UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Greenfield Bayou Levee & Ditch Conservancy District[1]	)	**Docket No. CWA 5 -2001-001**
	)	
	)	
Respondent	)	

INITIAL DECISION

I. Introduction

During the fall of 1997 the Greenfield Bayou Levee & Ditch Conservancy District ("District," or Respondent) engaged a contractor to dredge Negro Ditch and Prairie Creek, which are located in Vigo County, Indiana. EPA's Complaint alleges that, in performing that work, Respondent discharged dredged material, described as pollutants, on to wetlands. The Complaint asserts that before such activity can be performed one must obtain a permit from the United States Corps of Engineers ("Corps") but that the District had no such permit and therefore it had violated Section 301 (a) of the Clean Water Act ("CWA"). The Respondent has asserted that, while some of its dredging impacted areas beyond those necessary to perform the complained of work, most of its activity was exempted from the permit requirement because Section 404(f) of the statute expressly exempts maintenance of irrigation or drainage ditches from the permit requirement. An evidentiary hearing on this issue, and for the determination of the appropriate penalty, was held on May 15 and 16, 2002 in Terre Haute, Indiana.

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[1]Only Greenfield Bayou remains as a litigant in this proceeding. The other Respondents, Warren Wells d/b/a Wells & Sons, and Annapolis Grain Company, Inc., d/b/a LeRoy Wells Bulldozing, settled with EPA after the Complaint was filed and the parties agreed to remove those respondents from the caption.

II. Findings of Fact[2]

EPA's first witness was Mr. Terry Siemsen, a physical scientist with the Corps. Siemsen was the primary environmental person for the ecosystem restoration part of the Corps' Greenfield Bayou project. The project had two aspects: an "agricultural flood protection component" consisting of levees and an "ecosystem restoration component" intended to do "good environmental things." Tr. 31-32. The former included an intention to "relocate Negro Ditch and Prairie Creek back to its original channel, using explosives to reopen the old channel," while the latter had a reforestation component and areas it intended to flood for "duck management." Tr. 32 Siemsen noted that Negro Ditch is "a straight line moving south from County 67 in Section 19 down through the middle of [map] Section 30 to the point where it joins Prairie Creek."[3] *See* EPA Ex. 1A, a map reflecting the southern end of Greenfield Bayou

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[2]On July 26, 2002 the parties filed a Joint Motion to Conform Transcript because certain exhibits, as described in Attachment A to the Motion, apparently did not reach the Regional Hearing Clerk's ("RHC") office. EPA counsel acknowledged responsibility to ensure that the exhibits were delivered to the RHC. Tr. 256. Following this development, EPA counsel created a copy of the missing exhibits, and with Respondent's counsel's concurrence, the new set was delivered to the RHC. The Court grants the Motion, approving the filing of the exhibits, as listed in Attachment A, with the RHC.

[3]EPA, aware that the District was asserting the maintenance ditch permit exemption, attempted to deal with the uncomfortable fact that Siemsen continually referred to Negro *Ditch*. Therefore, on direct examination, the witness explained that he used the term 'ditch' for Negro Ditch because that is the place name reflected on the map, on EPA exhibit 1A, which map was created by the United States Geological Survey. He followed the same approach with his references to 'Prairie Creek.' The Court observes that the names listed on the map, which EPA itself introduced into evidence, were not created out of whole cloth or selected as a result of some free association exercise created at the whim of the cartographer. Rather, the names signify the descriptions known to those who supplied information used in the map's creation. Thus, the Wabash River, which also appears on the map, reflects the presence of a river known as the Wabash. The same is obviously true for Prairie *Creek* and for Negro *Ditch*. These fundamental observations would not need to be made were it not for the attempt by EPA to suggest that the names of these ditches, creek and rivers were happenstance occurrences, completely disassociated with their function. This aversion to saying the "ditch" word continued during Siemsen's cross-examination. This witness preferred to call it a "man-altered waterway." Tr 59. Ultimately, the witness could not use semantics to evade reality. When asked what the Corps calls a "ditch," he offered it was "a place where there's water that has been altered for the purpose of enhancing flow." Having offered that definition, Siemsen then conceded that Negro Ditch fit his own description. When asked if "Prairie Creek" is a ditch, he admitted "[i]t's also a flowing body of water. I kind of think of a ditch as something that's been manipulated where water stands in place in place and is used to drain land. ... the definitions are a bit fuzzy..." Tr 60. Finally, when asked if the straight line on the map, south from the middle

bottoms and the restoration project. He explained that because streams naturally meander, when one sees a straight line stream, one knows it has been influenced by man. Tr. 42. Negro Ditch joins Prairie Creek approximately where the number 30 appears on the map. He conceded "this stream has had some man's influence on it over the course of the last hundred years." Tr. 38. From that point south it's known as Prairie Creek. Prairie Creek is also shown on the map on the far right in Sections 27, 28 & 29. Siemsen was also asked about the ecosystem project being contemplated by Corps, a subject that the Court has determined has only a remote connection to the issues in this proceeding.[4] Nevertheless, Siemsen explained that the Greenfield Bayou Project was an evolving one and that, as time passed, the Corps viewed the agricultural flood protection portion of it as more difficult to justify economically. Ultimately, in August 1997, the Corps announced it was dropping consideration of the flood control levee aspect, leaving only the ecosystem restoration part of the project. Siemsen stated that the affected community was upset by this decision. Tr. 53. As for the ecosystem restoration part of the project, it too has never gone forward either because there has been no nonfederal sponsor for it. Tr. 56. Based on his personal view of the site in September 1997, Siemsen believed that the clearing activity performed by the Respondent, occurring through the center of a forested area, had the effect of diminishing the number of habitat units there.

When cross-examined, Siemsen conceded that if one puts together the area south on the center of Section 30 south as a ditch and immediately to the north of it as a ditch, (i.e. Prairie Creek and Negro Ditch), those two ditches perform a drainage function. While Siemsen agreed that, in the Corps' view, the "part of the Negro Ditch complex, including that north of the confluence of the Prairie Creek and that south of the confluence with Prairie Creek at section 30, would be considered a ditch used for drainage purposes, he insisted on calling it a "man-manipulated area [which] ...carries water during high flow and stagnant water during low flows and it's used to aid in draining land." Tr. 71 Ultimately Siemsen retreated entirely from his

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of Section 30, going south to County Line as reflected on EPA Exhibit 1-A meets his definition of a ditch, Siemsen at last conceded, "I'd say, yes, sir."

[4]Siemsen identified the location of the Corps' proposal as generally south of County Road 67. Under it, soil management units were proposed in the southwest corner of EPA Ex. 1A, map section 20 and in the southeast corner of section 19. These efforts, if implemented, would have involved tree planting and pumping water into the area to create duck stopover spots. The Corps also planned to build a small dam upstream from County Line Road in Section 31, for the creation of a waterfowl habitat. The plan would effectively create an auxiliary Negro Ditch because the original ditch would remain but the Corps intended to create another ditch for certain times of the year. As the witness explained it "during the summer and fall the existing Negro Ditch was stagnant water. What we wanted to do was have a place where water could flow through during the summertime. Essentially, there was minimal to no fish habitat as the creek existed." Tr. 41. The Corps also was looking at restoring Negro Ditch and Prairie Creek back to their original drainage locations, which Siemsen said once flowed through Sections 30 & 31. Tr. 38.

views of what a ditch is, saying he intended only to speak to the ecosystem project and that he had no expertise regarding drainage ditches.[5]

EPA's second witness was Mr. Forest Clark, who is employed with the Ecological Services Field Office of the U.S. Fish & Wildlife Service**.** Clark has been involved with habitat restoration projects and endangered species and his employer had an interagency agreement to do some of the biological assessment regarding the Corps' Greenfield Bayou project. Tr 84. Clark was familiar with the area alleged to have been improperly filled, as he had been there in 1993 or 1994, studying migratory bird and amphibian reptile use in the area. At that time he found a large, relatively contiguous, piece of bottom land, or flood plain, hardwood forest there. He stated that there aren't many large blocks of forested wetland left in Indiana. However, he acknowledged this view was made on the basis of only a "casual observation of geographic information" and that in doing that review he did find other such blocks, including some that were similar to Greenfield, and larger. Tr. 88. He also confirmed that there were forested wetlands around Prairie Creek/ Negro Ditch. EPA Exhibit 6 is a letter from Fish & Wildlife to the Corps. While signed by a David Hudak, this letter was actually composed by Clark. Tr 89-90. The letter concluded that the area had important forested bottom land and that it included habitat for a *potentially* endangered species habitat within the project area – the Indiana Bat. It also expressed concern about the impact of *the Corps*' *project* regarding the proposed levees. Tr. 92.

On Oct 9, 1997 Clark went with Corps' inspector Kuziensky to the site. Tr 98. Together they viewed the area shown in the photos that make up EPA exhibit 2. EPA Exhibit 2Q, a hand drawn map of Negro Ditch and Prairie Creek, was correlated, through testimony, to various photos from Exhibit 2. The two paced the area and concluded there was about a 175 foot wide swath cleared in the area on Exhibit 2Q beginning where the numbers 10-13 appear.[6]

While Clark stated that the area used to be completely forested, he also agreed there was a stream or channel running through it. Tr. 103. As he noted, the trees came to "the bank on both sides *of the ditch*." Tr. 104 Later, he reaffirmed that a ditch was there: "[t]he west bank of Prairie Creek-Negro Ditch had been cleared in that area as well as it appeared that dredging of

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[5]However, this late attempt to back away from testimony supporting the Respondent's position is rejected; Siemsen's testimony stands.

[6]Clark's testimony related to the biological impact from the activity. Accordingly, he did not claim accuracy for the cleared area numbers reflected in EPA Ex. 2 Q. Although he did not where those final numbers came from, he believed they were consistent with his recollection of the estimates he made. Regarding the clearing in the south, his recollection was that the clearing was about 75' wide. Tr. 125. He admitted having no knowledge as to whether the ditch had been dredged below its original depth, nor if had been widened beyond its original width. Tr. 126. Clark also did not know how wide a strip of land one would need to clear in order to get equipment on the site to do dredging.

the channel had been going on ... and ... [Clark observed] two gentlemen who were ... dredging the stream..."[7] (emphasis added) Tr. 107.

