollutants in violation of Section 301(a) of the CWA.[51]

---

[51] Complainant relied on primarily state law in arguing that the corporate veil should be pierced. Complainant's Post Hearing Brief at 25-28. However, under both state and federal case law, the record does not support piercing the corporate veil. The record does not show that Grady Smith "has overextended his privilege in the use of a corporate entity in order to . . . evade

In sum, it is concluded that Respondent Grady Smith is not liable for discharging a pollutant into navigable waters without a permit, in violation of Section 301(a) of the CWA.

V. OTHER ISSUES AS TO LIABILITY[52]

A. Whether Respondent C.W. Smith's activities constitute an attempt to "restore waters of the U.S." and whether the application of the CWA to the lake bed exceeds EPA's authority

Respondents have asserted in this proceeding that no violation of the CWA can be deemed to have occurred since C.W. Smith's activities in the lake bed were for the purpose of reimpounding the lake, that is, to restore Lake Carlton to its prior use and condition, which is in conformity with the CWA's purpose to "restore . . . the . . . physical and biological integrity of the Nation's waters." CWA § 101(a); Respondents' Post Hearing Brief at 31; Respondents' Prehearing Brief at 4. Respondents also argue that the application of CWA to cover the wetlands at issue in this case exceeds and expands EPA's CWA authority because in doing so EPA is expressing a preference for maintaining wetlands and streams over lakes, citing to Mr. Lord's testimony considering the costs of mitigating damages to streams and wetlands, without considering the benefits of restoring the lake. Respondents assert that the CWA does not support any such preference of one type of water over another, and that the reimpoundment of Lake Carlton does not run counter to the CWA goals of preventing loss of wetlands and increasing the quantity and quality of wetlands, because the lake was not a wetland when it was previously

---

. . . responsibility" under the CWA. *Spier v. Krieger*, 509 S.E.2d at 688; *Heyde v. Xtraman, Inc.,* 404 S.E.2d at 610.

[52] Respondent Grady Smith in his Answer to the Complaint, and Respondents' in their Post Hearing Brief, raise several affirmative defenses to liability. Although Respondent Grady Smith is being held by virtue of this decision not liable on other grounds, and C.W. Smith and Smith's Lake Corporation were previously found liable by default, it is nevertheless appropriate to consider those defenses herein in that those defenses could impact the defaulting Respondents. *See, United States v. Peerless Insurance Co.*, 374 F.2d 942, 945 (4th Cir. 1967) (where a defending party establishes that the plaintiff has no cause of action, the defense generally inures also to the benefit of the defaulting defendant); *Bastien v. R. Rowland & Co.,* 631 F. Supp. 1554, 1561 (E.D. Mo. 1986)(whatever judgment is entered against the parties that did not default would thereafter run against the defaulting party as well); *United States ex rel. Dattola v. National Treasury Employees Union,* 86 F.R.D. 496 (D.C. Pa. 1980) (granting motion to dismiss against answering defendants resulted in setting aside entry of default against non-answering defendant and dismissing the complaints against all defendants); *Lewis v. Lynn*, 236 F.3d 766 (5th Cir. 2001) (defendants who did not answer or join in other defendants' motion for summary judgment were entitled to benefit of summary judgment); 10A C. Wright, A. Miller, M. Kane, *Federal Practice & Procedure* Civil 3d § 2690 (1998).

impounded as a lake.[53] I find that neither of these arguments amount to a valid defense.

There is no dispute that Lake Carlton was not a natural lake but was man-made. Tr. 455-56; Respondents' Prehearing Brief at 4. Moreover, there is evidence in the record that the property at issue was a wetland prior to the creation of Lake Carlton. Tr. 174-77. Therefore, Respondents' reimpounding the lake would not restore the physical and biological integrity of the waters of the United States to their *natural* state, but rather would result in loss of wetlands, whether considering the wetland at the time prior to the existence of Lake Carlton or after the dam was breached.

Furthermore, testimony and evidence in the record shows that Respondent C.W. Smith's unpermitted activities in the lake bed, allegedly in pursuance of restoration, caused physical and biological damage to waters of the United States. During his inspection, Mr. Lord observed erosion and ditch walls collapsing into the stream (tr. 125-26) and testified that channeling and sidecasting activities destabilize streams, cause erosion of the banks, cause flooding downstream, dewater adjacent soils and wetlands, and cause turbidity and transportation of sediment downstream. Tr. 206-08, 211-12, 214-15. Mr. Cannon, who manages Rockdale County's storm water protection program and wastewater treatment program, testified that he saw a large sediment load near the dam. Tr. 742. As sediment travels downstream, it destroys habitat for invertebrates and fish, affects photosynthesis, covers benthic organisms and transports pollutants adhering to the sediment particles, and results in additional water treatment costs for the public drinking supply. Tr. 206-08, 211-12, 214-15, 749-51. Such adhering pollutants may include fecal coliform bacteria, herbicides, pesticides, and metals. Tr. 744. Mr. Lord testified that reimpounding the lake would destroy the wetland, and would require a permit from the Corps of Engineers and mitigation for loss of wetlands due to impounding. Tr. 486-87. Spoil piles created by the sidecasting may project above the water if the lake was impounded, which may impair water circulation and create dead spots or noxious zone in the lake. Tr. 489. Therefore, the channeling and sidecasting activities, even if they were done for the purpose of reimpounding the lake, degrade rather than restore the physical and biological integrity of the waters of the U.S., including the wetland, the adjacent water bodies, and the waters into which they flow.

Respondents have the burden of proof as to affirmative defenses. 40 C.F.R. § 22.24(a). They have not shown by a preponderance of the evidence that the purpose and effect of the sidecasting activity was to "restore . . . the . . . physical and biological integrity" of waters of the

[53] In response, Complainant asserts that, while it does not agree with the characterization that it has made a determination that wetlands are more valuable than other types of water bodies, it does note that, under guidelines and regulations the Agency has issued, wetlands have been defined as "special aquatic sites," impacts to which must be given special consideration when evaluating section 404 permits, and that artificially created fishing lakes are not considered "special aquatic sites." Complainant's Post-Hearing Reply Brief 11-12.

United States.[54] Furthermore they have not shown that EPA attempted in this case to expand its authority granted under the CWA.

B. Whether the term "navigable waters" is unconstitutionally vague

Respondents also assert in this proceeding that the CWA's definition of "navigable waters" is "unconstitutionally vague" and violates the U.S. Constitution's Fifth Amendment due process clause. Answer at p.4; Respondents' Post Hearing Brief at 32, 52. Specifically, Respondents argue that the statutory terms "navigable water" and "waters of the United States" are not sufficiently defined so as to allow experts, let alone ordinary people, to understand what conduct is prohibited. Respondents further assert that the CWA does not provide a statutory definition of "wetland," and that the regulatory definition as it applies to "affecting interstate commerce" (33 C.F.R. § 328.3(a)(3)) has been held to exceed the CWA definition of "waters of the United States," as stated in *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997). *Id.* at 33-34. In support of their vagueness argument, Respondents claim that it took three EPA experts and two site visits for EPA to delineate the lake bed as a "wetland," and EPA relied on U.S. Geological Survey maps to determine that Brushy Fork Creek was a "navigable water." Respondents' Post Hearing Brief at 36.

