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In The Matter of	)	
Smith Farm Enterprises, LLC,	)	CWA Appeal No. 05-05
Respondent	)	
Initial Decision: May 5, 2005 Docket No. CWA-3-2001-0022 Presiding Officer: Administrative Law Judge Carl C. Charneski	)	

COMPLAINANTS' APPELLATE BRIEF AS TO LIABILITY FOR VIOLATION OF SECTION 301 OF THE CLEAN WATER ACT

Dated July 1, 2005

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. INTRODUCTION

Complainants, the Directors of the Water Protection Division and the Environmental Assessment and Innovation Division, U.S. Environmental Protection Agency, Region III, through counsel, respectfully submit this appellate brief. A hearing was conducted in this matter before Administrative Law Judge Charneski on October 6-9 and October 28-29, 2003. ALJ Charneski issued his Initial Decision on May 5, 2005, finding Respondent had violated Section 301 of the Clean Water Act ("Act" or "CWA"), 33 U.S.C. § 1311, by discharging pollutants -- specifically, fill material and storm water associated with construction activity -- to waters of the United States without the permits required by Sections 402 and 404 of the CWA, 33 U.S.C. §§ 1342 & 1344. ALJ Charneski assessed a penalty of $94,000. On June 3, 2005, Respondent filed a Notice of Appeal along with its appellate brief, raising six issues for review. Pursuant to the Board's Order dated June 13, 2005, Complainants submit this brief limited to the question of Respondent's liability for violation of Section 301 of the CWA. On or before July 22, 2005, Complainants will submit their brief on the remaining issues, specifically the penalty and ALJ Charneski's decision to grant Complainants' motion for a retrial following the failure of the court reporter to produce a transcript after the first hearing in this matter.

This matter involves the unauthorized discharges of pollutants to wetlands and other waters of the United States on and adjacent to property that has come to be known as the "Smith Farm" site ("Site") in Chesapeake and Suffolk, Virginia. In enforcement matters, the Board reviews the ALJ's fact findings and legal conclusions *de novo*. *See* 40 C.F.R. § 22.30(f). As set forth more fully below, ALJ Charneski's determination that Respondent violated Section 301 of the CWA is well supported by the law and the record.

With respect to Count I, contrary to the unspoken assumption of Respondent's Brief, this

case does not present a choice between Section 404 or no regulation at all. There is no question that Respondent's unpermitted discharges violated Section 301 of the Clean Water Act. The only question is whether Respondent should have obtained a Section 404 permit or a National Pollutant Discharge Elimination System ("NPDES") permit under Section 402..

ALJ Charneski correctly held that Respondent discharged substantial amounts of wood chips to wetlands that are waters of the United States, that the wood chips were pollutants and fill material, and that Respondent violated Section 301 of the CWA by discharging fill material to waters of the United States without the requisite CWA Section 404 permit. Respondent's own witness characterized the discharge as part of "prepping the path" for the excavation equipment. Respondent discharged wood chips in connection with the creation of 35-50 foot wide access paths through forested wetlands. Respondent's discharges occurred over a total of 24 days, covered several acres, and resulted in a discharge to jurisdictional wetlands of a layer of wood chips ranging from 0.5 - 5 inches in depth.

The term "fill material" is not defined in the Clean Water Act. Up until 1977, both the U.S. Army Corps of Engineers ("Corps") and EPA had defined "fill material" as "any pollutant used to create fill in the traditional sense of replacing an aquatic area with dry land or of changing the bottom elevation of a water body for any purpose." 40 Fed. Reg. 31330, 31325 (July 25, 1975) (Corps); 40 Fed. Reg. 41292, 41293 (Sept. 5, 1975) (EPA). In 1977, the Corps, but not EPA, amended its definition of "fill material" to: "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under Section 402 of the Federal Water Pollution

Control Act Amendments of 1972." 42 Fed. Reg. 37130 (July 19, 1977) ("Corps' 1977 definition"). Thus, at the time of Respondent's activities, the two agencies' definitions of "fill material" were worded differently.[1]

Nevertheless, Respondent's activities fit within both the EPA's and the Corps's then-applicable definitions of "fill material." The discharges had the effect of fill (changing the bottom elevation of wetlands), and therefore satisfied EPA's definition. In addition, the record demonstrates that the discharges were part of Respondent's process for creating paths through wooded wetlands and facilitating site access for construction equipment. Thus, the Corps' definition also is satisfied. Even if one accepts Respondent's argument that the discharges occurred purely for disposal purposes (a claim which is inconsistent with Respondent's witnesses' statements), ALJ Charneski's holding is supported by the regulations and the case law.

The 1977 Corps definition does not present a question of the discharger's asserted subjective intent (which, would allow a discharger to choose its regulatory program), but whether a discharge that has the objective effect of fill more appropriately lends itself to regulation as waste under the Section 402 program or as fill under the Section 404 program. Under the 1977 definition, Section 404 is the appropriate permitting regime for discharges having the effect of fill, even if discharged for purposes of disposal. *See Kentuckians for the Commonwealth Inc. v. Rivenburgh*, 317 F.3d 425, 447-48 (4th Cir. 2003). Like the discharge at issue in *Rivenburgh*, Respondent's discharge of wood chips as part of their "prepping the path" activities was not garbage, sewage, or effluent that more readily lends itself to regulation by ongoing concentration-

[1] In May 2002, the Corps and EPA issued a joint rulemaking harmonizing their definitions and adopting for both agencies' purposes EPA's effects-based definition of "fill material." 67 Fed. Reg. 31129 (May 9, 2002). Because the discharges at issue in this case occurred in 1998-1999, Complainants agree that the pre-2002 definitions apply.

based effluent limitations under Section 402. Rather, Respondent's discharges were the type normally associated with construction, had the effect of fill and were discharged as part of the construction of an access road. Thus, Respondent's discharges, like those at issue in *Rivenburgh*, are the types of discharges that are more properly regulated pursuant to Section 404.

To the extent Respondent continues to claim an exemption for silviculture activity or a defense of estoppel, ALJ Charneski correctly rejected Respondent's assertions.

With respect to Count II, Respondent apparently does not contest the substantive finding that Respondent violated Section 301 of the CWA by discharging storm water associated with construction activity to waters of the United States without an NPDES permit. Instead, Respondent limits its appeal to a technical argument regarding the First Amended Complaint. As will be demonstrated more fully below, the First Amended Complaint more than sufficiently pleaded the facts established in the hearing and found by the ALJ.

II. GENERAL FACTUAL BACKGROUND

A. The Smith Farm Site and Smith Farm Enterprises, L.L.C.

Smith Farm Enterprises, L.L.C. is a Virginia limited liability corporation owned by Robert F. Boyd and his children. Tr. III-207 (R. Boyd); Tr. III-247 (J. Boyd). At all relevant times, Robert F. Boyd and James M Boyd were members and managers in Smith Farm Enterprises, L.L.C. Joint Stipulations of Facts No. 2 (filed June 13, 2002). Smith Farm Enterprises, L.L.C. acquired the Site from Robert F. Boyd and a partner in 1998. Joint Stipulations of Facts Nos. 4-5 (filed June 13, 2002).

The Smith Farm Site consists of approximately 300 acres. The Site straddles the border between Chesapeake and Suffolk, Virginia, with approximately half the Site in each locality. As

of December 1998, approximately 95.7 acres of the Site was under cultivation as cropland. RX 42. The remainder was forested. Tr. V-171-72 (Needham). There is no real dispute that, prior to the activities that are at issue in this matter, much of the forested portions of the Smith Farms Site were wetlands as that term is defined at 33 C.F.R. § 328.3(b); 40 C.F.R. § 232.2. This is confirmed by a preliminary jurisdictional determination by the Corps in 1991 (CX 27; Tr. I-267 (Martin)); the stipulation of the Parties (Joint Stipulations of Facts Nos. 24, 25, 26 (filed September 8, 2003)); the testimony of Respondent's witnesses (Tr. VI-20 (Needham); Tr. V-9 (Wolfe)); the National Wetlands Inventory ("NWI") map prepared by the U.S. Fish and Wildlife Service (Joint Stipulations of Facts No. 27 (filed September 8, 2003); CX 87, Figure 3); aerial photograph interpretation by Complainant's expert (Tr. II-135 (Stokely); CX 87 (Figure 4)); and field investigations conducted by representatives of the Corps and EPA (Tr. I-235 & 249 (Martin); CX 26 (EPA 0314-0319); CX 28; Tr. I-109-10, 118 (Lapp)).

B. Facts Related to CWA Jurisdiction

The parties agree that the wetlands on the Smith Farm Site are adjacent and contiguous to waterbodies that flow away from the Smith Farm Site. Tr. II-24-30 (Martin); Tr. II- 134-35 (Stokely); Tr. V-116-17 (Wolfe). The wetlands in the northwest portion of the Site and part of the southwest portion of the Site drain to an intermittent stream that flows to Quaker Neck Creek. The rest of the Site drains to tributaries to Bailey Creek. Tr. II-27-30 (Martin); CX 56; CX 87, Figure 2; *see also* Tr. II-134-35 (Stokely).

Quaker Neck Creek is influenced by tides approximately 2600 feet downstream of the Smith Farm Site. Tr. II-31 (Martin); CX 56; CX 102Y, 102Z, 102AA. Quaker Neck Creek flows to Bennett's Creek, which then flows to the Nansemond River, which in turn flows to the

James River and the Chesapeake Bay. Tr. II-24-26 (Martin). The Corps maintains navigation channels in the Nansemond River. Tr. II-24 (Martin).

Bailey Creek is influenced by tides approximately 4,200 feet downstream from the Smith Farm Site. Tr. II-32 (Martin); CX 56; CX 102o. Bailey Creek flows to the Western Branch of the Elizabeth River, which in turn flows into the James River and the Chesapeake Bay. The Corps has issued permits for docks or marinas on portions of Bailey Creek and maintains a navigation channel in the Western Branch of the Elizabeth River. Tr. II-25 (Martin). It is undisputed that the Chesapeake Bay, the James River, the Nansemond River, Bennett's Creek, the Western Branch of the Elizabeth River and the tidal portions of Quaker Neck Creek and Bailey Creek are navigable-in-fact waters. Tr. V-78-79, 82-83 (Wolfe).

III. FACTS AND LEGAL ARGUMENT RELATED TO RESPONDENT'S LIABILITY UNDER COUNT I

A. Facts Related to Discharges of a Layer of Wood Chips to Wetlands on the Smith Farm Site

In 1998, Respondent engaged Robert Needham to design so-called "Tulloch" ditches for the Site.[2] Contrary to statements in Respondent's brief, the ditches were not designed for silviculture or agriculture purposes. The purpose of the ditches constructed on the Smith Farm Site was to take advantage of a perceived loophole and to remove hydrology from wetlands on the Site, thus changing the character of the property from wetland to upland. *See* CX 27; Tr. I-

[2] The term "Tulloch" ditching refers to the decision in *National Mining Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998), that excavation in wetlands is not regulated by the Clean Water Act where the only discharge is "incidental fallback," *i.e.* "incidental soil movement from excavation, such as the soil that is disturbed when dirt is shoveled, or the back-spill that comes off a bucket and falls back into the same place from which it was removed." *American Mining Congress v. U.S. Army Corps of Engineers*, 120 F. Supp. 2d 23, 25 (D.D.C. 2000) (quoting *American Mining Congress v. U.S. Army Corps of Engineers*, 951 F. Supp. 267, 270 (D.D.C. 1997), *aff'd* 145 F.3d 1399 (D.C. Cir. 1998). Respondent's activities at issue in this case are not true "Tulloch" ditches because the discharges associated with the Respondent's activities far exceeded incidental fallback.