Clark spoke generally about wetland functions and their function for migratory birds and the Indiana Bat in the Greenfield Bayou. In his view, the harm done by the Respondent's activity was "primarily ... fragmentation of the habitat." Tr. 112-115. However, he could not speak to any specific impact from that activity, as no study of the area has been conducted. Clark acknowledged that he has no personal knowledge of the impact from the activity on the bat population and that Fish & Wildlife "did not do surveys either prior to the work there or subsequent to it." Nor did he have any data regarding parasitism or predation increase in the area. Tr. 123 -124. Clark informed that his opinion regarding predation and parasitism was based on studies made in the midwest which showed that fragmentation leads to these problems. However, he agreed that he had made no comparsion of the degree of fragmentation in those studies with the fragmentation in this case. Tr 130.

The government's primary witness[8] was Gregory T. Carlson, who is an environmental protection specialist and enforcement officer in the watershed and wetlands branch of water division of EPA. His responsibilities cover five states, including Indiana. Tr 143, 147. The subject of this litigation came to his attention in October 1997 and he did a site inspection on November 20 and 21, 1997. Tr. 149. The purpose was to verify the existence of wetlands at the site. He found a predominance of hydrophytic vegetation throughout the 2½ mile stretch starting

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[7]Clark consistently referred to the area as having a stream, channel or ditch. For example, he noted for one photograph "[w]e see the Prairie Creek-Negro Ditch *channel* on the right side..." and, when describing photo 26, Ex 2 L, he stated it shows "an excavator *working the channel*." (emphasis added).

[8]Maydine Payne was also called as a witness for EPA. Ms. Payne had been a member of the Greenfield District Board from January 1997 until January 2002. Although she offered her interpretation of remarks made at by other Board members during September 1997, regarding their reaction to the Corps' decisions for the District, her testimony was generally too vague to be of use. However, she knew that people were upset at Corps' announcement that they were not going through with the flood project. Tr 141. Following that meeting, she stated that the Board met at the site regarding "caring of the ditch." Tr. 133. She believed that the Board needed permits and bids to do such a large job. Tr. 134. While it was unclear from her testimony, she inferred that she abstained when the vote was taken to have the ditch cleared. However, the Board's official minutes reflect that Ms. Payne agreed to the motion. *See* Respondent's Exhibit BB. Neither Ms. Payne nor EPA disputed the accuracy of those minutes. She also revealed that in previous Board meetings there had been discussions about cleaning other ditches. Tr. 137-138. Ms. Payne agreed that the ditch could not be cleaned out in spring or the fall because it would have water in it. In fact she has seen water there during summer months. Because the ditch had been stopped up "forever," she saw no rush to unplug it. Tr. 140-142.

from County Road 67, traveling south along Negro Ditch, to County Line Road Bridge Tr. 157 EPA Ex. 2 Q. He also confirmed the presence of hydric soils. Carlson also used flood studies in making the determination that these were wetlands. Tr. 158. EPA Exhibits 10, 11, 12.

In addition, Carlson obtained aerial photography from the county surveyor and "all sorts of historical records of the formation ... way back in the early 1900s of the levee, the building of the levee, the digging of Negro Ditch, the channelization of Prairie Creek." Tr. 161. The aerial photos also allowed him to "parse out the dredge spoil piles that had pre-existed on the sides of either Negro Ditch or Prairie Creek. And [he] took those out, a certain segment of those out of [his] estimation of the jurisdictional wetland on site ...." Tr. 161-162.

Knowing that a spoil pile is adjacent to the ditch, Carlson selected 444' above sea level as the cut off point for making his wetland acreage determination. Tr. 164. Although he originally estimated 42 acres of wetland had been affected, once he subtracted the "elevated spoil piles that pre-existed the district's work" he revised that figure to 26.2 acres. Tr. 163. Putting the alleged amount of acreage in perspective, Carlson revealed, upon questioning by the Court, that the 26.2 acres was part of a larger forested area composed of some 1,500 acres. Tr. 79. Carlson did not know how many of those 1,500 acres were wetlands. *Id*.$

Carlson was taken through several photographic exhibits, all showing various views of the area after the dredging activity had taken place. The purpose of these exhibits was to establish that wetlands had been impacted by the activity, to record some of the clearing that took place and to gain a sense of how the area appeared before the work had been done. *See* Carlson's Memorandum dated March 1, 2001, EPA exhibit 9 A., and photographs at exhibit 9 B which were correlated to exhibit 2 Q, and photographs from exhibit 2. He also testified that he took measurements of the affected areas, taking representative widths in three distinct areas. He took about three measures in the northern most rectangle on the west side of Negro Ditch, a single measure on east side of Negro Ditch, where the clearing occurred, and then one or two measurements on the remainder of the site at the west bank of Prairie and west bank of Negro, south to County Line Rd. Tr. 187. These measurements are listed on EPA exhibit 2 Q. One area is listed as 175' by 2,640, another lists 175' to 190' and a third area is listed as 75' to 90' by 9,300. Tr. 188.

On cross-examination Carlson conceded that it is possible for one to believe there is no need to obtain a permit before they begin maintenance activity. Tr. 47. While he stated that upon receiving a November 1997 letter from E.D. Powell, the attorney then representing the District, that he then inquired of the Corps whether the maintenance exemption could apply, he did not make this inquiry by letter, nor did he ever receive a response by letter from the Corps. Tr. 48. Carlson admitted that he was aware there was a ditch maintenance issue from his first visit to the site. When directed to Ex. 2 Q, and the intersection of Negro Ditch with County Road 67 West and south from that point for 2 ½ miles to County Line Road, he stated he did not consider that entire length to be a ditch. However he did consider Negro Ditch to be a ditch at least from the confluence of Prairie Creek north. He did not believe Negro Ditch was used for the traditional purpose of drainage ditches, i.e. to drain lands, but he conceded that it would not be

unreasonable for the District to view that its purpose as drainage. Tr. 49. Thus, he agreed that it was reasonable for the District to view it as a drainage ditch, at least from the confluence of Prairie Creek North. Tr. 50. Carlson believed that the District's action caused less flood storage on the site. Tr. 49.

Carlson also admitted that there are spoil piles on the east side, from south of the confluence of Prairie Creek down to County Line Road. Further, he acknowledged that this "structure" (i.e. "Negro Ditch") runs straight down the center of these sections but he would not agree that it was a "ditch," only that it had been dug. He then conceded that it had been dug to serve the same purpose as the digging to the north of that area. Tr. 51.

Carlson said he had considered or distinguished wetland impacted from maintenance of a drainage ditch from wetland impacted by activity going beyond what was necessary to maintain the ditch. He considered as necessary for ditch maintenance "[a]ny area that was part of the previous dredge spoil pile, ... where we believe there was ditch." In his view, an example of the width of a spoil pile from the edge of a ditch is present at the north end on the west bank, where a remnant spoil bank appears. Tr. 52. Respondent's counsel, maintaining that it viewed the entire 2 ½ mile structure as a ditch, asked Carlson to identify those parts of that structure that he agreed are appropriately classified as a ditch. Carlson described this as "...Negro Ditch from what is labeled County Road 67 West, also known as Bowen Drive, where the waters – Negro Ditch intersect south to its junction, Prairie Creek." Tr. 53. However Carlson would not agree that this ditch he described was a drainage ditch but was instead "a ditch that carries flood waters out to the – in conjunction with Prairie Creek – out back to the Wabash River." *Id*. Speaking to the "north ditch"[9] Carlson conceded that the District has a right of way on either side of the ditch and that it was for maintenance purposes. Tr. 54. He believed that the activity in this area was beyond mere maintenance. However, he conceded that, subject to the recapture provisions of Section 404(f)(2), the District has a right to maintain the "north ditch." Tr. 55.

When asked about his view concerning the number of wetland acres that had been impacted, Carlson agreed that the entire length of the excavation was 13,265 feet. He was then asked to assume that the activity was limited to 75 feet from the top of the bank, which is the location he identified as the starting point of the right of way, and stated that amounted to 22.8 acres. Tr. 57. Asked to deduct the amount of that acreage that he agreed was "spoil,"[10] Carlson came up with 7.2 acres. Tr. 61. He agreed that when one takes the 22.8 acres which lies within the right of

[9]Respondent's attorney and Carlson agreed, for the sake of clear communication, to describe the portion of the 2 ½ mile structure north of the confluence with Prairie Creek as "the north ditch" and that the structure south of the confluence with Prairie Creek that runs along the half section line as "Prairie Creek South." Tr. 54.

[10]In this hearing the parties agreed to use the terms "spoil," "spoil pile," "berm," and "high ground" synonymously, defining these as encompassing spoil within 75' of the ditch. Tr. 59.

way and deducts the 7.2 acres of spoil within that right of way acreage, 15.6 acres remain. *Id*. Carlson also agreed that if one subtracts the 15.6 acres from the 26.2 acres he calculated as impacted wetland, one is left with 10.6 acres. Thus, Carlson agreed that, under those assumptions, that 10.6 acres represented wetlands lying more than 75' from the bank of the ditch. Tr. 62.

Carlson stated that not all the excavation work was included in the Complaint, as EPA did not consider dirt that was moved "on upland areas along the bank ditch itself ... [as they considered that] ... above ... jurisdictional wetland." Tr. 65. Thus, it exempted the 7.2 acres that were upland or spoil pile residue resulting from work previous to the actions taken by the District which are in issue in this proceeding.

The District, Carlson agreed, did go back and perform rehabilitation or mitigation in the dredged area, by regrading about four acres of dredged spoil mound[11] and by planting wheat and seedlings over that area. They also planted trees on the north end of the site in the area designated as cleared and listed as 175 to 190 feet by 2,640 feet. It was in this area that trees were planted within 50 to 70 feet of the ditch. Carlson, described the planting as within 10' of the toe of the dredge spoil berm, which translated into 50' from the ditch. Carlson conceded that the tree planting brought the tree line to within 60 feet or closer to the ditch. Tr. 68. The District planted trees immediately adjacent to the ditch for 2,700' along the portion described as Prairie Creek South and, from its perspective, did this at the insistence of the regulatory agencies.[12] These plantings have been successful as they have exceeded the 70% performance standard.

Carlson also conceded that EPA did not know if the ditch along the entire 2 ½ miles in issue, had been dredged any deeper or wider than its original construction. Tr. 68. Further, he agreed that "a first blush look at this site you see straight line water bodies, and that indicates to me that it's a possibility it could be a drainage ditch." Tr. 72.