Respondents' challenge to the statutory definitions of "navigable water" and "waters of the United States" as being unconstitutionally vague cannot be addressed in this administrative proceeding. *Mathews v. Diaz*, 426 U.S. 67, 76 (1976); *Johnson v. Robison*, 415 U.S. 361, 368 (1974) ("adjudication of the constitutionality of Congressional enactments has generally been thought beyond the jurisdiction of administrative agencies"). As to Respondents' challenge to the regulatory provisions, the Environmental Appeals Board has stated, "[a]s a general rule, . . . challenges to rulemaking are rarely entertained in an administrative enforcement proceeding . . . This general rule applies even when a party asserts that a rule is unconstitutionally vague." *Norma J. Echevarria and Frank J. Echevarria, d/b/a Echeco Environmental Services*, 1994 EPA App. LEXIS 61, 5 E.A.D. 626, 634 (EAB 1994) (citations omitted).

Moreover, even if Respondents' challenge to the statutory and regulatory provisions were permitted in this case, Respondents have not shown that they are unconstitutionally vague.

---

[54] Respondents' intent to restore the lake could have been implemented under the CWA if they were merely maintaining a dam. Restoration of a lake was contemplated by Congress as an exemption to the requirement for a permit under Section 404 of the CWA, by the exemption for "maintenance, including emergency reconstruction or recently damaged parts, of currently serviceable structures such as . . . dams." CWA § 404(f)(1)(B), 33 U.S.C. § 1344(f)(1)(B); *see also*, 40 C.F.R. § 232.3(c)(2). However, the dam that formed Lake Carlton was at all relevant times breached, with a large section removed by order of the State of Georgia, because the State found that the dam was unsafe and did not meet engineering specifications of a Category 1 dam, and the owner at the time (Mr. Marchell) was unable to meet those specifications to upgrade the dam. Tr. 75, 77, 84-86; C's Ex. 9. Because the dam was not "currently serviceable," Respondents' sidecasting activities could not meet the exemption for maintaining a dam.

It is well established that a law is "void for vagueness" and therefore violates due process, "if men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926); *see also Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 44 (1991); *Grayned v. City of Rockford*, 408 U.S. 104, 108, (1972). "The essential purpose of the 'void for vagueness' doctrine is to warn individuals of the *criminal* consequences of their conduct." *Jordan v. De George*, 341 U.S. 223, 230 (1951) (emphasis added); *see also Grayned* 408 U.S. at 108. Although "the doctrine's chief application is in respect to criminal legislation," *Lopez-Lopez v. Aran*, 844 F.2d 898, 901 (1st Cir. 1988), it has also been applied to laws implicating fundamental constitutional rights, especially First Amendment rights (*see e.g., Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982)). The prohibition against vagueness applies not only to statutes but also to administrative regulations. *General Electric Co. v. U.S. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995).

However, where the provision at issue neither imposes criminal penalties nor implicates fundamental constitutional rights, its language is subject to a less strict vagueness test than those laws that do. As the Supreme Court explained:

> The degree of vagueness that the Constitution tolerates--as well as the relative importance of fair notice and fair enforcement--depend in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.

Hoffman Estates, 455 U.S. at 498-99 (footnotes omitted).

In determining whether a challenged provision is unconstitutionally vague, the courts ask the question, “Does the regulation provide a person of ordinary intelligence reasonable notice of the prohibited conduct?” *See*, *Grayned v. City of Rockford*, 408 U.S. 109 (1972); *Norma J. Echevarria* 5 E.A.D. 626, 637 (EAB 1994); *Tennessee Valley Authority*, EAB Appeal No. 00-6, 2000 EPA App. LEXIS 25, at *120-21 (EAB, Sept. 15, 2000) (“The question is not whether a regulation is susceptible to only one possible interpretation but rather whether the particular interpretation advanced by the regulator was ascertainable by the regulated community.”); *General Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (“If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ‘ascertainable certainty,’ the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency’s interpretation.”).

Respondents have not shown what portion of the regulatory provisions is unconstitutionally vague, or how it becomes vague, as applied to the facts of this case. *Cf.*

Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 917 (5th Cir. 1983) ("We cannot agree that the application of the Corps' wetland definition in this case is so vague as to deprive the landowners of notice [in that they] were well aware that at least a significant portion of their land was wetland; if they wished to protect themselves from liability they could have applied for a permit and thus obtained a precise delineation of the extent of the wetland, as well as the activities permissible on the land."); *U.S. v. Tull*, 769 F.2d 182, 186 (4th Cir. 1985) ("Tull argues that the Clean Water Act regulations are unconstitutionally vague because their imprecise definition of 'wetlands' makes it too difficult for landowners to determine their potential liability. We reject this argument, as have other courts. As applied to this case, the regulatory definition of wetlands is sufficiently definite to give a person of ordinary intelligence fair notice of what conduct the Clean Water Act prohibits or requires." (Citations omitted)). The fact that three experts were involved in the investigation and enforcement of the violations, and that they referred to maps, does not suggest that one ordinary person could not make a determination that the site was a "wetland" and that it was "adjacent to" waters that are used for recreational purposes by interstate travelers, or adjacent to tributaries to navigable waters. Indeed, according to the undisputed testimony in this case, the site could readily be identified as "land" that is "wet" even under the common meanings of those terms. Further, the testimony of the Smiths establishes that the catfish pond itself was used by interstate travelers for recreational purposes, namely fishing. Notably, Respondents did not present any expert witness to show that the site was not a wetland.[55]

C. Jurisdiction over Respondent C.W. Smith

Respondents' final legal argument challenging liability is that this tribunal lacks jurisdiction over the person of C.W. Smith, who is an indispensable party and, therefore, this action must be dismissed. Respondents' Post Hearing Brief pps. 39-41. Respondents previously raised this issue, and their claim that proper and/or sufficient service was not made upon Respondent C.W. Smith, in a Motion to Dismiss, at which time they had ample opportunity though affidavit and argument to submit whatever evidence they deemed significant regarding service. In a lengthy Order issued by Judge McGuire on February 6, 2002, it was held that Respondent C.W. Smith *was* properly served. Respondents were advised by Order of the undersigned that Judge McGuire's ruling on this point was the law of the case. Respondent has not proffered any evidence or argument that warrants reconsideration of that ruling at this point.

VI. PENALTY

The Rules of Practice state that "the complainant has the burdens of presentation and

---

[55] The facts show, and the Respondents admit, that they were advised by COE and EPA officials shortly after their purchase of the property that a section 404 permit was required for their excavation activities. Characterizing such official representations to them as "lies," the Smiths ignored the opinions of government officials and continued with their activities. Tr. 1233-35.

persuasion that the violation occurred as set forth in the complaint and the relief sought is appropriate." 40 C.F.R. §22.24(a). The standard of proof under the Rules of Practice is a preponderance of the evidence. 40 C.F.R. § 22.24(b). Complainant, therefore, has the burden of demonstrating the appropriateness of its proposed penalty by a preponderance of the evidence.

