IN RE VICO CONSTRUCTION CORPORATION AND AMELIA VENTURE PROPERTIES, LLC

CWA Appeal No. 05-01

FINAL DECISION AND ORDER

Decided September 29, 2005

Syllabus

On January 12, 2005, Vico Construction Corporation and Amelia Venture Properties, LLC (collectively "Appellants"), filed an appeal from an Initial Decision issued on December 13, 2004, by United States Environmental Protection Agency Administrative Law Judge Carl C. Charneski ("Judge Charneski" or the "ALJ"). Judge Charneski determined that the Appellants committed two separate violations under section 301(a) of the Clean Water Act ("CWA" or "Act"). Specifically, Judge Charneski found that the Appellants had discharged fill material, in the form of wood chips, into wetlands that were waters of the United States, without a permit under CWA section 404, and that they had discharged pollutants in storm water in connection with construction activities without first obtaining a National Pollutant Discharge Elimination System permit under CWA section 402. Pursuant to CWA section 309(g)(1), 33 U.S.C. § 1319(g)(1), Judge Charneski assessed an administrative penalty against the Appellants in the amount of $126,800.

In this appeal, the Appellants contend that Judge Charneski's finding of liability was in error. Appellants argue that the definition of "fill material" in the applicable regulations precludes a finding that the material deposited by the Appellants in this case was fill. Specifically, the Appellants challenge on appeal whether the wood chips they placed in wetlands in connection with forest clearing activities on the Lewis Farm constitute "fill material" under the applicable statutory and regulatory provisions. They contend that the wood chips in question do not constitute fill because the discharge was not "intended for the primary purpose of replacing an aquatic area with dry land or changing the bottom elevation of the waterbody," as required by the U.S. Army Corps of Engineers' (the "Corps") regulations then in effect. Second, as to the question of liability under section 402, the Appellants assert only that the ALJ impermissibly relied on a point source for storm water runoff that EPA did not specifically identify in the Amended Complaint. Finally, with respect to the size of the penalty that Judge Charneski assessed for the violations, Appellants dispute their degree of culpability in discharging wood chips into wetlands in light of their purported attempts to comply with applicable law, and contend that the ALJ erred in his assessment of the extent and gravity of the respective violations in light of Region III's failure to demonstrate actual environmental harm.

Held: (1) The record clearly demonstrates that the Appellants ground small trees, shrubs, branches, treetops, and stumps into a substantial quantity of wood chips along thirty-to-fifty-foot-wide tracts through the Lewis Farm wetlands. The processing of such slash into wood chips, with the resulting discharge of wood chips into the wetlands, was

not merely a method of disposal of the woody debris remaining after the timbering operations, but rather an integral and inexorable step in the construction of a traversable pathway through the wetlands, without which the conversion of the wetlands to dry land would not have been feasible. The Board thus rejects Appellants' argument that the discharges had as their "primary" purpose the disposal of waste material. In assessing the purpose of this construction and its associated discharges, the Board simply cannot ignore the overarching purpose of the project: to replace the Lewis Farm wetlands with dry land. The trench digging and the land clearing, including the processing of slash into wood chips, did not occur in a vacuum, but rather were integral steps in furtherance of a project ultimately intended to remove the wetland characteristics of the Lewis Farm property. This view of the project appropriately links the discharge of pollutants to an activity that has an identifiable objective, placing in meaningful context the "purpose" of the discharge in question. Because the discharges here had the effect of displacing water or changing the bottom elevation of a water body (*i.e.*, a wetland), and because the material was not of a type ordinarily regulated by section 402 effluent limitations, they are appropriately subject to the permitting requirements of section 404. Applying Fifth and Fourth Circuit case law, the discharges in this case fell squarely within the scope of the Corps' regulatory authority under section 404.

(2) Appellants' argument that the Board must overturn Judge Charneski's finding of liability under section 402 must fail for two reasons. First, the Amended Complaint does, in fact, ascertainably identify the potential point source for storm water runoff, and second, as the Board has recently recognized, it is within the discretion of the ALJ to conform the pleadings to the evidence in circumstances, as here, where the relevant facts and issues have been fully presented before the administrative body and there is no likelihood of material prejudice to the parties.

(3) Under the facts of the case, the Board does not find clear error or an abuse of discretion in the ALJ's penalty assessment. Appellants were clearly aware (1) that there were wetlands on the property; (2) that the wetlands fell within the Corps' section 404 jurisdiction; (3) that "filling" wetlands without a section 404 permit was a violation of the CWA; (4) that the preparations for the "Tulloch" ditching would create wood chips; and (5) that chipping of substantial amounts of wood debris, at least to the extent it changed the surface elevation of the wetland, might be regarded as fill requiring a permit. Appellants did not make an advance, site-specific inquiry with the Corps about filling the wetlands but instead embarked on a course of action fraught with legal risk when they undertook to drain the wetlands at the Lewis Farm. Further, Appellants failed to meaningfully engage the Corps to ensure the ongoing appropriateness of the specific activities carried out in the Lewis Farm wetlands, and in fact proceeded as planned even when Appellants became aware that the Corps was questioning the legality of their activities. In his penalty assessment discussion in the Initial Decision, Judge Charneski examined the appropriate statutory factors, with regard to both the culpability of the Appellants and the gravity of the violations, and the Board does not find grounds to change or otherwise set aside the findings Judge Charneski made with respect to the penalty for Appellants' violations of the CWA's section 404 and section 402 permit provisions. The Board thus upholds the total penalty of $ 126,800 the ALJ assessed.

Before Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein.

Opinion of the Board by Judge Stein:

On January 12, 2005, Vico Construction Corporation and Amelia Venture Properties, LLC (collectively "Appellants"), filed an appeal from an Initial Deci-

sion issued on December 13, 2004, by United States Environmental Protection Agency ("EPA") Administrative Law Judge Carl C. Charneski ("Judge Charneski" or the "ALJ"). Judge Charneski determined that Appellants committed two separate violations under section 301(a) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1311(a). Specifically, Judge Charneski found that the Appellants had discharged fill material, in the form of wood chips, into wetlands that were waters of the United States, without a permit under CWA section 404, and that they had discharged pollutants in storm water in connection with construction activities without first obtaining a National Pollutant Discharge Elimination System ("NPDES") permit under CWA section 402. Pursuant to CWA section 309(g)(1), 33 U.S.C. § 1319(g)(1), Judge Charneski assessed an administrative penalty against the Appellants in the amount of $126,800.

In this appeal, Appellants contend that Judge Charneski's finding of liability was in error. Specifically, Appellants argue that the definition of "fill material" in the applicable regulations precludes a finding that the material deposited by the Appellants in this case was fill. Additionally, Appellants argue that the evidence in the record is inadequate to support a factual finding that Appellants deposited substantial quantities of material in a wetland area. Appellants also contend that Judge Charneski's finding of liability for storm water releases was erroneous because he impermissibly relied on a source for the discharge that was not identified in the original complaint. Finally, even assuming liability, Appellants argue that Judge Charneski erred in assessing a penalty that was just below the maximum penalty permitted under applicable law.

For the reasons set forth below, we uphold Judge Charneski's ruling as to all elements of the case.

I. *BACKGROUND*

A. *Statutory and Regulatory Background*

Section 301 of the CWA makes it unlawful for any person to "discharge" from any point source[1] into the waters of the United States any "pollutant,"[2] in-

[1] The Act defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, [or] discrete fissure * * * from which pollutants are or may be discharged." CWA § 502(14), 33 U.S.C. § 1362(14).

[2] The Act defines the term "pollutant" broadly, and specifically identifies, among other things, "dredged spoil, solid waste, * * * rock, sand, [and] cellar dirt * * * discharged into water." CWA § 502(6), 33 U.S.C. § 1362(6).

cluding dredge or fill material,[3] without first obtaining an appropriate CWA permit. 33 U.S.C. § 1311(a) (explaining that "the discharge of any pollutant by any person shall be unlawful" unless in compliance with other provisions of the Act);[4] *see also In re Phoenix Constr. Servs., Inc.*, 11 E.A.D. 379, 383 n.5 (EAB 2004); *In re Bricks, Inc.*, 11 E.A.D. 224, 225 (EAB 2003). While the CWA does not define "waters of the United States," federal regulations promulgated under authority of the CWA contain detailed definitions of this term. *See* 33 C.F.R. § 328.3(a); 40 C.F.R. §§ 122.2, 230.3(s). These regulations identify "navigable waters" as including, among other things, rivers, streams, and "wetlands." Wetlands, in turn, are defined as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas." 40 C.F.R. §§ 122.2, 230.3(t); 33 C.F.R. § 328.3(b).

Pursuant to the Act, in order to discharge dredge or fill material into navigable waters, a person must obtain a permit from the U.S. Army Corps of Engineers ("Corps"). Among other things, the Act states:

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

CWA § 404(f)(2), 33 U.S.C. § 1344(f)(2). The Corps issues permits for the discharge of dredge and fill material pursuant to regulations codified at 33 C.F.R.

---

[3] The Environmental Appeals Board ("Board" or "EAB") has recognized previously that the definition of "pollutant" includes dredge and fill material. *See In re Phoenix Constr. Servs., Inc.*, 11 E.A.D. 379, 383 n.5 (EAB 2004). Similarly, courts have acknowledged this understanding of the broad scope of the term "pollutant." *See United States v. Pozgai*, 999 F.2d 719, 725 (3d Cir. 1993)(identifying fill material as a pollutant); *United States v. Huebner*, 752 F.2d 1235, 1242 (7th Cir. 1985) (identifying dredge material as a pollutant), *cert. denied*, 474 U.S. 817 (1985); *United States v. Banks*, 873 F. Supp. 650, 656 (S.D. Fla. 1995) (identifying fill material and dredged soil as pollutants), *aff'd*, 115 F.3d 916 (11th Cir. 1997).

[4] As relevant here, "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source," CWA § 502(12), 33 U.S.C. § 1362(12). The Act defines "navigable waters" as "the waters of the United States, including the territorial seas." CWA § 501(7), 33 U.S.C. § 1362(7).

part 323.[5]

The CWA's NPDES permit program requires permits for, among other things, releases of storm water runoff associated with industrial activity, including construction.[6] *See* CWA § 402(a), 33 U.S.C. § 1342(a); 40 C.F.R. § 122.26. As relevant to this matter, EPA defines "construction activity" to include "clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area."[7] 40 C.F.R. § 122.26(b)(14)(x) (1998); *see also* Initial Decision at 33-34; Reg. Br. at 15 n.9 (explaining that the phase II storm water regulations, which do not apply in this case, require an NPDES permit for activity that disturbs between one and five acres as well) (citing 64 Fed. Reg. 68,722 (Dec. 8, 1999)).[8] The NPDES program requires that construction sites subject to the regulations have a Storm Water Pollution Plan, which is intended to ensure that the project employs best management practices to reduce or eliminate sources of pollution related to storm water runoff.[9] *See* 33 U.S.C. § 1342; *see also* Initial Decision at 18.

---

[5] EPA and the Corps jointly administer section 404 of the Act, with the Corps having responsibility for issuing permits. *See* 33 U.S.C. § 1344(a). States with an approved state permit program also may issue permits pursuant to CWA section 404. *See* CWA § 404(y), 33 U.S.C. § 1344(y). Pursuant to the Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning Federal Enforcement of the Section 404 Program of the Clean Water Act, EPA may request lead enforcement authority with respect to enforcement of the CWA's section 404 permit provisions. *See* Region III's Exhibit ("Reg. Ex.") 57; Initial Decision at 13; Complainant's Appellant Brief ("Reg. Br.") at 11.

[6] In general the NPDES permit program regulates discharges of pollutants from point sources into waters of the United States. *See* 40 C.F.R. § 122.1(b)(1). The NPDES provisions define "storm water" as "storm water runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. § 122.26(13).

[7] A construction activity that disturbs less than five acres is considered "industrial activity" if it "is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more." 40 C.F.R. § 122.26(b)(14)(x). Based on these regulations, courts have held that construction activity disturbing more than five acres is by definition a "point source" under the CWA. *See N.C. Shellfish Growers Ass'n v. Holly Ridge Assocs., LLC*, 278 F. Supp. 2d 654, 680-81 (E.D.N.C. 2003) (finding, among other thing, that "gullies and rills that have formed along * * * ditches to be point sources"); *Cal. Sportfishing Prot. Alliance v. Diablo Grande, Inc.*, 209 F. Supp. 2d 1059, 1076-77 (E.D. Cal. 2002).

[8] The NPDES program is typically administered by the states, and, at the time of the events in this matter, "the Commonwealth of Virginia was authorized to implement its own NPDES program." *See* Revision of the Virginia National Pollutant Discharge Elimination System (NPDES) Program to Issue General Permits, 56 Fed. Reg. 30,573 (July 3, 1991); *see also* Initial Decision at 34; Hearing Transcript ("Trans.") at 553.

[9] Such practices may include, among other things, stabilization (such as seeding and mulching), "track out control" to reduce the incidental removal of material from the construction site and onto public roads (from which it may wash into receiving waters), and velocity controls (to reduce the speed of water running through channels). Trans. at 557-58; Initial Decision at 18-19.

B. *Factual and Procedural Background*

1. *Construction Activities on Lewis Farm*

As described in detail in the Initial Decision, this case involves activities that took place on a 117-acre forested tract located in Chesapeake, Virginia. Initial Decision at 2-9. The property, commonly referred to as "Lewis Farm," is owned by Amelia Venture Properties, LLC ("Amelia"). Lewis Farm is bounded by Interstate Highway 664 to the east and by unimproved agricultural property on the south and west. The north-northwest boundary adjoins a tract of land known as "Gateway Commerce Park." *See* Initial Decision at 2. Finally, the northern property line is bounded by an unnamed tributary to Drum Point Creek,[10] as well as by unimproved agricultural land. Drum Point Creek flows to the western branch of the Elizabeth River, which flows in turn to the James River and ultimately into the Chesapeake Bay. *See* Reg. Br. at 3.

As reflected by a 1991 wetlands delineation performed by an Amelia consultant, Robert C. Needham, a significant portion of the Lewis Farm, as well as certain adjoining property, consists of wetlands. *See* Initial Decision at 3-4; Appellants' Exhibits ("App. Exs.") 6 & 7; Trans. at 828-29. This assessment was based on criteria set forth in applicable regulations and the U.S. Army Corps of Engineers' Wetlands Delineation Manual (1987) ("Wetlands Manual").[11] *See* Initial Decision at 3-4. The presence of wetlands at Lewis Farm was confirmed by the Corps and Region III during site visits. *Id*. at 4, 13 (explaining that the Corps and EPA confirmed the presence of wetlands at Lewis Farm); Trans. at 829. Because Appellants do not contest the wetland delineation itself, we find it unnecessary to further discuss the delineation process or the precise boundaries of the Lewis Farm wetlands.

At some point, Amelia decided to convert the Lewis Farm wetlands to uplands.[12] To this end, in 1997, Amelia engaged Vico Construction Corporation ("Vico") to construct a T-shaped drainage ditch ("T-ditch") in an upland area at the Lewis Farm, along the perimeter of the Lewis Farm wetlands.[13] *See* Initial Decision at 5. The objective of this T-ditch was to drain the Lewis Farm wetlands and

---

[10] Hereinafter, we will refer to this as the "tributary to Drum Point Creek."

[11] The primary factors that identify wetlands are: (1) hydric soil; (2) a predominance of wetlands vegetation; and (3) wetlands hydrology. *See* Initial Decision at 3; Trans. at 38-39; Wetlands Manual at 13-14.