248-49, 267-68; II-21-22 (Martin); Tr. IV-87-88 (J. Boyd); Tr. V-170-71, 228-29, VI-41-42 (Needham). The underlying purpose was to develop the property without having to seek a CWA Section 404 permit from the Corps. Respondent perceived *National Mining Ass'n v. U.S. Army Corps of Engineers,* 145 F.3d 1399 (D.C. Cir. 1998), as holding that the federal government lacked jurisdiction over certain types of excavation in wetlands, but realized that this "opportunity" (Mr. James Boyd's term) to construct ditches to drain wetlands would not last. Tr. III-256 (J. Boyd) ("[I]t was an opportunity that, you know, admittedly people realized that if you were working in a wetland, that this opportunity may not be around forever"); Tr. V-172 (Needham). Mr. James Boyd described the project as "a decision that had been made where we were going to proceed with doing this project [constructing ditches on the Smith Farm Site] to a standard that was *as if you were developing the property.*" Tr. IV-88 (J. Boyd) (emphasis added).

Smith Farm Enterprises, L.L.C. retained Vico Construction Corporation ("Vico") to perform the work at the Site. Joint Stipulation No. 6 (filed June 13, 2002). Vico subcontracted some of the work performed at the Site to Paxton Contractors. Tr. IV-193-94 (Viola).

On December 16, 1998, Vico sought a land disturbing permit from the City of Chesapeake for the purpose of "clearing, filling, excavating, grading or transporting or any combination thereof in accordance with approved plan of Robert F. Boyd and Raymond L. Harris." That permit was granted the same date. Joint Stipulations of Facts No. 11 (filed June 13, 2002); RX 17.

David Blevins of Vico arranged a Timber Harvest Agreement with Old Mill Land & Timber Company to remove trees from the path of the excavation equipment. RX 16. Rather than the typical clear cut operation, the timber company cut only timber in corridors ranging from

35 feet to 50 feet wide identified by Vico, thus clearing trees from the access paths. Tr. II-156 (Stokely); Tr. VI-143-44 (Paxton) (corridors were 40-60 feet wide). Although all trees were cut down, the only timber removed from the Site was marketable timber in the specified corridors. Marketable timber means larger trees that are a minimum diameter at breast height, minus their treetops and branches. Tr. I-229, 231 (Martin). The timber company left smaller trees that had been felled, broken pieces of trees, treetops, branches, underbrush etc. littering the corridors from which the marketable timber had been removed. This leftover woody material is referred to as "slash."[3] Tr. VI-99-100 (Paxton). The presence of the felled smaller trees, broken pieces of trees, treetops, branches, and slash made operation of the excavation equipment difficult and made for an uneven driving surface. In addition, sticks and slash could wind up in the excavator bucket, and pieces of wood could knock hoses off the excavation equipment or become caught in the treads. Tr. I-158-59 (Lapp); I-230 (Martin); IV-251 (Blevins). Consequently, prior to bringing any excavation equipment to an area, Respondent's contractors "prepped the path" (Mr. Paxton's term) for the excavation equipment. Tr. VI-73-74, 107 (Paxton); *see also* CX 41; Tr. I-157-59 (Lapp). The term "prepped the path" referred to Respondent's use of a Kershaw machine to grind up all of the slash, reducing it to wood chips. A Kershaw machine is a four-wheel, rubber tired machine with a rotary drum. It grinds up the woody debris and then distributes the wood chips behind it.

The Kershaw machine was driven in the 35-50 foot wide access paths where the slash remained. The Kershaw machine ground up the slash and deposited the ground up woody debris,

[3] See Complainants' Exhibit 41, the photograph identified as Roll 4, Frame 2 (EPA 0768) for a depiction of the type of logging debris and slash that littered the Site after Old Mill Timber and Land Company got through removing the marketable timber and before Respondent had reduced it to wood chips. Tr. I-135-36 (Lapp).

now reduced to wood chips, everywhere that it operated in the access paths. Tr. VI-74 (Paxton). This process discharged a layer of wood chips up to five inches thick in the 35-50 foot wide access paths. Tr. I-237 (Martin); Tr. IV-251 (Blevins); Tr. VI-80, 110 (Paxton); *see also* CX 26 (Photo 10, EPA 0324); CX 27. Respondent also used a piece of machinery called a "mountain goat," which is a whole tree chipper, to grind up the slash. CX 7 (EPA 0030) (billing for use of mountain goat); CX 27 & Tr.I-268 (Martin) (Needham and Blevins told Martin that a mountain goat was used at the Smith Farm Site). The mountain goat was purchased by Vico expressly for this job. RX 9.

The amount of wood chips and ground up woody debris discharged by operation of the Kershaw machine and mountain goat was far more than Respondent's portrait of the scattering of a few wood chips. Respondent's contractors operated the Kershaw at the Site on twenty-four different days for a total of over 225 hours, ultimately discharging a layer of wood chips up to five inches thick over approximately 13 acres. CX 7 (EPA 0030, 0076, 0077, 0078, 0079, 0100, 0105, 0124) (invoices); CX 45 (EPA 0814). When Mr. Martin of the Corps visited the Site on January 6, 1999, he observed and documented a layer of wood chips up to five inches deep in the cleared areas where the Kershaw machine had operated. He measured the depth using a soil auger. CX 27; Tr. I-237 (Martin). Mr. Martin's findings were confirmed by the findings of Complainants' site investigators during an inspection on September 9, 1999. Complainants' site investigators, who included an expert in soils and soil identification, visited the Site several months after the wood chips were discharged and after heavy excavation equipment repeatedly had traversed the cleared areas. At both disturbed locations where they took samples, Compainants' site investigators identified a layer of several inches of wood chips mixed with soil

on top of the natural soil surface. CX 22; CX 41 (EPA 761-62); Tr. I-133-34 (Lapp). By contrast, there was no layer of wood chips mixed with soil material on top of the natural soil surface at Complainants' sample location "B," which was located in an undisturbed area on the Site. Tr. I-134 (Lapp).

After paths were prepped in the wetland areas, an excavator would traverse the paths, excavating behind it. Dredged material was placed in a tracked dump truck operating alongside the excavator. CX 26 (Photos 1 -6, EPA 0320-22); Tr. VI-87-89 (Paxton). The dump truck would then transport the dredged material to spoil piles located in the cropfield areas on the Smith Farm Site. Tr. VI-76-78 (Paxton). The ditches were sloped to drain toward collector ditches or other receiving waters that either existed at the Site previously or were constructed by Respondent. Tr. VI-125 (Paxton). The collector ditches conveyed water towards the unnamed tributary to Quaker Neck Creek in the western/Suffolk portion of the Site and to tributaries to Bailey Creek in the rest of the Site. Tr. VI-131-33 (Paxton). Check dams were placed either in pre-existing or newly constructed ditches in the crop areas or, in one case, in a ditch at a location where Mr. Needham had determined there were no hydric soils. Tr. V-215-20 (Needham).

Respondent did not obtain either an NPDES permit pursuant to CWA Section 402 or a Section 404 permit for the discharges alleged in Count I. Joint Stipulations of Facts No. 12 (June 13, 2002); Joint Stipulations of Facts No. 33 (filed September 8, 2003).

B. Respondent violated Section 301 of the Act by discharging pollutants through point sources to waters of the United States without a permit

Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), prohibits the discharge of

any pollutant by any person except in compliance with, *inter alia*, permits issued pursuant to the National Pollutant Discharge Elimination System (NPDES) program under Section 402 of the Act, 33 U.S.C. § 1342, or in the case of the discharge of dredged or fill material, except in compliance with a permit issued by the U.S. Army Corps of Engineers under Section 404(a) of the Act, 33 U.S.C. § 1344(a).

Contrary to the unspoken assumption of Respondent's Brief, this case does not present a choice between Section 404 or no regulation at all. There is no question that Respondent's unpermitted discharges violated Section 301 of the Clean Water Act. The only question is whether Respondent should have obtained an NPDES permit or a Section 404 permit.

The Act defines the term "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). "Navigable waters" means "waters of the United States, including the territorial seas." *Id.* § 1362(7). "Pollutants" include, inter alia, biological material, dredged spoil, rock, sand and cellar dirt. *Id.* § 1362(6). Section 502(14) of the Act, 33 U.S.C. § 1362(14), defines "point source" to include "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged."

In Count I of the First Amended Complaint, Complainants allege that Respondent violated Section 301(a) of the Clean Water Act by discharging pollutants into wetlands on the Smith Farm Site that are waters of the United States. Count I sets forth two alternative legal theories: that Respondent discharged dredged or fill material to wetlands that are waters of the United States without a permit from the Corps pursuant to Section 404 of the Clean Water Act; or alternatively, that Respondent discharged pollutants to wetlands that are waters of the United

States without an NPDES permit.

ALJ Charnoski correctly held that the wetlands on the Smith Farm Site and the water bodies flowing on and from the Smith Farm Site are navigable waters and waters of the United States within the meaning of 33 U.S.C. § 1362(7). *See also* 33 C.F.R. § 328.3(a) (Corps regulations); 40 C.F.R. § 232.2 (EPA regulations). Respondent apparently recognizes that its jurisdictional argument is contrary to the overwhelming weight of the case law and "reserves the issue in the event any subsequent decisions alter the applicable legal landscape." Accordingly, Complainants will not trouble the Board with a discussion of the law supporting the ALJ's jurisdictional finding. Complainants reserve the arguments in their post-hearing briefs and any other arguments available to Complainants in the event Respondent resurrects this issue in this or any future appeal.

In the course of prepping the paths through forested wetlands on the Smith Farm Site for operation of excavation equipment, Respondent and/or persons acting on its behalf operated machinery that discharged substantial quantities of wood chips and ground up woody debris into the jurisdictional wetlands on the Smith Farm Site. Respondent's contractors operated the Kershaw machine on twenty-four days for a total of more than 225 hours and the mountain goat for 17 hours, resulting in a layer 0.5 – 5 inches deep on paths covering several acres.

The machines, including the Kershaw grinder and mountain goat, utilized by Respondent are discrete conveyances through which wood chips and other ground up woody debris were conveyed and deposited on the wetlands surface. Accordingly, the machines utilized by Respondent are "point sources" within the meaning of Sections 301(a) and 502(14) of the Act. 33 U.S.C. §§ 1311(a) & 1362(14). *See Borden Ranch Partnership v. U.S. Army Corps of*

Engineers, 261 F.3d 810, 815 (9th Cir. 2001), *aff'd* 123 S. Ct. 599 (2002) (per curiam) (noting that the statutory definition of "point sources" is very broad and that a combination of bulldozers and tractors used to pull large metal prongs through soil satisfies the definition of "point source"); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983) (bulldozers and backhoes are point sources).