The assessment of civil administrative penalties for violations of the Clean Water Act is authorized by Section 309(g) of the Act, 33 U.S.C. § 1319(g), as modified by 40 U.S.C. § 19.4 (Table 1). Under that section, penalties for Class II violations occurring after January 30, 1997, such as those alleged in this case, cannot exceed $11,000 for each day the violation continues, and the total penalty cannot exceed $137,500. 33 U.S.C. § 1319(g)(2)(B). The CWA provides that in determining the amount of any penalty, the nature, circumstances, extent and gravity of the violations must be taken into account. 33 U.S.C. § 1319(g)(3). In addition, consideration must also be given to the violator's 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. *Id.*

The Complaint filed on November 2, 2000, alleges a continuing violation without specified end, stating that "[b]eginning in March, 1997, Respondents or those acting on behalf of the Respondents used a backhoe or similar types of equipment to discharge dredged and/or fill material . . ." and that "[e]ach day that the material remains in the Discharge area . . . constitutes an additional day of violation . . . ." Complaint ¶¶ 3, 10. The Complaint seeks a penalty in the amount of $11,000 for each day the violations continued after March 1997 and proposes a total Class II penalty of the maximum allowable of $137,500. Complaint ¶ 11. In support thereof, Complainant alleges that Respondents were aware of their legal obligation to obtain a permit but failed to do so for their repeated and continuing discharges, that Respondents failed to comply with EPA orders, that their actions were environmentally destructive, and that they have a history of similar violations. Complaint ¶¶ 13, 14. Complainant asserts in its Post Hearing Brief (at 28), "if we could seek a higher penalty amount in light of the egregious nature of the case, we would."

Respondents dispute the proposed penalty, contending that it is excessive in light of the circumstances of this case.

There are no civil penalty guidelines issued under the CWA to provide a methodology for calculating a penalty, so the penalty must be determined by some method on the basis of the evidence of record and the list of penalty criteria set forth in Section 309(g) the CWA. 40 C.F.R. § 22.27(b). The Supreme Court has indicated that highly discretionary calculations are necessary in assessing penalties under the CWA. *Tull v. United States*, 481 U.S. 412, 427 (1987). Federal courts, calculating penalties under the penalty criteria of Section 309(d) of the CWA, generally use one of two methods. One method, known as the "bottom up" method, starts with the economic benefit of noncompliance, and then that amount is adjusted to reflect the other statutory factors. *United States v. Municipal Authority of Union Township*, 929 F. Supp. 800, 806 (M.D. Pa. 1996), *aff'd,* 150 F.3d 259 (3d Cir. 1998) (calculating "wrongful profits" - earnings the defendant made by not cutting back production volume to come into compliance, multiplied by two for deterrent effect). Other courts apply the "top down" method, starting with

the statutory maximum and reducing that amount for any statutory factors in mitigation of the penalty. *Atlantic States Legal Foundation v. Tyson Foods*, 897 F.2d 1128, 1142 (11th Cir. 1990). Some Administrative Law Judges have calculated penalties under Section 309(g) of the CWA following the framework of EPA's general civil penalty policies, known as "GM-21" (Policy on Civil Penalties) and "GM-22" (A Framework for Statute- Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties), 41 Env't Rep. (BNA) 2991, dated February 16, 1984. *See e.g., Urban Drainage and Flood Control District*, 1998 EPA ALJ LEXIS 42 (ALJ, June 24, 1998); *Industrial Chemicals Corp.*, 2000 EPA ALJ LEXIS 58 (ALJ, June 16, 2000). These policies provide that a preliminary deterrence figure should first be calculated, based upon the economic benefit of noncompliance and the gravity of the violation, and then that figure is increased or decreased based upon the other statutory factors. The Federal courts as well as the Environmental Appeals Board have emphasized the importance of the economic benefit factor, even where the exact or full amount cannot be calculated, and have provided that a partial amount or reasonable approximation is sufficient to include in a penalty assessment. *United States v. Smithfield Foods, Inc.,* 191 F.3d 516, 529 (4th Cir. 1999), *cert. denied,* 121 S. Ct. 46 (2000); *B.J. Carney,* 1997 EPA App. LEXIS 7, at *85-88 (EAB, June 9, 1997), *on remand,* 1998 EPA ALJ LEXIS 112 (ALJ, January 5, 1998), *appeal dismissed*, 192 F.3d 917 (9th Cir. 1999).

Because Complainant has proposed that the maximum penalty of $137,500 should be assessed, and considering the circumstances of this case as discussed below, the "top-down" method will be used to determine the penalty here.

Economic Benefit (or savings) resulting from the violation

The statutory factor "economic benefit (or savings) resulting from the violation" may represent "wrongful profits"obtained as the result of the violative activity or "costs avoided," *i.e.,* savings realized from not coming into compliance or delaying compliance with the CWA. *Municipal Authority of Union Township*, 150 F.3d at 267. The "cost-avoided" method is calculated using "the weighted average cost of capital as a discount/interest rate," on the rationale that "the company is able to use those funds for other income-producing activities, such as investing that money in their own company." *United States v. Smithfield Foods, Inc.,* 191 F.3d at 530. This method "is not in conflict with the CWA or basic economic principles" and "represents a logical method by which a violator . . . can be disgorged of any profits it obtained through its noncompliance." *Id.*

As of the date of the hearing, the evidence showed that Respondents have never come into compliance with the CWA in that they never either restored the wetlands or obtained an after the fact permit for their activities and incurred the costs related thereto. Complainant asserts that Respondents' costs avoided by not bringing the site into compliance after their violative activities exceeds $500,000, regardless of how they would chose to come into compliance, *i.e.*, by either: (1) restoring the lake bed, or (2) obtaining an after-the-fact Section 404 permit for their activities, which would require the Smiths to pay mitigation costs for the ditches dug, channelizations, and discharges of fill material in the lake bed. Tr. 219-23, 246. Bob Lord calculated that through a commercial mitigation banking system, to mitigate the

impacts to the streams on the property alone, Respondents would have to purchase 12,600 credits, and at $40 per credit, paying over $500,000 for those mitigation credits. Tr. 239, 246; see, C's Ex. 36. To additionally mitigate the wetland impacts, Respondents would have to pay $70,000 more in mitigation credits. Tr. 246. If Respondents chose to undertake the mitigation themselves, they would need to pay an environmental consultant to prepare a stream mitigation plan, which might cost over $20,000, and a wetland mitigation plan, which would cost over $1,000. Tr. 247-48, 252.

Respondents assert that they have obtained no economic benefit from the violations because if they are found liable for the violations they "may likely still be held responsible for the mitigation or restoration costs." Respondents' Post Hearing Brief at 43. Further, Respondents say that they could use mitigation credits they should have received when Lake Carlton was turned into wetlands by its prior owner.

Complainant replies that it has no current plan to follow up this penalty case with a referral to the Department of Justice and therefore economic benefit should not be adjusted for this theoretical and remote possibility. Moreover, Complainant estimates that the investment or interest value of delaying the expenditure for five years at 2% would result in an additional $10,000 per year or $50,000 over the five years since the violations commenced. Complainant's Reply Brief at 15, n. 4.