When his attention was directed to Exhibit 2Q, Carlson stated that he saw no clearing indicative of a right of way at, for example, the area to the north where Prairie Creek intersects a channel or to the east side south of the confluence of Prairie Creek with the channel.[13] In contrast, Carlson believed that aerial photographs showing the dredge spoil bank along the west

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[11]By "dredged spoil mound" Carlson was referring to material excavated from the channel of Prairie Creek. Tr. 66.

[12]Carlson initially disputed that the planting was done at EPA's insistence, by later reversed himself, admitting that "we *required* [trees] to be planted to get back a diverse forest..." Tr. 69 (emphasis added). Still later, he acknowledged that the tree planting was part of the administrative order and the restoration plan included in it. Tr. 74.

[13]The suggestion, from this testimony, that the failure to see a clearing is indicative that no right of way existed is rejected.

side of Negro Ditch on the north end indicated a right of way in those areas.[14] Tr. 73.

Respondent's first witness, George Seketa, is a retired wildlife biologist who worked for the Indiana Department of Natural Resources ("DNR"). Among his duties in his 33 years of service to the DNR, Seketa was "the lead person for the Greenfield Bayou" to develop a major wildlife area in that Bayou. Seketa testified about cowbirds and their nesting habits, noting they tend to invade other birds' nests particularly at the forest edges and in fragmented forests. Tr. 92. Seketa believed that bats would not tend to use the tree species found in this area. He agreed that the Indiana Bat existed in the subject forest but *not* in the area in issue within that forest. Seketa did not believe that the District's work created any new edges for cowbirds to cause problems.

Mr. Seketa was followed by Fred Wilson, Chairman of Board for Greenfield District. When shown Respondent's Exhibit E, a United States Corps of Engineers' map, dated 1914, of the Greenfield Bayou area, he agreed the map indicates presence of a ditch, extending north and south, and located approximately where Negro Ditch is today, and he marked its location on it. Tr. 99-100. Wilson also identified Respondent's Exhibit G, a two page document, dated July 20, 1914, reflecting the first minutes from the Board of Directors Meeting of Greenfield Bayou Levee Association in which they ratified the construction of the ditch system. In the notice of publication which accompanied those minutes, item number 18 refers to the main ditch, describing the ditch length as 31,465 feet. These documents were copied from the official minutes book. Tr. 102. Wilson then referred to Respondent's Exhibit I, which he identified as a copy of an order book entry made from the Vigo courthouse records. It reflects the order establishing the District and it also refers to a "main ditch," beginning 23 feet north of the center of Section 19 in Township 10 North of Range 10 West in Vigo County, Indiana and running south along the half section line, 15,447 feet or about 2 ½ miles. Wilson then marked the location of the "main ditch" using a yellow highlighter on Respondent's Exhibit O[15], the Greenfield Bayou Levee and Ditch Conservancy District Mitigation Plan Map, a U.S. Geological Survey map, the description from Respondent's Exhibit I-2.

Respondent's Exhibit J is an eight page compilation that Wilson prepared showing elevation surveys he took along the ditch. Tr. 111. The first page of the exhibit is a photocopy of a Geological Survey map of the area with numbered points along the line keyed to elevation measurements taken by Wilson along Prairie Creek and Negro Ditch. He informed that Bowen Drive Bridge is same location as the intersection of Negro Ditch and County Road 67 west and

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[14]Respondent's Counsel asserted that the local land records would document a 150 foot right of way, allowing 75 feet on each side of the ditch. Tr. 80. EPA counsel conceded that the particulars of the right of way are relevant and, with lukewarm enthusiasm, he stipulated that the 2 ½ miles in issue have a 75' right of way. However, he could not stipulate that the right of way was for the purpose of maintenance of the ditch. Tr. 83-84. Respondent's counsel believed it is relevant as reflecting the amount of space believed to be reasonably necessary to maintain the ditch.

[15]The dotted red line on this map represents the Greenfield Bayou District.

that Location 1 on Exhibit J-1 corresponds with 23 feet north of the mid-section of Section 19. As a reference point, Location 1 was assigned an elevation of zero. From that reference point, the elevation at location 2 is a plus 10.26. On Exhibit J-1, the confluence of Prairie Creek and north is located right near the center of Section 30. The elevation at Location 14, which is where the dredging stopped by virtue of the stop work order, was minus 3.53. Tr. 115. Wilson noted that the total drop from Location 1 to the bottom of the ditch immediately south of county line road was slightly more than 1 ½ feet and the highest elevation was at location 9 where it measured plus 6.18.' This high point is where Prairie Creek intersects the ditch. Tr. 116-117. Wilson explained that the six foot rise in the ditch where a 1 ½ foot drop was intended was attributable to sediment from the upper reaches of the Prairie Creek Vigo District , creating a plug in that portion of the main ditch. He also explained the relationship between Negro and Prairie and the Oxendine Ditch, which he described as the next most important ditch in the Conservancy.[16] He pointed out that the Oxendine intersects with the Wabash River and informed that there is a flood gate at that point which operates if the Wabash gets too high. At those times, with the gate shut, the only outlet for water from the Oxendine becomes Negro Ditch which is the main drain, as the Wabash is not an outlet under those circumstances. As a consequence of a Corps of Engineers project, the Wabash is manipulated so that it is held up when that river reaches certain levels, at which point the Oxendine no longer functions. Thus, when the Wabash cease to receive water from the Oxendine, the District drains via Negro Ditch.

Wilson confirmed that the depth and clearance of the "main drain" has an effect on how long it takes to get flood water out of the district once the river subsides. Tr .124. The "main drain" refers to Negro Ditch, which has also been referred to as "Prairie Creek South," and it includes Prairie Creek. *See* Respondent's Exhibit O and accompanying testimony of Wilson. The time water lingers affects the ability to farm. For example, to be eligible for crop insurance, corn must be planted by June 9th. Accordingly, the time it takes for flood waters to recede becomes important. Tr. 125.

Referring to Respondent's Exhibit M, Wilson concurred that after this litigation began the District sought an "after the fact" permit under the Indiana Flood Way Act from the Department of Natural Resources and that the Department revised the permit into two permit requests – one for the area lying north of the confluence of the ditch with Prairie Creek and the other for the area lying south of the ditch for Prairie Creek. Tr. 138. That Department also sent a letter to the Respondent disclaiming jurisdiction to require a permit north of the confluence of Prairie Creek.

Asked about his role in the District Board's decision making process to engage in a maintenance effort on the ditch, Wilson stated when he was first appointed to Board in 1977, and

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[16]Wilson indicated the approximate location of the Oxendine, marking it with blue pen on Respondent's Exhibit O. He explained that Oxendine Ditch is also Bryant Ditch and that the ditches "all interconnect." Tr. 195. He also marked the approximate location where the main ditch and the Oxendine Ditch intersect. Tr .118, 120. The "main ditch" or as it is sometimes called, the "main drain" is the main water outlet and refers to Negro Ditch. Tr. 121-124.

thereafter, there had been discussions "about how to organize priorities of doing maintenance in the district, in other words, taking care of the levees and ditches." Tr. 164. He stated that one of the District's roles is to perform maintenance. When asked if the records of the various predecessor boards show that there was prior maintenance, Wilson said he "found a lot of evidence where maintenance was going on on these ditches." Tr. 190. These reports did not disclose a lot of specific details about the type of maintenance that was done. His memory was that excavators had been in the area before, as he remembered the presence of backhoes and logging machinery there and another occasion when a dredge boat had been there and another time when it was dynamited. Tr. 191. The focus of these earlier actions, as he remembered it, was the same plugged area. Once he learned that there would be no levee project, he traveled around the District to assess its needs. He realized they would need to maintain what they had. Tr. 164. In the recent past, there had been some levee breaks, which were expensive to repair. After those were addressed, he concluded that the next priority was dealing with the outlet on the ditch system. As this was the main outlet, it was listed as the first one to address.[17] He functioned as a board member regarding the decision to perform maintenance on the ditch.

As to the Board's belief as to whether there was a requirement for it to obtain a permit from the Corps before proceeding with the work involved here, Wilson stated that he was aware from others that maintenance had been done on other ditches in the area and that there had been a challenge by a biologist who was trying to stop that maintenance. Tr. 165. He learned that the Corps had informed those who were trying to stop the maintenance that there was a maintenance exception. Thus it was Wilson's understanding that as long as one is not trying to do more than maintain the original construction design, such activity was exempted from the permit requirement. Tr. 166.

Wilson acknowledged that he was present at the meeting on the bridge and met with the contractor, Mr. Wells. Wells was asked to be there so that the District could get a cost estimate and his view of the best approach to deal with the blockage. The District was aware there was a six foot plug at the intersection where Prairie Creek meets Negro Ditch. The other Board members, Jerry Gard and Mrs. Strain voted to spend funds to clean the ditch and Wilson seconded that proposal.[18] The Board's focus was on the intersection of Prairie Creek and Negro

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[17]Wilson reaffirmed this on cross-examination, stating that once the District learned the levee project wasn't going forward, that created a turning point for the District. Since the project wasn't going forward, the District knew it could forget the impact it would have had on the area. This reality led them to the conclusion that they would have to maintain what they had. Tr. 185.

[18]EPA tried unsuccessfully to challenge Wilson's credibility by suggesting that he had held back disclosure of Board's minutes relating to the subject of this litigation. Challenged by EPA counsel as to the reason for not including those minutes in the prehearing exchange, Wilson initially could not explain the seeming omission. However, on redirect, he was provided with EPA's information request which sought "any historical information that characterizes or discusses previous ditch ... levee, drain or stream/creek/river related work within the jurisdiction

Ditch. Given their limited economic resources, they wanted the money to go as far as it could, with the focus being first on that intersection and then equally in both directions until the money allotted for Wells ran out. The contract with Wells was oral. When asked about whether directions were given Wells concerning the extent of the work, or whether it was just understood that he would do the dredging, with no thought as to amount of forested area that would be disturbed, Wilson stated that if one is cleaning a ditch it is understood that one has to put the soil someplace, but he could not explain why spoil ended up 150' away on the north end. The Board appreciated that the job entailed removing 6' of sediment and sufficient space to accomplish that task. As for the lack of detail given to Mr. Wells, Wilson explained "this is not a real complicated thing," noting one has to remove silt from the ditch and place it as closely beside it as you can. Wells history of correctly doing past jobs led Wilson to think he would do job right. However, he acknowledged that in the future the District would be more specific in details of work to be done.