[12] "Upland" refers to any area that is not wetlands, that is, any area that does not have characteristics typical of wetlands (*see supra* note 11).

[13] While Amelia had no immediate plans for development, it is clear from the record that elimination of the wetlands was intended to facilitate eventual development of the site. *See* Trans. at 1238-39, 1254-55; EAB Oral Argument Transcript ("Oral Argument") at 9.

thereby remove the area's wetlands characteristics.[14] *Id*.; Trans. at 1224-26. However, after construction of only one T-ditch, Amelia decided instead to pursue an alternative, less expensive and less time-consuming option for draining the wetlands: "Tulloch ditching." *See* Initial Decision at 5.

A Tulloch ditch is similar to a T-ditch, except that a Tulloch ditch is constructed in the wetlands themselves. *Id.; see also Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399 (D.C. Cir. 1998) (overturning what was known as the "Tulloch Rule," which had expanded the Corps' definition of discharge of dredged material to include all redeposits of dredge material). In light of the *National Mining* case, so long as construction of a Tulloch ditch involves no more than "incidental fallback" of dredged material into the wetlands, a CWA section 404 permit is not required for the ditch digging activity itself. *See Nat'l Mining*, 145 F.3d at 1410 (finding, in the context of a petition for review, that the Act does not authorize regulation of "incidental fallback" as a "discharge of dredge material" under section 404).[15]

In 1998, Amelia again engaged Vico, this time to construct four Tulloch ditches through the Lewis Farm's wooded wetlands. *See* Initial Decision at 6. As with the T-ditch, the purpose of the Tulloch ditches was to drain the wetlands and thereby convert them to uplands (which would allow for subsequent commercial or agricultural use). *Id*. In connection with the Tulloch ditch project, the Appellants applied for and received a land disturbance permit from the City of Chesapeake, Virginia (the "City"). The City granted the permit on December 28, 1998 (hereinafter "City Permit"), authorizing "[c]learing, filling, excavating, grading or transporting or any combination thereof." *See* App. Ex. 15; Initial Decision at 6.[16] The Tulloch ditch project was to include four paths, approximately forty feet wide and at least several thousand feet long, within which Vico would dig "vee"-shaped Tulloch ditches approximately four feet in depth. *See* Initial Decision at 6; Trans. at 1129 (indicating that Vico actually dug a total of about 3,800 linear feet of ditches in two of the four pathways). The project was also to include eight-foot-wide transects between the four paths for the installation and monitor-

---

[14] In general, T-ditches represent a permissible way to convert wetlands to uplands (this is so because T-ditching does not involve any activity that disturbs the wetlands themselves). Over time, by repeated ditch construction in upland areas adjacent to the wetlands, a large wetland area may be converted to upland, without any construction activity in the wetland area itself and therefore without the need for a CWA section 404 permit. *See* Initial Decision at 5.

[15] "Incidental fallback" refers to the unintentional and unavoidable deposition of small quantities of material during dredging or digging that "fall back" from the digging or dredging equipment onto the disturbed area. *See Nat'l Mining*, 145 F.3d at 1403.

[16] The City Permit also included an Erosion and Sediment Control Plan ("Erosion Plan"). App. Ex. 15; *see also* Initial Decision at 6.

ing of wells (which would allow Amelia to monitor the effectiveness of the Tulloch ditches at removing the wetland hydrology). *See* Initial Decision at 6.

The first step in the Tulloch ditch project was to clear the four paths through the wetlands in which Vico would construct the ditches themselves.[17] This part of the project involved, first, cutting the marketable timber — a job Vico subcontracted to Old Mill Land & Timber Co. ("Old Mill"), and that Old Mill performed in January and September of 1999.[18] Old Mill removed only the marketable timber, however, leaving behind small trees, saplings, underbrush, branches, and tree tops (referred to hereinafter generally as "slash"), as well as stumps from the felled timber.[19] Initial Decision at 7. Apparently, the amount of debris left on the property in the wake of Old Mill's work was substantial. *See, e.g.*, Trans. at 336, 841-42; Initial Decision at 7. Vico engaged Paxton Contractors Corporation ("Paxton") to construct the Tulloch ditches in the four cleared paths. Initial Decision at 7. In order to operate the excavation equipment along the timbered paths, however, Paxton first needed to clear the paths of slash and stumps. This process of "prepping the path" involved operation of a "kershaw" — a piece of machinery "having a 'lawn mower deck,' with a six and one-half foot head, and with skids on each side to prevent the grinder from coming into contact with the ground." Initial Decision at 7 (citing Trans. at 1019-20, 1044). According to the Vico supervisor (Mr. David Blevins), a kershaw chips woody vegetation into pieces "anywhere from half-inch wide to an inch wide up to several inches long depending on the species of tree."[20] Trans. at 1115. Mr. Blevins explained that "technically it's a grinder," containing teeth that cut chips out of the wood. Trans. at 1115; *see* Initial Decision at 7 n.11. The resulting wood chips were "blown out" of the rear of the kershaw and deposited behind the device as it traveled along the timbered path grinding the slash. Initial Decision at 8; Trans. at 1019, 1085. *See also* Initial Decision at 8 ("'front grinder'" of kershaw "'would chip up all the stuff that was laying'" in the ditch) (quoting Trans. at 1040). The woody debris was then simply left where it fell. Initial Decision at 8; Trans. at 1085. Additionally, Paxton used a stump grinder to remove the stumps left along the cleared paths, an activity that also produced wood chips that were left in the wetlands. Initial Decision at 8;

---

[17] According to the record, the area to be cleared included a total of about 100 acres within the Lewis Farm wetlands. *See* Initial Decision at 6 ("Amelia Venture contracted with Old Mill * * * for the logging of 'approximately 100 acres of woodlands.'"). This figure seems high, however, given that the total area of Lewis Farm is only 117 acres. *See* Initial Decision at 2.

[18] The record indicates that Old Mill used a rotating saw called a "feller buncher," which "kicked out [wood] chips" as it cut through tree trunks. Initial Decision at 7 (quoting Trans. at 1100). Old Mill also used chain saws to remove the branches from the felled timber before transporting them off the property. *Id.*

[19] Region III's exhibit No. 26 includes pictures of the cleared paths with the slash still present.

[20] Testimony indicates that the slash would have interfered with the excavation equipment. *See* Trans. at 1128, Initial Decision at 7; *see also infra* pt. II.C.

Trans. at 914, 1042. As discussed more fully below, the amount of wood chip debris deposited in the wetlands through these activities was substantial.

For the next stage of the Tulloch ditch project, Paxton used a "truck excavator with a V-bucket" to begin the ditch digging process. Trans. at 1022; Initial Decision at 8. According to the record, this piece of equipment rides on tracks (similar to a bulldozer) rather than on wheels, and it sidecasts excavated material directly into a dump truck. The excavated material was transported out of the wetlands and deposited in a spoil pile in the upland area of Lewis Farm. *See* Initial Decision at 9. Mr. Paxton testified that care was taken to ensure that excavated material was not spilled in the wetlands area. *Id.*; Trans. at 1022-23. Paxton completed construction of Tulloch ditches in two of the four cleared paths, connecting the two ditches to the previously constructed T-ditch in the adjoining upland area. Initial Decision at 9. The completed Tulloch ditches are shallower at the southern end in order to drain water from the wetlands to the north and into the tributary to the Drum Point Creek.[21] *Id.*

2. *Involvement of EPA and the Corps*

Appellants did not consult with the Corps or EPA regarding construction at the Lewis Farm prior to initiation of the Tulloch ditching project. This fact is not disputed.[22] Appellants' consultant, Mr. Needham, did have prior communications with the Corps regarding related activities, including projects similar to the Lewis Farm project at nearby sites. Of particular note in this regard were two pieces of correspondence: (1) a 1990 letter that Mr. Needham had received from the Corps concerning stump grinding and wood chips; and (2) correspondence addressing Tulloch ditching projects at the "Southern Pines Site" and at a property known as

---

[21] According to the record, one Tulloch ditch drains directly to the tributary to Drum Point Creek, while the other drains first into the pre-existing T-ditch, which in turn drains into the tributary to Drum Point Creek. *See* Initial Decision at 9 (citing Trans. at 112, 416-17, 590-91, 1025, 1046-47).

[22] Appellants' rendition of the facts creates the opposite impression, however. Appellants' Brief states: "the [Appellants] * * * hired a wetlands consultant * * * who had consulted and corresponded with the Corps prior to any work being performed about the specific detailed procedures that would be used. * * * The Corps inspected the Property at [Appellants'] invitation as work was being performed * * * and never advised [Appellants] that any work was a violation of any standard." App. Br. at 6 (citing Trans. at 797). This portion of the record, however, recounts testimony regarding activities at other sites, not at the Lewis Farm. *See* Trans. at 797. We believe the Appellants' description in this regard (*see* App. Br. at 5-6) is potentially misleading as it implies that the Appellants initiated consultation and invited a site visit specifically with respect to activities on the Lewis Farm site, which, as discussed below, is simply not the case. *See* Trans. at 794-95; Initial Decision at 11-12 n.18.; *see also* App. Ex. 2, 3, 5; Oral Argument at 24-25.

"Smith Farm."[23]

The Corps' 1990 letter informed Mr. Needham's understanding of the regulatory coverage of wood chips in the wetlands context. *See* App. Ex. 1 (Letter from the Acting Chief of the Regulatory Branch, U.S. Army Corps of Engineers, Wilmington District, to Mr. Robert N. Needham (Feb. 12, 1990)) ("1990 Corps Letter"). The letter indicated that while perhaps certain low impact chipping activities might not require a section 404 permit, "if significant accumulations or piles of wood chips were to result in certain areas, it might be interpreted to be a 'fill.' Your client should therefore be cautioned to ensure that the chips are sufficiently dispersed *so as not to result in any measurable changes in elevation of the surface area*." *Id.* (emphasis added). Thus, at least as early as 1990, Mr. Needham was aware that high impact wood chipping operations in wetlands areas might well require a permit.[24] Trans. at 882-83. Given Appellants' reliance on Mr. Needham's expertise, we impute this awareness to Appellants.

With regard to the Southern Pines Site, a Corps representative, Mr. William Poole, responded to a letter of inquiry from Mr. Needham (at the time a consultant for Southern Pines), indicating that a section 404 permit would not be required at that site so long as the activities in the wetlands did not deviate from the description that Mr. Needham had provided. The letter states in part:

> [Y]ou indicated that your ditch excavation activity would not involve:
>
> 1. Sidecasting of excavated material.
>
> 2. Double handling of excavated material in wetlands.
>
> 3. Digging of stumps other than excavation with a single pull of the excavator.
>
> 4. Corduroy roads from any fill material, including woody vegetation.
>
> 5. Any other discharge of excavated material except for "incidental fallback" associated with the ditch digging.

---

[23] Both of these sites are located near the Lewis Farm, but have no formal connection to the Lewis Farm (however, Emil Viola, the president of Appellant Vico, is a part owner of Southern Pines, LLC, which owns the Southern Pines Site). *See* Trans. at 1206; Reg. Br. at 8; Initial Decision at 18.

[24] In fact, the record also showed that Mr. Needham previously worked for the Corps for approximately nine years beginning in 1981, Trans. at 763-67, and during that time he had experience with cases where the Corps determined wood chips were unlawful fill. Trans. at 846-47, 920-21.

> To insure that the excavation activity does not cause any discharge into wetlands, except for "incidental fallback," you have also stated that the contractor will use the following procedure for excavation activities in wetlands.
>
> A. Shrubs and saplings will be mowed along the length of the proposed excavation.
>
> B. There will be no bulldozers or root rakes in wetlands.
>
> C. Large tree stumps will be avoided.
>
> D. Trucks will remove excavated material directly from backhoe bucket.
>
> E. Any placement of removed material will be in upland.
>
> F. Wooden mats may be used in soft soil areas.
>
> We have determined, based on Corps and EPA joint guidance dated April 11, 1997, that the proposed activity does not result in the movement of substantial amounts of dredged material from one location to another in waters of the United States. Therefore, as long as your project does not include a more substantial discharge that would trigger section 404 regulation, a Corps permit will not be required for the excavation of ditches in wetlands on the Southern Pines Site as you have proposed. This is a case specific determination and does not apply to any other site.

App. Ex. 3 (Letter from Mr. William Poole, Chief, Regulatory Branch, Norfolk District, U.S. Army Corps of Engineers. to Mr. Needham, Needham, Jernigan & Associates, Inc. (Sept. 11, 1998) ("Southern Pines Letter")); *see also* Initial Decision at 11 n.18; Reg. Br. at 8-9.[25]

The Lewis Farm project is similar to the Southern Pines project. However, at no point prior to commencement of the Tulloch ditching project at Lewis Farm

---

[25] We note that the Corps' single-page response makes a qualified determination with regard to whether the project, as described, will involve "the movement of substantial amounts of dredged material," but it does not reach any conclusions regarding discharges of fill material related to the clearing of wooded areas in preparation for excavation. *See generally* Southern Pines Letter. It also expressly qualifies its conclusions with the caveat that the project "not include a more substantial discharge that would trigger section 404 regulation." *Id.*

did Mr. Needham, or anyone else, consult with the Corps or EPA specifically about the activities planned at that site. *See* Trans. at 799; Reg. Br. at 10.

The Corps conducted its first visit to the Lewis Farm project on January 11, 1999, while Paxton was clearing the timbered paths (i.e., grinding the slash and tree stumps) prior to excavation of the Tulloch ditches. *See* Reg. Br. at 10. This visit was conducted by Mr. Greg Culpepper and Mr. Steve Martin, both Corps environmental scientists. *Id*. Mr. Culpepper testified that this visit occurred in response to either a phone call he received regarding activities on the Lewis Farm, or his own observation of construction equipment in the vicinity of the Lewis Farm site. Initial Decision at 9 n.16.[26]

Upon visiting the site, Mr. Culpepper observed "a layer of wood chips one to six inches deep" in a path where the slash had already been processed. Initial Decision at 10; Trans. at 206. As Judge Charneski observed, Mr. Culpepper described the wood chips as "roughly uniform." Trans. at 193; Initial Decision at 10. Mr. Martin also observed a layer of wood chips, which he described as two to five inches deep. Trans. at 336; Initial Decision at 10. The record includes photographs showing the presence of these wood chips. *See, e.g.*, Reg. Ex. 26. In their inspection report for the Lewis Farm, Mr. Culpepper and Mr. Martin described a "[d]eposit of wood chips in wetland for equipment to drive on allowing access for Tulloch ditching." Reg. Ex. 26; Initial Decision at 10.

In Mr. Martin's opinion the wood chips reflected "more than just shrubs and saplings along the length of the corridor * * * [but] trees as well." Trans. at 339; Initial Decision at 10, 30. This observation is consistent with evidence in the record indicating that there was a significant amount of debris in the cleared paths, including not only underbrush, but saplings, small trees, branches, tree tops, and stumps. *See, e.g.*, Trans. at 336, 841-42, 1126; Initial Decision at 7. In fact, Mr. Needham testified that the amount of debris in the timbered paths "provoked a call from some of the equipment operators to me while I was in my office in Wilmington. The question started off with there's a lot more tree limbs here because of the size of the timber than some of the other sites they have been working on, and the question was posed: 'Can we go in there with a root rake and push them off to the side?'" Trans. at 842; *see also id.* at 885.[27]

---

[26] On January 6, 1999, the Corps conducted a site visit at the Smith Farm site, where similar ditch digging activities were taking place. Trans. at 795-99. Ultimately, EPA filed a CWA penalty action against Smith Farm related to the construction activities in wetlands on that property, which case is also the subject of a pending appeal before the Board. *See In re Smith Farm Enterprises, LLC*, CWA Appeal No. 05-05 (EAB, filed June 3, 2005).

