UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of	)	
	)	
Vico Construction Corporation	)	Docket No. CWA-3-2001-0021
and Amelia Venture Properties, L.L.C.,	)	
	)	
Respondents	)	

INITIAL DECISION

By: Carl C. Charneski
Administrative Law Judge

Issued: December 13, 2004
Washington, D.C.

Appearances

For Complainant: Stefania D. Shamet, Esq.
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Region III
U.S. Environmental Protection Agency
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For Respondent: Hunter W. Sims, Jr., Esq.
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I. Statement of the Case

This is a civil penalty enforcement proceeding arising under the Clean Water Act ("CWA" or "the Act"). 33 U.S.C. § 1251 *et seq.* The United States Environmental Protection Agency ("EPA") initiated this action by filing a complaint against Amelia Venture Properties, LLC ("Amelia Venture"), and Vico Construction Corporation ("Vico"), charging respondents with two Clean Water Act violations. In Count I of its First Amended Complaint, EPA charges that Amelia Venture and Vico violated Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), by discharging dredged and/or fill material (*i.e.*, wood chips) into "wetlands" that are "waters of the United States," without a permit from the United States Army Corps of Engineers ("the Corps"), issued pursuant to Section 404 of the Act. 33 U.S.C. § 1344. Alternatively, EPA alleges that respondents committed this Section 301(a) violation by discharging pollutants

(again, wood chips) into "wetlands" that are "waters of the United States" without a National Pollutant Discharge Elimination System ("NPDES") permit, issued pursuant to Section 402 of the Act.
33 U.S.C. § 1342. In Count II of the First Amended Complaint, EPA charges that respondents discharged storm water associated with construction activity without a Section 402 NPDES permit. *Id.* Such activity also constitutes a violation of Section 301(a) of the Clean Water Act. *Id.* For these violations, EPA seeks a civil penalty of $137,500. 33 U.S.C. § 1319(g).

Respondents Amelia Venture and Vico dispute these charges. A hearing was held in this matter on January 13-17, 2003, and February 6, 2003, in Virginia Beach, Virginia. For the reasons that follow, it is held that respondents committed the Section 301(a) violations as alleged in Counts I and II. A civil penalty of $126,800 is assessed for these violations.

II. Facts

A. The Lewis Farm Site

The facts in this case involve a parcel of land which the parties have come to refer to as the "Lewis Farm" site. Respondent Amelia Venture, a limited liability corporation organized under the laws of the Commonwealth of Virginia, owns this land. Tr. 1234. Lewis Farm is a 117-acre forested tract located on the Atlantic coastal plain, in Chesapeake, Virginia. Tr. 96, 630, 713; CX 41.[1] This general area is known as the "Tidewater" area. Tr. 390. The location of Lewis Farm also is considered to be in the Elizabeth River watershed, or the lower James River basin. Tr. 170.

Lewis Farm is situated immediately west of Interstate Highway 664 ("I-664"), off of Portsmouth Boulevard, with approximately 2000 feet of highway frontage. It is bounded on the east by I-664, on the north by an unnamed tributary to Drum Point Creek,[2] and on the south, west, and north by unimproved agricultural property. CX 24; RX 27. Lewis Farm is also bounded on the north/northwest by a tract of land known as the "Gateway Commerce Park." Tr. 339. The U.S. Army Corps of Engineers has confirmed the existence of 36 acres of wetlands on that adjoining property. Tr. 344, 347.[3] Gum Court, a cul-de-sac just to the west of I-664 and adjacent to the northeastern-most portion of Lewis Farm, provides access to the site. Tr. 181, 358; CX 78.

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[1] The Lewis Farm site also has been described by the U.S. Army Corps of Engineers as a 66-acre site. *See* CX 26. The actual size of this tract does not affect the outcome of this case.

[2] This unnamed tributary is referred to in this decision as "the western tributary to Drum Point Creek."

[3] In fact, the National Wetlands Inventory Map, discussed *infra,* shows that wetlands extend in a "rather large area" south and west of the Lewis Farm site. Tr. 410-411.