Wood chips and ground up woody debris are biological material and "pollutants" within the meaning of Sections 301(a) and 502(6) of the Act. 33 U.S.C. §§ 1311(a) and 1362(6). *See United States v. Tilton*, 705 F.2d 429, 430 (11th Cir. 1983) (enjoining discharge of wood chips, pine bark and soil to wetlands that are waters of the United States); *United States v. Bay-Houston Towing Co., Inc.*, 33 F. Supp. 2d 596, 608 (E.D. Mich. 1999) (discharge of woody debris as foundation for a haul road found to be discharge of pollutants); *Matter of Shee Atika, Inc.*, 2 E.A.D. 487 (CJO 1988) (in context of NPDES permit appeal holding that logs, bark and other woody debris are pollutants as defined in Section 502(6) of the Act); *Matter of Environmental Timber Co., Inc., Kodiak, Alaska*, Dkt. No. 10-94-0192, 1996 WL 1088973 (EPA) (July 22, 1996) (Clarke, Regional Administrator) (loading logs onto surface waters discharges bark and other woody debris). Respondent concedes that wood chips can be fill material. Tr. VI-11 (Needham). *See, e.f.*, 33 C.F.R. § 323.2(e)(1) (2002); 40 C.F.R. § 232.2 (2002); 67 *Fed. Reg.* 31129, 31142-43 (May 9, 2002).[4]

It is immaterial that the wood chips and ground up woody debris were created from

[4] Because these discharges occurred in 1998-1999, Complainants agree that the former definitions apply. Nevertheless, the 2002 definition and its preamble are relevant to describe the agencies' longstanding interpretation. As noted by the Fourth Circuit, the agencies stated that the preamble and rule "would not alter current practice" and represent the agencies' historic interpretation of the division of authority between them. *See Kentuckians for the Commonwealth v. Rivenburgh*, 317 F.3d at 445.

materials found on the Smith Farm Site. There is consensus among the courts that redeposit of indigenous materials may be considered an addition of a pollutant to waters of the United States under the CWA. *See Borden Ranch Partnership*, 261 F. 3d at 814-15; *United States v. Deaton*, 209 F.3d 331, 335-36 (4th Cir. 2000), *cert. denied*, 541 U.S. 972 (2004); *Rybacheck v. U.S. Environmental Protection Agency*, 904 F.2d 1276, 1285 (9th Cir. 1990); *Avoyelles Sportsmen's League*, 715 F.2d at 923-24; *United States v. Bay-Houston Towing Co., Inc.*, 33 F. Supp. 2d at 608; *United States v. Sinclair Oil Company*, 767 F. Supp. 200, 204 (D. Mont. 1990).

Thus, the discharge of wood chips and ground up woody debris onto the wetlands on the Smith Farm property was a discharge of pollutants from a point source to waters of the United States, requiring either a permit pursuant to Section 404 or an NPDES permit pursuant to Section 402 of the Clean Water Act. To the extent a pollutant is dredged or fill material, a Section 404 permit is required; to the extent a pollutant is not dredged or fill material, its discharge requires an NPDES permit pursuant to Section 402. *See generally Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425 (4th Cir. 2003).

Respondent admits that it did not obtain a permit under either Section 402 or 404 of the Act for the discharge of wood chips and ground up woody debris to wetlands on the Smith Farm Site. Accordingly, Respondent has violated Section 301(a) of the CWA.

C. <u>The wood chips discharged by Respondent were fill material requiring a permit pursuant to Section 404 of the CWA</u>

Respondent's discharge of wood chips and ground up woody debris as part of the "prepping the path" process was a discharge of fill material to wetlands that are waters of the United States. The term "fill material" is not defined in the Clean Water Act. At the time of

Respondent's activities, both EPA and Corps regulations defined the "discharge of fill material" as follows:

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

33 C.F.R. § 323.2(f) (1998) (Corps regulations); 40 C.F.R. § 232.2 (1998) (EPA regulations).

EPA's regulations further 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," 40 C.F.R. § 232.2 (1998).

The Corps defined "fill material" ("1977 Corps definition") 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. The term 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," 33 C.F.R. § 323.2(e) (1998).

Contrary to the assertion in Respondent's brief, under the Corps' 1977 definition, the question is not purely one of Respondent's asserted subjective purpose, but whether a discharge that has the objective effect of fill more appropriately lends itself to regulation under the Section 402 program or under the Section 404 program. *See Kentuckians for the Commonwealth Inc. v. Rivenburgh*, 317 F.3d 425, 447-48 (4th Cir. 2003).

1. Respondent's discharge had the effect of raising the bottom elevation of the wetlands and therefore fits EPA's definition of "fill material"

The overwhelming evidence supports ALJ Charneski's finding that Respondent's discharge changed the elevation of the wetlands on the Smith Farm Site and that the discharge satisfied EPA's regulatory definition. The Kershaw machine and mountain goat were operated at the Site, producing and discharging wood chips, on twenty-four different days for a total of more than 225 hours. CX 7 (EPA 0030, 0076, 0077, 0078, 0079, 0100, 1015, 0124). Respondent's statement on page 30 of its Brief that Complainants introduced no evidence regarding elevation is simply untrue. To the contrary, Mr. Martin of the Corps, while accompanied by Messrs. Needham and Blevins as Respondent's representatives, used a soil augur to measure a layer of wood chips up to five inches deep in the cleared areas where the Kershaw machine had operated, which he also photographed. CX 27; Tr. I-237 (Martin). Mr. Martin's findings were unrebutted and are supported by the findings of Complainants' site investigators. Complainants' site investigators identified a layer of several inches of wood chips mixed with soil on top of the natural soil surface. CX 22; CX 41 (EPA 761-62); Tr. I-133-34 (Lapp). Mr. Lapp also testified that the hummocky microtopography observed in the undisturbed forested wetland areas had been obliterated in the corridors used by the equipment. Tr. I-164-65 (Lapp); CX 24.

In addition, the record shows the amount of material on the surface covered the tree stumps left by the timber company. Mr. Blevins and Mr. Paxton indicated that there were two-inch stumps remaining after operations by the timber company and operation of the Kershaw machine, (Tr. IV- 247-49 (Blevins); VI-137-38 (Paxton)). While Mr. Paxton testified that there were stumps "everywhere" on the Site and that his equipment drivers could feel the stumps as

they were driving (Tr. VI-137-38 (Paxton)), photographs taken at the Site show that few if any stumps are visible. *See, e.g.* CX 40 (EPA 0749 (Disk 5, Photo 8), EPA 0753 (Disk 5, Photo 12)); Tr. IV-247-49 (Blevins). The only explanation is obvious – there is so much material on the surface that the two-inch stumps cannot be seen.

Against this overwhelming evidence, Respondent offers an elevation survey conducted in December 2001, more than a year after the last discharges took place and after Respondent's heavy (30,000-60,000 pound) machinery had repeatedly traversed the area. Respondent's survey, however, adds nothing to the record. The survey fails to provide a baseline of pre-disturbance conditions, and thus cannot reliably be said to document the presence or absence of any change in elevation from undisturbed conditions. To the extent Respondent argues that the survey shows no change in elevation between the disturbed and undisturbed areas, the survey does not account for the fact that Respondent's 30,000-60,000 pound equipment repeatedly traversed the survey area, causing compaction and rutting.[5] Tr. IV-189-91 (Ferguson). Thus, the survey does not undermine the clear weight of the evidence that a layer of wood chips up to five inches thick was deposited on top of the wetland surface.

Respondent's reliance on the testimony and report of their soil expert, Mr. Parker, is equally unavailing. During his first visit to the Site in March 2000, Mr. Parker merely walked around the Site. It was not until his second visit in 2002 -- two years later and after there had been revegetation, erosion and some decomposition -- that Mr. Parker took samples. Tr. III-160-

5 There is no question that there was significant soil movement at the Site. Mr. Martin photographed significant rutting. CX 26 (EPA 0325, Photos 11 and 12). He also expressed concern about soil being flung off the tracks and tires of the machinery. CX 27; Tr. I-270 (Martin). Mr. Needham testified about areas being "pushed up" by movement of machinery (Tr. V-240 (Needham) and about tire ruts (Tr. VI-25 (Needham)). The samples taken by Complainants' site investigators in the disturbed areas were a mixture of soil and wood chips, indicating the surface was churned up. CX 22; CX 41 (EPA 761-62 & EPA 0793-94 Roll 5, Frames 2 & 3); Tr. I-133-34 (Lapp).

66. To the extent Respondent relies on Mr. Parker's opinion that the quantity of ground up woody debris discharged at the Site was consistent with a typical logging operation (Respondent's Brief at 20), his opinion is inconsistent with the record. It is undisputed that, in a typical silviculture operation, smaller trees, treetops, branches and slash are left in place -- not ground up with a Kershaw machine. Tr. IV-279 (Gregory). (Mr. Gregory was qualified as an expert in silviculture practice.) Respondent's contractors (not the timber company) operated the Kershaw machine at the Site. CX 7.

To the extent Respondent implies that Mr. Parker found no ground up woody debris, such a finding (if that were in fact Mr. Parker's testimony) would contradict Respondent's own witnesses and documents and the undisputed evidence that a Kershaw machine was used at the site for 24 days to grind up the slash, treetops, etc. at the Site. If Mr. Parker failed to observe a layer of wood chips, then he is the only witness to visit the Site who doesn't acknowledge they were there. A wood chip layer was observed both by the Corps of Engineers (Tr. I-237 (Martin)) and Complainants' site investigators (Tr. I-133-34 (Lapp)). In addition, Respondent's witnesses admitted that the Kershaw was operated at the Site and discharged wood chips or ground up woody debris on the surfaceof the Site. *See, e.g.*, Tr. VI-89 (Paxton) (reviewing one of Mr. Martin's photographs and noting that one can see chips where the Kershaw had operated).

To the extent Mr. Parker failed to see any wood chips, that likely was explained by the fact that he narrowly limited the type of "wood chip" that he recognized. Mr. Parker limited his characterization of "wood chips" to the distinctive flat chips created by a fellerbuncher. Tr. III-172-73 (Parker). He assumed anything other than a flat chip fell off a tree and called any other woody debris a "stick" or "limb." Tr. III-189-90 (Parker). Mr. Parker testified that he does not

know what a Kershaw is, nor would he recognize the type of wood chips that a Kershaw would leave behind. Tr. III-188, 190. Unlike the fellerbuncher, a Kershaw machine would not leave a square-shaped chip. The Kershaw leaves behind woody debris that looks like chopped up or shredded wood. Tr. VI-120 (Paxton) (describing Kershaw as shearing up or shredding wood); Tr. VI-64 (Needham) (Kershaw "chopped" treetops and logging slash). Thus, Mr. Parker's investigation failed to account for undisputed activity at the Site in that he failed to account for operation of the Kershaw machine. Tr. III-189-91 (Parker). By contrast, Complainants' soil scientist testified that she included all mechanically altered woody debris in her characterization of wood chips. Tr. III-80 (Vasilas); *see also* Tr. I-257 (Martin) (wood chips ranged in size from small regular pieces to shards as long as ten inches mixed with sticks).

In fact, Mr. Parker did observe a layer of woody debris, though he declined to characterize it as "wood chips." Of the 32 samples taken by Mr. Parker in the disturbed areas, he characterized 22 samples as containing woody debris -- either wood chips with woody debris or woody debris and no chips. Tr. III-190-91 (Parker). Thus Mr. Parker's testimony does not undermine ALJ Charneski's finding that a substantial quantity of wood chips were discharged resulting in a change in the elevation of the areas where they were discharged.