[27] Mr Needham testified that in response to this inquiry he only consulted the Southern Pines Letter from the Corps and related correspondence, *see supra* n.72, and did not contact the Corps directly to ask how to proceed. Trans. at 919.

The Corps inspectors who inspected the site on January 11, 1999, were not authorized to make a determination in the field regarding the existence of a violation; rather, they were required to consult with their superiors prior to drawing any conclusions about the legality of the Appellants' activities. Initial Decision at 10. It appears from the record that, due to the novelty of the Appellants' activities in the wake of the recently decided *National Mining* case, there was considerable internal discussion within the Corps regarding the significance of the Appellants' discharge of wood chips in the Lewis Farm wetlands and similar discharges in wetlands at nearby sites.[28] *See* Initial Decision at 10-11; Reg. Ex. 50 (Corps Memorandum Thru Commander, North Atlantic Division, to Commander, Norfolk District (Apr. 21, 1999)). However, EPA became involved in the case before the Corps had made a final determination with respect to whether the discharge of wood chips constituted fill for purposes of CWA section 404.[29]

On September 9, 1999, after requesting lead enforcement status in the case, EPA conducted its own site inspection for purposes of assessing both CWA section 404 compliance and compliance with the storm water permit requirements of section 402. Participants in the EPA inspection included Mr. Jeffery Lapp, Mr. Andrew Dinsmore, and Mr. Peter Stokely of Region III, along with Mr. Culpepper and Ms. Lenore Vasilas (a soil chemist with the Natural Resource Conservation Service). *See* Initial Decision at 13. At the time of EPA's inspection, all four paths had been cleared and the slash processed into wood chips, but Tulloch ditches had been constructed in only two of the paths. In order to assess whether the Appellants had discharged dredged or fill material into the Lewis Farm wetlands, the EPA inspection team took several soil samples. These included three samples from the disturbed areas of the Lewis Farm wetlands along the cleared paths containing completed Tulloch ditches,[30] and a reference sample

---

[28] Although the Appellants were not included in this dialogue, they were aware that a debate was underway within the Corps regarding how to proceed, "and that the [Corps'] Washington office told Mr. Culpepper he was to send [certain] documents up to them." Trans. at 1133; *see also id.* at 1143. Moreover, it appears from the record that the Appellants' consultant (Mr. Needham) was aware from his personal experience as a former Corps employee that the Corps inspectors could not make on-the-spot determinations, but "consulted with * * * management extensively before trying to call a violation." Trans. at 893-94; *see also* Reg. Br. at 34-35.

[29] EPA requested lead enforcement status in June of 1999, "after reading newspaper reports about the activities on Lewis Farm, and after receiving telephone calls from private citizens and non-governmental organizations." Initial Decision at 13; *see also supra* note 5 (regarding the Memorandum of Agreement allowing EPA to request lead enforcement status).

[30] These included Sample A (from one of the cleared paths containing a Tulloch ditch); Sample A1 (a second sample taken at "a spoil pile along [the] ditch and approximately eighty-five (85) feet Southwest of sample location A," Reg. Ex. 40 at 7); and Sample C (from the other cleared path containing a finished Tulloch ditch). *See* Initial Decision at 14-16 (providing a detailed description of the sample sites, sampling procedures, and site evaluation).

taken from an undisturbed forested section of the wetland area.[31] Apparently, in addition to these sampling sites, which were described in detail, the EPA inspectors also dug several other holes to become "familiar" with the site generally. Reg. Br. at 12.

According to the EPA report prepared in connection with the September 9, 1999 site visit ("EPA Report"), at "[s]ample point A * * * the soil was described * * * to a depth of thirty-six plus (36+) inches and the original soil surface was covered with a layer of fourteen (14) inches of wood chip bedding and soil." Reg. Ex. 40 at 7; *see* Initial Decision at 17. At sample point A1 "an eleven (11) inch mixed layer of wood chips and soil were placed on the original soil surface." Reg. Ex. 40 at 7; *see* Initial Decision at 16. Finally, at sample point C, which according to the EPA Report "was representative of wood chip and soil fill located in the cleared 'prepped path' areas of the site," EPA recorded "a nine (9) inch layer of fill material."[32] Reg. Ex. 40 at 7; Initial Decision at 17.[33] Additionally, the EPA Report concluded that Appellants had discharged dredge material[34] on top of the wetland soil (*see* Reg. Ex. 40 at 7) based on observations of "lighter gray" soil covering some vegetation in a location where one would typically find "darker colors at the soil surface if it were the natural soil surface." Trans. at 523, Initial Decision at 18; Reg. Ex. 40 (photograph, roll 5, frame 24).

EPA's September 9, 1999 site visit also involved a storm water inspection conducted by Mr. Kevin Magerr, a Region III environmental engineer. During the inspection Mr. Magerr discovered that Appellants did not have a section 402 NPDES permit for storm water discharges related to the construction activities at Lewis Farm. Moreover, contrary to representations in the Erosion Plan submitted in support of the City Permit, Mr. Magerr calculated that the proposed area of disturbed land (including activities in both the wetland and upland portions of the site) totaled significantly more than five acres.[35] Additionally, Mr. Magerr ob-

---

[31] Region III explains that "[t]he purpose of taking a reference sample is to try to ascertain the conditions on the Site prior to activities that disturb the Site." Reg. Br. at 12.

[32] The record contains photographs showing the wood chips deposited in the cleared paths at these locations. *See* Reg. Ex. 40 (photographs roll 5).

[33] In addition to these specific sample site observations, the EPA Report reflected the team's conclusion that the site, including the areas in which the four paths had been cleared and the two Tulloch ditches constructed, consisted of wetlands. Reg. Ex. 40 at 1-2.

[34] We note with respect to the alleged discharge of dredge that the ALJ found the evidence insufficient to demonstrate a violation of section 404. Initial Decision at 32 n.46. We do not address this issue here because it has not been clearly raised by either party before us in the context of this appeal.

[35] The Erosion Plan indicated that the project would disturb 4.885 acres (including the four Tulloch ditches and the uplands spoil pile). *See* Initial Decision at 19; Trans. at 952. Mr. Magerr, on

Continued

served conditions at the site that in his opinion were inconsistent with the provisions of the Erosion Plan.[36] *See* Trans. at 576-78; Initial Decision at 19.

After the inspection, EPA did not immediately inform the Appellants that their activities at Lewis Farm violated the CWA; however, on May 21, 2001, EPA filed the underlying penalty action. *See generally* Administrative Complaint and Notice of Opportunity to Request Hearing, Docket No. CWA-3-2001-0021 (filed May 21, 2001) ("Initial Complaint").[37] Thereafter, Petitioners performed their own sampling of the soils in the cleared paths on Lewis Farm. *See* App. Br. at 10. These samples were gathered in June of 2002, approximately two years and nine months after EPA gathered its samples, and more than three years after the Corps conducted its initial site inspection. *See* Reg. Br. at 11-14; App. Br. at 9-10.

Judge Charneski presided over a six-day administrative penalty hearing on January 13-17 and February 6, 2003. He issued his Initial Decision on December 13, 2004. The Appellants filed this appeal on January 12, 2005, and the Board heard oral argument on July 14, 2005.[38]

II. *DISCUSSION*

A. *Standard of Review*

EPA's regulations provide that in an enforcement proceeding "[t]he Environmental Appeals Board shall adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed, and shall set forth in the final order the reasons for its actions." 40 C.F.R.

(continued)
the other hand, calculated 4.88 acres for the ditches and monitoring wells, and approximately another acre for the spoil pile. *See* Trans. at 422-25, 566-69, 573-74; Initial Decision at 19; Reg. Br. at 15; Reg. Exs. 39, 43.

[36] He observed, among other things, a drainage swale from the spoil pile, as well as sediment, rills, and gullies, indicating erosion runoff. *See* Reg. Br. at 16. He concluded also that the Appellants had not complied with the Erosion Plan's requirements regarding stabilization of the construction entrance, silt fencing (to capture sediment runoff before it entered the wetlands), and check dam provisions (to prevent the migration of sediment through the ditches themselves); additionally, he reported evidence of erosion from the spoil pile and from the two Tulloch ditches, and significant amounts of sediment in at least one stream on the site. Trans. at 576-80, 585-88, 602-03, 593, 670; Reg. Ex. 41. (We note that the Erosion Plan is not directly related to CWA compliance; it was not issued in connection with a Corps or EPA permit but by the City in connection with local land use regulations).

[37] Region III filed an Amended Complaint on November 19, 2001. *See* First Amended Complaint, Docket No. CWA-3-2001-0021 (filed Nov. 19, 2001) ("Amended Complaint").

[38] Pursuant to the Board's Order of June 13, 2005, the July 14 oral argument included liability issues related to both this case and the *Smith Farm* case. *See supra* note 26.

§ 22.30(f). In an enforcement proceeding, the Board thus reviews an ALJ's factual findings and legal conclusions *de novo. See, e.g., In re Mayes*, 12 E.A.D. 54, 62 (EAB 2005); *In re Bricks, Inc.*, 11 E.A.D. 224, 225 (EAB 2003); Administrative Procedure Act, 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."). Nonetheless, the Board generally defers to an ALJ's factual findings where those findings rely on witness testimony and where the credibility of the witnesses is a factor in the ALJ's decisionmaking. *See In re Friedman*, 11 E.A.D. 302, 314 n.15 (EAB 2004) (citing *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998)). This approach recognizes that the ALJ is able to observe firsthand a witness's demeanor during testimony and is therefore in the best position to evaluate his or her credibility. *Id.; In re Julie's Limousine & Coachworks, Inc.*, 11 E.A.D. 498, 507 n.19 (EAB 2004).

In administrative penalty proceedings, it is the Region's burden to demonstrate that the alleged violation occurred. *See Bricks*, 11 E.A.D. at 226. That is, the Region must show, by a preponderance of the evidence, that the factual prerequisites exist for finding a violation of the applicable regulatory requirements.[39] *See id.; Julies's Limousine*, 11 E.A.D. at 507. A factual determination meets the preponderance standard if the fact finder concludes that it is more likely true than not. *See Julie's Limousine*, 11 E.A.D. at 507 n.20; *In re Lyon County Landfill*, 10 E.A.D. 416, 427 n.10 (EAB 2002), *aff'd*, 2004 U.S. Dist. LEXIS 10651 (D. Minn. June 7, 2004)), *aff'd*, 406 F.3d 981 (8th Cir. 2005); *In re The Bullen Cos.*, 9 E.A.D. 620, 632 (EAB 2001).

CWA section 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant from a point source into a navigable water without authorization under the Act. *See Bricks*, 11 E.A.D. at 225; *Save Our Community v. EPA*, 971 F.2d 1155, 1162 (5th Cir. 1992). With respect to "dredged or fill material," the Corps may authorize discharges into navigable water (including wetlands) through issuance of a section 404 permit; any such discharge of dredged or fill material without a permit, however, is prohibited. CWA § 404(a), 33 U.S.C. § 1344(a); *see also Save Our Community*, 971 F.2d at 1162-63. Here, the Appellants argue that the ALJ's finding of a violation was in error because the wood chips the Appellants placed onto the Lewis Farm wetlands were not "fill material" and therefore no section 404 permit was required. *See* App. Br. at 11-17. As for the ALJ's findings regarding storm water runoff, Appellants contend that Region III failed to carry its burden to properly identify an appropriate point source in the administra-

---

[39] The preponderance of the evidence standard is intended to "'instruct the fact finder concerning the degree of confidence society thinks he should have in the correctness of his factual conclusion.'" *In re Echevarria*, 5 E.A.D. 626, 638 (EAB 1994)(quoting *In re Winship*, 397 U.S. 358, 370 (1970)); *accord Bricks*, 11 E.A.D. at 226.

tive complaint. *Id*. at 17-19. The Appellants' arguments are addressed in detail below.

B. *Scope of Substantive Review*

While Appellants challenge both the ALJ's finding of liability and the amount of the penalty that the ALJ assessed, there are a number of issues that the parties raised before the ALJ during the course of the underlying penalty proceedings that are not before us on appeal. We identify these issues here in order to more clearly frame the issues that the parties have raised before the Board. First, Appellants do not contest on appeal the accuracy of the wetland delineation, or otherwise argue that the land upon which the ditch digging activities occurred was not wetlands. Second, although Appellants purport to "reserve argument" on the question of whether the wetlands at issue are "waters of the United States" under the CWA, they have not challenged as a factual matter the connectedness of wetlands directly to the adjoining tributary to Drum Point Creek, or indirectly to other down stream navigable-in-fact water bodies.[40] Third, Appellants admit the fact that they placed wood chips into the wetlands from multiple activities related to the Lewis Farm Tulloch ditch construction project. Fourth, Appellants do not dispute that they did not contact or consult with the Corps specifically with respect to the planned activities on the Lewis Farm prior to beginning construction activities on that property. Fifth, Appellants do not challenge on appeal EPA's factual determination that the Lewis Farm construction project involved the disturbance of more than five acres of land. Finally, Appellants concede that they did not seek or obtain either a section 404 or section 402 permit prior to engaging in construction activities at the Lewis Farm.

Having identified those issues that Appellants have not challenged in this case, we may now clearly identify those issues that the parties have raised on appeal. First, as to the question of liability for failure to obtain a CWA section 404 permit, the Appellants challenge on appeal whether the wood chips they placed in the wetland in connection with forest-clearing activities on the Lewis

---

[40] In their brief Appellants "expressly reserve the issue" of whether the ALJ "erred in finding Clean Water Act jurisdiction over the wetlands at issue in this case." App. Br. at 5. Appellants suggest that jurisdiction may be lacking because the wetlands on Lewis Farm are not sufficiently connected to "navigable waters" to provide a jurisdictional basis for Region III's administrative penalty action. However, because Appellants offer no substantive argument on this point, we need not address the issue in detail in this decision. We note only that the uncontested factual record establishes the existence of wetlands on the Lewis Farm, the connection of these wetlands to a navigable-in-fact waterbody by way of the tributary to Drum Point Creek and Drum Point Creek itself, and that the construction activities discussed above occurred on these wetlands. *See, e.g., United States v. Riverside Bayview Homes, Inc*., 474 U.S. 120, 133 (1985)(acknowledging generally CWA jurisdiction over wetlands adjacent to navigable waters); *see also Treacy v. Newdunn Assocs.*, 344 F.3d 407, 416-17 (4th Cir. 2003) (finding CWA jurisdiction based on a wetlands' connection to navigable-in-fact waters through tributaries); *United States v. Edison*, 108 F.3d 1336, 1342 (11th Cir. 1997).

Farm wetlands constitute "fill material" under the applicable statutory and regulatory provisions. Second, as to the question of liability for the CWA section 402 violation, the Appellants assert only that the ALJ impermissibly relied on a point source for storm water runoff that Region III did not specifically identify in the Amended Complaint. Finally, with respect to the size of the penalty that Judge Charneski assessed for the section 404 and 402 violations, Appellants dispute their degree of culpability in discharging wood chips into wetlands in light of their purported attempts to comply with applicable law, and contend that the ALJ erred in his assessment of the extent and gravity of the respective violations in light of Region III's failure to demonstrate actual environmental harm.