The Lewis Farm property is zoned for agricultural use. Tr. 1235; RX 14. The City of Chesapeake Comprehensive Plan, however, has designated this land for light industrial use. CX 24. According to William Ashton Lewis, a managing member of Amelia Venture, the Lewis Farm site originally was purchased around 1952 as forest land for use in connection with the family lumber business. Tr. 1234-1235; Stip. 2. In the late 1980's, Amelia Venture granted an option to New Boone Farm, a group interested in consolidating and developing Lewis Farm and its surrounding properties. Because New Boone Farm subsequently went bankrupt, the option was not exercised. In connection with the New Boone Farm option, however, a wetlands delineation was performed on Lewis Farm. This delineation -- *i.e.*, the mapping of wetlands -- occurred in 1991. Tr. 1238-1239; RX 6.

B. <u>The Wetlands</u>

The term "wetlands" is defined by both the U.S. Army Corps of Engineers and EPA as "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. 328.3(b) & 40 C.F.R. 122.2. Further, the Corps has provided guidance for identifying wetlands in the *U.S. Army Corps of Engineers Wetlands Delineation Manual (1987)* ("1987 Corps Manual"). CX 33. This Manual is the primary document used by EPA for the identification of wetlands. Essentially, the presence of wetlands is characterized by: (1) hydric soils; (2) a predominance of wetlands vegetation; and (3) wetlands hydrology. Tr. 38-39, 768-774.

A wetlands delineation is performed by a field investigator using the wetlands criteria of the 1987 Corps Manual -- *i.e.*, hydric soils, predominance of wetlands vegetation, and wetlands hydrology. Using flags, the field investigator marks boundaries between the wetland and upland areas. A land surveyor then superimposes the wetland-upland boundary on a map. Tr. 767-775, 826-829. Robert Needham, a wetlands consultant and expert witness retained by respondents explained this process as follows:

> Once you determine that there are wetlands on the property or I should say wetlands and dust points, now there's a line between the two. And what you want to do is be at some boundary of that property and tie up what you ultimately call flag number one. And that's your starting point. It's much like a maze. For instance, if you keep the wetlands on your left hand and you just keep tying flags -- these are never straight lines or rarely. And as you meander through the property, eventually you will come out on the other side. And everything to one side of you should be uplands and the other side should be wetlands. You have numbered all these flags in between. Then a land surveyor can come back and locate, make a map and find out how many acres of wetlands and how many acres of uplands.

Tr. 769.

The1991 wetlands delineation commissioned by Amelia Venture was performed by Needham (*i.e.*, Needham Environmental, Inc.), and it identified the presence of wetlands on the Lewis Farm site. These wetlands are depicted on Respondents' Exhibit 6. Tr. 828-829. (The area outside the red marking is the wetland area. Tr. 832.). This wetlands delineation subsequently was confirmed by the U.S. Army Corps of Engineers. Tr. 829.[4] Charles Wolfe, another of respondents' wetlands experts, likewise testified that wetlands were present on Lewis Farm. Tr. 1290-1291; RX 39C.[5]

Besides Respondents' Exhibit 6, the National Wetlands Inventory Map also depicts wetlands on the Lewis Farm site. CX 43, Fig. 12. This document was prepared by the U.S. Fish and Wildlife Service, which is charged with mapping the nation's wetlands. Tr. 409-410.

In addition, Peter Stokely, an EPA witness and an expert in aerial photographic interpretation, also identified wetlands on the Lewis Farm site. Tr. 411-413. Stokely explained that wetlands are a feature on the landscape which can be identified through aerial photography. Specifically, aerial photography is used to identify the wetlands "signature." This signature consists of vegetation covering, landscape position, tonal qualities, and drainage patterns. The use of aerial photography is cited in the 1987 Corps Manual as an aid in wetlands delineations.

In this case, Stokely used infrared aerial photographs. He stated that infrared photographs are "particularly useful" in identifying a wetlands signature because soil moisture and water absorb the infrared radiation, thus enhancing the difference between dry and wet soil. Tr. 393-396. Stokely's testimony essentially is summarized by the following passage:

> Well, aerial photography can give you a general sense of where the wetlands are initially before you go out in the field, so that you have something to look at and base your field work on. It can also help you identify the outer boundaries of wetlands if you don't have a formal delineation in the field, and you base that on the signature of a wetland, and then you can put the boundary around it on the photograph.

Tr. 395.