Wilson stated that the Board understood they had a 75 foot right-of-way to work within for the cleaning, later clarifying that the 75 feet applied on either side of the bank. To the extent Wells exceeded that right of way, there was thought that by clearing beyond 75 feet, Wells' job was made easier and this had the effect of increasing the amount of clearing he could accomplish, within the allotted funding. However, even with the increased efficiency of that approach, Wilson conceded it was not necessary for Wells to clean as far back as 175 feet from the ditch.

Once EPA became involved, Wilson related, Carlson brought up an "emergency action permit" which they needed in order to get an "after-the-fact" permit to address the first half mile

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of the District, including, but not limited to permits, permit applications and other correspondence." Respondent took this request as seeking historical information and on that basis submitted representative minutes. Wilson did not interpret the request as one for the minutes about the challenged activity, as he thought it was obvious what the District had done at the site. Although the Court considered the response to be a reasonable explanation, Respondent's Counsel then introduced the minutes concerning the challenged activity, which revealed that the District was not hiding anything, as the text provided: "Directors present were Jerry Gard, Dennis Harlan, Maydine Payne, Fred Wilson and Sharon Strain. Others present, Mr. Wells. The board called this meeting to discuss the ditch south of the road. After much discussion, Jerry Gard said he would be willing to borrow $75,000 to repair this ditch so it would require only maintenance of mowing and spraying to retain the flood water south. Sharon Strain said that she thought since the short-term loan was paid off that it was for $50,000 and that this was as high as the loan for the project should be. Jerry Gard asked if she would put that in the form of a motion. Sharon Strain made a motion that $50,000 on the short-term loan be borrowed for this project. Fred Wilson seconded the motion. All agreed. The ditch behind Fred Wilson was discussed. Dennis Harlan made a motion that the Greenfield Bayou & Ditch Conservancy District pay for the seeding since Fred Wilson had done the bulldozing. Fred Wilson seconded the motion. There was no objection from the board. Signed Sharon Strain, secretary." Respondent's Exhibit "BB" Tr. 214.

– the southern 2,300 feet, from the County Line North where dredging had occurred. Thereafter the District hired Wells to come back and level the spoil pile. They also planted trees at the site and, as further mitigation, bought a 40 acre tract,[19] where they planted trees on seven acres of that tract. Tr. 170. The cost for this acreage was around $36,000 to $38,000. The district incurred other expenses too, in relation to this activity, spending in excess of $5,000 for consulting, legal, and tree planting fees. Wells had been paid around $ 35,000 and then paid an additional $1,800 to $2,500 to level the spoil pile. As shown on a document prepared by an accountant, the District's annual income is roughly $30,000 and it has debt in amount of about $37,000. Tr 180. Last year, a levee break cost the District $32,000 and another $16,000 will need to be expended to fix that. Other expenses include mowing and herbiciding, with yearly mowing costs at between $5,000 to $7,000. Tr. 181.

Respondent's second witness, Mr. David Daugherty, is the Drainage Coordinator for City of Terre Haute. He has also served on Vigo County Drainage Board, as an appointed member, acting as the Board Chairman over the past seven years. Through Daugherty, Respondent introduced Exhibits K and L. The former, is a November 1994 letter from Daugherty to the Corps, informing that the Drainage Board was considering reconstruction of a ditch within its jurisdiction known as "Cox Ditch # 2 ." The Board, wanting to be sure that it was "meeting the requirements of Section 404 of the Clean Water Act," asked that the Corps review its plans but it also added its view that no permit was needed for such reconstruction work involving regulated ditches. Tr. 217. The letter noted that heavy equipment – track excavators, dozers, and graders, would be used in the effort. It also advised that "[s]ediment will be ... leveled within 75' R/W of the ditch." Respondent's Exhibit K. In response, on December 23, 1994 the Drainage Board was advised by William Christman, the Chief of the Regulatory Branch for U.S. Army Corps of Engineers, Louisville District, that the information had been reviewed. Christman advised:

> **Certain activities *such as maintenance of existing drainage ditches* are exempt from Section 404 of the CWA.** However, please note, this exemption does not allow the construction of new drainage ditches or the maintenance of natural stream channels such as Otter or Sulphur Creeks ..... **your maintenance work on Cox Drainage Ditch # 2 is exempt from Section 404 of the CWA**.

Respondent's Exhibit L. (emphasis added)

Daugherty also testified that, in the course of his duties with the Vigo Drainage Board, he has become familiar with Indiana Drainage Law. In this connection, it was noted that Section 33 of Indiana Code 36-9-27 provides that the board, or its authorized representative has "the right of entry over and upon land lying within seventy-five (75) feet of any regulated drain ... [and that] [s]poil bank spreading resulting from the ... maintenance of an open drain may extend beyond

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[19]Wilson marked the location of the 40 acre site upon Respondent's Exhibit O, drawing an "X" to designate the 40 acres. Tr. 171. Forty acres was more than needed but the District was unable to find a 7 acre tract. Tr. 172.

the seventy-five (75) foot right-of-way [under certain conditions]. Respondent's Exhibit CC, IC 36-9-27-33.

Dougherty stated it was not customary practice for the Board to have petitions for reconstruction of ditches reviewed by the Corps. The Board makes these decisions but for the Cox Ditch # 2 it wanted to be sure that its current understanding of the law was still correct.[20] Tr. 223 - 225.

Upon the completion of Respondent's case, EPA offered two rebuttal witnesses.[21] Forest Clark was recalled and through him EPA Counsel attempted to introduce the field notes of a Fish & Wildlife biologist who had conducted a migratory bird count at Greenfield Bayou. These notes were not part of EPA's prehearing exchange which counsel attempted to excuse on the theory that he had not planned to use it in the government's case in chief. The Court is unaware that such a theory is an acceptable basis for holding back material in the prehearing exchange and counsel did not offer any authority for that position. In any event, as the field notes spoke only to conditions before the maintenance work began and no corresponding post-maintenance study has ever been made, the Court ruled that the document could not be admitted. Tr. 237.

The Parties' Arguments

EPA's Post-Hearing Brief and Respondent's Reply Brief

EPA asserts that the elements necessary to establish a violation of Section 301 of the CWA – that the Respondent is a person, which added a pollutant, from a point source, into waters of the United States, and which addition was unpermitted – have all been established. EPA Br. at 7. It is true that there is no controversy regarding several of these elements. Two of these elements require discussion. Noting that waters of the United States includes wetlands, EPA asserts that the evidence establishes "that the 26.2 acres at the Site which are the focus of this proceeding are waters of the United States." However, the Agency then proceeds to blur the details of the nature of these waters. It notes there was testimony of "the *presence* of wetlands on the site." *Id*. at 10 (emphasis added). Looking to the parameters used in the Army Corp of Engineers' Wetlands Delineation Manual, it maintains that the evidence shows the presence of hydric soils,

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[20]During cross-examination Dougherty was shown an Indiana Drainage Handbook, dated October 1996, or nearly two years after the activity in issue in this proceeding. As EPA counsel could not demonstrate this handbook was unchanged from the handbook which existed at the time in issue, it was not admitted due to a lack of materiality.

[21]The second rebuttal witness, Mr. George Higginbotham, lives within the Conservancy District. He stated that he observed the work being done at the ditch and questioned why the clearing was so extensive. He was also concerned about how the expense involved could impact his taxes. He admitted that the effect of cleaning the ditch caused the water to flow faster now but this was not beneficial for his land, which is to the north of the site. Tr. 240-247.

hydrophytic vegetation and a site hydrology to support those soils and vegetation. Referring to the testimony of witness Carlson, it asserts that the number of wetland acres impacted was somewhere between 24.4 and 28.5 acres. *Id*. at 10-11. Thus, EPA describes the case as a straightforward and simple matter: the waters of the United States involved here were wetlands and the District had no permit to discharge pollutants into them. *Id*. The problem with this analysis is that there was no dispute that wetlands are adjacent to Prairie Creek and Negro Ditch. Rather, the paramount question is whether the CWA's maintenance exemption applies to the Creek and Ditch involved here.

EPA also addresses the District's affirmative defense, which it characterizes as the claim that for "approximately 15.8 of the total 26.2 acres of jurisdictional wetlands filled, there is [no Section 404 violation] because that filling was performed to maintain a drainage ditch, and is therefore exempt from regulation pursuant to 33 U.S.C. § 1344(f)(1)(c)." *Id*. at 19. It maintains that Prairie Creek is not a "drainage ditch" under the CWA. EPA notes that "the creation of Negro Ditch in 1914 did serve to drain uplands to the north of that excavation." However, it asserts that the southern half of the Negro Ditch, which starts at the point[22] where it intercepts Prairie Creek, is no longer a maintenance ditch. Where Negro Ditch functioned to drain land not previously subject to drainage, EPA maintains it is properly described as a "drainage ditch," but where the Ditch functioned to "merely reroute[ ] Prairie Creek," it is not. *Id*.

EPA also contends that District's "clearing timber from over 26 acres of forested wetland adjacent to Negro Ditch and Prairie Creek and the subsequent scraping of soil, leveling of spoil banks, and piling of organic material in those wetlands goes far beyond work associated with 'maintenance of a drainage ditch' under section 404(f)(1)(c) of the Clean Water Act." *Id*. at 20. It states that the District has conceded that 10.4 acres of the 26 acres involved was not exempted maintenance and asserts that, as to the remaining 15.6 acres, respondent has failed to meet the evidentiary burden of its affirmative defense that those acres are within the maintenance exemption. However, EPA agrees that if one assumes that "the original 1914 excavation which captured Prairie Creek [meets] the definition of a drainage ditch," and if the Respondent had limited its work to "removing dredged spoil from the bottom of the stream and piling it on the existing spoil banks, a maintenance exemption could be justified." This is because "[s]uch sidecasting of the dredged spoil onto and just beyond the existing spoil banks are the types of activities which would be exempt from section 404's permit requirement." *Id*. EPA contends such a situation does not exist here because "the pollutants deposited by Respondent were in waters ... not previously subject to maintenance work." This is so because the District engaged in "unpermitted filing of wetlands adjacent to the ditch and creek[ ] beyond its historic spoil banks" as to all 26 acres. *Id*. at 21. Further, EPA contends that "there are no specific facts of record which would justify the need to destroy over 26 acres of rare forested wetland extending 75 to 190 feet from the banks of the 1914 excavation to maintain this ditch." *Id*.