Upon consideration of the evidence, I find that Complainant has shown, particularly with the testimony of Mr. Lord, that the economic benefit of Respondents' noncompliance would result in a significant penalty assessment, if not the maximum penalty. There is no need to calculate a more specific amount, as the consideration of the other statutory penalty factors would result in assessment of the maximum penalty.

Nature, Circumstances, Extent and Gravity of the Violation

The violations at issue here involve the conversion by channelizing and ditching of a natural freshwater wetland to dry land. Channelizing and ditching diminishes the ability of the wetland in the lake bed to perform its function to absorb and retain pollutants, absorb nutrients, break down pollutants and trap sediments. Tr. 215-16, 248-49. The sidecast piles smother wetland vegetation, become upland areas, and disconnect the stream from its flood plain. Tr. 216-17. Congress has determined that "the systematic destruction of the Nation's wetlands is causing serious, permanent ecological damage." Senate Committee of the Environment, 95th Cong. 2nd Sess., 4 Legislative History of the Clean Water Act of 1977, p. 869 (Comm. Print 1978) (remarks of Senator Muskie on S. 1952, Aug. 4, 1977). The Army Corps of Engineers has recognized that wetlands "play a key role in protecting and enhancing water quality." *Riverside Bayview Homes,* 474 U.S. at 133. "Freshwater wetlands are ecologically valuable for various reasons . . . [t]hey help supply fresh water to recharge groundwater supplies . . . serve as biological filters by purifying water as it flows through the wetlands . . . [and] provide seasonal and year-round habitat for both terrestrial and aquatic wildlife." *United States v. Cumberland Farms of Conn., Inc.,* 826 F.2d 1151, 1153 (1st Cir. 1987) (citing 33 C.F.R. 320.4(b)), *cert. denied,* 484 U.S. 1061 (1988).

The nature of the violations, discharging pollutants into waters of the United States without a permit, goes to the very heart of, and thus significantly harms, the statutory CWA program, and wetlands "comprise an important part of waters of the United States and thus clearly constitute a material part of the waters the CWA is intended to protect." *Phoenix Construction Services, Inc.,* CWA App. 02-07, slip op. at 25-27 (EAB, April 15, 2004). Issuance of permits, including permits for discharges of dredged or fill material into wetlands, allows for regulation of discharges into such waters and thus the cleaning up of the nation's waters. *Id.* at 27-28. The obtaining of permits and following such conditions as are prescribed therein "is *critical* to the basic purpose of the section 404 program as well as the CWA." *Id.* at 28-29 (emphasis in original). The Board has noted that because wetland filling activities are typically visible to other members of the community, "the perception that an individual is 'getting away with it' and openly flaunting the environmental requirements may set a poor example for the community and encourage other similar violations in the future and/or lead to the acceptance of such activities as commonplace, minor infractions not worthy of attention." *Id.* at 29.

Indeed, the Smith brothers' activities at Lake Freeman and Lake Carlton were well known in the local communities. As noted by the Board, some courts have designed remedies to help undo such damage to the wetlands program. *United States v. Van Leuzen*, 816 F.Supp. 1171, 1179, 1180, 1182 (S.D. Tex. 1993) (court required defendant to erect a large billboard along the highway indicating that defendant was required to pay a fine and remove, at his expense, illegal fill material placed without a permit) (cited in *Phoenix*, slip op. at 29). Unfortunately, this type of remedy is not available in an administrative enforcement proceeding, so the damage to the wetlands program can only be considered in terms of an enhancement to the penalty assessment.

The Board has stated that there may be significant potential for harm even where there was no actual harm to the environment, for failure to obtain a Section 404 permit prior to filling wetlands. *Phoenix,* slip op. at 30. In this case, the testimony and evidence showed that there was actual environmental harm as a result of Respondents' activities in the lake bed, including a large sediment load which had been carried downstream. Tr. 742. Respondents were not using any best management practices or erosion control devices, such as silt fencing. *Id.* The contribution of sediment from Respondents' property may have contributed to the sediment load entering Big Haynes Creek, Brushy Fork Creek and the Rockdale County drinking water reservoir, increasing costs for the drinking water plant to dredge sediment and treat the water. Tr. 748-50, 755; C's Ex. 51. In the discussion above regarding Respondents' alleged attempts to restore waters of the United States, the evidence of actual harm was set out in detail.

Respondents assert that the extent and gravity of any environmental impacts from C.W. Smith's activities are unknown, and should be considered only from the perspective of the impacts which would have occurred had Respondents completed their plan to reimpound the lake. However, Respondents have not shown any evidence of how reimpoundment of the lake would mitigate the harm to the environment discussed above.

Respondents assert that the fact that there are two impoundments of water between the lake bed and the Ocmulgee River reduces the "nexus" to navigable waters, because

impoundments reduce the sediment load. Respondent's Post Hearing Brief at 25-26. This argument is meritless in that the sediment load from the Respondents' property affects all of the "waters of the United States" as it flows from that property through all of the tributaries; the harm to the Ocmulgee River certainly is not the only issue of harm to the environment.

The discharges remained in the wetland as sidecast spoil piles from March 1997 until the date of the Complaint, November 20, 2000, a period of over 3½ years, and there is no evidence that the environmental harm has ever been mitigated. C.W. Smith's activities resulted in an area of 70,000 square feet of sidecast material, or about 1½ acres. Tr. 143, 148; C's Ex. 14. Considering these facts, there is no basis to reduce the penalty for extent of the violations.

Respondents have not presented any persuasive reason, and there is no basis in the record, to decrease the maximum statutory penalty for the factors of nature, circumstances, extent or gravity of the violation.

Ability to Pay

The burden of proof with regard to the ability to pay a penalty was discussed by the Environmental Appeals Board (EAB) in *New Waterbury Ltd.,* 5 E.A.D. 529 (EAB 1994). The EAB stated therein as follows:

> Where ability to pay is at issue going into a hearing, the Region will need to present some evidence to show that it considered the respondent's ability to pay a penalty. The Region need not present any *specific* evidence to show that the respondent *can pay* or obtain funds to pay the assessed penalty, but can simply rely on some *general* financial information regarding the respondent's financial status which can support the *inference* that the penalty assessment need not be reduced. Once the respondent has presented *specific* evidence to show that despite its sales volume or apparent solvency it cannot pay any penalty, the Region as part of its burden of proof in demonstrating the "appropriateness" of the penalty 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.

5 E.A.D. 542- 543 (italics in original).

Recently discussing this decision, the EAB clarified that *New Waterbury* established that:

> the Complainant has the initial burden of production to establish that the penalty is appropriate and as part of that burden, that a respondent generally has the ability to pay the proposed penalty. The burden of production then shifts to the respondent to establish with specific information that the proposed penalty assessment is excessive or incorrect. If a respondent satisfies its burden of production, the Complainant must rebut respondent's contentions through rigorous cross-examination or through the introduction of additional information.

Chempace Corporation, 9 E.A.D. 119, 133 (EAB 2000) (footnotes omitted).