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[4] A second wetlands delineation of the Lewis Farm site is set forth in Respondents' Exhibit 7. Tr. 833. Exhibit 7, however, does not represent a new delineation. Instead, with the intervening bankruptcy of New Boone Farm and the collapse of that business venture, Exhibit 7 simply focuses on the Lewis Farm property and eliminates some of the other parcels relating to New Boone Farm which otherwise appear in Respondents' Exhibit 6. Tr. 833-835.

[5] Whether these wetlands are "jurisdictional wetlands" invoking the coverage of the Clean Water Act will be discussed, *infra.*

C. Construction of the "T-Ditch"

In 1997, Amelia Venture Properties entered into a contract with co-respondent Vico Construction Corporation for the construction of a T-shaped drainage ditch ("T-ditch") on the Lewis Farm site. A T-ditch, also referred to as a "rim ditch," is placed in uplands, along the wetlands perimeter. Its function is to drain the water from the adjoining wetlands. Tr. 880-881, 1104. A T-ditch is a lawful method by which a wetland area is converted to an upland area. The process is relatively simple. In this case, once the T-ditch is constructed and the adjacent wetland area is drained, the U.S. Army Corps of Engineers is brought in by the landowner to confirm that the newly drained area is now an upland, and no longer a wetland. When that happens, a new
T-ditch is dug in the newly converted upland, adjacent to the remaining wetland area, and the drainage process is repeated. The landowner can continue this procedure until all the wetlands are removed from the property. Tr. 1224-1226. Because the T-ditch is dug in uplands, a Section 404 permit is not required from the Corps.

The T-ditch dug by Vico in this case was constructed in wooded uplands along the northeastern upland-wetland boundary of the property. RXs 7 & 14; CX 41 (T-ditch marked in blue. Tr. 835-836).[6] This ditch is 1600 feet long and approximately 8 feet wide. Tr. 1107; CX 5. (It was occasionally referred to at the hearing as Ditch Five. Tr. 93; CX 74.) In order to accommodate Vico's ditch digging equipment, a path approximately 12-15 feet in width was first cut through this wooded area. The T-ditch was then constructed down the middle of this path. Tr. 1108-1109.

D. Construction of the Tulloch Ditches

While T-ditches are an accepted method for converting wetlands into uplands, this process can be a lengthy one. A quicker and less expensive way to achieve this wetland to upland conversion is to dig what is referred to as a "Tulloch ditch." Tr. 1226. A Tulloch ditch is like a T-ditch in the sense that its purpose is to drain water from wetlands in order to convert them to uplands. The difference is that while T-ditches are dug in uplands, Tulloch ditches are actually dug in the wetlands. Tulloch ditches are lawful so long as only "incidental fallback" is discharged into the wetlands as the ditches are being dug. If the Tulloch ditches are properly dug and nothing more than incidental fallback occurs, as in the construction of T-ditches, there is no requirement that a Section 404 permit be obtained from the U.S. Army Corps of Engineers.[7]

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[6] Respondents' wetlands expert, Needham, marked the T-ditch on both Respondents' Exhibit 7 and Complainant's Exhibit 41. Tr. 835-836.

[7] The seminal case regarding Tulloch ditches is *National Mining Association* v. *U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998). There, the Court held that the Corps cannot require a Section 404 permit for dredging operations taking place in wetlands if the only discharge or redeposit of dredged materials into "waters of the United States" consists of

In November of 1998, one year after entering into a contract for the construction of the T-ditch on the Lewis Farm site, respondents Amelia Venture and Vico entered into another contract for work to be performed on the property. This time, Vico was hired to "grind paths" through a wooded wetlands area on the site and then to dig Tulloch ditches in the cleared wetlands. The contract called for the paths to be 40 feet in width and for the "Vee" shaped Tulloch ditches to average 4 feet in depth. RX 8. The purpose of these Tulloch ditches was to drain the wetlands -- *i.e.*, to remove the wetlands hydrology -- and thus convert the wetlands to uplands. Tr. 881-882, 1104.

In addition, Vico was to grind eight-foot transects between the ditches for the installation of monitoring wells. These transects, along with the cleared paths, would form a checkerboard pattern in the otherwise forested area. The purpose of these monitoring wells was to allow Amelia Venture to determine whether the Tulloch ditches were effectively draining the water from the wetlands. Tr. 1109-1111; RXs 8 & 19.