Last, EPA addresses the District's reliance on Indiana Drainage Law, IC 36-9-27 and Section 33 of that law, which refers to a right of entry within 75 feet of any regulated drain. It asserts

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[22]EPA states this interception point is reflected in Exhibits 1 and 2Q.

that, unless there is an approval of a state permit program under Section 404(g)-(h) of the CWA, a state statute is "simply irrelevant." Indiana has no approved state permit program. Further, assuming it is relevant, EPA asserts that the District still failed to meet the Indiana Drainage Law requirements because it did not follow the very specific procedures to be taken before maintenance of a drain may be undertaken. Nor is there evidence that the Conservancy District is an "authorized representative" of the Drainage Board or the county surveyor, an essential requirement for one to have a right of entry. In any event, the District exceeded the right of way, which is only 28.2 feet, not 75 feet.

The District, in its Reply, observes that EPA has conceded that in 1914, a straight line excavation, which captured and rerouted the flow of Prairie Creek, a free-flowing stream, was made from County Road 67 to the Vigo/Sullivan county line, and that the District hired Wells to clean out Prairie Creek and Negro Ditch for the 2 ½ mile length shown on Exhibit 2Q. When the District asked EPA's witness what part of this 2 ½ mile length would be considered a "ditch," the witness stated it would be "[t]he place name of Negro Ditch from what is labeled County Road 67 West, also known as Bowen Drive, where the waters – Negro Ditch intersect south to its junction, Prairie Creek." However, the witness distinguished the "ditch" from a "drainage ditch," because it is "a ditch that carries flood waters out to the - - in conjunction with Prairie Creek out back to the Wabash River. It asserts that EPA agreed the District has the right to maintain the ditch north, without a permit, under Section 404, subject to the recapture provisions of Section 404 (f)(2).

The District notes that in 1914 "a ditch was dug from County Road 67 for approximately two and one-half miles south to County Line Road. It also asserts that EPA has pled, and the record supports a determination that the 1914 excavation is a drainage ditch, and consequently is within the drainage ditch exemption under Section 1344(f)(1)(c) of the CWA. It observes that the record contains no evidence that the ditch was widened or deepened. The District further notes that there is no EPA or Army Corps of Engineers regulation "limiting the area adjacent to a drainage ditch which might be used in conjunction with the drainage ditch exemption." Respondent's Reply at 3. Absent such a regulation, Respondent contends there is no federal preemption and consequently EPA cannot assert that Indiana's 75 foot limitation for drainage ditch maintenance is irrelevant. Further, it contends that if the exempted area adjacent is left to the discretion of the Corps of Engineers on a case-by-case review, the effect would be a de facto elimination of the CWA's permit exemption, as no maintenance could be undertaken until the Corps had announced the scope of the permissible area adjacent to the drainage ditch available for such maintenance. Thus, the District concludes that, as the only state or federal constraint on maintenance activity is that all such activity be conducted within 75 feet of the ditch, activity within that zone should be deemed to be within the ditch maintenance exemption. *Id*. at 4.

Respondent Greenfield's Post-Hearing Brief and EPA's Reply

Respondent asserts that the drainage ditch exception under Section 404 (f) applies to the waters in issue in this case, but concedes that "at least some acreage was in fact a violation of a

permit requirement... .” Respondent’s Post-Hearing Br. at 2. It notes that the Section 404 permit exemption extends to the discharge of dredge or fill material “for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches.” *Id*. Observing that this permit exemption does not extend to “[a]ny discharge of dredged or fill material into navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced ... ,” the District notes that EPA produced no evidence, nor did the parties stipulate, that the contested activity had such a purpose of creating a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced.

Respondent points out that it is a conservancy district and that as such it is responsible for the maintenance of levies and ditches within its district. The District encompasses eleven miles of levy, two principle ditches – the Oxedine Ditch and Negro Ditch, and several smaller ditches. Although the Oxedine Ditch drains much of the District, it ceases to function when the Wabash River gets too high because Wabash waters flow back into the Oxedine during those times. It is at those times that the Oxedine Ditch is closed and Negro Ditch serves to provide drainage for the District. The Negro Ditch “flows due south along a half-section line 15,447' from County Road 67, also known as Bowen Drive, to County Line Road separating Vigo and Sullivan Counties.” *Id*. at 3. Negro Ditch has a long term existence, as reflected in a 1914 map by Corps of Engineers, Louisville, Kentucky. Additionally, the Order Book for Vigo Circuit Court, dated January 13, 1916 reflects an entry describing Negro Ditch as the “main ditch.” “Along its course it meets a confluence with Prairie Creek form the east. Historically Prairie Creek flowed further west than Negro Ditch and then southerly in the vicinity of the west bank of Negro Ditch to a point of re-confluence at the southern most end of Negro Ditch.” Respondent’s Post-Hearing Br. at 3.

Due to sediment flowing upstream from Prairie Creek and settling in Negro Ditch, north and south of the northerly Prairie Creek confluence, Negro Ditch had become plugged, preventing water from flowing south along it. The plug, based on a survey conducted at the behest of the District, ran between the Negro Ditch in the north at County Road 67 (“Bowen Drive) and to the south at County Line Road, 15,447' downstream. While the relative elevations at Bowen Drive in the north and County Line Road in the south were 0.0' and -1.68', the sediment had produced elevations up to 6.18' between the north and south points, thus preventing the flow of water south along Negro Ditch. Because of this, the District met and decided to clear Negro Ditch of the sediment build up, employing contractor Warren Wells to clear the built-up sediment. *Id*. at 4.

Respondent asserts it was entitled to maintain the drainage ditch, under the CWA’s Section 404 (f)(3) exemption from permits for such work. Noting that the Federal District Court in *Sargent County*[23] upheld the applicability of the maintenance exemption where the original width and depth of the ditch was not changed, Respondent points out that the record contains no

[23] *United States v. Sargent County Water Resource*, 876 F.Supp.1090 (D. N.D. 1994)

evidence that "any excavation was done of Negro Ditch lower than its original channel or wider than its original width." *Id*.

The District also notes that a previous administrative determination by the Corps of Engineers supports its position. *See* Ex. L, letter from William Christman, Chief of the Regulatory Branch, for the U.S. Army Engineer District, in Louisville Kentucky. Christman advised the Terre Haute, Indiana Vigo County Drainage Board in December 1994:

> Certain activities such as maintenance of existing drainage ditches are exempt from Section 404 of the CWA. However, please note this exemption does not allow the construction of new drainage ditches or the maintenance of new drainage ditches ... ."

Id.

As in the Vigo County example, Respondent notes that it also intended that its contractor only perform clearing and brush removal, on one side only, within a 75' right-of-way.

Addressing the amount of wetlands impacted by Respondent's actions and accepting the testimony of EPA witness Carlson, Respondent calculates that once the area within 75' of the ditch is excepted, a remainder of non-exempt wetlands totaling 10.6 acres was impacted. It notes that Indiana drainage law at IC 36-9-27-33 permits a 75' maintenance right-of-way for regulated drains and that the record is bereft of any evidence that such a maintenance right-of-way was unreasonable or excessive. Further, it points to the Corps of Engineers' tacit approval of the 75' right-of-way, as expressed in its advice to Vigo Drainage Board.

In its Reply, EPA, after noting that the Respondent has conceded that some 10.4 acres of wetland were outside of the permit exception, as that acreage was beyond "75 feet from the banks of Negro Ditch and Prairie Creek," reasserts that the remaining acreage is not within the ditch maintenance exemption and consequently that the violation encompasses the entire 26 acres. EPA repeats that the ditch maintenance exemption is an affirmative defense, which includes the burdens of showing the elements set forth in Section 404(f)(1)(c) and (f)(2). Thus, it asserts that EPA had no duty to introduce evidence regarding whether the 75 foot maintenance way was unreasonable or excessive, nor need it show that any excavation of Negro Ditch was lower than its original channel or greater than its original width. Further, EPA believes it had no burden to introduce evidence that the Respondent's activity brought an area of navigable water into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of those waters reduced. EPA Reply at 2-3.

Accordingly, EPA asserts that the Respondent failed to establish its affirmative defense. It challenges Respondent's claim that Negro Ditch has been long established. It asserts that the 1914 excavation re-routed Prairie Creek from its original "free-flowing meander" and that the excavation's effect in capturing Prairie Creek, only demonstrates a need to clean out sedimentation created by activity, which, at most, translates into a 28 foot right-of-way for such

cleaning, not the 75 to 190 foot swath Respondent made. It dismisses the Corps of Engineers opinion that Cox Ditch # 2 could be maintained without a permit as being instructive for similar work on other excavation projects, because the Respondent did not establish "that conditions on [the] Cox Ditch were similar to those pertaining to this case." To support this contention it notes there was no evidence that the Corps "ever reviewed work on the project which is the subject of this proceeding," nor did the Respondent establish the type of area filled by the Cox Ditch work, such as whether the work was upland, wetlands, and how much of such land types was filled. *Id*. at 4. It also attempts to distinguish the Cox Ditch work on the basis that the County Drainage Board was involved in that work, not the Conservancy District, and by the fact that written plans were submitted to the County Surveyor, to the Drainage Board, and then to the Corps of Engineers before any work began. *Id*.

Nor does EPA believe that IC 36-9-27-33 provides justification for the Respondent's actions here. The fact that a state statute creates a right of way permitting the "maintenance of the adjoining ditch" does not require such maintenance activity nor does such a state statute operate to supercede the independent federal authority under the CWA. EPA believes that the Respondent, not EPA, must establish as part of its affirmative defense that "75 feet of clearing [was] necessary and reasonable in order [for it] to perform maintenance on Negro Ditch," and that the Respondent failed to make such a showing.

The Court's Liability Determinations

EPA has asserted that the Respondent, Greenfield Bayou Levee and Ditch Conservancy District, dredged material from Negro Ditch and Prairie Creek and discharged that material over some 42 acres[24] of wetlands and navigable waters of the United States without possessing the requisite permit to do so, in violation of Section 301 of the Clean Water Act. The Respondent has contended that its activity, for the most part, was exempted from the permit requirement by virtue of the Clean Water Act's Section 404 (f)(3) exemption "for the purpose of ... the maintenance of drainage ditches." For the reasons which follow, the Court agrees with the Respondent.