Complainant has presented evidence that Respondents' ability to pay was considered, including a newspaper article reporting that in 1996, C.W. Smith purchased an 80 acre commercial site for $1.57 million. Smith's Lake Corporation borrowed from C.W. Smith $215,000 in April 1995 to purchase Freeman's Lake, executed a note and deed to secure debt for that amount, and then the note went into default and the deed was transferred to C.W. Smith in lieu of foreclosure, and C.W. Smith also loaned Smith's Lake Corporation $150,000 to purchase Lake Carlton. Tr. 1014, 1062; C's Ex. 32 ¶ 7. C.W. Smith acknowledged at the hearing that he went into the field of automobile transmissions, "got lucky," and "got rich." Tr. 1089-90, 1269, 1271. He also said that in 1998, he sold his business and finally "had money," something he had not previously had in his life. Tr. 1095-96. Upon selling the business and retiring in 1998, C.W. Smith, a self-described workaholic, noted that he then had two things he said he never had before, "money and free time." Tr. 1094-95.

Complainant points out in its Post-Hearing Brief (at 42) that inability to pay is an affirmative defense on which Respondents carry the burden of proof and that, despite requests to do so, Respondents have not submitted any documentation supporting an inability to pay defense. *See*, Prehearing Order dated January 22, 1999. Respondents do not raise the issue of inability to pay the proposed penalty in their Post Hearing Brief. Indeed, C.W Smith conceded at the hearing that he had the money to pay the proposed penalty. Tr. 1268-69. Therefore, it is concluded that it is not appropriate to reduce the penalty for inability to pay.

History of Violations

As detailed at length above, the Respondents have a long and sordid history of committing violations similar to those at issue here. The violations in regard to Freeman's Lake property were so severe that they resulted in a court order to restore the lake, restoration costs of $580,000, Respondents serving jail time, and loss of their property. Tr. 669, 949, 1103-04.

Respondents argue in their Post Hearing Brief (at 44) that to "allow the situation at Freeman Lake to justify the excessive fine in this case would amount to double jeopardy. The violations at Freeman Lake have been fully resolved judicially and the Smith's have already paid a dear price in losing their property. . ." Further, Respondents argue that the situations are not similar, as Freeman Lake was not an action brought by EPA under the CWA, and concerned draining of the lake without a permit, and the remedy sought by Gwinnett County was the refilling of the lake. In this case, Lake Carlton was already drained before they purchased it.

Mr. Mancusi-Ungaro testified that he went out to the Freeman Lake site on August 31, 1996, because of complaints from neighbors that backhoes were operating in the lake bed. Tr. 626. This was after a cease and desist order was issued by EPA. *Id.* There he saw three backhoes operating on the property, one of which was being operated by Respondent C.W. Smith personally. Tr. 627. Mr. Mancusi-Ungaro testified that at that time he explained to the Smith brothers that they were violating the cease and desist order as they were sidecasting materials in adjacent wetlands which required a Section 404 permit. Tr. 627-28. He testified

that they indicated that they were unwilling to comply unless so ordered by a Federal court, and that until then, C.W. Smith stated he would continue to work. Tr. 630. An administrative cease and desist Order was served on Respondents on September 4, 1996. Good to his word, C.W. Smith continued his work in the lake bed, digging ditches and sidecasting. Tr. 632. Thus, when Mr. Mancusi -Ungaro returned to Lake Freeman on September 19, 1996, he found additional work done in the lake bed, and he again explained the requirements of the CWA in an effort to obtain voluntary compliance. Tr. 633-34, 636; C's Ex. 41. And, again, C.W. Smith indicated he did not recognize the authority of EPA and until a federal Judge ordered him to stop working he was not going to stop. Tr. 636.

Mr. Chastant of Gwinnett County testified that in connection with the Freeman Lake property, Respondents were charged with grading without a permit, violations of the flood plain management ordinance, and violation of the buffer requirement between commercial and residential areas. Tr. 665. Dozens of citations, 37 in total, were issued by the County. Tr. 1102. He testified that residents of homes around the lake complained to him about the lake being drained. Tr. 668. He testified that the Smiths asserted that Gwinnett County had no jurisdiction in the lake bed in reaction to enforcement efforts by the County. Tr. 665.

The CWA does not require that only identical violations be considered under the history of violations factor. Mr. Chastant and Mr. Mancusi-Ungaro clearly gave Respondents actual notice of the requirements of the CWA before they undertook their violative activity at Lake Carlton at issue in this case. It is clear that an increased deterrent is needed in terms of penalty assessment when the past enforcement efforts in regard to similar violations, and actual notice regarding CWA requirements, were not sufficient to deter the present violation. Accordingly, because Respondents have a history of past similar violations, including several cease and desist orders, no reduction in the maximum penalty amount is warranted to account for any lack of history of violations.[56]

Culpability

Factors that may be included in considering culpability are the violator's previous experience with the Section 404 permitting requirements, degree of control over the illegal conduct, foreseeability of events constituting the violation, precaution taken against such events, knowledge of the hazards associated with the conduct, knowledge of the legal requirements, attitude, cooperativeness, and good faith and diligence in reporting violations and fixing problems. *Phoenix Construction Services*, slip op. at 54-55.

---

[56] Complainant alleges that Respondents' post-Complaint violative activities should also be taken into account under the prior history factor, citing in support thereof *Buxton*, 1995 WL 1080538 (E.P.A. Region 3); *Jehovah-Jireh Corp.*, 2001 WL 884546 (EPA Region 5); and *City of Marshall*, 2000 WL 1770500 (EPA Region 5). Complainant's Post Hearing Brief at 35-36. In that no reduction is being made in the penalty here based upon lack of prior history of violations, there is no need to decide the issue of whether violations occurring after the Complaint is filed, but before a decision is entered, should be considered.

Complainant believes that Respondents have a high degree of culpability for the violations. As discussed above, Mr. Mancusi-Ungaro's testimony shows that Respondents were given notice of the CWA requirements in 1996 in connection with Lake Freeman, and nevertheless went ahead with their activities in Lake Carlton without seeking a permit therefor.

Respondent C.W. Smith testified that "the expert that I was talking to in the field says hey, you can do anything you want with a shovel. The only thing you can't do is with a mechanical piece of equipment." Tr. 1147. Nevertheless, he testified that, because he had two back operations, "I thought I had a good, legal right for the government to let me do anything I want to down here with a mechanical piece of equipment on account of I can't shovel dirt." *Id.*

Moreover, despite his experiences in regard to Lake Freeman, Respondent C.W. Smith apparently continued to believe, and acted on his belief, that he could undertake virtually any activities in the lake bed merely by virtue of the fact that he owned the property. Tr. 1102, 1107-1108, 1147. This notion undercuts one of the most fundamental and ancient principles of a civilized society, expressed in Latin as "sic utere tuo ut alienum non laedas," meaning that one should use his own property in such a manner as not to injure that of another. Although in remote rural areas the principle may not be such an obvious requisite to maintain basic civility, certainly even the Smith brothers might agree with the principle had it been their own residences that were damaged by sewage lines broken and plugged by someone else.