C. *Discharge of Fill Material*

Wetlands are a vital component of an overall watershed, and their preservation is an important element of the Act's protection of our national waters. *See infra* part II.E.2.b (describing the significant benefits of intact wetlands).[41] The CWA's permitting programs provide the basis for the preservation of wetlands, in particular through the requirements of section 404.[42] Because of the importance of wetlands as natural resources, it is vital that construction activities carried out on wetlands either fall clearly outside the scope of the permit requirements or are evaluated and undertaken within the context of the permitting program — a program that intends both the proper stewardship of wetland resources and the

---

[41] As Judge Charneski observed, the Supreme Court has recognized the significance of the CWA in wetland preservation, among other things acknowledging that "wetlands adjacent to navigable waters do as a general matter play a key role in protecting and enhancing water quality." *United States v. Riverside Bayview Homes, Inc*., 474 U.S. 121, 133 (1985); *see also* Initial Decision at 40.

[42] Indeed, wetlands protection is far from trivial, and it is appropriate for the agencies tasked with overseeing the relevant CWA provisions to take a hard and considered look at projects that might impair the Nation's wetlands. For example, in *Phoenix Construction*, we explained:

> "Congress has determined that 'the systematic destruction of the Nation's wetlands is causing serious, permanent ecological damage,' damage so egregious that wetlands merit protection by laws like the CWA which promotes the restoration and maintenance of wetland resources." *United States v. Larki*n, 657 F. Supp. 76 (W.D. Ky. 1987) (quoting Staff of Senate Comm. on the Environment, 95th Cong., 2d Sess., A Legislative History of the Clean Water Act of 1977, at 869-70 (Comm. Print 1978) (Statement of Sen. Muskie)), *aff'd*, 852 F.2d 189 (6th Cir. 1988), *cert. denie*d, 489 U.S. 1016 (1989). Additionally, in the Emergency Wetlands Resources Act of 1986, Congress has stated that "wetlands play an integral role in maintaining the quality of life through material contributions to our national economy, food supply, water supply and quality, flood control, and fish, wildlife, and plant resources, and thus to the health, safety, recreation, and economic well-being of all our citizens of the Nation." 16 U.S.C. § 3901(a)(1).

In re Phoenix Constr. Servs., Inc., 11 E.A.D. 379, 398 n.44 (EAB 2004).

thoughtful reconciliation of competition between wetlands protection and developmental land use. Indeed, as discussed at oral argument in this case, the permit process triggers an important evaluation of the direct impacts of a project as well as its broader implications for local resources. *See* Oral Argument at 59-62. This kind of evaluation is particularly important where, as here, the activity is part of a broader pattern of development that will have a cumulative impact on the local watershed. *See, e.g., Crutchfield v. County of Hanover*, 325 F.3d 211, 221 (4th Cir. 2003) (explaining that the Corps must look at all elements of a project as a whole so it "can make an informed decision about the project's cumulative effect on wetlands"); *Nat'l Wildlife Fed'n v. Whistler*, 27 F.3d 1341, 1345 (8th Cir. 1994) (explaining that "[t]he cumulative destruction of our nation's wetlands that would result if developers were permitted to artificially constrain the Corps' alternatives analysis by defining the projects' purpose in an overly narrow manner would frustrate the statute and its accompanying regulatory scheme")*; Buttrey v. United States*, 690 F.2d 1170, 1181 (5th Cir. 1982) (observing that destroying wetlands may increase the chances of local flooding) (citing 40 C.F.R. § 230.41(b) (1981)). In view of these considerations, those who choose to stand on or past the line of permissible conduct in pursuit of development objectives, rather than submit to the section 404 permitting process, necessarily do so at their own risk. With this background in mind, we now turn to Appellants' arguments.

In this case, Appellants argue, based on the definition of "fill material" in the Corps' regulations at the time of the alleged violations, that the wood chips discharged in connection with construction activities in the Lewis Farm wetlands do not constitute "fill" because the discharge was not intended "for the primary purpose of replacing an aquatic area with dry land or changing the bottom elevation of a waterbody." 33 C.F.R. § 323.2(e), (f); App. Br. at 12-14. Rather, Appellants argue, they discharged the wood chips into the wetland as a means of disposing of a waste by-product of the land clearing activities.[43] App. Br. at 12-14.

---

[43] The Appellants argue also that because their expert concluded that the wood chips in the cleared pathways were of a quantity no greater than would be expected from ordinary silviculture activity, the ALJ's conclusion that they had violated section 404 was in error. While, based on the record, we disagree with the Appellants' factual assertion regarding the quantity of wood chips in the cleared pathways, even if Appellants' assertion were factually correct, we fail to see how it leads to a different outcome. First, the Appellants admit that they do not qualify for the CWA section 404(f) silviculture exemption (which specifically excludes from regulation "the discharge of dredge or fill material * * * from normal farming, silviculture, and ranching activities"). Oral Argument at 83-84; *see also* CWA § 404(f)(2), 33 U.S.C. § 1344(f)(2) (recapture clause requiring a § 404 permit for "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"). Second, even assuming the Appellants' factual assertion were true, they provide no explanation of why, since that statutory exemption does not apply, it matters that the discharge of wood chips was no more than would result from ordinary silviculture. Indeed, in our view, the fact that the exemption exists at all suggests that without an exemption discharges associated with silviculture activities may require a section 404 permit. In fact, the record demonstrates that

Continued

As discussed in Part I.A above, pursuant to the CWA, "the discharge of any pollutant by any person shall be unlawful" unless in compliance with other provisions of the Act. CWA § 301(a), 33 U.S.C. § 1311(a). Section 404, in turn, provides that the Corps "may issue permits * * * for the discharge of dredged or fill material into the navigable waters," and that "[a]ny discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section." CWA §§ 404(a), (f)(2), 33 U.S.C. §§ 1344(a), (f)(2).

While the Act does not define the term "fill material," at the time of the events in this case, both the Corps' and EPA's regulations defined the term, and did so differently.[44] The Corps' 1977 implementing regulations (which were in effect during the relevant time period) defined "fill material" as "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of an [sic] waterbody." 33 C.F.R. § 323.2(e) (1998). The Corps' regulations provided further that "the term ['fill material'] does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under section 402 of the Clean Water Act." *Id.* EPA's regulations, as in force at the time of the events in this case, defined "fill material" as "any 'pollutant' which replaces portions of the 'waters of the United States' with dry land or which changes the bottom elevation of a water body for any purpose."[45] 40 C.F.R. § 232.2 (1998). Conspicuously absent from EPA's definition is any reference to the "primary purpose" of the discharge.

(continued)
Mr. Needham was aware that wood chips might well be considered "fill material," even in relatively small quantities, such as those associated with stump grinding. *See supra* Part I.B.2 *and infra* note 53 (quoting the 1990 Corps Letter); Trans. at 882-84.

[44] As discussed below, after the occurrence of the events in this case, the Corps and EPA issued a joint rulemaking harmonizing their definitions of "fill material." *See infra* note 56 and accompanying text.

[45] At this time, however, the two agencies had identical definitions of the term "discharge of fill material":

> The term discharge of fill material means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary to the construction of any structure in water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other materials for its construction; site-development fills for recreational, industrial, commercial, residential and other uses, causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures, such as sewage treatment

Continued

Because the test for establishing the applicability of the section 404 permit provisions depends on a determination that the material placed in the wetlands is either "dredge" or "fill," and the parties do not dispute that the wood chips are not dredge, the definition of "fill material" is central to our liability analysis. *See Save Our Community*, 971 F.2d at 1162-63. The Appellants contend that the Corps' regulations should apply "because [Appellants] were dealing with the Corps as the permitting authority and as the agency with regulatory authority. Any permit to be issued would have been issued through the Corps. The [Appellants] had no contact with the EPA until after the ditches had been dug."[46] App. Br. at 13 n.3. Because we conclude that the Appellants' discharge of wood chips in this instance met the criteria for "fill material" under either agency's regulations, we need not address whether we might have looked solely at EPA's regulations.

In his Initial Decision, Judge Charneski concluded that "wood chips and woody debris are 'pollutants' within the meaning of Section 301(a) and 502(6) of the Clean Water Act," and that the wood chips discharged in this instance "constitute fill material." Initial Decision at 28. Judge Charneski further observed that cleared vegetation placed in a wetland area may constitute fill, even when it is being redeposited into the same wetland area from which it was removed, a point that the Appellants do not contest. *See* Initial Decision at 28*; see also Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 901 (5th Cir. 1983)(describing land clearing activities that the court in that case ultimately found to involve the discharge of fill material); *United States v. Bay-Houston Towing*, 33 F. Supp. 2d 596, 608 (E.D. Mich. 1999) (finding, among other things, that the use of bog vegetation as foundation material for windrows and haul roads amounted to a discharge of "fill material"). Judge Charneski concluded further that "the discharge of this fill material onto the wetlands on the Lewis Farm property constituted the discharge of 'pollutants' from a 'point source' requiring a Section 404 permit." Initial Decision at 28. In reaching these conclusions, Judge Charneski found, based on the considerable evidence in the record (including, among other things, the site inspectors' field notes, photographic evidence, and witness testimony), that the Appellants deposited a "substantial amount of wood chips" on top of the

---

(continued)

> facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs.

33 C.F.R. § 323.2(f); 40 C.F.R. § 232.2.

[46] Region III argues, on the other hand, "that the appropriate definition should be the EPA definition. * * * First, the enforcement MOA between EPA and the Corps * * * indicates that where EPA has enforcement lead, EPA makes the decision about whether or not [there is] a violation. Second, while the Corps is the permit-issuing agency, it is EPA who is charged under Section 404(b)(1) with setting forth the guidelines the Corps must consider in determining whether to issue a permit. Third, while the Corps is the permitting agency, EPA has veto authority of the Corps' permits under Section 404(c)." Oral Argument at 47 (acknowledging also that Region III has "been unable to find any case law that addresses [the] particular question" of whose definition should control).

wetland soil (citing observations ranging from one to fourteen inches of wood chips or wood chips mixed with soil). *Id.* at 16-17, 30-31. Judge Charneski thus concluded, albeit implicitly, that these facts demonstrated that the discharge of wood chips functioned to "'replace[] an aquatic area with dry land or change the bottom elevation of [a] waterbody.'" *Id*. at 29 (quoting 33 C.F.R. § 323.2(e)). Appellants have not mounted a serious challenge to any of Judge Charneski's evidentiary findings, and in any case, as we have observed, we generally defer to an ALJ's factual findings where those findings are informed by witness testimony at an evidentiary hearing. *See supra* Part II.A.

While it is not entirely clear to us which agency's regulation Judge Charneski applied in his analysis, Appellants' conclusions regarding the nature of the discharges to the Lewis Farm wetlands are irreconcilable with both of the agencies' regulations. Appellants' assertion that the distribution of wood chips in the Lewis Farm wetlands was for the "primary purpose" of disposal, and therefore that the wood chips cannot constitute fill, relies on an unduly narrow interpretation of "primary purpose" that is not at all compelled by the regulations. Moreover, Appellants' interpretation ignores and conflicts with EPA's and the Corps' interpretation of these regulations, which the courts have affirmed. We thus follow ample Circuit Courts of Appeal precedents in holding that the Corps' definition of fill material does not necessarily create a blanket exclusion from section 404 regulation for any discharge that might technically be described as waste disposal — rather, the *effect* of the discharge as well as the ultimate purpose of the underlying activity may help to inform the determination of whether a discharge is or is not fill. *See generally Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 448 (4th Cir. 2003); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 924-26 (5th Cir. 1983); *Save Our Wetlands, Inc. v. Sands*, 711 F.2d 634, 647 (5th Cir. 1983).

As Region III points out in its brief, the record clearly demonstrates that the Appellants ground small trees, shrubs, branches, treetops, and stumps into wood chips along the thirty-to-fifty-foot wide tracts through the Lewis Farm wetlands for the primary purpose of constructing a pathway to accommodate the machinery necessary to dig the Tulloch ditches.[47] *See* Reg. Br. at 25; Trans. at 1128 (explaining that absent use of a kershaw "you'd have sticks and everything in your bucket of dirt, and that would cause a problem. You really couldn't cleanly dig something, and also for the trucks coming through, those pieces of wood could have knocked hoses off, et cetera"); Initial Decision at 7 (concluding that had Appellants not ground the slash "the ditching equipment would be unable either to enter the site, or to effectively excavate the ditches").[48] By using a kershaw and a stump

---

[47] The ditches themselves were only a few feet wide. *See* Reg. Br. at 6-7.

[48] *See also* Trans. at 1016 (reflecting the contractor's view that prepping the paths allowed them "to drive [their] trucks down and excavate the material and load it in the off-road trucks").

grinder to prepare the paths through the wetlands and process the woody debris in the timbered areas into wood chips, Appellants created a better driving and operating surface for their excavating equipment (wood chips and soil instead of branches, saplings, tree tops, and underbrush).[49] *See* Trans. at 208-09, 333-35, 1016, 1128; Initial Decision at 7.

Appellants maintain in this case, however, that replacing an aquatic area with dry land or changing the bottom elevation of a waterbody was not their primary purpose for chipping the slash or discharging the wood chips into the wetland. Rather, the Appellants urge that the primary purpose for discharging the wood chips into the wetland was to dispose of them, and therefore this discharge cannot be considered "fill." App. Br. at 13-14. In this respect, essentially Appellants suggest that the Corps' regulations require, when identifying the purpose of a discharge, that we look in isolation at the point at which the pollutant is released into the wetlands, ignoring the broader context of the activities leading to the discharge.

We disagree. Such a narrow view of the purpose of the discharge is not compelled by the plain language of the Corps' regulations, nor is it consistent with the stated regulatory objectives of the Corps' rules. Rather, the Corps views its definition of "fill material" as creating a practical bifurcation of the regulatory framework, channeling those discharges that can be effectively regulated under the NPDES provision into the section 402 permit program, and addressing under section 404 those discharges that primarily have the effect of changing the bottom elevation of a waterbody or replacing a waterbody with dry land. *See* 42 Fed. Reg. 37,122, 37,130 (July 19, 1977) (explaining in this context that the exclusion of waste from the definition of "fill material" was meant to address "industrial and municipal discharges of solid waste materials * * * which technically fit within our definition of 'fill material' but which are intended to be regulated under the NPDES program * * * such as sludge, garbage, trash, and debris in water"). As a result, we flatly reject Appellants' argument that merely because the wood chips might be characterized as waste at the point of discharge from the kershaw, they cannot constitute fill material for purposes of the CWA.

---

[49] The record suggests also that another reason for removing the slash was to avoid the perception that Vico was constructing a "corduroy road." Trans. at 208, 842-43, 847, 887. Appellants imply, in this regard, that had they driven over the slash that remained in the paths after the initial timbering operation, thereby pressing the remaining vegetation into the wetlands soil instead of processing it into wood chips, the material may have been considered a "corduroy road," which would have triggered the obligation to obtain a section 404 permit. *See* App. Br. at 13; Trans. at 843. In light of our analysis here, however, we fail to see how the processing of the slash into wood chips, and the discharge of those wood chips on the soil surface in connection with the construction of a pathway through the wetlands, makes the resulting debris any less likely to constitute fill for purposes of the CWA.