Finally, to the extent Respondent casts aspersions on Complainants' site investigation, Respondent mischaracterizes the nature of Complainants' investigation and findings. Complainants' purpose during the site visit was not to conduct some "CSI"-type forensic reconstruction of what had happened at the Site because there was no need to do so. Prior to arriving at the Site, Complainants had gathered copious amounts of information regarding the Site. They already knew what operations had taken place based on information provided by the

Corps and the Respondent. Tr. I-94-106, 109-10, 152-53 (Lapp). Complainants' only purpose in taking samples was to confirm the information they had already received, not to reconstruct operations at the Site. Tr. I-109-10, 128, 152 (Lapp); Tr. III-98 (Vasilas) ("I was not trying to establish any type of probability or statistics. I was just trying to document whether or not those conditions existed"). To the extent Respondent's Brief (page 18) states that Complainants' sample locations were based on an unsupported assumption that conditions were similar throughout the Site, Respondent ignores the testimony of its own consultant. Mr. Needham (who was present at the site investigation) testified that, prior to taking any samples, Mr. Lapp asked him if conditions in the corridor where Complainants ultimately took samples were typical of the cleared corridors on the Site, *and Mr. Needham informed him that they were.* Tr. V-241 (Needham). In light of the substantial information already available to Complainants before and during the Site visit, Complainants' decision to take a limited number of confirmation samples was appropriate.[6]

In sum, the overwhelming weight of the evidence supports ALJ Charneski's conclusion that Respondent discharged a layer of wood chips up to five inches deep, changed the bottom elevation of the wetlands at the Smith Farm Site, and thereby satisfied EPA's regulatory definition of fill material.

On page 28 of its Brief, Respondent misapplies these facts to the regulatory definition.

[6] Respondent also mischaracterizes Complainants' site investigation as simply looking around and picking a couple of sample points at random or intentionally near mounded areas. To the contrary, as Complainants toured the southwest quadrant of the Site and prior to formally describing any samples, Complainants' soils expert took a shovel or knife and probed the pathways to familiarize herself with general site conditions and to inform the team's selection of other sample points that would be representative of overall Site conditions. Tr. I-129 (Lapp); Tr. III-68, 85-86 (Vasilas); CX 41, photographs labeled Roll 4, Frames 18, 19, 20 (EPA 0784, 0785, 0786) (photographs recording Ms. Vasilas's probing).

Both EPA's definition and the Corps' refer to a discharge that replaces a portion of waters of the United States with dry land ***or*** changes the bottom elevation of a water of the United States. Respondent argues that the discharge did not replace wetlands with dry land, but fails to address the second prong, *i.e.*, whether the discharge changed the bottom elevation. The record shows that Respondent's discharge changed the bottom elevation of the wetland in that it created a layer of wood chips up to five inches deep. In addition, the discharge could have the effect of replacing wetland with dry land. As Complainant's soil scientist pointed out, one of the determining characteristics of a wetland is the proximity of the water table to the surface, *i.e.,* the hydrology. By adding a layer of wood chips on the soil surface, Respondent has caused the water table to be a greater distance from the (now-elevated) surface. Tr. III-101-02 (Vasilas).

2. *Respondent discharged up to 5 inches of wood chips in connection with construction of access paths and therefore the discharge satisfied the Corps' 1977 regulation defining "fill material"*

As set forth above, Respondent's discharge raised the bottom elevation of wetlands on the Smith Farm Site. In addition, the Respondent's discharge satisfies the Corps' definition because it was necessary to construction of access paths and was part of an overall activity designed to turn wetlands into dry land.

Although Respondent's witnesses, testifying in response to direct examination by Respondent's counsel, denied any subjective intent to construct a road,[7] the evidence in the record makes clear and ALJ Charneski found that is exactly what they were doing. Respondent's own subcontractor coined the phrase "prepping the path" to refer to the operation of the Kershaw machine resulting in the discharge of a layer of wood chips up to 5 inches thick "in preparation

[7] Tr. Vol. IV-225-226 (Blevins); Vol. V-204 (testimony of Mr. Needham); Vol. VI-74-75 (Paxton).

for us to go with the trucks and excavators to do the ditching on these paths." Tr. VI-73 (Paxton); *see also* Tr. I-157-59 (Lapp); CX 41.

Explanations provided by Respondent's representatives prior to the filing of the complaint in this matter stated that Respondent prepped the path because the excavation equipment would have had trouble operating on the slash left on the Site. The slash was ground up and wood chips discharged to improve the driving surface. Mr. Martin, the representative from the U.S. Army Corps of Engineers, testified that, during his initial site visit, Mr. Needham and Mr Blevins informed him that the Kershaw was used to discharge wood chips to improve the driving surface for the equipment. Mr. Martin testified:

> Q: Did they explain the reason for grinding up the logging slash?
>
> A: Basically, it was two-fold. The first reason was so as not to damage the equipment. The tract dump trucks, by getting logging slash, brush caught up in the treads. And the second reason was to avoid sloppiness; that the equipment manipulating or operating over this uneven surface was more likely to spill material, and they were trying to avoid that.

Tr. I-230 (Martin).

Respondent's representatives gave a similar explanation to Complainants' site investigators during EPA's site visit:

> Q: Further down in the same paragraph [in Mr. Lapp's inspection report, CX 41] you state "These pieces of equipment used the prepped paths as access roads and a stable base from which to perform the ditching operations." What caused you to reach that conclusion?
>
> A: Because there were discussions over the tracks and how the tract equipment needed a level surface to operate on, because they didn't want the tracks breaking. And if you hit, you know, something it would nudge it and it would be difficult to do. And so that's why I wrote that.

Tr. I-158-59 (Lapp).

Testimony by Mr. Blevins, the on-site supervisor for Vico Construction Corporation, on cross-examination supports Mr. Martin's and Mr. Lapp's recitations of what they were told in the field. Tr. IV-251 (Blevins).

The order in which activities occurred at the Site supports Complainants' assertion that operation of and discharge from the Kershaw was necessary to the construction of access paths for the excavation equipment. Before any excavation equipment arrived at the Site, Respondent operated the Kershaw for six days, ten hours a day. Tr. VI-103-05 (Paxton); CX 7 (EPA 0028, 0031, 0035, 0036, 0037, 0041). It was only after paths had been "prepped" using the Kershaw machine that excavation equipment entered the Site. The Kershaw machine continued to work ahead of the excavating equipment preparing the next area for excavation as operations progressed through the Site. Tr. VI-110-11 (Paxton).

Use of ground up woody debris to create a driving platform for the equipment also was consistent with what Respondent was doing in the upland portions of the Site. Respondent also used wood mulch (i.e., ground up wood) to create a driving surface for its excavation equipment in the non-forested upland areas of the Smith Farm Site. Respondent hauled a total of 32 truckloads of mulch (approximately 320 cubic yards) to the Site. CX 7 (EPA 0033, 0034, 0038-40, 0042-44, 0065). Vico's on-site supervisor described how the mulch hauled to the Site was used to create a driving surface for Respondent's equipment in the cropland areas on the Site:

> Q: What was mulch used for?
>
> A: When we came in off the road, we had rock which knocks the dirt off any vehicle entering in off the road at the construction entrance. Then, at the Smith Farm, there was probably the better part of a mile to get back to where we were actually working from the Chesapeake side, and from the Suffolk side there was at least 600 feet. So we used mulch in the path coming in there to help stabilize the road, as

opposed to putting rock because rock was very expensive. That's applied in six to eight inches. We did it for the home shows the same way. *If you have six to eight inches of mulch, it will help give you more stability in driving.*

* * *

Q: You had to put mulch down a few times. Why would you have to keep remulching?

A: When we first started on the Chesapeake side, we went across the middle of a field and there was a path that was quite greasy and slick. The mulch would make it so you wouldn't spin out. That road path was near a fuel ditch and we were trying to stay out of that. So if we went a different route, we would bring some more mulch to put in there.

Tr. Vol. IV, pages 256-57 (emphasis added); CX 7 (EPA 0033, 0034, 0038, 0039, 0040, 0042, 0063, 0064, 0065); Tr. IV-256 (Blevins).

Respondent used ground up wood chips to create access paths for its equipment both in the wetlands and in the uplands. The only difference was that Respondent hauled mulch from off-site for the upland paths and created mulch from indigenous material for the wetlands paths.

Thus, grinding up the woody debris was necessary to the process of prepping the paths, i.e., creating access paths for the construction equipment. In his Findings of Fact Nos. 37, 38 and 40, ALJ Charneski agreed:

37. Clearing the timber was only the first step in *preparing the paths for the excavation of the Tulloch ditches.* The second step was to clear the saplings and other woody debris (also known as "slash") left behind in the paths by Old Mill. This second phase was done by both Vico Construction and its subcontractor, Paxton Contractors. *The purpose of this second phase clearing operation was to allow Paxton Contractors to get its ditch digging equipment (i.e., the excavator and haul trucks) into the pathways. This second phase was known as "prepping" the paths.* Tr. 157 (Vol. I), 73-75 (Vol. VI).

38. *In preparing the paths*, Vico Construction and Paxton Contractors used a grinding machine known as a "Kershaw." The Kershaw is a four wheel, rubber-tired piece of equipment which has a rotary drum. It is situated on a "timber skidder" which prevents the head from coming into contact with the ground. The Kershaw grinds up the woody vegetation into chips. These wood chips are then randomly distributed to the rear of the Kershaw. Tr. 229-230 (Vol. I), 190-192 (Vol. V), 73, 105 (Vol. VI). It is the disposition of these chips into wetlands that forms part of EPA's claim (and by far the most

persuasive) that respondent discharged fill material in violation of Section 301(a) of the Clean Water Act.

* * *

40. *After a path was "prepped,"* an excavator was used to dig the Tulloch ditches. The dredged material was placed in a track-truck and hauled to an upland area on the Smith Farm site. Tr. 76-78, 87-89 (Vol. VI); CX 26 (Photographs 1-6).

Initial Decision at 9 (emphasis added).

ALJ Charneski also stated:

> In sum, the substantial amount of wood chips discharged onto the wetlands constitutes an unlawful discharge of a pollutant. EPA maintains, in part, that it was respondent's "intent to raise the bottom elevation of the wetlands for the purpose of creating a driving surface." Compl. Br. at 74. That proposition is not supported by the record inasmuch as several of respondent's witnesses testified that the chips were distributed randomly and that, in any event, they could not support the weight of the construction equipment. *See, e.g.*, Tr. 74 (Vol. VI).

Initial Decision at 32.

Respondent relies heavily on ALJ Charneski's statement on page 32 and discounts his findings of fact Nos. 37, 38 and 40. Respondent particularly discounts ALJ Charneski's finding that the discharge of wood chips was part of the process of "prepping the paths" as merely a descriptor devoid of content. Respondent's Brief at p. 12, fn.3. Respondent, however, never explains how the term "prepping the path," (used repeatedly by Respondent's own subcontractor both in court and during Complainant's site investigation) could describe anything other than construction of an access road for the excavation equipment. To the extent the statement on page 32 of the Initial Decision is not supported by or contradicts the record, the Board is not bound by it. *In re Bricks, Inc.*, 11 E.A.D. __ (EAB Oct. 28, 2003), CWA App. No. 02-09, slip op. at 13.

Regardless, ALJ Charneski's statement on page 32 of the Initial Decision can be

reconciled with his findings of fact Nos. 37, 38 and 40 and is consistent with his holding that the Respondent discharged fill material. The then-applicable definition of "discharge of fill material" included discharges that are "necessary" to construction of a structure in water. 33 C.F.R. § 323.2(f) (1998); 40 C.F.R. § 232.2 (1998). ALJ Charneski's findings of fact Nos. 37, 38, and 40 support a holding that discharge of the wood chips was a necessary part of the process of "prepping the path" " to allow Paxton Contractors to get its ditch digging equipment (i.e., the excavator and haul trucks) into the pathways." ALJ Charneski based Findings of Fact Nos. 37, 38 and 40 on statements by Respondent's witnesses explaining what they were doing (prepping the path) and why (to facilitate access by the excavation equipment).