Preliminary to its construction of the Tulloch ditches, Vico applied for a land disturbance permit from the City of Chesapeake. RX 15. The Vico land disturbance permit application sought authorization from the City of Chesapeake for "[c]learing, filling, excavating, grading or transporting or any combination thereof in accordance with approved plan of Amelia Venture Properties, L.L.C." RX 15.

As part of its permit application, Vico submitted an Erosion and Sediment Control Plan ("E&S Plan") which was prepared by the engineering firm of Hoggard Eure Associates. Tr. 950; RX 15.[8] The E&S Plan proposed that four paths would be cleared on the Lewis Farm site. It also depicted the location of a construction entrance off of Gum Court and a large stockpile area, both in the uplands portion of the property. RX 14 & CX 41. The City of Chesapeake granted a land disturbing permit to Vico on December 28, 1998. RX 15.

Before the Tulloch ditches could be dug, the paths referred to in the E&S Plan had to be cleared of trees, bushes, and shrubs so that the excavation equipment could enter upon the property. Tr. 886, 1113-1114. Accordingly, Amelia Venture contracted with Old Mill Land & Timber Company ("Old Mill") for the logging of "approximately 100 acres of woodlands." RX 9. The timber company was instructed to remove timber only from the paths that would be used by the equipment for the digging of the Tulloch ditches. Tr. 1113-1114.

As per its contract with Vico, Old Mill logged three of the four proposed paths on the

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"incidental fallback" resulting from the excavation. *Id.,* at 1404.

[8] The Erosion Sediment and Control Plan is a major component of the Stormwater Pollution Prevention Plan. Tr. 949. An E&S Plan includes measures to be taken in the field during construction, including the temporary stabilization of the disturbed land. Tr. 954-955.

Lewis Farm site in January, 1999, and the remaining path in September, 1999. Tr. 1082, 1092.[9] Old Mill removed from the paths the marketable pine and hardwood, leaving on site all of the non-marketable timber such as small trees, underbrush, branches, and tree tops. The paths that were cleared were approximately 35-40 feet in width. Tr. 1125-1128. In its timbering operation, Old Mill "used a feller buncher which had a rotating saw which had teeth on it and kicked out chips." Tr. 1100. Old Mill also used chain saws to cut off the tree limbs before the trees were dragged out of the forest. Tr. 1100, 1127.

After Old Mill had cleared the first three paths, Vico subcontracted with Paxton Contractors Corporation ("Paxton"), a land development company, to dig the Tulloch ditches. Tr. 1015, 1082. Work relating to the Tulloch ditches began sometime in December of 1999. RX 16. Paxton came on to the Lewis Farm site after Old Mill had completed its timber removal. Tr. 1018. Before Paxton could dig the Tulloch ditches, however, the small trees, underbrush, branches, and tree tops that remained (referred to as "slash"), as well as the stumps of the trees that were cut by the logger, had to removed. Otherwise, the ditching equipment would be unable either to enter the site, or to effectively excavate the ditches. Tr. 842, 1128. This land clearing process is referred to as "prepping" the path. Tr. 1016.[10]

In order to eliminate the slash and tree stumps remaining in the paths, Paxton used a device known as a "Kershaw." The Kershaw was described as having a "lawn mower deck," with a six and one-half foot head, and with skids on each side to prevent the grinder from coming into contact with the ground. Tr. 1019-1020, 1044.[11] Jeffrey Paxton, the company owner, explained:

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[9] The parties refer to the four paths as Path One, Path Two, Path Three, and Path Four, with Path One being the northwestern-most path and Path Four being the southeastern-most path. The two ditches that were excavated (Ditches One and Two) bear the corresponding path number. Tr. 93; RX 14 & CX 74.

[10] There also was testimony that respondents believed that slash, if left in the wetland corridor, would constitute fill material (Tr. 208), thus necessitating a Section 404 permit. 33 U.S.C. § 1344.

[11] David Blevins, the Vico supervisor in charge of the Lewis Farm operation (Tr. 1079) also described the Kershaw. Blevins stated:

> It is a -- technically it's a grinder. It has teeth which are like flails but they're fixed and they cut chips out of the wood, and they would be anywhere from half-inch wide to an inch wide up to several inches long depending on the species of the tree. A pine would shred more and throw out a longer chip. A hardwood would be a smaller chip. [Tr. 1115]

> We would come in with our Kershaw machine and we would start driving back and forth and back and forth. We'd start down at the far end, the deepest part of the ditch, and we'd run, just like driving a vehicle, down that path. We would just ride along, and that front grinder would chip up all the stuff that was laying there.