Considering all of these facts together, I find that it is not appropriate to mitigate the penalty for lack of culpability on the part of Respondents.[57]

Other factors as justice may require

Respondents assert that application of Section 404 of the CWA to their property, requiring mitigation compensation which approaches or exceeds the value of the property, effects a regulatory taking. Therefore, Respondents argue that it is illogical to assess a penalty where application of the law would require that Respondents be compensated for a regulatory taking. Respondents' Post Hearing Brief at 48. This argument has no merit, and has already been disposed of in this proceeding. Judge McGuire ruled in the Order on Motions (at 12), that the remedy for any regulatory taking is in other venues, not in an administrative enforcement proceeding. In an Order dated March 11, 2003, the undersigned stated that Judge McGuire's ruling was the law of the case, that it may not be relitigated in subsequent stages of this

---

[57] Respondents also raise the issue of their willingness to engage in settlement discussions with EPA and their offers of settlement as evidence of their acting in good faith in regard to this matter. Respondents' Post Hearing Brief at 18-19. In addition, in their Brief, Respondents claim that they attempted in good faith to determine whether their discharges were legal before acting. *Id.* at 41-42. Their attorney characterized the Smiths as men "more sinned against than sinning. They have come with the best motives in the world." Tr. 1325. However, in consideration of the record as a whole, I find that these arguments do not warrant any reduction in the penalty to be imposed in this matter.

proceeding except to prevent plain error, that plain error had not been shown, and that Respondents may not raise this issue at the hearing. 2003 EPA ALJ LEXIS 8 *7-9 (March 11, 2003).[58]

Moreover, this meritless argument, repeatedly made, is but one example of how Respondents' counsel, Mr. Hubert, wasted time and otherwise acted inappropriately in this proceeding.[59]

---

[58] That Order did not dissuade Mr. Hubert, however, from raising the takings argument again at the hearing. *See*, Tr. 28. It should also be noted that the takings argument Mr. Hubert and the Respondents raised multiple times in this proceeding is essentially the same takings claim they made multiple times in the litigation concerning Freeman's Lake. In each instance, they did not prevail. *See* cases cited in Section II Factual Background above. Further, as Complainant notes in its brief, Respondents allegedly sold the property for essentially what they paid for it, evidencing that its economic value has not been significantly diminished by virtue of the imposition of the CWA permitting requirement thereon, and which in fact was initially imposed on the prior owner. *See,* Complainant's Reply Brief at 14.

[59] Another example is the Respondents' refusal to accept the ruling of this Tribunal regarding service upon C.W. Smith, mentioned above. Respondents initially raised that issue in a Motion filed on December 7, 2001, at which time they had ample opportunity to provide the Court with their affidavits and arguments in support of their position. Receiving an adverse ruling, Respondents moved for reconsideration of the Order on June 7, 2002, and were again denied. Nevertheless, on March 10, 2003, Respondents filed a request to be allowed at hearing to present evidence on this same issue. Despite being told in a responsive written Order that the prior decision of this Tribunal constituted the law of the case on the matter, during the hearing Mr. Hubert insisted on raising the issue again, and making a proffer of testimony of his *own client* (testimony which he was fully capable of submitting via affidavit at any prior point in the litigation), and has again argued the issue in the post-hearing brief. Tr. 1171; Respondent's Post Hearing Brief at 39. Yet another example is the *"de minimus* exception" mentioned by Respondents as a defense in motions filed in this case in 2001 which has no factual support in the record in this case and has not been applicable *since 1993*, long before the activities at issue here took place. The regulations initially promulgated by EPA in 1988 contained such an exception. *See*, 53 Fed. Reg. 20764 (June 6, 1988) ("The term [discharge of dredged material] does not include *de minimus*, incidental soil movement occurring during normal dredging operations."). However, in 1993 the definition was amended and eliminated such language *See*, 58 Fed. Reg. 45008, 45037 (August 25, 1993). EPA's current regulatory definition of the term "discharge of dredged material" codified at 40 C.F.R. § 232.2 includes "Any addition, including redeposit other than incidental fallback, of dredged material including excavated material, into waters of the United States which is incidental to any activity including mechanized landclearing, ditching, channelization, or other excavation." Moreover, Mr. Hubert seemed fervently intent on clouding the record in this case with inconsistencies, even as to simple matters such as who he represents in this case. For example, even after Mr. Hubert filed two Motions in this action on behalf of the Respondent Corporation in December 2001, on February

As the transcript evidences, Mr. Hubert was condescending, sarcastic, insulting, and attempted to intimidate witnesses, opposing counsel and the court during the hearing of this case. *See, e.g.*, Tr. 193 (Mr. Hubert comments that Mr. Lord "goes everywhere with his expertise and sprinkles it around as if it were stardust"); Tr. 257 (Mr. Hubert states "Nothing would satisfy me, Judge, unless your order comes down . . . that says absolution and apology from the government, that would satisfy me); Tr. 269 (Mr. Hubert states in regard to Complainant's counsel, "He ought to be a trained lawyer. He works for the United States government. He ought to be able to try a case."); Tr. 510 (Mr. Hubert comments, "your Honor is throwing her eyes on the top of her head"); Tr. 514, 541 (Mr. Hubert comments in regard to Mr. Pelej, "he's a smart aleck" and "He's arrogant. He started it. He's arrogant as he can be."); 829 (Mr. Hubert comments in regard to EPA counsel, "He's a child. He's an absolute child."); 833 (Mr. Hubert states, "your Honor is indicating that somehow I've said something that causes you to put your face in your hands"). He argued with witnesses and engaged in meaningless questioning, speeches and comments while cross examining witnesses. *See e.g.*, Tr. 448, 511-514, 640-641, 701, 765, 1302-03. Mr. Hubert constantly objected to testimony and exhibits, repeatedly raised objections which were meritless, and after his objections were overruled, he continued to argue with the court or make the same objection. *See e.g.*, Tr. 186, 202-03, 517, 535-37, 588-90, 628-29, 765, 833-35, 1026, 1143-46 (when requested to not argue with the rulings of the Court on objections, Mr. Hubert stated "It's my job" and "I either have to back down and let you run it [the hearing] . . . but I do not think the Court has any right to tell a person here representing a defendant in a case that they can't say anything on the record or set the record straight. . ."). For example, during Mr. Mancuso's testimony, Mr. Hubert made frivolous arguments regarding Miranda rights, service of process, and whether an attorney can testify as a witness. Tr. 621, 638-39, 648-53. Mr. Hubert also tried to intimidate Complainant's attorney into not objecting to his questioning, proper or improper. *See e.g.,* Tr. 763-66, 1143. He demanded Complainant's counsel state grounds for objecting even when the grounds were self-evident or stated. *See e.g.,* Tr. 545, 774-75, 1143. Mr. Hubert also intentionally and repeatedly mispronounced names of Complainant's witnesses, even those he had previously dealt with in prior proceedings, one of whom he also addressed by his first name. Tr. 541, 637, 673, 678, 681, 683-86, 689, 691.