ALJ Charneski's statement on page 32 of the Initial Decision, however, is based on different evidence and does not undermine his finding that the discharge of wood chips was part of the process of prepping the path for the construction equipment. First, in support of the statement on page 32 of the Initial Decision, ALJ Charneski relies on testimony that the wood chips would not support the weight of the excavation equipment.[8] That finding is not inconsistent with Findings of Fact Nos. 37, 38 and 40 that the discharge was part of prepping the path. Support, however, is not the only purpose that could be served by discharging wood chips to prep the path, thereby elevating the bottom level of the wetland. As described *supra,* Respondent set down a woody mulch in the upland areas to provide traction and stability for its equipment. Tr. Vol. IV, pages 256-57 (Blevins). The wood chips in the wetlands had the same function. Tr. Tr. Vol. I, page 230 (Martin); Tr. Vol. I, pages 158-59 (Lapp).

[8] The cited testimony in the Initial Decision gives the weight of the equipment but does not actually state that the wood chips could not support the equipment. Tr. VI-74 (Paxton). It is possible that ALJ Charneski was thinking of the testimony on direct examination of Mr. Needham, Respondent's consultant. Tr. Vol. V-204.

Second, the statement on page 32 is based on ALJ Charneski's impression that "several of respondent's witnesses testified that the chips were distributed randomly." The testimony cited by ALJ Charneski, however, does not state that the wood chips were randomly distributed; rather, that term was used by Respondent's counsel on direct examination. The witness actually testified that the wood chips were placed wherever the Kershaw machine was operated (which was the prepped path areas):

> Q: And were they – were they directed in this path or blown randomly around, or what was done with those chips?
>
> A: Actually, what – it's the same process as cutting grass. You go back and forth over the wood that's laying on the paths, and it just breaks down and shears up just like grass would do if you mow a lawn mower over it.

Tr. Vol. VI-74 (Paxton). This testimony is consistent with Finding of Fact No. 37, that the wood chips were disbursed behind the Kershaw machine, which operated only in the cleared areas. Thus, the wood chips were not disbursed randomly throughout the Site, but only in the cleared areas intended as access paths for the excavation equipment. Tr. I-134 (Lapp); Tr. I-257-58 (Martin); CX 22.

The record shows and ALJ Charneski found that Respondent was building a road. In addition, there is no serious dispute that the overall operations of which these discharges were part were designed to replace an aquatic area (the wetlands) with dry land. CX 27; Tr. I-248-49, 267-68; II-21-22 (Martin); Tr. IV-87-88 (J. Boyd); Tr. V-170-71, 228-29, VI-41-42 (Needham). Because the wood chips were discharged in connection with and as part of creation of access paths through wetlands and as part of an overall activities designed to replace an aquatic area with dry land, the discharge was necessary to the construction of a structure pursuant to the definition of "discharge of fill material." *Avoyelles*, 715 F.2d at 924-25.

3. *Even if one accepts Respondent's assertion of a disposal purpose, the appropriate permitting regime was Section 404*

Respondent's argument that their discharge is not fill material suffers from at least two flaws. One is Respondent's assumption that the Corps' 1977 definition must trump EPA's. That is not necessarily the case.[9] Second, even if one accepts Respondent's assertion (which, as set forth above, is inconsistent with the record) that Respondent discharged a layer of wood chips up to five inches thick in the access paths with the subjective purpose of disposal, the discharges fit within the 1977 definition.

Contrary to Respondent's apparent assertion, application of the Corps 1977 definition does not depend upon the asserted intent of the discharger (which is subject to manipulation, allowing the discharger to pick his regulatory program) or whether the discharge occurred for the subjective purpose of disposal. Rather, application of the Corps' former definition turns on the nature of the discharge and whether it more appropriately lends itself to regulation as waste by EPA under the Section 402 NPDES program or as fill under the Section 404 program.

Prior to 1977, the Corps and EPA had the same definition of fill material, which essentially was the same as the EPA definition. In 1977, the Corps promulgated the definition at issue in this matter. In the preamble to the 1977 definition, the Corps explained that certain discharges fell within the overlap between the Corps' authorities under Section 404 and EPA's authorities under Section 402 in that the discharge resulted in a "fill" but the nature of the discharge more appropriately fell within EPA's authorities under Section 402. Specifically, the

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[9] *Administrative Authority to Construe Section 404 of the Federal Water Pollution Control Act*, 43 U.S. Op. Attorney Gen. 197, 1979 WL 16529 (U.S.A.G.) (Sept. 5, 1979) (in light of EPA's overall responsibility for implementing the CWA, EPA – not the Corps – that has final administrative responsibility for construing the term "navigable waters").

Corps' focus was sludge, garbage, trash and debris:

> 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.

42 Fed. Reg. 37122, 37130 (July 19, 1977).

As the Corps and EPA have acknowledged (*see* 65 Fed. Reg. 21292 (April 20, 2000)), the disparity in the two agencies' definitions of fill material has caused some confusion in the courts. *See Kentuckians for the Commonwealth v. Rivenburgh*, 317 F.3d 425 (4th Cir. 2003); *Resource Investments, Inc. v. U.S. Army Corps of Engineers*, 151 F.3d 1162 (9th Cir. 1998); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983).

The most closely analogous case is the Fourth Circuit's decision in *Rivenburgh*. In that case, the Fourth Circuit rejected the subjective intent-based application of the regulation urged by Respondent in this matter. *Rivenburgh* involved a challenge to the Corps' longstanding practice of issuing a Section 404 permit to authorize the discharge of excess spoil from surface coal mining operations. The Fourth Circuit described the discharge as follows: "'Overburden' is the soil and rock that overlies a coal seam, and overburden that is excavated and removed is 'spoil.' In connection with surface mining operations in mountains where the mine operator must return the mountains to their approximate original contour, the spoil is placed temporarily in valleys while the coal is removed from the seam and then returned to the mining location. However, because spoil takes up more space than did the original overburden, all surface mining creates excess spoil that must be placed somewhere. The permit in this case authorized Martin Coal to

create 27 valley fills with excess spoil, which in turn would bury some 6.3 miles of streams at the head of the valleys." 317 F.3d at 430-31.

In *Rivenburgh*, the plaintiffs argued that "'the Corps lacks authority under Section 404 of the Clean Water Act to allow the filling of the waters of the United States solely for waste disposal.'" *Id.* at 440. Thus, the issue as framed in *Rivenburgh* is strikingly similar to Respondent's arguments in this matter.

In *Rivenburgh*, the Fourth Circuit held that Section 404 was the appropriate permitting regime for the discharge of coal mining spoil, even though that discharge amounted to a disposal of materials. Undertaking the familiar two-step analysis first described in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Fourth Circuit held, under *Chevron* step one, that the absence of a definition of "fill material" in the CWA gives rise to an ambiguity in the Act. *Id.* at 443. The Fourth Circuit then described its *Chevron* step two inquiry as "whether that regulation [the Corps 1977 definition], *as interpreted by the Corps*, is based on a permissible reading of the Clean Water Act, and, if so, whether the agency acted consistently with the regulation in issuing a permit to Mountain Coal ...." *Id.* at 444 (emphasis added). In *Rivenburgh*, the Corps has interpreted its own regulation as not precluding it from issuing a Section 404 permit authorizing disposal of materials having the effect of fill.

The Fourth Circuit noted that, when the Corps issued the permit to Martin Coal, the Corps "continued to operate with an understanding that it was authorized to regulate discharges of fill, even for waste, unless the fill amounted to effluent that could be subjected to effluent limitations." *Id.* at 445. The court further stated that it was not plainly erroneous or inconsistent with the regulation "for the Corps to have asserted that its use of the term 'waste' in the 1977

Regulation was not intended to defer to the EPA on all material deposited for disposal ....". *Id.* at 447. Finally, the Fourth Circuit held:

> In sum, we conclude that the Corps' interpretation of "fill material" as used in Section 404 of the Clean Water Act 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 Section 402 -- is a permissible construction of Section 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; *See also Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 924-25 (5th Cir. 1983) (rejecting argument that discharge was not fill because any leveling or effect of fill was "incidental" to the other activities, where activities were ultimately designed to replace aquatic area with dry land).

The Fourth Circuit's reasoning in *Rivenburgh* (and ALJ Charneski's reasoning in this matter) is consistent with the two agencies' interpretation in the preamble to their proposed joint rule revising the definition of fill material. 65 Fed. Reg. 21292 (April 20, 2002). While the 2002 joint rule does not apply directly to these discharges, the preamble (which was signed by the EPA Administrator and the Principal Deputy Assistant Secretary of the Army (Civil Works)) provides evidence of the agencies' interpretation of the Corps' 1977 definition, particularly because the agencies stated in the preamble that the proposed joint rule "does not alter current practice, but rather is intended to clarify what constitutes 'fill material' subject to CWA section 404." 65 Fed. Reg. at 21292. *See Rivenburgh*, 317 F.3d at 445 (citing preamble as evidence of how Corps interpreted the 1977 definition).

In the preamble, the agencies noted that the Section 402 and 404 programs address fundamentally different types of discharges and consequently employ different approaches to

regulation. The Section 402 program is focused primarily, though not exclusively, on wastewater discharges. By contrast, with respect to fill material, the principle concern of the Section 404 program is loss of a portion of the water body itself and therefore takes different factors under consideration. 65 Fed. Reg. at 21293. The agencies noted that "[t]ypically fill serves some purpose other than just creating dry land or changing a water body's bottom elevation. Thus, if [an alternative primary purpose] approach to interpreting the Corps' 'primary purpose test' were to be taken to its extreme conclusion, the unreasonable end result could be that almost any traditional fill material proposed to be placed in waters of the U.S. does not need a section 404 permit." The agencies expressed agreement with the interpretation in *Avoyelles*, where the court interpreted the primary purpose test as retaining a predominant effects-based component. 65 Fed. Reg. at 21294-95.

As with the discharge at issue in *Rivenburgh*, Respondent's discharge of wood chips as part of their "prepping the path" activities was not garbage, sewage, or effluent that more readily lends itself under Section 402. Rather, Respondent's discharges were the type normally associated with construction, had the effect of fill, and were discharged in connection with the construction of an access road. Thus, Respondent's discharges, like those at issue in *Rivenburgh*, are the types of discharges that are more properly regulated pursuant to Section 404. Respondent's discharge of wood chips and ground up woody debris into wetlands at the Site, therefore, was a discharge of fill material within the meaning of the Corps 1977 definition. *See United States v. Bay-Houston Towing Co., Inc.*, 33 F. Supp. 2d at 608 (use of woody surface vegetation cleared from intended peat harvesting area as foundation for temporary harvesting windrow and haul roads constructed through the bog was discharge of fill material regulated

under Section 404 of the Act).

Respondent's citation to *Resource Investments, Inc. v. U.S. Army Corps of Engineers*, 151 F.3d 1162 (9th Cir. 1998), is misplaced. In that case, the discharge involved discharges to a municipal solid waste landfill. The court's focus was not on the subjective intent of the discharge (disposal), but on the nature of the discharge (a municipal solid waste landfill). In other words, the discharge at issue in *Resource Investments* was precisely the type of discharge of garbage, etc. that the Corps' 1977 regulation was intended to exclude. Much of the court's discussion centered on the fact that there already is in place outside the CWA Section 404 program an extensive program for regulating municipal solid waste landfills under the Resource Conservation and Recovery Act, 42 U.S.C. § 6941, *et seq.*, that provided the same types of protections as the Section 404 program.