Based on our review of the record and applicable law, we find that the processing of the slash into wood chips, and the resulting discharge of wood chips into the wetlands, was not merely a method of disposal of the woody debris remaining after completion of timbering operations, as Appellants erroneously claim, but rather an integral and inexorable step in the construction of a traversable pathway through the wooded wetlands, without which the conversion of wetlands to dry land would not have been feasible.[50] We thus decline to disassociate the discharge of wood chips from the activity that led to the discharge. Thus, we will not attribute an independent purpose to the discharge of wood chips that is separate and distinct from the broader purpose of the wetlands conversion activity that led to the discharge. But for the broader effort to convert the wetlands to dry land, neither the timbering nor the chipping operation that followed would have occurred. We therefore reject the Appellants' characterization of the discharge as having as its primary purpose the disposal of waste material.[51]

In short, viewed in their overall context, the activities in the Lewis Farm wetlands are most appropriately characterized as follows. The first step in the Appellants' wetland drainage project was to construct a pathway through the wetlands along which excavation equipment could effectively travel and operate. Appellants' construction of a pathway through the wetlands involved, among other things, the processing of woody vegetation on the wetland soil into wood chips to create a surface that was more easily traversed by the Appellants' machinery.[52] The effect of the discharge associated with this activity was to replace an aquatic

---

[50] *See* Oral Argument at 22 (Appellants' counsel explained that "Judge Charneski even found that * * * clearing the timber was only the first step. The second step was to clear the saplings and other woody debris. * * * [T]the purpose of the second phase of the operation was to allow Paxton to get the equipment in there.").

[51] The Appellants argue that the "[t]he Initial Decision recognized that the wood chips were spread only to get rid of the material (to 'eliminate the slash and tree stumps remaining in the path') and noted that the chips were just 'blown out' of the equipment and left 'where they fell.'" App. Br. at 12 (quoting Initial Decision at 7-8). We note, however, that the ALJ did not conclude, as Appellants claim, that the discharge of wood chips was for the primary purpose of disposal. In the portion of the Initial Decision that the Appellants quote, the ALJ was merely describing the physical action of the equipment unrelated to any determination of "purpose" in the regulatory context. Indeed, quite to the contrary, the ALJ expressly recognized that "[b]efore Paxton could dig the Tulloch ditches * * * the small trees, underbrush, branches, and tree tops that remained * * * , as well as the stumps of the trees that were cut by the logger, had to be removed. Otherwise, the ditching equipment would be unable either to enter the site, or to effectively excavate the ditches," a description consistent with our finding that the grinding of slash was a necessary and integral step in the construction of an access-way for equipment. Initial Decision at 7.

[52] This might be better described as "reprocessing" since this material had already been handled once by the timber company (Old Mill) before being processed into wood chips by Paxton. That is, Old Mill cut down the saplings and small trees, severed branches and tree tops from marketable trees, and left the remaining debris in the timbered pathways.

area with dry land or to change the bottom elevation of a waterbody.[53]

In assessing the purpose of the pathway construction and its associated discharges, we simply cannot ignore the overarching purpose of the project: to replace the Lewis Farm wetlands with dry land. *See* Oral Argument at 10. The trench digging and the land clearing, including the processing of slash into wood chips, did not occur in a vacuum, but rather were integral steps in furtherance of a project ultimately intended to remove the wetland characteristics of the Lewis Farm property. This characterization appropriately links the discharge of pollutants to an activity that has an identifiable objective, placing in meaningful context the "purpose" of the discharge in question. Thus, we believe that the record provides an adequate factual basis on which to conclude that the wood chips that the Appellants discharged in this instance met the Corps' definition of "fill

---

[53] We are not persuaded by the Appellants' argument that the discharge of wood chips did not, in fact, change the bottom elevation of the wetlands. It is clear in this instance that there were significant deposits of wood chips that did change elevation of the wetlands — that is, the elevation of areas within the wetland would be different were the wood chips not present. In this respect, we need not find a change in elevation across the entire disturbed area, we conclude only that the Appellants' activities resulted in the creation of an amount of wood chips sufficient to create localized changes in elevation (such as mounds, piles, or berms). *See, e.g.*, Reg. Ex. 40 (photograph roll 5, frames 16-17, 20-23, 25). For example, during cross-examination of Mr. Needham the following exchange occurred:

> Q. So you would probably see in a heavily wooded area where stumps had been ground up, you would see piles of chips everywhere, wouldn't you?
>
> A. I'd be careful with the word "everywhere."
>
> Q. There would be a significant number of piles of chips?
>
> A. Yes.
>
> Q. Where are the pile of chips [in Complainant's Exhibit 39, Disk 6, Photo 18]?
>
> A. I think there are some off to the right of where this gentleman is standing. I think that may be one pile. * * *
>
> * * *
>
> Q. How may piles of chips do you see in the photo?
>
> A. I think there may be three or four.
>
> * * *
>
> Q. The entire corridor?
>
> A. Right in the vicinity of the foreground where you can see.

Trans. at 914-15. In fact, the Corps had previously cautioned Mr. Needham that material such as this might have the effect of changing an area's bottom elevation and therefore constitute fill. *See* 1990 Corps Letter; *see also* Reg. Ex. 26 (Photographs 7-8) (caption reading "Notice chips fill entire corridor with scattered mounds of chips throughout"); Trans. at 335.

material."[54]

Our conclusion in this regard is bolstered by federal case law addressing the Corps' 1977 definition of "fill material." Indeed, at least one court has specifically recognized the significance of a project's overall objective in the context of evaluating whether a discharge constitutes fill under the CWA. *See Avoyelles*, 715 F.2d at 924-25. In *Avoyelles*, the Fifth Circuit looked at the definition of "fill material" in a situation factually similar to the present case. There, the landowners had cleared and burned vegetation in a wetland in connection with a project intended ultimately to convert the wetland to upland. *Id.* at 920-21. The landowners then "disced" the ashes into the ground and buried unburned vegetative material in pits dug in the wetland. *Id.* at 921. Finally, the landowners dug ditches to drain the wetlands. *Id.* While the landowners in Avoyelles claimed, as the Appellants do here, that the discharge of vegetative material was for purposes of disposal, the court rejected this argument, explaining that "the burying of the unburned material, as well as the discing, had the effect of filling in the sloughs on the tract and leveling the land." *Id.* at 924. In light of this effect, and given the overall intent of the project to remove the area's wetland hydrology, the court concluded that "[c]ertainly, the activities were designed to 'replace the aquatic area with dry land.'" *Id.* at 924-25.

According to another Fifth Circuit opinion discussing the district court ruling in *Avoyelles Sportsmen's League, Inc. v. Alexander* (473 F. Supp. 525, 535 (W.D. La. 1979) (*Avoyelles I*), "[o]ne of the key elements behind [the district court's] decision [in *Avoyelles I*] was the fact that the work would destroy the wetlands." *Save Our Wetlands, Inc. v. Sands*, 711 F.2d 634, 647 (5th Cir. 1983). This discussion from *Save Our Wetlands* was quoted by the Fifth Circuit in its appellate ruling in the *Avoyelles* case. *See Avoyelles*, 715 F.2d at 926. The facts in *Save Our Wetlands*, once again, were partially similar to the facts in this case, in that they involved the discharge of cleared vegetation in a wetland area. However, unlike the facts here, in *Save Our Wetlands* the "wooded swampland" was to be cleared and converted to a "swampland * * * with shrubs, grasses, and other low growth." *Id*. The court explained "[t]he wetland involved here will not be converted as in *[Avoyelles I]*. The trees and vegetation to be windrowed will not be used to 'replac[e] an aquatic area with dry land or * * * chang[e] the bottom elevation of a waterbody.] Additionally, no access roads will be built to the corridor. All work will be done from marsh buggies and helicopters."[55] *Id*. Based on

---

[54] Moreover, because we conclude that the discharge had the effect of changing the bottom elevation of a waterbody, it would also meet EPA's definition of "fill material." *See supra* note 53; 40 C.F.R. § 232.2 (EPA's definition of "fill material").

[55] We note that the facts here are unlike those in *Save Our Community v. EPA*, in which the Fifth Circuit disagreed with a lower court's conclusion that if an activity "viewed as a whole" is in-
Continued

this analysis, the Fifth Circuit in *Save Our Wetlands* found that there had been no CWA section 404 violation. *Id.* In contrast, the facts in this case parallel those in *Avoyelles I*, where the objective was to convert the wetlands to dry land.

Moreover, our conclusion that the wood chips in this instance had the *effect* of fill further supports the ALJ's finding of a violation. In *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, the Fourth Circuit considered whether the Corps had properly interpreted the definition of "fill material" as an effects-based test in issuing a section 404 permit for the deposit of mining overburden into nearby valleys that contained navigable waters where "the valley fills serve no purpose other than to dispose of waste." 317 F.3d 425, 439 (4th Cir. 2003). The court concluded that "Congress has not clearly spoken on the meaning of 'fill material' and, in particular, has not clearly defined 'fill material to be material deposited for some beneficial primary purpose.'" *Id.* at 444. It went on to examine "whether [the Corps' 1977] regulation, as interpreted by the Corps, is based on a permissible reading of the [CWA], and, if so, whether the [Corps] acted consistently with the regulation in issuing" the contested section 404 permit. *Id.*

In doing so, the court focused on an April 2000 proposed rulemaking in which the Corps and EPA jointly proposed to amend their regulatory definitions of "fill material." *See id.* at 445-46; *see also* Proposed Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 65 Fed. Reg. 21,292 (Apr. 20, 2000).[56] The joint Corps-EPA rule explained the agencies' interpretation of the division of labor between section 402 and section 404, in part, as follows:

> [S]ection 404 focuses exclusively on two materials: dredged material and fill material. The term "fill material" clearly contemplates material that fills in a water body, and thereby converts it to dry land or changes the bottom elevation. Fill material differs fundamentally from the

---

(continued)
tended to remove the wetlands characteristics of an area then it requires a § 404 permit even without a determination that any discharge did in fact occur. 971 F.2d 1155, 1160 (5th Cir. 1992). The key to the Fifth Circuit's ruling in *Save Our Community* was the absence of a factual determination that there had been any discharge. That is, the court concluded that "wetlands draining activity *per se* does not require a § 404 permit," and because it was "unclear from the record the extent of or if any prohibited discharge ha[d] occurred," the lower court had erred in finding that a § 404 permit was required. *Id.* In the present case, the ALJ concluded that there *had* been a discharge in the form of wood chips (and the existence of such discharge is not seriously disputed). At issue in the present case, therefore, is whether, given the context of the discharge, the discharged material constitutes fill — an issue to which *Save Our Community* does not speak.

[56] The rulemaking was finalized on May 9, 2002. *See* Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,129 (May 9, 2002).

> types of pollutants covered by section 402 because the principal environmental concern is the loss of a portion of the water body itself. For this reason, the section 404 permitting process focuses on different considerations than the section 402 permitting process.

65 Fed. Reg. at 21,293. The proposed rule also explains that "[t]here are no statutory or regulatory provisions under the section 402 program designed to address discharges that convert waters of the United States to dry land." *Id.; see also Kentuckians*, 317 F.3d at 446. This explanation is consistent with the Corps' discussion of this issue in its 1977 rulemaking, in which it stated:

> During the two years of experience with the Section 404 program, several industrial and municipal discharges of solid waste materials have been brought to our attention which technically fit within our definition of "fill material" but which were intended to be regulated under the NPDES program. These include the disposal of waste materials such as sludge, garbage, trash, and debris in water. In some cases involving the disposal of these types of material in water, the final result may be a landfill even though the primary purpose of the discharge is waste disposal.
>
> The Corps and the [EPA] feel that the initial decision relating to this type of discharge should be through the NPDES program. We have, therefore, modified our definition of fill material to exclude those pollutants that are discharged into water primarily to dispose of waste.

42 Fed. Reg. at 37,130.

The court in *Kentuckians* observed that "the Corps [had] joined with the EPA to propose a joint rule that would 'not alter current practice,' but rather was intended to clarify what constitutes 'fill material' subject to CWA section 404." *Kentuckians*, 317 F.3d at 445 (quoting 65 Fed. Reg. at 21,292). The court noted that EPA and the Corps had already "effectively interpreted the 'primary purpose test' as an 'effects based' definition of 'fill material.'" *Id.* at 432.[57] The Court then

---

[57] The court identified this interpretation of the Corps' regulation as having been made "both by interpretations published in the Federal Register [in 1977 and 2000] and by [the Corps'] application of that regulation in issuing permits." *Kentuckians*, 317 F.3d at 447. The court explained, for example, that "[t]he 1977 Regulation seeks to divide statutory responsibility between the agencies charged with different responsibilities by defining 'fill material' that is subject to regulation by the Corps and 'waste' that is subject to regulation by the EPA through the administration of effluent limitations." *Id.* at 446..

upheld this interpretation as being "neither plainly erroneous nor inconsistent with the text of the regulations." *Id.* at 447. The Court explained:

> [W]e conclude that the Corps' interpretation of "fill material" as used in § 404 of the [CWA] to mean all material that displaces water or changes the bottom elevation of a water body except for "waste" — meaning garbage, sewage, and effluent that could be regulated by ongoing effluent limitations as described in § 402 — is a permissible construction of § 404. And as an interpretation of its 1977 Regulation, it is neither plainly erroneous nor inconsistent with the text of the regulation.

Id. at 448.

Following this line of reasoning, because the discharges here had the *effect* of displacing water or changing the bottom elevation of a waterbody, *see supra* note 53, and because the material discharged was not of a type ordinarily regulated by ongoing effluent limitations under section 402, they are appropriately subject to the permitting requirements of section 404, even if they could be understood, technically, as involving waste disposal.

In sum, either the Fourth Circuit's ruling in *Kentuckians*, or the Fifth Circuit's ruling in *Avoyelles*, alone would support our holding in this case that the Appellants' discharge of wood chips constitutes fill. Considered together, these two cases sufficiently identify the contours of the Corps' regulatory definition of "fill material" for us to conclude that the discharges of wood chips in this case falls squarely within the scope of the Corps' regulatory authority.[58] Accordingly, for the reasons discussed above, we find no basis to disturb Judge Charneski's finding that the Appellants violated CWA section 301(a) by discharging fill material into waters of the United States without first obtaining a permit under CWA section 404.[59]

---

[58] This is especially clear when these cases are viewed in light of the Fifth Circuit's opinions in *Save Our Community* and *Save Our Wetlands. See generally Save Our Community v. EPA*, 971 F.2d 1155 (5th Cir. 1992); *Save Our Wetlands, Inc. v. Sands*, 711 F.2d 634 (5th Cir. 1983).

[59] As a final note on the Appellants' liability under the CWA for discharges of wood chips into the Lewis Farm wetlands, based on the intent of the Corps' regulations to assign discharges into waters of the United States, as appropriate, to either the section 402 permitting program or the section 404 permitting program (*see supra* note 57 and accompanying text), we observe that had we concluded that there was no section 404 violation, we may have been compelled to remand the case back to Judge Charneski for a ruling on whether the discharge required an NPDES permit under section 402, an alternative basis for the first count of the complaint. *See* Initial Decision at 20 n.32 (declining to rule on whether the discharge required a section 402 permit); Oral Argument at 33 (indicating that the parties argued the section 402 permit issue before the ALJ).