Although EPA's witnesses tried mightily, through semantic contortions, to call Negro Ditch and Prairie Creek anything but drainage ditches, the evidence demonstrates they are exactly that. EPA witness Siemsen described Negro Ditch as a straight line and acknowledged that is the signal that it was created by men, not nature. All the maps in the record reflect that, for the entire length in issue, Negro Ditch, including the point after it converges with Prairie Creek, is a straight line. See, for example, EPA Exhibits 1 A and 2 Q and R's Exhibits J 1 and O. No recent, post Clean Water Act, creation, Siemsen acknowledged that man has influenced the Ditch/Creek "over the course of the last *hundred years*." Tr. 38 (emphasis added). Siemsen admitted that, together, Negro Ditch and Prairie Creek combined to form a drainage function. This was consistent with testimony of EPA's Forest Clark, of the United States Fish & Wildlife

[24]Much later, it decided the acreage was significantly less, as it revised its claim to 26 acres.

Service, who admitted that a stream or channel runs through the area in issue. Continually, EPA witnesses, with their own words conceded the reality that this case involves a ditch:

> "[t]he west bank of Prairie Creek-Negro Ditch had been cleared in that area as well as it appeared that dredging of the channel had been going on ... and ... [Clark observed] " two gentlemen who were ... dredging the stream..."

Clark testimony at Tr. 107.

The testimony of EPA's chief witness, Gregory Carlson, effectively made the same concession – Negro Ditch and Prairie Creek are historical drainage ditches. Carlson admitted he found in his investigation:

> ... all sorts of historical records of the formation ... way back in the early 1900s of the levee, the building of the levee, the digging of Negro Ditch, the channelization of Prairie Creek.

Tr. 161.

While the Court concludes that EPA's own witnesses established that Negro Ditch and Prairie Creek are drainage ditches, the Respondent's Exhibits, introduced through District Chairman Wilson, also established that the ditch in issue has been present since at least 1914. Respondent's Exhibits E, G, and I. Thus, by whatever name one prefers to call it, Negro Ditch/Prairie Creek or the "main ditch," running at least from C.R. 67 West down to County Line Road, form a straight line and constitute a drainage ditch. *See* EPA Exhibit 2 Q and Respondent's Exhibit O. A broad hint about the District's long established purpose is apparent from its very name. After all, the District is not called the Greenfield Bayou Parks and Recreation Department. Rather, it is named the Greenfield Bayou Levee & *Ditch Conservancy* District.

The Court finds that the discussion and analysis presented by the Federal District Court in *United States v. Sargent County Water Resource*, 876 F.Supp.1090 (D. N.D. 1994) ("*Sargent*") is instructive here. As the District Court in *Sargent* noted: "The exemption from the permit requirements under 33 U.S.C. § 1344(f)(1)(c) for 'maintenance of drainage ditches' applies to 'any discharge of dredged or fill material that may result from ... the maintenance (but not construction) of drainage ditches." 33 C.F.R. § 323.4(a)(3). *Id*. at *1098. Like the Greenfield District ditch here, the ditch in *Sargent* was constructed long ago,[25] and, again as in Greenfield, its location has remained unchanged. Thus, in neither case has the government asserted that the work involved construction of a new drainage ditch.

In a striking similarity with this case, the government in *Sargent* argued that there was no evidence that any maintenance had been done prior to the complained of activity then in issue.

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[25]The *Sargent* ditch was constructed some seventy (70) years earlier.

However the District Court found that Sargent County had shown that the work performed was maintenance, not improvement, work with evidence that the drain had been maintained at least minimally throughout its history and that it had performed a drainage function.[26] As in Greenfield, the County in *Sargent* also directed the reputable contractor to perform only maintenance work on the ditch. While in neither case was the work performed perfectly, the District Court held that perfection is not required under the exemption. *Id*. at 1099. The record in *Sargent* established, as the record establishes here, that the "work directed by the County was for the purpose of maintaining an existing drainage ditch." *Id*. Thus, in both cases the "County set out to clean-out an existing drain ... [and in both cases] the County's objective of cleaning out the drainage ditch was accomplished." *Id*.

While the District Court recognized that the exemption is to be narrowly construed in order to avoid adverse impacts on wetlands, it distinguished other cases which had only remote similarities.[27] The District Court observed that those cases involved the "large-scale conversion of a wetland area ... in an attempt to convert the areas to agricultural use or the *construct*[*ion of*] drainage ditches in order to remove water from wetlands." *Sargent* at 1100-1101. (emphasis added). Thus the District Court distinguished each of the cited cases because only a facial exemption existed and the intent of the respondents in those cases was to evade the Clean Water Act, whereas in *Sargent* the County was addressing an existing ditch that it wanted cleaned out. *Id*. Again, as in this case, the District Court observed that the purpose was to perform clean-out maintenance work in order to preserve a beneficial ditch that had been built long before the Act had been promulgated. *Id.* at 1101. Thus in *Sargent*, as in this case, the objective purpose was not a ruse or a pretext but was consistent with the respondents' stated intentions.

Unlike this case, in *Sargent* the government asserted an estoppel theory, arguing that the

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[26]The District Court also noted the state would not fund the work as it was deemed to be maintenance, which was not a fundable activity. *Id*. at 1098.

[27]The distinctions in those other cases were significant. In *United States v. Huebner*, 752 F.2d 1235 (7th Cir.) farmers had entered into a consent decree regarding maintenance of wetlands on their property. Under the consent decree those farmers agreed that no additional discharge of dredge or fill materials would occur without their first obtaining a permit. Thus, when additional work was performed, the court was examining whether the farmers had violated that consent agreement, and it found that not only did the respondents there deepen existing ditches, but also created a new ditch. The other cases discussed by the District Court were even more attenuated as each involved the 'normal farming' exemption. In *United States v. Akers*, 785 F.2d 814 (9th Cir.) the respondent *constructed* a three mile dike through wetlands; in *United States v. Larkins*, 657 F. Supp. 76 (W.D.Ky. 1987) the respondents acquired wetland property and proceeded to dig ditches and build dikes and levees upon it; in *United States v. Cumberland Farms*, 647 F.Supp. 1166 (D. Mass. 1986) the respondents attempted to convert wetlands to dry land farming by constructing new ditches; and in *United States v. Brace*, 41 F.3d 117 (3rd Cir. 1994) the respondents excavated land to install miles of pipe for drainage. Accordingly, none of those cases involved maintenance of existing ditches.

County had not been diligent in maintaining the ditch and therefore had lost its maintenance rights. As the CWA did not apply to wetlands until 1975, the District Court held that such a theory applied only from the time subsequent to the effective date of that Act. In another striking parallel between these cases, in *Sargent* there had been much talk of a diversion project but it too failed to be carried out, leaving the County to examine its own options for action. Thus, in *Sargent* the District Court determined that the County acted prudently. In doing so, it determined that the evidence as well as the credibility of the County witnesses, supported its conclusion that the County had met its burden of proof.[28] Further, the District Court noted that, while the regulations spell out details for some exemptions, "the regulations pertaining to the maintenance of [the] drainage ditch exemption under subsection 1344(f)(1)(c) do not contain an 'on-going' requirement." *Id*. at 1102.

Rather than viewing the District's actions as a "pretext," done as some sort of malevolent reaction to the news that the Corps had decided to drop the flood control part of its Greenfield Bayou Project, the Court finds that this argument is an irrelevant distraction. Upon arriving at the realistic conclusion that it could no longer look to others to deal with the drainage issues it faced, the District merely proceeded to address those matters on its own by using the express authority reserved for such maintenance activities under the CWA. Therefore, the Court finds that the Chairman of the Board Fred Wilson's explanation that, after the Corps backed out of its levee project, he assessed the District's priorities and concluded that as this Ditch/Creek composed the main outlet, maintenance should be done there first, was a forthright and credible explanation for the District's action.[29]

Having determined that the Greenfield Bayou Levee & *Ditch Conservancy* District's challenged activity was performed for maintenance on the ditch and therefore exempt from the general permit requirement under the CWA does not completely resolve the case because the District has admitted that, in performing the ditch maintenance, its contractor impacted more adjacent wetlands than was necessary. Accordingly, this decision now addresses the amount of land that exceeded that which was necessary to perform the ditch maintenance. Once that has been articulated, the Court will address the appropriate penalty to be assessed.

Although the Complaint itself did not list the number of wetland acres alleged to have impacted, the prehearing exchange, provided some four months later, declared that about 42 acres were involved. However, after Carlson subtracted the "elevated spoil piles that pre-existed

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[28]The Court summarily rejected any assertion that the "recapture" provision applied because there was not evidence that the activity in question brought the area into a use to which it was not previously subject. *See Sargent* at 1102-1103. EPA did not claim that the recapture provision was involved in Greenfield and the Court concludes that no "new use" was involved.

[29]This is not to suggest that the District needed to justify its reasoning before proceeding. The CWA imposes no such requirement prior to conducting maintenance. The only question is whether the purpose of the action was for the maintenance of a drainage ditch, which it indisputably was.

the district's work"[30] he revised that figure to 26.2 acres. Tr. 163. The Court finds that the wetland acreage impacted beyond what was necessary for the ditch maintenance, was actually about 10.6 acres.[31] This figure is derived from Carlson's agreement concerning several critical points. First, he agreed that the entire length of the excavation was 13,265 feet. When asked to assume that the violative activity was limited to 75 feet away from the top of the bank, the location Respondent's counsel contended was the limit of the District's right of way, Carlson agreed that if one takes the 22.8 acres which lies within the right of way and deducts the 7.2 acres of spoil within that right of way acreage, 15.6 acres remain. Carlson then agreed that if one subtracts the 15.6 acres from the 26.2 acres he calculated as impacted wetland, one is left with 10.6 acres. Thus, Carlson agreed that, under those assumptions, 10.6 acres represented wetlands lying more than 75 feet from the bank of the ditch. Tr. 62. Further, EPA's own Exhibit 2 Q reflects that a significant majority of the challenged maintenance activity was within the 75' right-of-way. While that exhibit reflects a 2,640' length where the clearing extended 100' beyond the 75' right-of-way, the 9,300' remainder records that the clearing was 75'.

The District has observed that there is no evidence in the record that the work it performed widened or deepened the ditch from its original construction. It also takes note that neither EPA nor the Corps identified any regulation or interpretation limiting the available area adjacent to a drainage ditch that may be used for maintenance. Obviously, any maintenance work would involve some disturbance of adjacent land to accomplish the task. Further, any suggestion that the Corps must first examine and then approve any proposed ditch maintenance on a case-by-case basis would vitiate the exemption Congress intended.