For all the reasons set forth above, Complainants assert that Respondent violated Section 301 of the CWA by discharging pollutants to waters of the United States without a permit. Complainants further assert that the pollutants were fill material and that the permit that was required was a Section 404 permit from the Corps. In the event the Board determines that the discharge of a layer of wood chips up to five inches in connection with preparing paths through wetlands for construction equipment is not a discharge of fill material, the discharge remains a discharge of pollutants without a permit and remains a violation of Section 301.

IV. RESPONDENT'S ACTIVITIES WERE NOT SILVICULTURE OR AGRICULTURE

In its brief, Respondent refers to agricultural or silviculture at the Site, to Mr. Robert Boyd's experience with silviculture, and to drainage for the purpose of facilitating tree growth.

Complainants do not construe Respondent's brief as seeking an exemption for silviculture or agriculture activities. To the extent, however, the Board interprets Respondent as seeking to avail itself of an exemption for agriculture or silviculture activities, the facts do not support an assertion that Respondent's activities had anything to do with agriculture or silviculture.

To the extent Respondent refers to an intent to "drain water from the property so that ... crops would grow better" (Respondent's brief at 9), Respondent fails to explain how excavation in the uncultivated wooded wetlands on the Site and creation of large spoil piles in the cropland areas would promote crop growth in the farm fields.

The activities at the Site also do not support a silviculture exemption. To the extent the CWA extends an exemption for silviculture operations, Respondent's ditching operation did not qualify because (1) Respondent's assertion of a silviculture purpose is not credible; (2) Respondent's ditching operation was not an ordinary or normal silviculture operation; and (3) Respondent's ditching operation does not fit within the exemptions.

Respondent's assertion of a silviculture purpose simply is not credible. Nothing in the history of Respondent's or Mr. Robert Boyd's use or operation of the Site is consistent with an intent to maintain an ongoing silviculture operation.[20] In 1990, the Virginia Department of Forestry was told that the "Landowners Objective" was "Harvest timber and hold property for development." RX 2. Despite the Virginia Department of Forestry's recommendation to avoid wet weather harvesting (which would cause excessive disturbance of soil, thus retarding future tree growth), the timber harvest on the Site in 1991 was conducted during a wet time of the year

[20] To the extent Mr. Robert Boyd has been "involved in timbering historically," (Respondent's brief at 46), Mr. Boyd also testified that he personally was unfamiliar with timbering practices, such as drainage, and relied on a consultant. As he put it, "I never cut a tree." Tr. III-241 (R. Boyd).

(RX2; RX3; Tr. III-231-32 (R. Boyd); Tr. IV-275 -76 (Gregory)) and the operations at issue in this suit also occurred during wet months. The 1991 harvest was only a partial harvest of the highest quality pine, leaving lower value hardwood in place to compete with the pine stand. Tr. III-235-37 (R. Boyd); Tr. IV-281-82 (Gregory). Contrary to Respondent's statement on page 9 of their brief, the property does not remain under a timber management plan. Respondent was released from its timber management plan by the Virginia Department of Forestry in 1994. RX 7. To the extent there ever was a timber management plan, Respondent did not fertilize or control competing vegetation. The timber management plan consisted hoping enough seedlings would be produced by natural process. RX 7; RX 8; IV-295 (Gregory).

There was no indication of a silviculture purpose contemporaneous with the operations at issue in this case. Respondents have never explained why, if they truly believed a silviculture exemption applied, they did not simply sidecast the material and avoid the significant expense of transporting dredged material to the croplands. Tr. IV-279 (Gregory). There is no reference to any silviculture purpose in any of Respondent's contemporaneous correspondence. RX 14; RX 20. Respondent did not hire experts in silviculture practices to conduct the ditching. Although Mr. Robert Boyd had historically relied on Milliken Forestry Company, Inc., for forestry matters, Tr. III-213-14, 233-34 (R. Boyd), Smith Farm Enterprises, L.L.C. did not retain Milliken to handle the ditching operation. Instead, Respondent retained consultants and contractors who had no experience or expertise in designing silviculture operations. Tr. IV-162 (Bonnell); Tr. IV-211 (Viola); Tr. VI-9 (Needham).

The ditching activities conducted by Respondent are not consistent with minor drainage associated with ordinary or normal silviculture practices. Minor drainage associated with

ordinary or normal silviculture does not take place when the stand is seven years old. Tr. IV-277-78 (Gregory). If a seven-year-old stand was not growing sufficiently, the normal silviculture practice would be to clearcut the site and start over. Tr. IV-281 (Gregory). It is not normal silviculture practice to grind up logging slash and distribute it in cleared areas (Tr. IV-279 (Gregory)); it is not normal silviculture practice to use dump trucks to take dredged material to uplands (Tr. IV-279-80 (Gregory)); it is not normal silviculture practice to install monitoring wells to determine whether wetlands hydrology has been removed (Tr. IV-283 (Gregory)); it is not normal silviculture practice to remove marketable timber only from corridors 35-60 feet wide (Tr. IV-283-84 (Gregory)); it is not normal silviculture practice when installing minor drainage to create corridors 35-50 feet wide (Tr. IV-284 (Gregory)). Thus, the operations do not satisfy the exemption under Section 404(f)(1) (33 U.S.C. § 1344(f)(1)) for "normal" silvicuture activities. Because the operations were designed to drain wetlands, they also would be subject to the "recapture" provision of Section 404(f)(2) (33 U.S.C. § 1344(f)(2)). *See also* 33 C.F.R. § 323.4; 40 C.F.R. § 232.2. See Tr. I-248-40 (Martin) (the reason for installing monitoring wells was to demonstrate to the Corps that wetland hydrology had been removed); RX 13. Thus, the Section 404(f)(1) exemption does not apply.

The roads constructed on the Smith Farm site were not "silviculture" roads used for logging or harvesting. The roads constructed on the Smith Farm Site were roads or "prepped paths" prepared for use by excavation equipment. Accordingly, 40 C.F.R. 122.3(e) and 122.27 are irrelevant. *See North Carolina Shellfish Growers Ass'n v. Holly Ridge Associates, L.L.C.*, 278 F. Supp. 2d 654, 679 (E.D.N.C. 2003).

V. NEITHER THE DOCTRINE OF ESTOPPEL NOR PRINCIPLES OF FAIRNESS

PRECLUDE A FINDING OF LIABILITY

It is unclear whether Respondent's various references to alleged Corps "approval" (either affirmative or by acquiescence) are intended to exonerate Respondent from liability or to mitigate the penalty. To the extent Respondent's arguments go to liability, as set forth in greater detail below, those arguments are disingenuous.

To the extent Respondent relies on pre-activity communications between Respondent or its consultant and the Corps, ALJ Charneski correctly held and the record firmly establishes that Respondent did not convey to the Corps the nature and extent of the discharges at the Smith Farm Site. To the extent Respondent relies on the site visits by the Corps' representative, Mr. Martin told Respondent's consultant that the conditions at the Site were not what he anticipated and that he had questions regarding whether there were violations. Despite this, Respondent neither temporarily halted work nor followed up with the Corps. When EPA contacted Respondent in July 1999 about setting up a site inspection in September 1999, Respondent resumed excavation activities at the Site in August, rather than wait until it received feedback from EPA on the legality of its operations. In sum, neither the doctrine of estoppel nor any consideration of fairness precludes a finding of liability.

To the extent Respondent relies upon pre-activity communications, Respondent refers to (1) correspondence between Respondent's consultant Mr. Needham and the Corps related to another Site, called the "Southern Pines,"[10] (2) a meeting between Respondent and a Corps

[21] Emil Viola, the President of Vico Construction Corporation, is a part owner of Southern Pines, L.L.C., which owns the Southern Pines Site. Tr. IV-203-04 (Viola). Complainants brought an enforcement action against the owners and operator of the Southern Pines Site, who contested Complainants' allegations. That matter was resolved prior to hearing in a Consent Agreement and Final Order (*Matter of Vico Construction Corp. and Southern Pines Associates, L.P.*, Dkt. No. CWA-03-2003-0325, and an Administrative Order for Compliance on Consent, Dkt. No. CWA—03-2004-0224DW.

representative, and (3) a follow-up letter sent by Respondent's consultant Mr. Needham. In connection with the Southern Pines Site, Mr. Needham sent a letter to John Evans, an environmental scientist at the Corps assigned to the Southern Pines Site (RX 10) describing certain conditions and activities associated with excavation in wetlands. Mr. Evans' second level supervisor, William Poore, wrote back to Mr. Needham. RX 11. Mr. Poore's letter specifically stated that it was a site-specific determination for the Southern Pines Site and did not apply to any other Site. RX 11. Mr. Poore stated that no Section 404 permit from the Corps would be required, so long as activities conformed with the following:

1. No sidecasting of excavated material.
2. No double handling of excavated material in wetlands.
3. No digging of stumps other than excavation with a single pull of the excavator.
4. No corduroy roads from any fill material, including woody vegetation.
5. No discharge of excavated material except for "incidental fallback" associated with the ditch excavation.

Mr. Poore's letter (RX 11) stated that no Section 404 permit would be required for the following activities:

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 matts may be used in soft soil areas.

Mr. Poore's letter was conditioned on the accuracy of Mr. Needham's letter (RX 10) describing operations at the Southern Pines Site: "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 excavation of ditches in wetlands on the Southern Pines site as you have

proposed. RX 11 (emphasis added).

To the extent the exchange regarding the Corps' site-specific statements related to the Southern Pines Site can be considered in connection with a different site, Mr. Needham's letter did not convey accurately conditions at the Smith Farm Site to the Corps. Neither Mr. Needham's letter nor Mr. Poore's letter refer to wood chips, the use of a Kershaw machine or stump grinders, or the grinding of treetops, branches or slash, placement of rock check dams in pre-existing waterways, or manipulation of pre-existing waterways, all of which occurred at the Smith Farm Site. Tr. VI-29-30, 33-34 (Needham).

Messrs. Boyd met with a Corps representative on October 30, 1998. That meeting is summarized in a letter from Mr. Needham to Mr. Nick Konchuba of the Corps dated November 6, 1998. RX 14. That letter (and the meeting it summarized) did not convey to the Corps the conditions at the Smith Farm Site. That letter does not mention wood chips, the use of a Kershaw machine or stump grinders, or the grinding of treetops, branches or slash, or Respondent's intent to grind up all treetops, branches, slash and other woody debris and deposit those wood chips in the cleared corridors. Nor does RX 14 mention placement of check dams in pre-existing waterbodies or manipulation of pre-existing waterbodies.

Respondent's frequent references to "mowing" in its brief apparently are designed to encourage the Board to draw an inference that the phrases "mow shrubs and saplings" "along the length of the excavation" in Mr. Needham's letters somehow conveyed to the Corps knowledge of the following: (1) removal of marketable timber from the Smith Farm Site, leaving a voluminous layer of treetops, branches, smaller non-marketable trees, and slash in the path of excavation equipment; (2) use of a Kershaw machine and Morbark Mountain Goat chipper to

grind up the treetops, branches and other slash, leaving the cleared portions of the site devoid of visible vegetation; and (3) the discharge over cleared corridors 35-50 feet wide of a layer of wood chips and ground up woody debris up to five inches thick. Respondent's inference appropriately was rejected by ALJ Charneski.