D. *Storm Water Runoff*

Judge Charneski concluded that Appellants violated the CWA by failing to obtain a section 402 storm water permit in connection with construction activities at the Lewis Farm, and by "failing to prevent storm water discharges into the wetlands on Lewis Farm and into the western tributary to Drum Point Creek."[60] Initial Decision at 36-38. In reaching this conclusion, the ALJ relied heavily on the testimony of Mr. Magerr, who testified that he "observed rills and gullies conveying storm water runoff to the ditches," and described the Tulloch ditches "as being 'U'-shaped, rather than 'V'-shaped which indicated that the banks of the Tulloch ditches had worn down due to erosion." *Id*. at 36-37 (citing Trans. at 585-88; Reg. Ex. 39 (disk 6, photographs 10, 13-16)). As Judge Charneski notes, Mr. Magerr also testified that the spoil pile in the upland area of Lewis Farm "did not contain the silt fences as required by the [Erosion Plan in the State Permit]." *Id.* at 37. Mr. Magerr testified further, with respect to photographic evidence in the record (Reg. Ex. 39, disk 6, photograph 8), that "[t]he pile is not stabilized. In the foreground there's a drainage — sort of a drainage swale that is directly linked to an existing ditching area." Trans. at 583; *see also* Initial Decision at 37.

While the Appellants offered expert testimony from a water quality expert (Dr. Cahoon) who visited the site approximately six months after Mr. Magerr's inspection, Judge Charneski concluded that, "[o]n balance, the testimony of Dr. Cahoon regarding his March, 2000, visit to the Lewis Farm site is not enough to rebut the testimony of EPA environmental engineer Magerr." Initial Decision at 38. In this regard, Judge Charneski concluded that given the passage of time after Mr. Magerr's visit, "the site conditions had changed. There was time (6 months) for the banks to become more stable." *Id*. at 38. Judge Charneski also found that "Dr. Cahoon's observations regarding his March 2000 visit do not in any way discredit the observations of Magerr, critical to this case, that on September 9, 1999, the ditch banks were unstable in areas, that the stockpile lacked silt fencing, and that erosion was causing soil and wood chips to enter the ditches." *Id.*

In reviewing an ALJ's factual determinations based on the testimony of witnesses during the administrative proceeding, where witness credibility plays a role, the Board will ordinarily defer to the ALJ's judgment. *See In re Julie's Limousine & Coachworks, Inc.*, 11 E.A.D. 498, 507 n.19 (EAB 2004); *In re Friedman*, 11 E.A.D. 302, 314 n.15 (EAB 2004) (citing *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998)). Thus, in such instances, the ap-

[60] Judge Charneski found that "[t]he evidence in this case supports [Region III's] position that storm water associated with industrial activity was discharged into the two Tulloch ditches. (It has previously been held that the Tulloch ditches drain into the T-ditch and then on to the western tributary of Drum Point Creek)." Initial Decision at 36.

pellant must demonstrate that the ALJ's factual conclusions constitute clear error or otherwise exceed his or her discretion. *See, e.g., In re Phoenix Constr. Servs., Inc.*, 11 E.A.D. 379, 411 (EAB 2004) ("We defer to the Presiding Officer's credibility and determination and find no clear error or abuse of discretion * * *."). In this case, Judge Charneski's factual conclusions regarding the presence of storm water runoff from the site rely, in part, on his assessment of the witnesses' credibility, thus raising the bar for the Appellants. *See* Initial Decision at 36-38 (discussing the competing testimony of Mr. Magerr and Dr. Cahoon and concluding that "the testimony of Mr. Magerr is credited").

Appellants argue on appeal that Judge Charneski's finding of liability for the section 402 violation was improper because he impermissibly relied on a point source (the ditches themselves) that Region III did not specifically identify in its Amended Complaint.[61] *See* App. Br. at 17. Appellants do not contest directly the accuracy of the ALJ's findings of fact regarding the discharge of rainwater through "rills and gullies" into the Tulloch ditches on Lewis Farm, although they dispute (unsuccessfully in our view) whether any "evidence was introduced that any soil or sediment was actually moving from the stockpile to any waterway."[62] *Id*. at 19. Consequently, the substance of the Appellants' storm water-related argument is entirely procedural in nature. That is, they challenge the ALJ's conclusion of law, based on a perceived inconsistency between Judge Charneski's liability finding and the complaint upon which the administrative penalty action was predicated.[63]

---

[61] As discussed above, Appellants do not challenge the threshold factual determination that more than five acres of land were disturbed. Nor do Appellants argue, for any other reason, that the NPDES permit requirements did not apply to them in this instance. *See* App. Br. at 17-19.

[62] We believe that it was not clearly erroneous for the ALJ to conclude, based on Mr. Magerr's testimony regarding the "drainage swale" from the spoil pile, that actual erosion runoff from the spoil pile did occur, especially when this testimony is considered in conjunction with uncontested evidence in the record regarding the amount of rain required to cause runoff from the property and the actual severity of rainfall events during the critical period of time. *See* Trans. at 583, 609-14; Initial Decision at 37.

[63] The Appellants state also that "[i]f erosion did occur at the property * * * any such erosion could possibly be violative of the locally administered Erosion & Sediment Control regime, but it would not constitute a Section 402 violation." App. Br. at 19. To the extent this is intended to be an argument separate and distinct from the Appellants' other arguments, as described above, we reject it. Assuming storm water-related erosion of the ditch banks did occur, causing the discharge of rainwater and sediment into the Tulloch ditches, as the ALJ concluded, then there was a violation of the CWA storm water-related provisions, which require a section 402 permit for any discharge of rainwater from a covered construction site. *See* Initial Decision at 36-38; 40 C.F.R. pt. 122. None of Appellants' arguments are adequate to overcome Judge Charneski's conclusions of fact in this regard, and to the extent Appellants may make argumentative statements in their recitation of the facts, we do not recognize those statements as formal arguments raised before the Board.

Accordingly, we turn now to the Appellants' argument that we must overturn Judge Charneski's finding of liability with respect to Count II because Region III "did not claim that the ditches themselves were point sources." App. Br. at 17-18. In our view, the Appellants' argument on this point must fail for two reasons. First, the Amended Complaint does, in fact, ascertainably identify the ditches themselves as potential point sources for storm water runoff. Second, as we have recently recognized, it is within the discretion of the ALJ to conform the pleadings to the evidence in circumstances, as here, where the relevant facts and issues have been fully presented before the administrative body and there is no likelihood of material prejudice to the parties.

Region III's Amended Complaint included the following language regarding the Appellants' failure to obtain a CWA section 402 storm water permit:

> 27. Commencing in or about November 1998 and continuing through at least September 1999, Respondents or persons acting on behalf of Respondents engaged in construction activity resulting in the discharge of pollutants in storm water to wetlands at the Site and through ditches at the Site to unnamed tributaries to Drum Point Creek, a water of the United States. Ditches cut in wetlands which have not been stabilized have resulted in significant sloughing and erosion into ditches and streams. Eroded soils and sediments from the rills and fissures along the bank walls have been deposited in the ditches, which eventually flow into the unnamed tributaries. The site has not undergone final stabilization.
>
> * * *
>
> 30. The equipment used at the site is a "point source" which "discharges" "pollutants" contained in storm water runoff as those terms are defined in Section 502(6), (14) and (16) of the Act, 33 U.S.C. §§ 1362(6), (14), and (16), and 40 C.F.R. § 122.2.
>
> 31. Respondents' construction activities resulted in the discharge of pollutants to wetlands on the Site and into ditches which discharge into an unnamed tributary of Drum Point Creek, a "water of the United States" within the meaning of 40 C.F.R. § 122.2.
>
> 32. Respondents discharged pollutants to "waters of the United States" within the meaning of 40 C.F.R. § 122.2

> without an NPDES permit issued under Section 402 of the Act, 33 U.S.C. § 1342.
>
> 33. Respondents' discharge of pollutants without a NPDES permit violates Section 301 of the Act, 33 U.S.C. § 1311.

Amended Complaint (Docket No. CWA-3-2001-0021) ¶¶ 27, 31-33.

The Appellants argue that because paragraph 30 of the Amended Complaint, as quoted above, does not list the ditches themselves (or rills and fissures along the ditch banks) as "point sources," the Amended Complaint does not provide a sufficient legal foundation for the ALJ's finding that the discharge of pollutants from the ditches into the wetlands amounts to a violation of the CWA.[64] *See* Initial Decision at 36-38. Apparently, the Appellants believe that since the Amended Complaint includes what appears to be a boilerplate paragraph identifying "equipment used at the Site" as a "point source" it cannot reasonably be read as identifying other potential point sources as well.[65] *See* App. Br. at 17-18 ("The EPA's Complaint asserted that the 'equipment used at the Site is a point source' for the 402 violations. * * * Importantly, the EPA did not claim that the ditches themselves were point sources, although that is the basis for the Administrative Law Judge's finding of a violation.").

In our view, however, Region III's theory of the case, as expressed in the Amended Complaint, quite clearly identifies storm water discharges from the ditches themselves — and even more specifically "*from the rills and fissures along the bank walls*" (Amended Complaint ¶ 27) — as the basis for the CWA section 402 violation. The very first paragraph of the section 402 portion of the Amended Complaint states that "[e]roded soils and sediments *from the rills and fissures along the bank walls* have been deposited in the ditches, which eventually flow into the unnamed tributaries." Amended Complaint ¶ 27. This discharge of "pollutants in storm water," which the Amended Complaint expressly attributes to "rills and fissures along the bank walls," resulted in "the discharge of pollutants in storm water to wetlands at the Site and through ditches at the Site to unnamed tributaries to Drum Point Creek." *Id.* It seems clear to us from the nature of the

---

[64] The Appellants do not argue, in general, that ditches cannot be considered a "point source" under the applicable statutory and regulatory provisions, but only that Region III did not identify them as the point source upon which they were relying in the Amended Complaint. *See* Oral Argument at 34-35; *see also N.C. Shellfish Growers Ass'n v. Holly Ridge Assocs., LLC*, 278 F. Supp. 2d 654, 680-81 (E.D.N.C. 2003)(indicating that ditches can be a point source for purposes of the CWA's storm water provisions).

[65] This paragraph appears verbatim in the wetlands section of the Amended Complaint as well. Amended Complaint ¶ 21.

violation described in paragraph 27 of the Amended Complaint that Region III alleged precisely the violation that the ALJ found to have occurred — a discharge of pollutants in storm water *from and through* the ditches. That Region III did not use the words "point source" in the Amended Complaint to describe the ditches is immaterial. It was sufficient for Region III to have expressly identified the ditches as the source of the discharge, and for the ALJ to have subsequently found that the ditches were in fact point sources. *See* Initial Decision at 36 n.49 ("The term 'point source' includes ditches, such as the Tulloch ditches excavated in [the two cleared paths] on Lewis Farm."). The existence of the paragraph identifying "equipment used at the site" as a point source, while ultimately not helpful to Region III's case, does not alter the fact that the Region clearly alleged that the ditches were the source of the pollutant discharges, and does not preclude a finding by the ALJ that the ditches were point sources.

Indeed, the case Region III presented before the ALJ, and the case argued in detail by the parties throughout the administrative proceeding, fully reflects the violation alleged in the Amended Complaint — that rills and fissures along the bank walls caused discharges of pollutants in storm water into the wetlands and through the ditches into waters of the United States.[66] In short, we are not convinced that the Amended Complaint is lacking in any respect with regard to the identification of the ditches themselves as a point source for storm water related discharges.

However, even to the extent that the Amended Complaint might be construed as deficient, it is well within the ALJ's discretion to "treat pleadings as conforming to the evidence presented at trial." *In re Mayes*, 12 E.A.D. 54, 94 (EAB 2005) (citing *In re H.E.L.P.E.R., Inc.*, 8 E.A.D. 437 (EAB 1999)). As we explained in *Mayes*, "[t]he critical question is whether such amendment would unduly prejudice the opposing party."[67] *Id.* Here, Region III appears to have pro-

---

[66] As the Amended Complaint suggests, arguments before the ALJ focused on whether the Appellants' "construction activity result[ed] in the discharge of pollutants in storm water to wetlands at the Site and through ditches at the Site to unnamed tributaries to Drum Point Creek." Amended Complaint ¶ 27. In fact, the parties litigated precisely those facts relevant to whether pollutant discharges from the ditches themselves actually occurred. *See* Initial Decision at 36-38 (discussing the testimony regarding the section 402 violation); Trans. at 557-89, 1151-62 (testimony of Mr. Magerrr and Mr. Cahoon). It was not until the Appellants' post-hearing brief, after the relevant facts had been fully explored, that they even raised the issue of whether the Amended Complaint identified an appropriate "point source" for the storm water-related discharges. *See* Respondents' Post-Trial Brief at 49 (filed May 2, 2003) (arguing that "EPA failed to allege any viable 'point source' for its allegations").

[67] In *Mayes*, we held that the ALJ's exercise of discretion, finding a violation of RCRA regulations regarding the mandatory upgrade or closure of underground storage tanks (40 C.F.R. § 280.21), was appropriate even though the Region had alleged violation of a different regulatory provision addressing closure-and-assessment requirements (40 C.F.R. § 280.70(c)). Among other things, we observed that while "the evidence necessary to establish a 40 C.F.R. § 280.70(c) violation differs from
Continued

ceeded throughout the administrative proceeding as if the complaint had identified the ditches as a point source for storm water runoff. That is, the evidence Region III presented at the five-day hearing with respect to Count II focused on demonstrating that storm water had adversely affected the ditch banks and the spoil pile, resulting in "rills and fissures" that discharged pollutants into and through the wetlands. *See* Initial Decision at 36-38 (citing Trans. at 557-58, 576-77, 583-89, 698, 609-14, 682-84, 1151-62, 1176). Nowhere in the record does it appear that either the Region or the Appellants focused their arguments on discharges of storm water from the ditch digging or land-clearing equipment. Rather, testimony focused on the degree to which the ditch banks and the spoil pile showed signs of erosion that suggested the occurrence of storm water and sediment runoff. *See* Initial Decision at 36-37. Thus, the factual questions relevant to the ALJ's finding that the ditches themselves were the source of storm water discharge into the wetlands were thoroughly examined during the administrative proceeding. As such, an exercise of discretion to conform the pleading to the evidence would involve no prejudice to the Appellants whatsoever.

Accordingly, in that Judge Charneski had the discretion in this case to treat the complaint as conforming to the evidence presented during the administrative proceeding, we decline to disturb his judgment. Moreover, to the extent that Judge Charneski's exercise of such discretion was implicit rather than explicit (and to the extent that an explicit exercise of discretion is necessary to support a finding of liability in this case), we explicitly exercise our discretion to conform the pleading to the evidence, and find that the Appellants' discharge of storm water from the ditch banks and spoil pile into and through the wetland without a section 402 permit was a violation of CWA section 301(a).[68]

In sum, for the reasons discussed above, we find no basis for disturbing Judge Charneski's factual determinations regarding storm water discharges, and we are unpersuaded by Appellants' argument that the Amended Complaint was insufficient to support the ALJ's ruling on the storm water issue. Moreover, to the extent that the Amended Complaint might be perceived as deficient, we believe it is appropriate in this case to exercise discretion to conform the pleadings to the evidence presented. Accordingly, we leave intact Judge Charneski's determination that Appellants violated section 301(a) of the CWA by engaging in construction activities, and discharging pollutants in storm water, without the required section 402 permit.

(continued)
that required to prove a 40 C.F.R. § 280.21 violation * * * the parties had full opportunity to litigate these various issues." *Mayes,* 11 E.A.D. at 95.

[68] We note once again, however, that we do not believe that such an exercise of discretion is truly necessary, as we view the Amended Complaint as fully supporting Judge Charneski's ruling.