Even the Complaint recognized the District's right of way. As EPA declared:

> [The District] is and was at all times relevant to this Complaint, the legal holder of a 150 foot right-of-way, i,e., 75 feet east and west from the centerline of both Negro Ditch and Prairie Creek, in Sections 19, 30, and 31, Township 10 North, Range 10 West, in Prairie Creek Township, Vigo County, Indiana.[32]

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[30]Although the issue was resolved earlier in this Initial Decision, the quoted passage provides another example establishing the long existence of these ditches by Carlson's concession that elevated spoil piles pre-existed those created by the challenged activity. Not every concession by EPA's witnesses that these ditches had long existed has been spelled out in this section of the Court's decision. The reader is directed to the Findings of Fact section for other examples of this concession.

[31]EPA did not measure the entire area it claimed had been affected. This was understandable but the point is that, as the evidence of record is based on estimates, no exact figure can be determined.

[32] The challenged activity occurred at this site

Complaint at 3-4, ¶ 12.

Thus, on the basis of the record evidence, and accepting EPA's admission that there is a 75 foot right-of-way, the Court concludes that the amount of land in excess of that needed to maintain the ditch was 10.6 acres.

The Court's Penalty Determination

The determination of a penalty is to take into account "the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require." CWA § 309(g)(3), 33 U.S.C. § 1319 (g)(3). While there is no agency penalty policy to be applied in CWA cases for cases that are not settled, the Court still assesses the record evidence.

Carlson testified that he determined the penalty that was proposed by applying those factors set forth in Section 309(g)(3).[33] Tr. 24. Specifically, he testified that in considering the nature of the violation he concluded there had been unpermitted discharge of dredge materials into waters of the United States, namely the bottom land wetland forest. Tr. 25. Because the Court has determined that a much reduced acreage was involved, Carlson's view of the nature of the violation was in error, as he viewed it as a completely unpermitted discharge into waters. It must be noted that EPA acknowledged that, at least for the 9,300' section to the south, the clearing was

75'. Nor did EPA offer any evidence regarding how wide a strip of land would be needed to allow the District access to the site and a sufficient area to permit the maintenance. Seventy-five feet, or twenty-five yards, is a small width for heavy equipment to function within.

As for the circumstances of the alleged violation, Carlson took cognizance of the conflict between the Corps "large-scale environmental planning and ecosystem restoration project[34]

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[33]Carlson also identified as part of his penalty proposal considerations, EPA Exhibit 3, which is an August 10, 2000 letter from EPA to Indiana's Department of Environmental Management, notifying that Department of its proposed penalty assessment. EPA introduced an affidavit, showing that it noticed the Complaint in the local newspaper, along with a letter from Ms. Ramona Clark, commenting on the proposed penalty and her worry over whether a fine will result in higher taxes for those residing within the conservancy, and a letter from LaRay Danner, which also commented on the public notice in the newspaper. *See* Exhibits 4A, 4B & 4C. Tr. 22-24.

[34]It is ironic that, unlike the Respondent, who has been faced with the charge of depositing dredged material on wetlands without the necessary permit, the Corps intended to use

ongoing in [the] area" and the District's "interests that wanted drainage through [that] area." He viewed the timing of the District's work as "closely associated" with the conflict over the drainage that had been discussed at the Corps' public meeting when they discussed dropping flood protection and focusing on environmental restoration. In the penalty discussion of EPA's prehearing exchange, EPA asserts that because the Respondent has worked with the Corps and the Indiana Department of Environmental Management on ditch cleaning and levee repair issues, and because the Greenfield Board had been involved with the Corps' proposed Restoration Project, they were aware of federal and state environmental water regulations. EPA suggests that the Corps' interest in pursuing the ecosystem restoration project "may have provided a pretext for [it] to act quickly and clean out Negro Ditch and Prairie Creek." EPA Prehearing Exchange at 9.

Carlson tried, unsuccessfully, to support the 'pretext' assertion on these same grounds. Tr. 193-196. On cross-examination, Carlson was shown Respondent's Exhibit N, a letter from Mr. Powell, a lawyer then representing the District, and he agreed that letter, which claimed any violation was inadvertent, was part of the reason he viewed the District's activity as a pretext. On re-direct, he added that "other sources" led him to conclude that the letter was a pretext. Tr. 74. These "sources" were people that he spoke with in the District, who relayed that the District was concerned "about their future drainage activities" and that it acted to kill the Corps' ecosystem restoration project. Tr. 75. Carlson attempted to put a face on the "sources" by relating that former Board member Maydine Payne told him the Board was upset that the Corps had decided to drop the flood control aspect of its project and thereafter decided to clean out the ditches before the Corps implemented its ecosystem restoration plan. Tr 197. When pressed to state how this information established a 'pretext' Carlson inconsistently asserted: "[t]heir pretext is that they were ignorant; that they did not know that they needed a permit." Tr. 198. Finally, Carlson considered the "rare and unique quality of this particular wetland system and the functional value it maintains" in evaluating the circumstances.

As noted, Carlson's view that the District operated under a "pretext" was in error. This error was compounded by factoring this erroneous conclusion into his penalty computation. The District had a right to maintain the ditch in issue. Therefore there is no place for EPA to speak of

its actions as a pretext. Beyond that, Carlson's own description of the District's "pretext" contradicts such a conclusion. Given that a pretext is "an effort or strategy intended to conceal something,"[35] and the fact that the District's maintenance purpose was to unclog the ditch, no pretext was involved. Further, Carlson's admission that the District was "ignorant, ... not

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dynamite to carry out its plan to relocate Negro Creek and Prairie Creek back to its best guess of their original, albeit meandering, location in order to create resting stops for migratory birds. Dynamite, one would presume, would have some impact on the area's wetland.

[35]American Heritage Dictionary of the English Language, 3rd Edit.1992

know[ing] that they needed a permit" refutes that claim.

In evaluating the "extent" factor, Carlson considered 26 acres to be a large area and therefore significant. He acknowledged that in the original administrative order it was asserted that 42 acres had been filled, but the 16 acre reduction in his estimate did not alter his view that the area remained significant. The Court concludes that EPA's evaluation of the "extent" was in error for the same reason it miscast the "nature of the violation." The great reduction in the amount of acreage, a reassessment that occurred twice, should have resulted in a reduction in the evaluation of this penalty factor.

As for the "gravity" factor, Carlson considered the area as "a very high value wetland system." In his view, Respondent's activity caused a "complete destruction of the habitat and degraded the functional values of the wetlands." This assessment, built on the assumption that 42, and later 26, acres had been destroyed without right, as with his assessment of the criteria above, also resulted in an overstatement of the gravity. In addition, as to the 10 acres that were impacted, EPA did not prove, under the preponderance standard, that the District's excess activities had a profound effect on the wildlife. With no post-filling evaluation to compare with the pre-filling conditions, the evidence was conflicting on the effect of the activity on wildlife.

Carlson also spoke to his view of the "economic benefit" the District realized from its violation. His analysis rested on the assumption that if the District had gone through the permitting process and the permit had been approved, certain conditions would have been imposed with that permit. These would have involved minimizing the wetland area impacted. Because this did not occur, Carlson theorized these mitigation costs had been delayed. The agency arrived at a dollar figure by plugging those costs into its "Ben" computer model. Despite his explanation for determining the economic benefit, Carlson revealed that, in fact, he did not assume that the Respondent would have ever received a permit. Instead he calculated only the mitigation aspect, which he believed represented the major costs. Tr. 29. His estimate for this came from a 7 ½ acre parcel that the District had offered up as mitigation. They offered to replant that area into a bottom lands forest and manage it for a decade and it was the costs associated with that effort, which included purchasing that acreage, that Carlson ultimately used. Using these figures in the EPA "Ben model" produced an economic benefit of $8,600. Tr. 33. Further it asserts that, per Environmental Appeals Board decisions, it need not establish such benefit amount with precision by showing an exact amount, but that a reasonable approximation satisfies its obligation. Here, EPA notes that the Respondent's brief did not object to the manner

of EPA's calculation, nor the figure it produced.[36]

[36]However, the District clearly objected to the penalty EPA is seeking. In any event, at this juncture, it is for the Court to determine the appropriate penalty.

The economic benefit/savings factor is intended to remove any financial advantage gained through a violator's failure to comply with the CWA. Here, the District was not avoiding a CWA expense that similarly situated people would incur. The reasoning applied by EPA was flawed because it went down an imaginary road to arrive at contrived economic benefit. This reasoning assumed that a permit was required and from that it assumed that obtaining such a permit would have entailed certain costs to get one. To determine these costs, it looked at the monies the District expended to appease the complaining authorities, and concluded that those expenditures should be considered as its economic benefits or savings. Thus, employing jabberwocky, EPA effectively tried to punish the District's own mitigation efforts by counting it against them twice: once, by virtue of ignoring the expenditure itself and a second time, by counting those funds as an "economic benefit." Obviously, those expenditures should have been factored to lessen, not increase, any penalty proposal.

In terms of the previous history of violations, Carlson acknowledged Respondent had no prior violations. All EPA policies use a previously pristine environmental record, such as the District's record here, only as a basis for a respondent to avoid an *increase* in the proposed penalty, the theory being that a reduction is already built-in to the penalty amount, as it assumes full past compliance. However, apart from the policies, there is nothing to suggest that a court may not view a spotless previous history as a factor to *reduce* the penalty in a given situation and the Court does so here.

For the analysis of the "degree of culpability," Carlson considered that the District and its predecessor entity had a long history of dealing with the Corps of Engineers. Tr. 35. In this regard, as evidence of this relationship, he identified a June 13, 1993 letter from the District in which it informed the Indiana Department of Natural Resources of its creation as a conservancy district. The letter, a copy of which was sent to the Corps, also inquired about "receiving a permit for work on the levee and the ditches..." Tr. 36, EPA Ex. 27. Carlson believed this letter and the long relationship evidenced by Exhibit 27, spoke to the Respondent's culpability. As for the "ability to pay," Carlson had audited annual reports from 1997 through part of 2002, which reports were supplied by the District. *See* EPA Ex. 20 A through 20 J. He considered these when he issued his administrative penalty order. Tr. 39. He also identified Ex. 21, which reflects EPA's required letter to the District informing it of the proposed penalty. The letter offered the District the opportunity to add any information regarding the penalty the Agency was seeking, but Carlson testified no response was made.