Both Mr. Martin and Mr. Lapp testified that what they saw in the field was not consistent with Mr. Needham's letters. Mr. Lapp testified that the Smith Farm Site was not consistent with other projects he had seen involving ditches constructed around trees and trees felled by chainsaw. Tr. I-163-64 (Lapp). He also testified that conditions at the Smith Farm Site were not consistent with other sites where he had observed mowing of vegetation along the length of a proposed excavation in that, at other sites, there was no cleared 35-50 foot swath, nor was there a layer of wood chips up to five inches deep. Tr. I-165-66 (Lapp). Mr. Martin, who had both reviewed Mr. Needham's letter and spoken with Mr. Needham, testified that what he saw at the Site was *not* what he had expected to see. Tr. I-269-70, II-5-6 (Martin). Mr. Martin further testified he told Mr. Needham: "[The conditions at the Smith Farm Site] really wasn't what I envisioned. It was, it was not what I expected or anticipated and that I wasn't quite sure." Tr. I-271 (Martin). To the extent Respondent has questioned Mr. Martin's credibility, the concerns to which Mr. Martin testified at the hearing are confirmed by his contemporaneous writings in his inspection report. CX 27. ALJ Charneski observed the testimony of both Mr. Martin andMr. Needham, and he accepted Mr. Martin's testimony on this point. Initial Decision at 11-12.

To the extent that Respondent seeks exoneration based on the fact that the Corps did not shut down the project, silence by the Corps is not the equivalent of acquiescence and, in any case, is inadequate to support estoppel. The standard for establishing estoppel against the Government

is extremely high. *See generally Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990); *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984). One must establish not only the traditional elements of estoppel -- that is, the existence of a misrepresentation by the Government on which Respondents reasonably relied to Respondent's detriment -- but also affirmative misconduct by the Government. *See Heckler*, 476 U.S. at 60-63; *United States v. Ven-Fuel*, Inc., 758 F.2d 741, 761 (1st Cir. 1985); United *States v. Sheyenne Tooling & Mfg. Co., Inc.*, 952 F. Supp. 1414, 1419 (D. N. Dakota 1996); *United States v. CPS Chemical Co., Inc.*, 779 F. Supp. 437 (E.D. Ark. 1991).[11]

There was no misrepresentation by the Corps. In Mr. Poore's letter (RX 11), the Corps accepted Respondent's representations as to activities on the Southern Pines Site. It was *Respondent's consultant* who failed to convey to the Corps the true nature and extent of the discharges.[12] There also was no misrepresentation by Mr. Martin during his January 6, 1999 site visit. Mr. Martin did not approve the project. To the contrary, Mr. Martin's uncontradicted testimony is that he told Mr. Needham that the activities at the Smith Farm Site were not what he anticipated and that he (Mr. Martin) had questions. Tr. I-271, II-5-6 (Martin). Mr. Martin's testimony is confirmed by his contemporaneous writings in his inspection report. CX 27. In its

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[22] The reason for this heightened standard is the obvious public interest in ensuring that laws are enforced. "When the Government is unable to enforce the law because the conduct of its agents gives rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined." *Heckler*, 476 U.S. at 60.

23 To the extent Respondent relies on statements in RX 11 or on communications between the Norfolk District and Corps Headquarters as evidence of liability, those statements are not entitled to deference. Such pronouncements from an administrative agency do not carry the force of law and are entitled to deference only to the extent they are persuasive. *See United States v. Mead Corp.*, 533 U.S. 218 (2001); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). As set forth herein, these statements are based upon Respondent's description of activities at the Site, which do not reflect actual on-site conditions and therefore should be accorded no deference. In any event, it is not Complainant's position that Respondent is liable for failing to comply with Mr. Poore's letter. To the contrary, as ALJ Charneski found, the discharges at issue far exceed what was described to Mr. Poore.

references to subsequent site visits by Mr. Martin, Respondent fails to inform the Board that Respondent had restricted Mr. Martin's site access to the sole purpose of checking on monitoring wells on the property. CX 69 (letter from James M. Boyd to Steve Martin dated March 12, 1999). The fact that the Corps did not shut down Respondent's operation is not a misrepresentation. *See United States v. Chevron, U.S.A., Inc.*, 757 F. Supp. 512, 515 (E.D. Pa. 1990) (four-year delay in bringing enforcement action is not a misrepresentation).

There also was no detrimental reliance by Respondent. Respondent started work at the Site before the Corps visit, and thus could not have relied prior to January 6, 1999 on anything Mr. Martin said or didn't say during his Site visit. Following the visit on January 6, 1999, Respondent neither halted work nor followed up with the Corps to find out whether Mr. Martin or the Corps had reached any conclusions regarding Mr. Martin's questions, even though Mr. Needham was aware that wood chips could be considered fill material (which was one of Mr. Martin's questions). *See* Tr.VI-11 (Needham). Instead, operations proceeded as usual. *See* CX 7 (invoices show operations continuing almost daily following Martin's visit). See *Sasser v. EPA*, 990 F.2d 127, 130-31 (4th Cir. 1993) (a person who acts under the assumption that his discharge is allowed bears the risk of liability if his assumption is incorrect).

To the extent Respondent asserts that it would have ceased operations if informed by a regulatory agency of a possible violation, Respondent's actions reveal otherwise. Once Respondent learned that EPA planned to inspect the Site, Respondent apparently rushed to complete all excavation work, rather than await EPA's inspection and feedback. In July 1999, EPA contacted Respondent's counsel about scheduling a Site inspection. That inspection was scheduled with Respondent for early September 1999. Tr. I-108 (Lapp). On August 11, 1999,

Mr. Blevins of Vico began work to re-initiate the ditching process (which had been dormant since February 22, 1999) and on August 16, 1999, Mr. Paxton began excavating at the Smith Farm Site again. The excavation work was completed August 20, 1999, and EPA arrived on site nineteen days later. CX 7 (EPA 0104, 0122-24).

Neither the doctrine of estoppel nor principles of fairness preclude a finding of liability.

VI. FACTS AND ANALYSIS RELEVANT TO COUNT II

According to the Statement of Issues, Respondent's arguments relative to Count II are limited to a technical argument regarding the adequacy of the First Amended Complaint. Nevertheless, the Board stated in its Order dated June 13, 2005 that: "Smith Farm filed an appeal with the Board on June 3, 2005, contesting liability as to both counts, and challenging the amount of the assessed penalty." Accordingly, Complainants here brief the facts and legal analysis relevant to Respondent's liability under Count II, as well as respond to the technical argument regarding the First Amended Complaint.

Complainants have established by a clear preponderance of the evidence that Respondent violated Section 301 of the CWA by discharging storm water associated with construction activity without an NPDES permit. At the time of Respondent's activities at the Smith Farm Site, an NPDES permit was required for discharges associated with eleven categories of "industrial activity." One such category was "construction activity including clearing, grading and excavation activities except: operations that result in the disturbance of less than five acres of total land area which are not part of a larger common plan of development or sale." *See* 33 U.S.C. § 1342(p); 40 C.F.R. § 122.26(b)(14)(x) (1998).[13] An NPDES permit was required if the

[24] EPA implemented Section 402(p) of the CWA as to discharges of storm water associated with construction activity

activity satisfies the definition in 40 C.F.R. § 122.26(b)(14)(x), regardless of the location of the land disturbing activity or the ultimate use of the site.

Virginia is authorized to implement the NPDES program within its borders. Tr. II-197-98 (Magerr). Virginia law requires dischargers to seek coverage under an NPDES permit prior to commencement of land disturbing activity. 9 V.A.C. § 25-180-60.

There is no question that the activities on the Site were the type of land disturbing activities described in 40 C.F.R. § 122.26(b)(14)(x). Respondent's application for a land disturbing permit from the City of Chesapeake describes the proposed activity as "[c]learing, filling, excavating, grading or transporting or any combination thereof." Joint Stipulation of Facts No. 11 (filed June 13, 2002); RX 17. The purpose of Respondent's activities was excavation of ditches to drain the Smith Farm Site. As part of that process, Respondent cleared the ditch corridors by removing all vegetation. Tr. IV-168 (Bonnell) ("All I see is a removal of vegetation"). Respondent also excavated and regraded additional ditches. CX 7 (EPA 0118); Tr. VI-127-28 (Paxton) (regraded ditches); Tr. IV-260-61 (Blevins) ("We dug quite a few ditches in the upland area"). In addition, stockpiles and fields were graded and drainage swales were constructed to convey water from the stockpiles to receiving ditches. CX 7 (EPA 0075, 0076);

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in two phases. Phase I, in effect at the time of Respondent's discharges, required an NPDES permit for storm water discharges associated with construction activity greater than five acres or part of a common plan of development greater than five acres. Subsequently, EPA promulgated regulations covering "Phase II." *See* 64 Fed. Reg. 68,722 (Dec. 8, 1999). Under the Phase II regulations, discharges associated with construction activity between one and five acres require an NPDES permit. Because Respondent's activities occurred prior to the promulgation of the Phase II regulations, the five-acre Phase I threshold applies to this matter.

Tr. VI-111-13, 129-30 (Paxton).

There was significant soil movement at the Site. Mr. Martin described and photographed significant rutting and soil movement caused by heavy machinery moving through the Site. CX 26 (EPA 0325, Photos 11 and 12); CX 27; Tr. I-270 (Martin). Mr. Needham testified about areas being "pushed up" by movement of machinery. Tr. V-240 (Needham). Mr. Lapp testified that the hummocky microtopography he had observed in the undisturbed forested wetland area had been obliterated in the cleared corridors. Tr. I-164-65 (Lapp). The samples taken by Complainants' site investigators in the disturbed areas were a mixture of soil and wood chips, indicating that the surface was churned up, causing the wood chip layer to be mixed with the soil. CX 22; Tr. I-133-34 (Lapp).

The record is equally clear that Respondent's construction activity disturbed more than five acres. Respondent's erosion and sediment control ("E&S") plans, prepared pursuant to county requirements, estimate that 7.147 acres would be disturbed on the Suffolk portion of the property, and 3.562 acres would be disturbed on the Chesapeake side of the property. CX 109; CX 44A. Because the two E&S Plans represent a common plan for development of the Site,[14] Tr. II-196-97 (Magerr), one would add the two figures together to derive a total of 10.709 acres projected to be disturbed on the face of E&S Plans prepared for Smith Farm Enterprises, L.L.C. *See* CX 44A; CX 109; II-224 (Magerr).[15,16]

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[25] Respondent Smith Farm Enterprises treated the work on both sides of the property as a single project. RX 12; RX 13; RX 16; CX 7).