E. *Penalty Amount*

Having found that Appellants violated CWA section 301(a) by failing to obtain the required section 404 and section 402 permits prior to engaging in construction activities at the Lewis Farm, Judge Charneski assessed a total penalty of $126,800 — reflecting $100,000 and $26,500 for the section 404 and section 402 violations, respectively. The Appellants challenge the amount of the penalty, arguing that the ALJ's findings that Appellants were "highly negligent" with regard to the discharge of fill, and "moderately negligent" with regard to the discharge of storm water, were unfounded, and that the ALJ erred in concluding that the extent and gravity of the violations was significant. *See* App. Br. at 19.

1. *Penalty Assessment Criteria*

Clean Water Act section 309(g), 33 U.S.C. § 1319(g), provides that the EPA may assess civil penalties for violations of CWA section 301. The statute provides that the amount of the penalty must be based on "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 violation, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require." 33 U.S.C. § 1319(g)(3). Under the Consolidated Rules of Practice ("CROP"), 40 C.F.R. Part 22, the ALJ assessing a civil penalty "shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act." 40 C.F.R. § 22.27(b). The EAB reviews penalty assessments *de novo*, *see* 40 C.F.R. § 22.30(f), but will generally defer to the ALJ's judgment unless an appellant can demonstrate that the ALJ's judgment is clearly erroneous or otherwise constitutes an abuse of discretion. *See In re Phoenix Constr. Servs., Inc.*, 11 E.A.D. 379, 390 (EAB 2004); *In re Advanced Elecs., Inc.*, 10 E.A.D. 385, 399 (EAB 2002); *In re Slinger Drainage*, 8 E.A.D. 644, 669 n.32 (EAB 1999), *appeal dismissed*, 237 F.3d 681 (D.C. Cir. 2001); *In re Britton Constr. Co.*, 8 E.A.D. 261 (EAB 1999). As discussed below, based on the record before us, we do not find clear error or an abuse of discretion in the ALJ's penalty assessment.

We have explained in the past that "[t]he culpability statutory factor generally measures the level of the violator's fault or 'blameworthiness' and frequently includes consideration of a host of factors to assess the violator's wilfulness and/or negligence." *Phoenix Constr.*, 11 E.A.D. at 418. Since there is no specific penalty policy intended for use in CWA litigation, the Board has looked to general penalty policies for guidance on what factors to consider in reviewing culpa-

bility.[69] *Id.* (citing EPA General Enforcement Policy #GM-22, *A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties* at 18 (Feb. 16, 1984)) ("Penalty Framework").

2. *Penalty for Section 404 Violation*

a. *Appellants' Culpability*

With respect to the section 404 violation, Appellants argue that they "clearly attempted to comply fully with the law." App. Br. at 19. In support of this proposition, Appellants explain that "[t]hey hired an [sic] wetlands consultant * * * to advise them * * * [and] sought the advice of the Corps prior to beginning work because they wanted to ensure that all work complied fully with any applicable rules and regulations." *Id.* Appellants argue further that "[t]he work was performed openly and in full accordance with the conditions that had been agreed upon, and the Corps inspected the work as it was being performed at Respondent's invitation."[70] *Id*. at 20.

As we have already noted, the above representations appear simply to be inaccurate. *See supra* note 22 and accompanying text. The Appellants' statement that "[t]he Corps pre-approved the activities that were conducted on Site both orally and in writing," also is misleading at best. App. Br. at 19. In fact, there is no evidence that either of the Appellants had *any* contact with the Corps specifically regarding the proposed construction activities at Lewis Farm prior to beginning of the project at the site. *Id.; see* Initial Decision at 32-33, 42-43. Rather, the Appellants' environmental consultant (Mr. Needham) had contacted the Corps regarding similar activities being planned or undertaken at *different* sites, specifically the Smith Farm and Southern Pines Sites. *See* Initial Decision at 11-12 n.18; Trans. at 795-99. Moreover, the one letter that the consultant had received from the Corps regarding the activities at the Southern Pines Site indicated expressly that it reflected "a case specific determination and does not apply to any other site." Southern Pines Letter at 1. Thus, the Appellants were on notice that they should not rely on the representation in the Southern Pines Letter, despite any similarities be-

---

[69] Additionally, although settlement policies are generally not used outside of the settlement context, *Phoenix Constr.*, 11 E.A.D. at 379, 394 n.37, we have noted previously that the settlement guidance for section 404 violations instructs agency personnel to consider the violator's experience with the regulatory provisions and control over the events when assessing culpability, *id.* (citing U.S. EPA, *Final Clean Water Act Section 404 Civil Administrative Penalty Settlement Guidance and Appendices* at 3 (Dec. 14, 1990)).

[70] Appellants also claim that "[s]pecial equipment and more cumbersome and expensive procedures were employed so as to eliminate environmental impacts of the work." App. Br. at 20. Rather, in fact, it appears to us that the special equipment and procedures were employed in an attempt to avoid the need for a CWA § 404 permit — the intended environmental impact was undisputedly to eliminate the existence of the Lewis Farm wetlands.

tween the activities at the two sites. Accordingly, to the extent Appellants claim that the Southern Pines Letter contained a "determination upon which [Appellants] relied," in light of the express limitations contained in that document, we do not believe that the letter excused the need for site-specific consultation. As the ALJ observed, "[R]espondents should have taken the same care in discussing Tulloch ditch matters with the Corps, as it relates to the circumstances at Lewis Farm, that they exercised with respect to other wetland sites in the Tidewater area. They did not." Initial Decision at 43.

Reliance on the Southern Pines Letter is particularly misplaced in this case in light of the fact that the Southern Pines Letter does not describe the activities that occurred at the Lewis Farm site accurately or completely. For example, the letter makes no mention of wood chips at all. It also does not discuss stump grinding — although clearly Mr. Needham was aware that discharges of wood chips from stump grinding might constitute ground for a violation under section 404. *See generally* 1990 Corps Letter.[71] Additionally, while the Southern Pines Letter mentions "mowing of shrubs and saplings," it stops well short of describing the full extent of the path clearing activities that took place at the Lewis Farm site (i.e., grinding of small trees, tree tops, and tree branches, as well as saplings and shrubs along a 40-foot wide path and discharge of the resulting wood chips on the surface of the wetland soil).[72] Southern Pines Letter at 1.

Moreover, the Southern Pines Letter makes a "qualified determination" only about whether the "excavation activities" (i.e., the ditch digging itself) will consti-

---

[71] *See supra* Part I.B.2 & note 53.

[72] The Appellants argue, based on language in the Southern Pines Letter regarding "mowing of shrubs and saplings," that the Corps understood that the Appellants were planning to grind slash into wood chips and disperse those wood chips on top of the wetland soil. *See* Oral Argument at 15 ("So we need to recognize, I believe, that the people who are parties to this letter have an understanding of what's going on out in those woods when you dig ditches. * * * When you talk about 'mowing of shrubs and saplings along the length of proposed excavation,' there's a lot of testimony about what mowing is * * * . It's a machine that turns shrubs, saplings, woody debris on the floor of the forest, into wood chips. That's what that is."). We note again, however, that Mr. Needham's letter to the Corps did not mention wood chips at all, nor the use of a kershaw or stump grinder, and the Corps' response neither mentions wood chips nor makes any determinations regarding any potential discharge of "fill materials." *See generally* App. Ex. 2 (Letter from Mr. Needham to John Evans, Army Corps of Engineers (August 24, 1998) ("Needham Letter")); Southern Pines Letter at 1; *see also supra* note 25. Nor does anything else in the record evince such an "understanding" on the part of the Corps. However, even to the extent that the Corps may have anticipated the discharge of some wood chips into the wetlands based on the Needham Letter, the record clearly demonstrates that the amount of debris in the cleared paths exceeded the expectations of the Corps' inspectors and included trees and tree tops that went well beyond saplings and shrubs. *See* Initial Decision at 10, 30, 43; Trans. at 338-39, 841-43 (describing surprise on the part of the Appellants' contractors and the Corps' inspectors at the amount of debris in the cleared paths). Further, based on the 1990 letter from the Corps to Mr. Needham, Appellants should have known that wood chipping that resulted in a measurable increase in the surface level of a wetlands might well be regarded as fill activity. *See supra* Part I.B.2.

tute a violation — specifically whether there would be more than "incidental fallback." Southern Pines Letter at 1. The letter makes no findings at all about the land-clearing/chipping activities and does not reach any conclusions regarding discharges of "fill material" related to the clearing of wooded areas in preparation for excavation. *Id.* Even to the extent it makes a determination about the excavation process, and "incidental fallback," this finding is applicable, by its own terms, only "as long as [the] project does not include a more substantial discharge that would trigger Section 404 regulation." *Id.* Finally, the letter expressly states that the ditch digging activities should not include "[c]orduroy roads from *any fill material*, including woody vegetation." *Id.* (emphasis added). This provision should at least have triggered further questions on the part of the Appellants regarding the appropriateness of discharging significant quantities of wood chips onto the wetlands soil in connection with the construction of a pathway for the ditch digging equipment — the functional equivalent of building a corduroy road, in terms of both utility and effect.[73] *See supra* note 49.

Coupled with record testimony that Mr. Needham, the recipient of the Southern Pines Letter, received a call about the considerable amount and size of woody vegetation produced at the Lewis Farm site (in contrast to other similar sites where Appellants' contractors were working), Appellants had sufficient information from which to determine that, at a minimum, it would be prudent to inquire further as to the legality of their activities. *See supra*, Part I.B.2; Initial Decision at 30-31; Trans. at 842, 885, 919. Mr. Needham testified that rather than consult the Corps when he was apprised of the considerable amount of woody vegetation, he consulted instead the Needham and Southern Pines Letters, which, as we have observed, did not purport to address either the Lewis Farm site or the extensive chipping activity at issue there. Indeed, the ALJ's finding of a high degree of culpability is predicated on the fact that Appellants were on notice that there was more slash than expected but decided to proceed as planned despite this information. Initial Decision at 43. As he stated in conclusion, "on the facts of this case, given the substantial amount of slash remaining in the four paths after the timbering had been completed, it should have been clear to Needham (and to the respondents) that a substantial amount of wood chips, i.e. fill material, would be discharged into the wetlands as a result of the Kershaw operation." *Id*

Under these facts, we do not find clear error or an abuse of discretion in the ALJ's penalty analysis. In evaluating culpability, it is clear that Appellants were aware: (1) that there were wetlands on the property; (2) that these wetlands fell within the Corps' section 404 jurisdiction; (3) that "filling" wetlands without a permit was a violation of the CWA; (4) that the preparations for the Tulloch ditching would create wood chips; and (5) that chipping of substantial amounts of

---

[73] In other words, the chipping both made for a surer path for trenching work and resulted in the wood debris being ground into the earth and left there.

wood debris, at least to the extent that it changed the surface elevation of the wetland, might be regarded as fill requiring a permit. Nonetheless, the Appellants began their construction project without first specifically alerting or consulting with the Corps.[74] In our view, while the Appellants clearly hoped that ultimately the Corps would find their actions to be in compliance with the law, they were also attempting to operate within a recently recognized gap in the statutory and regulatory scope of the CWA's wetlands protections in a manner that was relatively untested. That is, due to a decision in the U.S. Court of Appeals for the District of Columbia Circuit issued on June 19, 1998 (only six months before Appellants began construction on the Lewis Farm), the Corps was no longer able to regulate the "incidental fallback" of material into waters of the United States (including wetlands) associated with digging or dredging activities. *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399 (D.C. Cir. 1998) (finding, in the context of a petition for review of a Corps rulemaking, that the Act does not authorize regulation of "incidental fallback" as a "discharge of dredged material" under § 404).[75] Ostensibly, this case opened the door for so-called Tulloch ditching in wetlands, to remove an area's wetland characteristics, without a section 404 permit.[76]

As Appellants' attorney explained at oral argument, "they had learned of the *National Mining* case, and they wanted to try legally to construct ditches on their land."[77] Oral Argument at 7. Certainly, the Appellants intended to do so without being penalized for violating the law. However, it is clear that they were blazing a relatively uncharted path. Conceptually, given the novelty of the activities in which the Appellants were engaged, it is not unreasonable to expect them to exercise a greater degree of caution than is evident here, and to hold them accountable when their lack of caution results in a violation.

---

[74] Additionally, to the extent that Appellants suggest that they proceeded with construction at Lewis Farm based on the Corps' failure to put a stop to construction activities at the Smith Farm site after the initial site visit there, we note that construction at Lewis Farm began in mid-December 1998, before the January 6, 1999 site visit to Smith Farm. *See* Reg. Br. at 34. n.22. The first Lewis Farm site visit, which was initiated by the Corps, did not occur until January 11, 1999, at which point the four paths had already been timbered, and the grinding of slash was already well underway. *See id.*

[75] We note, however, that the challenge in *National Mining* did not address the discharge of "fill material" or the Corps' definition of fill material. *See Nat'l Mining*, 145 F.3d at 1401. Thus, it plainly did not create a safe harbor for all of the activities undertaken at Lewis Farm.

[76] Apparently, this door has since closed in the State of Virginia, however. *See* Oral Argument at 5 (indicating that the State of Virginia has since restricted this type of construction activity in wetlands).

[77] Mr. Needham testified similarly at the hearing: "All of this was sort of new, you know, with Tulloch being overturned. And I'm sure the district was going to discuss it and what they would be looking at." Trans. at 793 (discussing his communications with the Corps regarding the Southern Pines Site).

While the Appellants hired an experienced consultant, demonstrating that they were at least aware of the need for caution, this in itself does not necessarily relieve them of culpability. First, the Appellants appear to have engaged the consultant in the first place to assist them in mapping a relatively uncharted course. Second, given the novelty of the situation, neither the Appellants nor the consultant seem to have exercised the appropriate degree of care with regard to engaging the Corps early in the process, and ensuring that the Corps was fully apprised of both the *nature and extent* of the proposed construction activities (including the chipping of slash and grinding of stumps in the cleared pathways). Thus, unlike in previous Board cases where reliance on the factual representations of a consultant has, where justified, functioned as a mitigating factor, here the Appellants' use of a consultant does not mitigate their degree of culpability. *See, e.g., In re City of Marshall*, 10 E.A.D. 173, 191 (EAB 2001).[78]

In considering Appellants' challenge to the ALJ's assessment of culpability, we have carefully considered that the violation here occurred in connection with a broader, and to some degree coordinated, pattern of activity in the region, of which the Corps was aware.[79] In light of the contacts the Corps had with Mr. Needham in connection with his work at the Southern Pines, Smith Farm, and Lewis Farm sites, the Corps could have been more comprehensive and proactive in addressing its reservations it had about these projects, and conveyed more specific concerns or otherwise advised the landowners of any remaining uncertainty regarding the legality of the ongoing construction activities. The Corps was instead more restrained. In the Southern Pines Letter, for example, the Corps stopped with the observation that a more substantial discharge could require a section 404 permit and its caveat that its Southern Pines determination was site-specific.

---

[78] In *City of Marshall*, the Board held that the Presiding Officer had appropriately considered the violator's "good faith reliance" on a consultant's factual determination that the construction of additional pollution control technology would be necessary to bring the City's treatment works into compliance with new regulations for the disposal of sewage sludge. 10 E.A.D. at 181-82, 191. If new construction had been necessary, the City would have had an additional year to come into compliance with the Clean Water Act. *Id.* at 181. The Board thus upheld the ALJ's determination that the city had established it was entitled to an extended compliance schedule as provided for in 40 C.F.R. section 503.2(a) on one count of the complaint, and concluded that the ALJ had adequately explained how he factored culpability under the Act and regulations into the penalty assessment. However, the Board remanded the case for additional consideration of the penalty analysis on other grounds.