Furthermore, Mr. Hubert challenged the qualifications of each witness offered by Complainant as an expert, insisted on extensive and unnecessary voir dire, repeatedly objected that their testimony was incompetent, unreliable, or "junk science," and sought to exclude their

---

11, 2003, he represented to EPA that "the undersigned and this firm have never represented Smith's Lake Corporation." C's Ex. 57. At the hearing, Mr. Hubert also claimed not to represent the Corporation, asserted that neither of the individual Respondents were appearing on behalf of the Corporation, and that no one "sitting at the respondent's table" had taken any "official action" on behalf of the Corporation since the Smiths resigned their positions with the Corporation "sometime before 2000." Tr. 3-4. Nevertheless, the post-hearing brief Mr. Hubert filed in this case was filed on behalf of *all three* Respondents, including explicitly Smith's Lake Corporation. *See*, Respondent's Brief at 1.

testimony and exhibits.[60] Tr. 66-72, 143, 172-73, 202, 506-16, 564-68, 731-39. He also repeatedly sought to exclude their testimony on the basis that the experts did not meet the standard under *Daubert v. Merrell Dow Pharmaceuticals* 509 U.S. 570, 589-95 (1993).[61] Tr. 143, 202, 738-39. However, from his arguments and voir dire examination, it is not clear that Mr. Hubert understood the application of FRE 702 or *Daubert*. For example, seeking to exclude Mr. Cannon's testimony as an expert, Mr. Hubert stated at the hearing that Mr. Cannon's *work experience* "is not either particularized enough nor meets the standards of what we would call the Daubert test of a witness in which you have to document the kinds of studies you do and so forth." Tr. 739. FRE 702 allows testimony by an expert witness if his specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, where he is "qualified as an expert by knowledge, skill, experience, training *or* education." (emphasis added). Mr. Hubert seems to read the word "and" rather than the word "or" in the Rule. Mr. Hubert did not even address the *Daubert* factors in his voir dire, and indeed those factors are not appropriate measures of determining the reliability of Complainant's experts in this case. First, FRE 702 and *Daubert* are not controlling principles in agency hearings, which are not bound by the strict rules governing jury trials. *Solutia, Inc.,* 2001 EPA App. LEXIS 19 n. 22 (EAB 2001). Second, even if looked to for guidance, the Supreme Court stated that "the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable . . . [and] should consider the specific factors identified in *Daubert* only where they are reasonable measures of expert testimony" because those factors may not be pertinent, "depending on the nature of the issue, the expert's particular expertise and the subject of his testimony." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999).

---

[60] For example, at the hearing Mr. Pelej testified to having a B.S. degree in botany and professionally performing *over 500* wetlands delineations and supervising hundreds more over a period of 20 years. Tr. 503-04. Wetlands delineations experts have routinely been recognized in Federal Court *(see e.g., Harris v. United States*, 820 F. Supp. 1026 (N.D. Miss. 1993)) and Mr. Pelej testified he has twice been so recognized. Nevertheless, Mr. Hubert vigorously objected to Mr. Pelej being qualified as an expert in "wetlands delineation,"on the basis that there are no formal standards established for someone being qualified in legal proceedings as such an expert and that Mr. Pelej had not met the standard of an expert witness in that he had not shown "*some specialized knowledge, some specialized education, some experience* which let him form the opinion on the ultimate fact in the case and testify to his opinion. . . . ." Tr. 500-16 (italics added).

[61] The Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals* 509 U.S. 570, 589-595 (1993) held that Federal Rule of Evidence 702 charges trial courts to act as "gate-keepers," making a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid, grounded in the methods of science, and of whether that reasoning or methodology properly can be applied to the facts in issue; the court considers whether the scientific theory or technique can be tested, whether the theory or technique has been subjected to peer review and publication, its known or potential error rate, and whether the theory or technique is generally accepted in the scientific community.

In sum, Mr. Hubert's conduct did nothing to further his clients' case. The transcript, being merely a paper memorialization, cannot convey nearly the full effect of Mr. Hubert's demeanor at the hearing. His condescending tone of voice in speaking to witnesses, opposing counsel and the court during the hearing was offensive, unprofessional and contemptuous. His conduct was not merely that of an attorney who is zealously and aggressively defending his clients, but rather was a clear display of his disrespect for the witnesses, opposing counsel and the court, and was a disservice to his own clients.[62]

As to whether Mr. Hubert's inappropriate conduct has any effect on the penalty to be assessed against Respondents C.W. Smith and Smith's Lake Corporation, the Supreme Court has stated that clients must be held accountable for the acts and omissions of their attorneys. *Link v. Wabash R. Co.*, 370 U.S. 626 (1962) (client may be held to suffer consequences of dismissal of its lawsuit because of its attorney's failure to attend a pretrial conference); *Taylor v. Illinois,* 484 U.S. 400, 417-18 (1988) (Court stated that "it is not unfair to hold petitioner responsible for his lawyer's misconduct" and excluded witness testimony for failure to identify timely the witness, in violation of discovery rules). The Court in *Link* stated, "Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each person is deemed bound by the acts of his lawyer agent." 370 U.S. at 633. If an attorney's conduct falls substantially below what is reasonable in the circumstances, the client's remedy against the attorney is a suit for malpractice. In the judicial system, a criminal defendant may be convicted because he did not have the presence of mind to repudiate his attorney's conduct in the course of trial. *Gripe v. Enid,* 312 F.3d 1184, 1189 (10th Cir. 2002) (citing *Link*, 370 U.S. at 634 n. 10).

It has been said that although the *Link* principle remains valid, courts have increasingly emphasized directly sanctioning the delinquent lawyer, rather than an innocent client. *Coleman v. American Red Cross*, 23 F.3d 1091, 1095 (6th Cir. 1993) (citation omitted). For example, where counsel representing a criminal defendant argued with the court over objections, made sarcastic remarks, and had a persistent pattern of surly, disruptive and contemptuous behavior, the court had counsel removed from the courtroom in handcuffs. *United States v. Elder,* 309 F.3d 519 (9th Cir. 2002), *cert. denied*, 2003 U.S. LEXIS 491 (Jan. 13, 2003); *United States v. Griffin*, 84 F.3d 820 (7th Cir. 1996) (attorney held in contempt where he acted in direct defiance of court's instructions, refused to abide by court's rulings including sustained objections, and made misrepresentations to court).

Unfortunately, in EPA administrative enforcement proceedings, the ALJ has no authority to directly sanction a lawyer, yet the ALJ alone must control the hearing without any assistance

---

[62] By the end of the hearing, even Mr. Hubert recognized that his conduct at the hearing went far beyond what was appropriate, commenting that "I hope the judge understands my, that I am an old warhorse, and I dart out of age sometimes. And there was, I haven't been before your honor before, but you know it was, in what I could see my professional duty. . . I do apologize if I was overexuberant or overzealous." Tr. 1330.

of the U.S. Marshals Service. The Manual for Administrative Law Judges provides that if counsel is recalcitrant, antagonistic, unruly, offensive, argues with the ALJ after a ruling or otherwise violently contests a ruling, the ALJ should use "courteous admonition," call a recess, or "express disapproval of the opprobrious conduct and warn against a repetition." Morrell E. Mullins, Manual for Administrative Law Judges (1991 Interim Internet Edition). Such measures were taken during the hearing in this proceeding. *See e.g.* (Tr. 1143). The Manual states that an ALJ may resort to informal reprimands during recesses or otherwise off the record, and "A final resort is to exclude counsel from further participation in the case, [or] to take prejudicial action against the client if authorized by statute or rule." *Id.*

The behavior on the part of Respondents' counsel hampered the proper adjudication of this case, making an unduly lengthy and disorganized transcript, and taking up inordinate amounts of time at the hearing that could have been spent instead on eliciting more thorough testimony focused on the relevant issues. This resulted in manifest prejudice to Complainant. *See, Chemtall, Inc. v. Citi-Chem, Inc.,* 992 F. Supp. 1390, 1411 (S.D. Ga. 1998) (attorney's repeated objections, constantly overruled, came as part of an overall pattern and practice of obstructing plaintiff's efforts with ultimately unsuccessful, often sanction-inducing litigation maneuvers); *Topliff v. Gross,* 9 F. Supp. 2d 1247 (D. Kan. 1998) (motion for a new trial denied despite attorney's repeated objections, without merit, obviously intended to disrupt the flow of counsel's cross-examination). If not for Mr. Hubert's inappropriate conduct, the hearing of this case would probably have taken only two days; instead it went on for four days.