[26] Other evidence that more than five acres was disturbed comes from the contract between Vico and Smith Farm Enterprises (RX 13); Vico's bills to Smith Farm Enterprises (CX 7 (EPA 117 & 132)). By using an estimated width of 35-50 feet for the corridors times the linear length of the ditches, one arrives at total square footage, which can be divided by 43,560 square feet to estimate the number of acres disturbed. The Timber Harvest Agreement instructs

Complainants observed and documented numerous instances of Respondent's failure to install controls depicted on their erosion and sediment control ("E&S") plans. These included construction of a ditch not depicted on the E&S plan (Tr. IV-136 (Haste)); reconfiguration of a pre-existing water course on the Site (CX 98; Tr. I-261-62 (Martin); RX 15; RX 36; Tr. V-214-21, VI-39-41 (Needham)); construction of collector ditches and lateral or "finger" ditches to facilitate drainage that are not on the E&S plans (Tr. IV-232, 240-42, 260-62, 266 (Blevins); Tr. III-87 (Vasilas); Tr. I-256 (Martin); CX 96 (EPA 1115B, 1116)); placement of spoil piles inconsistent with the E&S plan (CX 98; Tr. II-228, 242-47 (Magerr)); failure to install controls such as vegetation or silt fencing to prevent erosion from the spoil piles (Tr. II-256 (Magerr); CX 40 (EPA0754, 0755, Disk 5, Photos 14 and 15); *see also* Respondent's inspection reports, RX 40); use of a construction entrance and staging area off Shoulder Hill Road not depicted on the E&S plan (Tr. II-5 (Martin); Tr. II-230-31, 247-49 (Magerr); CX 40 (EPA 0742, Disk 4, Photo 2); CX 41 (EPA0771, 0772); the unauthorized construction entrance did not meet the specification on page three of CX 44A (Tr. II-249, 256 (Magerr)); check dams inconsistent with specifications in the E&S plan (Tr. II-231-33 (Magerr); CX 40 (EPA0743, Disk 4, Photo 2); Tr. II-235-36 (Magerr); Tr. IV-134-35 (Haste); CX 40 (EPA 0744; Disk 4, Photo 3)).

In addition, Respondent failed to conduct periodic inspections described in the E&S Plan

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Old Mill Land and Timber Company to remove trees from 11.34 acres of woods on the Smith Farm Site. RX 16. After Complainants inspected the Site, Mr. Boyd finally submitted an application to the Virginia Department of Environmental Quality for a Section 402 permit for the discharge of storm water associated with construction activity. In his sworn application, Mr. Boyd lists the "Estimated Area to be Disturbed (acres)" as "11." CX 14.

[27] To the extent Respondent offers its survey to counter a finding that more than five acres was disturbed, that survey did not reflect all land disturbing activities. It identifies only the ditches, not the cleared corridors. The survey measured only those ditches depicted on the first page of RX 39 (an "as built" depiction of the Site). Tr. IV-188 (Ferguson). However, RX 39 does not depict (and the survey does not include) a number of ditches that were constructed in uplands areas at the Site or the ditches that were re-graded. Tr. IV-240-42, 260-61, 266 (Blevins); Tr.

and required by the Virginia General Permit for Discharges of Storm Water Associated with Construction Activities. CX 44A, page 3; RX 25, Part II, page 9 of 10. Contrary to the assertion in Respondent's Brief at page 15, Respondent's inspector did not perform inspections at the Site until May 22, 2000, approximately seventeen months after work bgan at the Site. RX 40; Tr. IV-106 (Bohlander); Joint Stipulations of Facts No. 19 (filed September 8, 2003).

Complainants' storm water inspector observed and documented significant erosion. The ditch banks were unprotected, and Mr. Magerr observed evidence of erosion of the ditch banks, including rills, fissures, and the sliding or sloughing down of the ditch banks and bank failure. Tr. II-235-39, 252-53 (Magerr); CX 40 (EPA 0745-47, Disk 4, Photos 4, 5, 6; EPA 749-51 Disk 5, Photos 8, 9, 10); CX 41 (EPA 787 & 790, Roll 4, Frames 21 & 24). During his testimony, Mr. Magerr compared a photograph of a freshly constructed "v"-shaped ditch taken by Mr. Martin in January 1998 (CX 26, EPA 0320, Photo 1) with the sloughed sides of the ditches observed by him. Tr. II-236 (Magerr). The sloughed sides and "U"-shape of the ditch was evidence of failure of the ditch banks. There was evidence of erosion from the cleared corridor areas into the ditches. Tr. II-238-39 (Magerr); CX 40 (EPA 0749-51, Disk 5, Photos 8, 9, 10).

Mr. Magerr took a photograph demonstrating the flow of sediment from the ditches to a previously existing waterbody (drainage 6). CX 40 (EPA 0747, Disk 4, Photo 6) was taken downstream from the check dam on the Suffolk side of the Site where the ditch converged with the previously existing waterway. It is clear from this photograph that sediment -- which should have been trapped by the check dam upstream -- was flowing to the previously existing waterway. Tr. II-236-37 (Magerr). Respondent's witness, Dr. Cahoon, acknowledged that the

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VI-126-28 (Paxton) (discussing RX 36, which is the same "as built" drawing as RX 39, see Tr. V-231).

photograph showed turbid water converging with another waterway. Tr. IV-60-61 (Cahoon). Mr. Magerr observed drainage swales that allowed erosion from spoil piles to flow to the ditch network. Tr. II-242-48 (Magerr); CX 40 (EPA0754, 0755, Disk 5, Photos 14 and 15). Respondent's contractor acknowledged that that drainage swales were constructed from the spoil piles to the ditches in order to prevent ponding near the spoil piles. Tr. VI-129-30 (Paxton).

Water in the ditch network flowed downstream to collector ditches and then off-site. Tr. VI-125 (Paxton) (ditches were designed to convey flow in that they were shallower at the upstream and deeper downstream to allow water to flow to receiving ditches and streams). To the extent Respondent asserts that none of the work was not intended to drain surface water to the ditches is contradicted by Respondent's own witnesses. Because of significant rainfall during the winter 1998-99, several ditches on the Suffolk side of the property were constructed in two passes to allow the Site to be drained. In the first pass in February 1999, a shallower ditch was constructed. Mr. Paxton testified that the purpose of the first pass was to drain surface water, allowing the equipment to return later. Tr. VI-124-25 (Paxton); *see also* RX 9 ("we have been able to drain the surface water beyond the 700' by digging an 18" shallow ditch for the remaining distance of the proposed 'Tulloch' ditch. This will allow the surface to dry out").

In addition to his inspection, Mr. Magerr calculated the types of rain events that would cause runoff from the portions of the Smith Farm Site where land disturbing activities had occurred. He used the run off formula from the Soil Conservation Service Technical Reference Manual 55 (CX 36), a standard technical manual. Tr. II-266-70 (Magerr). When Mr. Magerr performed the calculations, he determined that thirty-two hundreths of an inch of rain (0.32 inches) over a 24-hour period would cause runoff from the disturbed areas on the Lewis Farms

Site. Tr. II–266-75 (Magerr). Between January 1, 1999 (when work at the Site was underway) and September 15,1999 (the date Respondents sought an NPDES permit for the discharge of storm water associated with construction activity), there were thirty-eight days on which .32 inches of rain or more fell at the Suffolk Lake Kilby Station, which is the appropriate rainfall station for the Smith Farm Site. CX 90; Tr. VI-9-10 (Needham). Thus, Mr. Magerr both documented in the field and calculated using standard technical texts the discharge of storm water associated with construction activity from the disturbed areas at the Lewis Farms Site.[17]

By clearing the paths and creating the ditch system on the Smith Farm Site, Respondent created a conduit for the unpermitted discharge of storm water associated with construction activity. *See Molokai Chamber of Commerce v. Kukui (Molokai), Inc.*, 891 F. Supp. 1389, 1400-01 (D. Hawaii 1995).

To the extent Respondent argues that Complainants have failed to prove the existence of a point source consistent with what was pleaded, Respondent misrepresents the First Amended Complaint (filed November 19, 2001, Exhibit 1 to Complainants' Motion for Leave to File a First Amended Complaint). Respondent cites only Paragraph 30, but misquotes that paragraph. The paragraph actually quoted in Respondent's brief is Paragraph 29, which states: "The equipment used at the Site is a 'point source' which 'discharges' 'pollutants' contained in storm water runoff as those terms are defined at Sections 502(6), (114) and (16) of the Act, 33 U.S.C. §§ 1362(6),

[28] To the extent Respondent offers the testimony and report of Dr. Cahoon to rebut the evidence of discharges observed and documented by Complainants, Dr. Cahoon's report and findings add little to the record. Dr. Cahoon first visited the Site over a year after the land disturbing activities occurred and after the Site had begun to revegetate and stabilize, at which point one would expect sediment transport to decrease. Tr. II-199, 246-47, 250 (Magerr); Tr. IV-59 (Cahoon). Moreover, Dr. Cahoon's report documents sediment transported from the ditch network to the pond (a water of the United States) into which the ditch network drained on the Suffolk side of the Site. RX 28 (Photo 4 and caption to Photo 4). Dr. Cahoon also acknowledged that some of his photos depict ditch bank failure, which would have flowed downstream. Tr. IV-59-60 (Cahoon).

(14) and (16), and 40 C.F.R. § 122.2." Respondent misquotes Paragraph 30, which states: "Respondent's construction activities resulted in the discharge of pollutants to wetlands on the Site *and into ditches which discharge into* unnamed tributaries of Bennetts Creek, Goose Creek, and Baileys Creek, all 'waters of the United States' within the meaning of 40 C.F.R. § 122.2." (emphasis added)

Respondent also fails to call the Board's attention to Paragraph 17, which was a general allegation applying to both Counts, and which states: "Respondent Vico Construction Corporation operated equipment at the Site resulting in the discharge of pollutants to waters of the United States, including wetlands."[18] Respondent also fails to note Paragraph 13: "Section 402(p) of the Act, 33 U.S.C. § 1342(p), and 40 C.F.R. §§ 122.1 and 122.26 provide that facilities with storm water discharges associated with industrial activity are 'point sources' subject to NPDES permitting requirements under § 402(a) of the Act, 33 U.S.C. § 1342(a)."

Taken together, Paragraphs 13, 17, 29 and 30 more than sufficiently pleaded the facts established in the hearing and the theory argued in Complainants' briefs that the land disturbing activity, including excavation of the ditches, created a conduit for the discharge of storm water associated with construction activity to both the receiving waters off-site and to the wetlands and other waters of the United States located on the Smith Farm Site.

VII. CONCLUSION

For all of the foregoing reasons, Complainants respectfully request that the Board affirm ALJ Charneski's holding, pursuant to Count I of the First Amended Complaint, that Respondent has violated Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), by discharging fill

[29] Vico was Respondent's contractor, and within Respondent's control. Vico settled prior to the hearing.

material to wetlands on the Smith Farm Site that are waters of the United States without a permit pursuant to Section 404 of the Clean Water Act, *id.* § 1344. Alternatively, Complainants respectfully request that the Board find, pursuant to Count I, that Respondent has violated Section 301(a) of the Act by discharging pollutants to wetlands on the Smith Farm Site that are waters of the United States without an NPDES permit issued pursuant to Section 402 of the Act, *id.* § 1342. Complainants also respectfully request that the Board affirm ALJ Charneski's holding, pursuant to Count II, that Respondent violated Section 301(a) by discharging storm water associated with construction activity without an NPDES permit.

Pursuant to the Board's Order dated June 13, 2005, Complainants will submit on or before July 22, 2005 their brief on non-liability issues, including penalty and ALJ Charneski's decision to grant a re-trial following the court reporter's failure to produce a transcript.

Respectfully submitted,

Date: 7/1/05

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CERTIFICATE OF SERVICE

I hereby certify that on this date I caused the foregoing Complainants' Appellate Brief as to Liability for Violation of Section 301 of the Clean Water Act in the Matter of Smith Farm Enterprises, LLC, CWA Appeal No. 05-05 to be served in the following manner:

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