Tr. 1040.[12]

The Kershaw ground the slash to within one and one-half to two inches of the soil. Tr. 1019, 1021. The chips created by the Kershaw were distributed behind this grinding device, along the width of the path. Tr. 1084, 1019.[13] The wood chips were just "blown out" and left "wherever they fell." Tr. 1019, 1085. Once the paths were "prepped," it was time to dig the Tulloch ditches.[14]

To allow for the transport of the excavation equipment to the ditches, an access road was constructed from Gum Court in the uplands portion of the site to the T-ditch. Tr. 1038, 1468-1476; CXs 77 & 78. This road was 20-30 feet wide. Tr. 1038. In order to determine when the access road was constructed, Peter Stokely, EPA's aerial photographic interpreter, compared Complainant's Exhibit 77 (an aerial photograph of Lewis Farm taken in 1998, after the T-ditch was constructed but before the timber was cleared from the four paths by Old Mill) with Complainant's Exhibit 78 (an aerial photograph of the site taken in 1999, after the paths had been cleared of timber and after the two Tulloch ditches were constructed). Stokely testified that an access road extending from Gum Court to the stockpile did not appear in Exhibit 77, the 1998 photograph, but that it did appear in Exhibit 78, the 1999 photograph. Tr. 1468-1476.

As for the ditching portion of this operation, Jeffrey Paxton stated that his company used "a track excavator with a V-bucket." Tr. 1022. Paxton explained:

> We had off-road - - all-track trucks which is compatible to an off-road truck. The only difference is is this has a track other than wheels. It does less damage to the ground. It has better

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[12] While a Kershaw was used for the slash, a stump grinder was used at some point for the tree stumps. Tr. 1042.

[13] Jeffery Paxton stated that the paths varied between 30 to 50 feet in width. Tr. 1019.

[14] Complainant's Exhibit 26, Photographs 5 and 6, show the slash remaining in one of the paths after Old Mill had removed the timber. Complainant's Exhibit 26, Photographs 7 and 8, show a path on the Lewis Farm site after the timber had been removed and the slash reduced to wood chips. Tr. 335-336.

flotation.[15]

> We would get in there and start digging the ditch and sidecasting the material into the truck, and the truck would take it out of the wetland area to the uplands. Then we would dump it on the spoil pile that was designated on that plan for a stockpile area.

Id.

Paxton added that the excavated material was never sidecasted onto the ground, and that the excavator bucket was not filled "all the way up" so as to avoid any spillage of material. Tr. 1022-1023. The company dug Tulloch ditches in Paths One and Two, but it did not excavate Paths Three and Four. In addition, the ditches dug by Paxton in Paths One and Two in the wetlands area were connected to the T-ditch, which is located in uplands. Tr. 1024-1026; CX 43 (Figure 3). The ditches were constructed so as to be shallower in the southern-most portion, thus causing the water to flow in a northerly direction. Tr. 1021. In that regard, the ditch in Path One extended north beyond the T-shaped ditch and drained to the western tributary of Drum Point Creek. The ditch in Path Two connected to the T-ditch and drained through the T-ditch to the western tributary to Drum Point Creek. Tr. 112, 416-417, 590-591, 1025, 1046-1047; RX 35 & CX 43.

E. <u>Visit by the Corps</u>

On January 11, 1999, Greg Culpepper and Steve Martin, two environmental scientists with the U.S. Army Corps of Engineers, Norfolk District, visited Lewis Farm. Tr. 163, 191-192, 318.[16] This visit occurred while Paxton was "prepping " the paths. The ditches in Paths One and Two had not as yet been dug. Tr. 205, 338-339.

While on site, Culpepper concluded that they were in wetlands. He stated: "[L]ooking at the types of vegetation out there and the soils we saw, the amount of organics and the top surface of the soil and the fact that they were conducting a Tulloch ditching, they don't do that in uplands, so a number of things led me to that conclusion." Tr. 207. Martin also concluded that there were wetlands on the Lewis Farm site, based upon his familiarity with wetlands

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[15] According to Paxton, this "better flotation" protects the land from being damaged by the equipment. Tr. 1034. Some of this equipment weighed as much as 60,000 to 70,000 pounds. Tr. 1070.