[79] For example, the Corps had communicated with Mr. Needham about the Southern Pines Site, had participated in a meeting with representatives of the Smith Farm site, and ultimately conducted several site visits at the various project locations. *See* Initial Decision at 9-12 & n.18; Trans. at 781-83, 795-97. Additionally, Mr. Needham's testimony at the hearing at least implies that Corps staff actually recognized the broader pattern of activity. *See* Trans. at 796 (indicating that a Corps staff person (Mr. Konchuba) anticipated that the Corps would "be in store for a lot of these" types of ditch construction projects).

To some degree, this restraint on the Corps' part is understandable under the circumstances. We recognize, for example, that the full extent of the Lewis Farm project was not known until January 1999, when inspectors visited the Lewis and Smith Farm sites, and that inspectors in the field, as in this case, are not always authorized to make determinations of violations. Moreover, it is not surprising that a measure of restraint prevailed at the Corps in the wake of the *National Mining* decision. Nonetheless, had it taken more affirmative steps to alert Appellants or Mr. Needham to their concerns or remaining questions about the wood chipping activity,[80] the Corps might have played a more meaningful role in the developing pattern of wetlands construction in the area, and seized the opportunity for an earlier intervention or warning that might have mitigated the extent of the harm by preventing some of the discharges from occurring.

Ultimately, however, considering the totality of the circumstances relating to the particular section 404 violation in this case, including the facts that Appellants here did not make a site-specific inquiry to the Corps before embarking on their Tulloch ditching activities at Lewis Farm, and the fact that at several points in time they made decisions to proceed as planned rather than adopting the more cautious approach of consulting or checking back in with the Corps, we conclude that the ALJ did not commit clear error or an abuse of discretion in not discounting the penalty assessment based on the Corps' somewhat tentative approach to this and other wetlands projects in the area.[81]

We observe in this regard that the record strongly suggests that the Appellants became aware, during the course of the construction project, that the Corps was still debating the legality of their activities, and, contrary to the Appellants' protestations, they were not in fact willing to cease construction at the site pending resolution of these questions. *See* App. Br. at 21 ("If they had ever been advised any of their activities were violative, they would have ceased."). While clearly the Corps did not immediately issue a cease-and-desist order (or otherwise expressly alert the Appellants that their activities were problematic), it did become clear that the project was raising serious doubts on the part of the Corps and/or EPA well before Appellants' cessation of construction activities.[82] *See* Ini-

---

[80] While the Corps clearly identified certain concerns in their field report, apparently these concerns were not shared immediately with the Appellants. *See* Reg. Ex. 26 (Corps inspectors' field notes observing substantial quantities of wood chips and identifying them as potential "fill material"); Trans. at 193-206 (Testimony of Corps' Inspector Mr. Culpepper).

[81] We emphasize that our determination in this regard is heavily dependent on the particular factual circumstances of this case, and that another case with somewhat different facts might call for a different outcome.

[82] We note also, that while the Corps did not immediately intervene, neither did it expressly approve the activities occurring at Lewis Farm. As Region III observes, despite Mr. Needham's famili-

Continued

tial Decision at 13 (indicating that EPA requested lead enforcement status in June of 1999). Indeed, even after the Appellants became aware of these concerns it appears that they did not in fact stop construction, but rather intended to move forward in hopes of completing the project before being prevented from doing so. *See* Trans. at 1143 (Testimony of Mr. Blevins) ("I knew there was an effort to shut us down, a stop — a cease and desist order, and I talked to Mr. Needham about it, and in that process, that's when I understood that [the existence of a violation] was not Mr. Culpepper's decision to make and that it was to be decided by a higher power, and that's why I anticipated we were going to keep digging.").

Mr. Blevins also testified that he "understood that [the Appellants] had been given a cease and desist order, but * * * they had talked in D.C. and the Washington office told Mr. Culpepper he was to send those documents up to them. They would make the decisions about what to do and what not to do. He was just to collect data, and that was part of what we discussed." Trans. at 1133 (Testimony of Mr. Blevins). This testimony went on to describe construction activities at Lewis Farm that post-dated this "understanding," in connection with which Mr. Blevins stated that he "understood that we could keep digging, and in [1999] we were still counting on finishing digging the ditches." *Id.* at 133-34.

Appellants' eagerness to move forward with the project, despite awareness of the Corps' and/or EPA's misgivings, exemplifies the Appellants' conscious intent to aggressively push the limits of the regulatory program. Moreover, based on the 1990 letter from the Corps to Mr. Needham warning against chipping activities of a scale that affected wetlands surface elevation, Appellants, separate and apart from what they were hearing from the Corps regarding their activities at Lewis Farm, should have known, based on their own observations at the site, that they were engaged in potentially unlawful activity. Their decision to push on in the face of these observable circumstances is troublesome at best.

Accordingly, in our view, the Appellants' argument regarding their intent to comply with the law, and their resulting lack of culpability, is insufficient to demonstrate clear error or an abuse of discretion in the ALJ's penalty assessment.

b. *Extent and Gravity of Violation*

Appellants argue that "the [ALJ] erred in assessing the severity of the alleged violations," in that he "found in assessing the penalty that the 'adverse consequences of the Section 404 violation in this case are significant.'" App. Br. at 21 (quoting Initial Decision at 39). In support of this argument, Appellants contend

---

(continued)
arity with the Corps' decision making process, "[Appellants] did not follow up with the Corps or cease work at the Site until they could confirm that the Corps had found no violation." Reg. Br. at 35.

that there is no evidence in the record that the Lewis Farm wetlands were diminished or altered in their functioning, that there was any loss of wetlands, that navigable-in-fact waters were compromised, or that any plant or animal life were impacted. *Id*. They conclude, therefore, that "[t]he initial decision's imposition of such a significant penalty on these facts is inequitable and should be reversed."[83] *Id.* at 22.

First, we reiterate that the amount of the penalty should be based, in part, on "the nature, circumstances, extent and gravity of the violation, or violations." 33 U.S.C. § 1319(g)(3). The Initial Decision included the following assessment in its discussion of the statutory factors:

> The adverse consequences of the Section 404 violation in this case are significant. In that regard, EPA wetlands team leader Jeffrey Lapp spoke toward the significant environmental role which wetlands play. He testified:
>
> > Wetlands are associated with a number of functions which then give value to the public at whole. Part of that would be things such as flood flow, alteration and storage. When you would have high storm events, wetlands tend to act as sinks for the volumes of water, whereby the water comes into a wetland, sits in these areas, is slowly released out into the tributary system. What that does is ameliorate some of the downstream effects of flooding.
> >
> > Wetlands are attributed to doing ground water purification. * * *
> >
> > Wetlands also provide base flow to the tributary system * * * .
> >
> > Other things would be erosion stabilization properties * * * [and surface] water purification. * * *

---

[83] Appellants also observe that the wetlands are not "highly valued wetlands" but "non-tidal high elevation, hydric soil flats, which are qualitatively different and less functional than wetlands that lay closer to navigable, open water." App. Br. at 21 (citing *United States v. Newdunn Assocs*., 195 F. Supp. 2d 751, 758 (E.D. Va. 2002), *rev'd sub nom., Treacy v. Newdunn Assocs*., 344 F.3d 407 (4th Cir. 2003)). Appellants cite nothing in the record to support this argument, and even assuming the accuracy of Appellants' statement in this regard, they fail to explain its significance in this case. Therefore, we do not address this issue further.

> In addition, Lapp testified that the forested wetland on the Lewis Farm site drains to the Chesapeake Bay, "an important resource for the region." [Trans. at 120]. He concluded that this is a "significant environmental loss within the Bay watershed." [Trans. at 121].

Initial Decision at 29-40. Thus, Judge Charneski directly addressed the importance of the wetlands generally, and the corresponding significance of their loss or impairment.

We note at this juncture that the Appellants' discussion of penalty issues does not clearly distinguish between the section 404 permit violation and the section 402 permit violation. However, with respect to both violations, we find the Appellants' arguments unpersuasive. We agree with Judge Charneski that the placement of fill into a wetland is inherently significant in its potential impact. We find it difficult to accept, as the Appellants appear to suggest, that because the discharge of wood chips did not itself eliminate the wetlands characteristics of the Lewis Farm property, the violation was insignificant or benign. *See* App. Br. at 21-22. As discussed above, it is clear from the record that substantial amounts of vegetative material were added to the top several inches of the wetlands soil in the areas of the cleared pathways. Moreover, as we have held in the past,

> [W]here a respondent has failed to obtain necessary permits or failed to provide required notice, such failure causes harm to the regulatory program. * * * Thus, for example, in holding that a respondent's failure to obtain a RCRA permit prior to disposing of hazardous wastes was of major significance, we have stated that 'the RCRA permitting requirements go to the very heart of the RCRA program. If they are disregarded, intentionally or inadvertently, the program cannot function.' * * * Similar to the principles enunciated in the RCRA context, the failure to obtain a permit goes to the heart of the statutory program under [section 404 of] the CWA.

In re Phoenix Constr. Servs., Inc., 11 E.A.D. 379, 397-98 (EAB 2004) (*quoting In re Everwood Treatment Co.*, 6 E.A.D. 589, 602 (EAB 1996) (quotations omitted)).[84] This is manifestly true here, where the discharge was integrally related to a project whose ultimate objective was the elimination of the Lewis Farm wet-

---

[84] As explained in *Phoenix Construction*, "[t]hese Board determinations are consistent with the Agency's general penalty framework guidance, which lists 'importance to the regulatory scheme' as one of the important factors to consider in quantifying the gravity of a violation." *Phoenix Constr.*, 11 E.A.D. at 347 (citing Penalty Framework at 14).

lands, and where the permitting process may have significantly reduced the impact of the project, for example by leading to permit conditions that would "prevent or reduce significant impacts on neighboring wetlands." *Id.* at 399.

We explained further in *Phoenix Construction* that, in addition to potential environmental harm, in the section 404 context "[e]ven though in many cases only a small acreage is impacted, because private landowners' (or hired contractors') filling activities are typically visible to other members of the local community, the perception that an individual is 'getting away with it' and openly flaunting the environmental requirements may set a poor example for the community and encourage other similar violations in the future and/or lead to the acceptance of such activities as commonplace, minor infractions not worthy of attention." *Id.* Indeed, in this case, it is clear that a broader pattern of similar projects (such as Smith Farm and Southern Pines) did develop as knowledge spread through the local community about the occurrence of these kinds of land clearing and ditch digging activities.

Therefore, by failing to disclose to the Corps the full extent of the project, in particular the substantial dispersal of wood chips that was to take place in the wetland, Appellants deprived the Corps of the opportunity to make an informed, up-front determination of whether such activities would require a section 404 permit. Had the Corps made an informed determination that a permit was required, then as a part of the permitting process the Corps could have decided to deny a permit, or if such a permit was to be issued, to place restrictions on how and where the chips could be placed in the wetland and possibly to require that Appellants mitigate any adverse consequences of their activities. By proceeding with the project even when questions were raised, Appellants effectively substituted their own judgment for that of EPA and the Corps, thus frustrating the objectives of the wetlands program. Indeed, in circumstances such as these where the wetlands project was part of a regional pattern of projects, the overall impact on wetlands in the area could be very significant.

3. *Penalty for Section 402 Violation*

As far as we can discern, with respect to the section 402 permit violation, the Appellants' only argument is that the record contains "no evidence that navigable-in-fact waters were compromised by the activities at the Site" or that "the Tulloch ditches increased any flow of material off site," because "[t]he testimony of the only water quality expert presented at trial established that the water quality at the site was excellent and that no appreciable sediment was present in the ditches, even during downpours." App. Br. at 21. Accordingly, in the Appellants' view, "at a minimum [this evidence] establishes that any violations were short-lived at best and not significant environmentally, further counseling against the imposition of a hefty fine." *Id.* at 22. We are unmoved by the Appellants' arguments.

First, as Judge Charneski observed, the Appellants' water quality expert visited the construction site more than six months after EPA's site visit, during which time the conditions at the site could have changed significantly. As a result, he chose to credit the testimony of the EPA inspectors. *See* Initial Decision at 36-38. Second, there is more than adequate evidence in the record to support a finding that storm water related erosion from the ditch banks and/or spoil pile made its way into the Tulloch ditches themselves, and that at least some of this material traveled through the ditches into the tributary to Drum Point Creek. This kind of release is precisely what the NPDES storm water permit program is designed to prevent.

The Appellants do not meaningfully contest that at the time of EPA's inspection there were "rills and gullies" in the ditch banks, nor do they refute that the Erosion Plan in the State Permit was not strictly followed. *See supra* note16; Initial Decision at 36-37. As we discuss above in Part II.D, Judge Charneski reasonably concluded that "storm water associated with industrial activity was discharged into the two Tulloch ditches." Initial Decision at 36 (noting that it had previously been established that the Tulloch ditches drain into the western tributary of Drum Point Creek). Moreover, Mr. Magerr testified specifically that he observed evidence of runoff from the ditch banks and the spoil pile, as well as the impact of sediment runoff from Lewis Farm into the tributary to Drum Point Creek. *See* Trans. at 583-85, 592-93 (indicating that the ditches contained significant amounts of sediment and that the tributary was "heavily braided" with sediment near the outfall from the Lewis Farm ditches, and discussing a "drainage swale" from the spoil pile); *see also* Reg. Br. at 16. In light of this and other evidence in the record, we reject the Appellants' argument that the ALJ erred in assessing the severity of the section 402 permit violation.[85]

In sum, we believe that the Appellants embarked on an inherently risky course of action when they undertook to drain the wetlands at the Lewis Farm so closely in the wake of the *National Mining* decision without having fully explored the legal consequences of their action. Having done so, we believe that the Appellants accepted the risk that their actions might be found ultimately to violate the CWA. As noted above, they did not exercise particular caution in this regard, in that they did not consult in advance with the Corps about this particular project, the Southern Pines Letter and related communications did not disclose the com-

---

[85] To the extent that the Appellants argue that these discharges should be overlooked because of a severe weather event near the time of EPA's site visit, *see* App. Br. at 22 n.7, we note that the purpose of the Act's storm water provisions is to prevent runoff during storms. Moreover, the record contains an uncontested EPA analysis demonstrating what amount of rainfall would be required to cause runoff from the site, and showing that such rain events did occur during the relevant time period. Thus, the record amply supports the conclusion that even without the hurricane there would have been storm water runoff from the ditch banks. *See* Reg. Br. at 30; Trans. at 609-14, 682-84; Reg. Ex. 59.

plete nature and extent of the activities at Lewis Farm, and Appellants continued digging in an effort to finish the project notwithstanding knowledge that the Corps was still debating the legality of their activities. Accordingly, they did not meaningfully engage the Corps to ensure the ongoing appropriateness of the specific activities carried out in the Lewis Farm wetlands, and we believe that a finding of significant culpability is appropriate. In his penalty assessment discussion in the Initial Decision, Judge Charneski examined the appropriate statutory factors, with regard to both the culpability of the Appellants and the gravity of the violations, and for the reasons discussed above, we do not find grounds to change or otherwise set aside the findings Judge Charneski made with respect to the penalty for Appellants' violations of the CWA's section 404 and section 402 permit provision.

III. *CONCLUSION*

For the reasons discussed above, we affirm Judge Charneski's finding in the Initial Decision that Appellants violated section 301(a) of the CWA by discharging fill material into jurisdictional wetlands and by engaging in construction activities at the Lewis Farm that resulted in the discharge of storm water and pollutants into waters of the United States without the necessary permits under CWA sections 402 and 404. We also affirm his penalty assessment of $126,800.

So ordered.