As reflected in EPA exhibit 18, Carlson ultimately recommended taking an enforcement action and a Section 309 administrative order was issued on May 5, 1998. A purpose of this Order was to direct the Respondents to take certain steps to come into compliance.[37] Carlson testified that, in determining what he believed to be an appropriate penalty, he evaluated the degree to which the Respondent followed the Administrative Order. Tr. 16. Respondent objected that this was not an appropriate penalty consideration but this was overruled since, right

[37]As EPA counsel conceded, this case is not about the enforcement of this Administrative Order; the case only deals with the alleged violation of Section 309 of the CWA.

or wrong, Carlson in fact considered it. As Carlson stated, in determining the appropriate penalty, he considered what he viewed as the District's recalcitrance in complying with the administrative order. He also considered both the broader deterrence to the regulated community and especially drainage districts within Indiana, as he viewed the problem here as emblematic of other existing drainage issues in other Indiana counties. Tr. 42. In determining the proposed penalty Carlson wanted the penalty to have the effect of deterring the District by making it clear they would know "they could go through something like this and that the penalty would be sufficient to deter them from doing that." Tr. 43.

EPA's contention that the District had not complied with the Administrative Order and that this was an appropriate factor to consider in arriving at its proposed penalty is flawed as well. First, there is no mention of the Administrative Order in the Complaint. The first mention of this appears in its pre-hearing exchange where it was applied under the "such other matters as justice may require" factor. EPA concluded that the Respondent had been recalcitrant in complying with that Order by its failure to submit "an acceptable mitigation plan." By assuming that the District was in fact in complete violation and then asserting, in addition, that it was not satisfactorily rectifying that violation, EPA was punishing the respondent before a violation was established in fact. This amounts to a sentencing first, trial later, policy and is rejected.

Accepting responsibility for the contractor's actions in exceeding the District's intention that the ditch maintenance not go beyond the 75' right-of-way, Respondent asserts that the $90,000 penalty sought by EPA is excessive. In this regard it notes that the District has already incurred substantial expenses associated with this matter. These expenses have included the purchase of 40 acres for use as mitigation, at a cost of about $36,000. Of this, at EPA's insistence, it has planted seven of those acres with trees, representing another expenditure in the amount of approximately $2,500. Beyond those ameliorating expenses, it still had to pay the errant contractor $35,000 for the work it could not complete because EPA acted as if there was in fact no maintenance exemption and insisted that clearing cease. Another approximately $1,800 was spent to level spoil piles from the contractor's previous excavation. These expenses present a heavy burden on the District, particularly when it is considered that it annual revenues to maintain its responsibilities are only about $30,000, and that it faced an unexpected $32,000 expense last year to repair a levy break. While not ignoring its responsibilities for the excessive clearing, it asserts that it took action to correct the contractor's overzealous clearing before any intervention by a regulatory authority, including EPA. In contrast, it maintains that the activity which EPA stopped was in fact lawful, as the contractor at the south end of Negro Ditch (i.e. Prairie Creek South) was working within the 75' maintenance right-of-way and thus within the permit exemption.

EPA notes that, regarding the proposed $90,000 penalty, the Respondent only addressed some of the factors to be considered.[38] Without conceding that only 10.6 acres were involved, instead of the 26.2 acres it believes were affected, or whether Prairie Creek is in fact a drainage ditch,

[38]Again, at this stage, it is up to the Court to address the penalty factors. This responsibility is not reduced where a respondent fails to specifically address some criteria.

which EPA continues to assert it is not, EPA believes that, if both of these issues were conceded for the sake of argument, the $90,000 penalty remains appropriate. EPA Reply at 5. It argues that even if only 10 acres were illegally filled, the activity still resulted in significant fragmentation of the forest because the clearing activity "occurred 'down the center' of the existing forest" with the effect that "no ecological restoration project of the type proposed by the proposed by the Corps of Engineers can now go forward." Thus, the "destruction and diminishment of [the] rare and valuable resource [involved] warrants the "size penalty Complainant proposes." *Id*.

As for the Respondent's ability to pay the proposed penalty, EPA asserts it "provided evidence ... that it considered this statutory factor and concluded, given the District's past funding of projects and their statutory authority to tax and borrow," they can the penalty as proposed. In contrast, it notes that the District never asserted that it could not pay the penalty nor did it offer up an alternative amount that it could pay. When Exhibit 22, a letter dated April 24, 2002, from Respondent's legal counsel, Mr. Hellmann, which contained District financial statements from 1997 through 2002, was considered by Carlson, he testified that it did not cause him to reevaluate his opinion about the District's ability to pay. Tr. 44. It argues that the District's discussion of those expenses it has already incurred and its unsupported claim that it incurred a $38,000 loss, do not establish that it can not pay the $90,000 EPA seeks. From EPA's perspective "[w]hile such a payment might be painful, causing pain is the purpose of a penalty." *Id*. at 6.

EPA acknowledges that the degree of culpability is a factor to be considered in assessing a penalty. While it notes that Respondent has asserted that it did not intend for its contractor to work beyond the 75 foot right of way, it responds that the Clean Water Act is a strict liability statute, making knowledge and intent irrelevant. By advancing that assertion in the discussion of the penalty assessment, EPA has thereby confused liability with the penalty assessment process. However, EPA asserts that the Respondent is "highly culpable" in any event. This is so, it urges, because, despite the District's claims that it never intended that the work exceed 75 feet from the ditch, it hastily hired contractor Wells to do the work after concluding that the Corps would not provide flood control. It hired Wells upon an oral agreement and without taking bids, factors which EPA believes evidences "extreme carelessness." *Id*. at 6-7. Further, it points to Board Chairman Wilson's admission that the Board gave "no specific instructions ... concerning the conduct of the work." *Id*. at 7. To the contrary, EPA views the evidence as showing the Board was complicit in the wetland destruction because several Board members were present when Wells was "denuding wetlands on the north end of the site" and yet permitted the work to

continue in the face of George Higginbotham's protests. Nor did the Board initiate corrective action to restrict Wells' clearing actions to within 75 feet from the ditch. Not only is there no evidence to support the District's claim in that regard, it contends that the testimony of Forest Clark and Higginbotham establish that the it was the Corps that took steps to stop the work, not the Respondent. *Id*. at 7.

The Court notes that, having found that 10.6 acres of wetland were outside of the permit exception, as opposed to the 26.2 acres alleged by EPA, this represents a 59.6 % reduction from the acreage EPA considered in arriving at its proposed penalty. Thus the "extent" of the violation is less than half of the acreage EPA used in arriving at its penalty. It is troublesome that in its brief EPA still insists that, even if the affected acreage is 10.6 acres, the penalty should remain unchanged. While troublesome to be sure, the kind of thinking that led it to adhere to the same penalty amount, even if the amount of acreage affected was reduced by more than half, was at least consistently rigid. This rigidity, even as the facts changed significantly, is more glaring when it is recalled that at the time of its original penalty proposal EPA believed that 42 acres had been affected. At that time it calculated that the penalty should be $137,500. After settling with Respondents Kenneth Wells & Sons and Leroy Wells Bulldozing for $10,000, a settlement which rested on the assumption that 42 acres had been impacted, EPA took the position the District should still pay a $90,000 civil penalty. This amount, EPA stated, reflected the offset from the settlement with the other respondents. Tr. 5. Thus, whether the affected area is 42, 26 or 10 acres, the penalty EPA has proposed against the District has not been reduced. One might think, assuming for the moment that all the other factors remained constant, and were accurately assessed, that an acreage reduction of more than 75% from that originally presumed would produce an in kind reduction in the penalty sought to around $22,000, but EPA's post-hearing brief rejects that idea, hewing to the full amount originally sought. So too, EPA's argument that the full penalty should still be paid because the District's activity ran "down the center" of the forest, ignores the fairly obvious reason that this occurred because that is where the ditch is located. As for the "rare and valuable" land involved, it must be remembered, without diminishing that observation, that it was 10 acres out of 1500[39] and EPA had no idea what percentage of the remaining 1490 acres were wetlands.

In the Court's view the vast reduction in the non-exempted acreage from the amount EPA believed to be present warrants, on that basis alone, a proportional reduction in the penalty. Obviously, in evaluating the "extent" component for a civil penalty, the amount of wetlands impacted is a significant consideration in assessing a CWA penalty. In addition, because the District's actions, when charged by EPA with violating the CWA, represented a salutary response and because that response does not fit within any of the other statutory penalty criteria, the Court

considers those actions under the "other matters as justice may require" criterion.[40] Those

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[39]Thus, at .6%, the 10 acres amounted to a little more than ½ of 1% of the 1500 acres.

[40]The Court expressly finds that failure to consider the District's actions in the wake of the charges would produce an inappropriate penalty because those actions could not be fairly considered under any of the other penalty criteria.

actions included the $36,000 the District expended by purchasing forty (40) acres for mitigation purposes, the $2,500 it spent on tree planting both at the site and on the mitigation acreage, and $1,800 to level the spoil piles created by the work at the site. When these factors are considered together with the evaluation of the other statutory criteria, as has been fully discussed above, the Court concludes that a $5,000 penalty is the appropriate penalty to be imposed. The Court recognizes that, as the District's mitigation expenditures themselves far exceeded the reasonable penalty EPA should have sought, an argument could be made that no additional sum should be imposed for the penalty. However, the District has acknowledged that it should have more closely monitored Wells maintenance activities and, in light of that admission, the Court concludes that some additional penalty should be imposed. Given the very modest financial means of the District, together with the mitigation expenditures it has already made, the Court is of the view that a $5,000 penalty is both significant and fair.

ORDER

A civil penalty in the amount of $5,000 is assessed against the Respondent, Greenfield Bayou Levee and Ditch Conservancy District. Payment of the full amount of the civil penalty assessed shall be made within thirty (30) days ***after*** this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c). Payment shall be submitted by a certified check or cashier's check payable to the Treasurer, United States of America and mailed to:

United States Environmental Protection Agency
EPA Region V
Regional Hearing Clerk
P.O. Box 70753
Chicago, Illinois 60673

A transmittal letter identifying the subject case and EPA docket number, plus the Respondent's name and address must accompany the check. Failure of the Respondent to pay the penalty within the prescribed statutory time frame *after* entry of the final order may result in the assessment of interest on the civil penalties. 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 the Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the EAB is taken from it by a party to this proceeding, pursuant to 40 C.F.R. § 22.30(a), within thirty (30) days after the Initial Decision is served upon the parties; or (3) the EAB elects, upon its own initiative, under 40 C.F.R. § 22.30(b), to review the Initial Decision.

So Ordered.

William B. Moran
United States Administrative Law Judge

Dated: December 13, 2002
Washington, D.C.