[16] Culpepper stated that this visit occurred either as a result of a phone call that he received regarding the activity on Lewis Farm, or his observance of ditch digging equipment in Gum Court. Tr. 174.

delineations performed on adjoining properties. Tr. 332.[17]

During this January 11 visit, Culpepper observed a layer of wood chips one to six inches deep. Tr. 206. He described the placement of the wood chips as being "roughly uniform," although "they undulated a bit." Tr. 193. Martin similarly observed a layer of wood chips two to five inches deep in one of the wetland corridors. Tr. 336; CX 26 (Photographs 9 & 10). Martin stated, "the mowing or reduction of wood material was more than just shrubs and saplings along the length of the corridor[;] [i]t included trees as well." Tr. 339. He was also of the view that these chips were not caused by loggers, given their size and breadth. Tr. 381.

At the time of their Lewis Farm visit, Culpepper and Martin were not authorized to determine whether the conditions that they observed on the site constituted a violation of the Clean Water Act's permitting provisions. Instead, Culpepper and Martin were directed "to record what [they] saw on Tulloch ditching sites and return to the district where the decision was going to be held at the branch level." Tr. 196. Their subsequent report on the Lewis Farm site, in part, reads:

> ACTIVITY REPORTED: Deposit of 1-6" of wood chips in wetlands for equipment to drive on allowing access for Tulloch ditching.
>
> * * * * *
>
> OTHER: Job foreman stated that the chips were created from logging slash because leaving logging slash in wetlands was a fill. He stated that the slash and stumps caused problems for the tracks of the dump trucks. He also stated that the chips provided a good driving surface for the tracked dump trucks.

CX 26.

On January 14, 1999, after Culpepper's and Martin's visit to Lewis Farm, the U.S. Army Corps of Engineers' Norfolk District Office sought general guidance from Corps Headquarters regarding the application of the *National Mining* decision (*see* n.7, *supra*) to the Tulloch ditching activities at Lewis Farm, as well as at other sites in the area. Tr. 212-213; CX 49. Headquarters' response to the Norfolk District, dated April 19, 1999, in part read:

> a. Wood Chips. As outlined in previous guidance, we do not regulate wood chips. There is consensus that wood chips are not dredged materials. *It is possible that wood chips could be used as*

[17] For instance, there are 36 acres of wetlands on the Gateway Commerce Park property, just to the north-northwest of Lewis Farm. Tr. 339, 344, 347.

> *fill material.* The regulatory definition of fill material requires that the material be placed for the primary purpose of replacing aquatic area with dry land or changing the bottom elevation of a water body. The term does not include any pollutant discharged into the water primarily to dispose of waste. Such activity may be regulated under Section 402 of the Clean Water Act. As portrayed, the developer brought in a chipper to reduce slash materials that resulted from a logging operation. The chips were subsequently blown over the area to eliminate them, as the developer was concerned that the materials may have been determined to be a violation. *The fact that the equipment operators have found the chips to be good support for their equipment does not eliminate the fact that they were blown over the area simply as a means of disposing of the chips.*

CX 50 (emphasis added).

Following receipt of this Headquarters guidance, Woodie Poore, chief of the Corps' Norfolk District, offered further instruction on how to handle Tulloch ditching issues. Culpepper related that Poore "put in writing to the staff what he had earlier advised us verbally, that he was going to keep all Tulloch decisions at his level." Tr. 220; *see* CX 51. Insofar as this case is concerned, the Corps did not make a Section 404 permit determination relative to Lewis Farm. Tr. 62.[18]

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[18] Predating this internal staff directive (CX 51), as well as the Headquarters Tulloch ditch guidance letter (CX 50), Norfolk District chief Poore advised Robert Needham (one of respondents' wetlands consultants in this case) as to the Norfolk District's position relative to the digging of certain Tulloch ditches (other than on the Lewis Farm site) in the Chesapeake, Virginia, area. At the time, Needham represented an entity known as the "Southern Pines, L.L.C." (This entity is different from Amelia Venture, one of the respondents in this case. However, Emil Viola, the president of Vico, and a respondent in this matter, is also a part-owner of Southern Pines, L.L.C., which in turn owns property known as "the Southern Pines site." Tr. 1218.) In connection with the Southern Pines site, Needham contacted the Corps explaining that the landowner "is planning to excavate a series of 'vee' ditches in the wetland area of the tract." RX 2. Needham was seeking clarification of the Corps' position regarding Tulloch ditching in light of the Court's decision in *National Mining Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998). Tr. 781-782.