There could be some doubt as to whether to consider this prejudice to Complainant's case if Mr. Hubert's conduct did not so clearly reflect the attitude of Respondents. However, Mr. Hubert's conduct clearly reflected Respondents' utter lack of respect for authorities, so that Mr. Hubert was truly acting as Respondents' representative and spokesman, as exemplified by the following items in the record.[63]

The record shows that when Mr. Ponstler, a County inspector, issued an erosion control violation letter, C.W. Smith "warned" him that if he made any mistakes in issuing warning letters or tickets to him that he would hold Mr. Ponstler personally responsible, even to the point

[63] Evidence of Respondents' conduct in regard to Lake Freeman could also be considered as evidence of their inappropriate method of responding to challenges to the propriety of their actions. Mr. Chastant testified that neighbors complained to him that the Smiths would ride on their mechanical equipment early in the morning with the radio volume turned up so the neighbors would be awakened, and if they objected, C.W. Smith "would come out and had a big wad of money and shoved it in their face and said, I've got more money than you do, and I can do what I want on my property." Tr. 668-69. The record shows that C.W. Smith intentionally cut a sewer line in the lake bed resulting in the sewer being backed up into a neighbors' house, and refused to cooperate with County authorities to have it repaired. Tr. 669. Rather than attempt to work out an amicable resolution of the issues regarding Freeman Lake with County authorities, Respondents chose to engage in "vexatious and frivolous" litigation. *See*, Ct. Ex. 5.

of suing him personally.[64] C's Ex. 45, Tr. 557-60. At the COE inspection on April 11, 1997, when the female inspector told the Smiths to stop work in the lake bed, they "did not comment." C's Ex. 3. During the hearing, C.W. Smith referred to the COE inspector as "the girl from the Army Corps" and "the little girl." Tr. 927, 1129. The Smiths repeatedly failed to receive or respond to documents sent by overnight mail or facsimile from EPA and the COE. Tr. 646- 53. The Smiths never responded to the Orders to cease activities in April 1997 or May 1998. Tr. 113; C's Ex. 6, 7. 646-53. They did not respond to a written request from EPA for permission to enter the site to conduct a delineation. Tr. 151. When Mr. Lord tried to wave down C.W. Smith to talk about the activities in which he was engaged on the property, C.W. Smith drove within ten feet of Mr. Lord and while looking right at him, drove right on by. Tr. 135. C.W. Smith complained that he had to "spend about a half a million dollars" to buy certain stools so ladies could stand on an assembly line and not hurt their back or wrists, so he believed he had a "good, legal right for the government to let me do anything I want to with a mechanical piece of equipment" because he could not shovel dirt by hand, having had operations on his back. Tr. 1147. At the hearing, C.W. Smith referred to Mr. Ponstler as "Mr. Poindexter" and Mr. Chastant as "Mr. Chestnut." Tr. 1103, 1131.

The attitude of Respondents as reflected by their counsel, and the prejudice to Complainant's case, will be taken into account, using the "top-down" penalty calculation method, by not decreasing the maximum penalty in consideration of the factor, "any such matters as justice may require."

Accordingly, the total penalty assessed against Respondents, C.W. Smith and Smith's Lake Corporation, jointly and severally, is $137,500.[65]

---

[64] Contrary to Mr. C.W. Smith's opinion, a misnomer in the description of the defendant does not make an order invalid, but subject to amendment, and the proper response to receiving an order with such an error is with a motion to quash or to dismiss. *See e.g. Miller v. U.S. Shelter Corporation of Delaware*, 347 S.E. 2d 251, 254 (Ga. Ct. App. 1986) ("Our own Georgia cases have implicitly followed this rationale and do *not* hold that the existence of a mere misnomer authorizes one freely to ignore the fact that he has been served with legal process.")

[65] Respondents argue in their post hearing brief that they were denied in this proceeding the basic requirements of due process and a fair trial and object in particular to the undersigned's questioning of witnesses for both sides in an effort to clarify the record. Respondent's Post Hearing Brief at 52. However, at the conclusion of the hearing, Respondent C.W. Smith expressed his gratitude to the undersigned for an opportunity to be fully heard (Tr. 1267), appreciated the Court's pertinent questions (Tr. 1272), and even stated "right now, if you was to say, Mr. Smith, go over there and give these people the $137,000, I think you've heard enough testimony that, if you say I owe $137,000, I'll go over there and write them a check." Tr. 1269-70.

ORDER

1. A civil penalty of $137,500 is assessed, jointly and severally, against Respondents C.W. Smith also known as Clarence W. Smith and Smith's Lake Corporation.

2. Payment of the full amount of this civil penalty shall be made within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c), as provided below. Payment shall be made by submitting a certified or cashier's check in the amount of $137,500, payable to the Treasurer, United States of America, and mailed to:

Nations Bank
EPA - Region 4
Regional Hearing Clerk
P.O. Box 100142
Atlanta, Georgia 30384

3. A transmittal letter identifying the subject case and the EPA docket number, as well as Respondents' names and address must accompany the check.

4. If Respondents fail to pay the penalty within the prescribed statutory period after entry of this Order, interest on the penalty may be assessed. *See,* 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

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

____
Susan L. Biro
Chief Administrative Law Judge

Date: July 15, 2004
Washington, D.C.

In the Matter of C.W. Smith, Grady Smith & Smith's Lake Corporation, Respondents
Docket No. CWA-04-2001-1501

CERTIFICATE OF SERVICE

I certify that the foregoing **Initial Decision**, dated July 15, 2004, was sent this day in the following manner to the addressees listed below:

____
Maria Whiting-Beale
Legal Staff Assistant

Dated: July 15, 2004

Original and One Copy by Pouch Mail to:

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

Copy by Pouch Mail to:

William W. Sapp, Esquire
Paul Schwartz, Esquire
Associate Regional Counsel
U.S. EPA
61 Forsyth Street, SW
Atlanta, GA 30303-8960

Copy by Certified Mail Return Receipt to:

Richard N. Hubert, Esquire
Chamberlain, Hrdlicka, White, Williams & Martin
191 Peachtree Street, NE, 9th Floor
Atlanta, GA 30303-1747

Mr. C.W. Smith
Smith's Lake Corporation
3552 Lake Carlton Road
Loganville, GA 30052