On September 11, 1998, chief Poore of the Norfolk District responded, in part as follows:

> [Y]ou indicated that your ditch excavation activity would not include:

F. <u>The EPA Inspection</u>

The next major event in this case involves the U.S. Environmental Protection Agency's

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1. Sidecasting of excavated material.
2. Double handling of excavated material in wetlands.
3. Digging of stumps other than excavation with a single pull of the excavator.
4. Corduroy roads from any fill material, including woody vegetation.
5. Any other discharge of excavated material except for 'incidental fallback' associated with the ditch excavation.

To insure that the excavation activity does not cause any discharge into wetlands, except for 'incidental fallback,' you have also stated that the contractor will use the following procedures for excavation activities in wetlands.

A. Shrubs and saplings will be mowed along the length of the proposed excavation.
B. There will be no bulldozers or root rakes in wetlands.
C. Large tree stumps will be avoided.
D. Trucks will remove excavated material directly from backhoe bucket.
E. Any placement of removed material will be in upland.
F. Wooden mats may be used in soft soil areas.

We have determined, based on Corps and EPA joint guidance dated April 11, 1997, that the proposed activity does not result in the movement of substantial amounts of dredged material from one location to another in waters of the United States. *Therefore, as long as your project does not include a more substantial discharge that would trigger Section 404 regulation, a Corps permit will not be required for the excavation of ditches in wetlands on the Southern Pines site as you have proposed. This is a case specific determination and does not apply to any other site.*

RX 3 (emphasis added).

Around this time, Ashton Lewis of respondent Amelia Venture, like Southern Pines, also had approached Needham with a similar inquiry regarding the Corps' position on Tulloch ditching. Despite the Corps' site-specific response to his inquiry on behalf of Southern Pines, Needham did not contact the Corps to obtain its view as to Tulloch ditching on the Lewis Farm site. Tr. 781, 799.

inspection of the Lewis Farm site. Both EPA and the U.S. Army Corps of Engineers have responsibility for implementing Section 404 of the Clean Water Act. *Compare* 33 U.S.C. § 402(a) *with* 33 U.S.C. §§ 404(b)(1), (c) & (q).

In June of 1999, after reading newspaper reports about the activities on Lewis Farm, and after receiving telephone calls from private citizens and non-governmental organizations, EPA requested lead enforcement status in this matter from the Corps. This request was granted pursuant to the *Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning Federal Enforcement for the Section 404 Program of the Clean Water Act*. Tr. 55-60; CXs 1 & 54. *See* Tr. 223; CX 34.

Thereafter, EPA conducted an inspection of Lewis Farm on September 9, 1999, to determine Clean Water Act compliance. There were actually two inspection teams sent to the Amelia Venture property. One EPA team investigated discharges to wetlands and another EPA team investigated storm water discharges.

1. <u>The Discharges to Wetlands Investigation</u>

The wetlands investigative team included Jeffrey Lapp, EPA Region III's wetlands permit and enforcement team leader, Andrew Dinsmore, a member of Lapp's staff, and Peter Stokely, an environmental specialist, with a background in aerial photography. Tr. 36, 81, 386, 502. In addition, U.S. Army Corps of Engineers environmental scientist Culpepper (who previously had visited the site) and Lenore Vasilas, a soil scientist with the National Resources Conservation Service, accompanied the EPA personnel. Tr. 94, 209, 495.

Prior to entry upon the Lewis Farm property, Stokely compiled the Norfolk and Suffolk city soil surveys, the National Wetland Inventory Map (CX 43, Fig. 12) and the Bowers Hill United States Geological Service ("USGS") topographic map. Tr. 397. He also prepared maps depicting wetland boundaries, drainage paths, and the site disturbances. Stokely stated that the purpose of the field visit was to "ground truth," *i.e.*, to verify what the aerial photography indicated regarding the Lewis Farm wetlands. Tr. 397-398. In that regard, one of respondents' wetlands experts testified, "the more information you have before you go, the better you are in terms of soil surveys which the key thing you're hunting for on a soil survey is an aerial photo that shows map soils." Tr. 768.

Team leader Lapp testified that the investigative team entered the Lewis Farm site from the Gum Court cul-de-sac. They then proceeded past the stockpile in the uplands area to the two cleared paths that had Tulloch ditches (Paths One and Two). Tr. 92-93; CXs 41 & 43.[19] The EPA wetlands team did not perform a wetlands delineation on the Lewis Farm site. Tr. 80. Instead, as discussed below, they made a wetlands determination. Whereas a "delineation" is the

[19] As noted, the path numbering begins with Path One which is the northwestern-most path. Tr. 93.

mapping of the wetland-upland boundary, a "determination" involves a basic review of the property to determine whether wetlands are present in the first place. Tr. 165-166.

After consulting with Stokely and Vasilas, Lapp selected the northeast corner of the juncture of Ditch Two and the T-ditch to collect a soil sample. This location was identified as Sample Point A. Tr. 93; CX 74. The team also took a subset sample here (Sample A1), as well as samples at two other locations, labeled as Sample Points B and C. Lapp explained, "we were trying to see if there, in fact, had been any type of discharge of material onto the surface of the wetlands system." Tr. 96.[20]

Sample Points A, A1, and C were located in disturbed areas (*i.e.*, areas no longer forested and without vegetation), while Sample Point B was located in an undisturbed, forested area. Sample Point B was the "reference site." Tr. 96, 146, 510-511.[21] The purpose of taking a reference sample is to ascertain the conditions on the site prior to the activities that disturbed the site. Thus, a reference sample can confirm that other portions of the site contained wetlands prior to the land disturbance. Tr. 122-123, 159, 925-926. As EPA's soil expert, Vasilas, explained, "we just picked a representative area that we thought represented the whole wetland." Tr. 536. Culpepper, the Corps' representative, agreed that the samples were taken in an area representative of the site. Tr. 209.

At each of the four sample sites, Vasilas, qualified as a soil expert (Tr. 496), took the soil samples. She explained the process for identifying hydric soils as follows:

> I will dig a small pit using a tiling spade and typically I will dig a hole 12 to 18 inches and use that to describe the upper part of the soil; and then if I need to go down any deeper, I'll use a bucket auger, which is basically a bucket on a long pole that you screw into the ground. It's got teeth on the bottom, so when you screw it into the ground, the soil goes up into the bucket and you end up with a cylindrical sample of soil from below the pit.
>
> As I'm digging, I usually identify the soil horizons. When soils form, they form layers, and these layers we call them horizons.[22] As I'm digging, I'll identify those horizons and I'll

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[20] Samples were not taken in Paths Three and Four because no Tulloch ditches had been dug there. Tr. 137-138.

[21] The 1987 Corps Manual contains a "disturbed site," or "atypical," methodology for determining the presence of wetlands despite site disturbance. Tr. 396.

[22] Soil horizons are identified by letters. A wetlands soil typically will include some, or all, of the O, A, E, B, and C horizons. Tr. 510. A Munsell Color Chart (CX 46) is used to standardize the manner in which the soil "call" is made. Tr. 501. As one moves lower in a

> use a measuring tape to measure the thickness and depth of those horizons, and then I will also describe important characteristics, such as soil color, soil texture, redoximorphic features, which are basically splotches of colors in the soil that are due to anaerobic conditions in the soil [*i.e.*, conditions which cause a much slower decomposition (Tr. 505)], and any other characteristics that I think are important. Maybe some organic features in the soil, anything else I feel is important to identify that soil as a hydric soil.

Tr. 500.

The selection of the reference site here (Sample Point B) was based, in part, upon Stokely's analysis of aerial photographs taken prior to the clearing of the paths and the digging of the Tulloch ditches. Tr. 399-400.[23] Sample Point B was located between Ditch One and Ditch Two, an area identified by both Stokely and respondents as being a wetland area. Tr. 103-104; CX 43, Fig. 3; RXs 6 & 7. At this reference site there was no soil disturbance, the vegetation had not been removed, and the historical aerial photographs indicated that Point B had a "typical signature" for the area. Tr. 103-104. Also, there were no wood chips present at Sample Point B. Tr. 510.

A routine field investigation was conducted at this reference site to determine if it contained hydric soils, a predominance of wetlands vegetation, and wetlands hydrology. In taking a reference sample, the assumption is made that the disturbed area (*i.e.*, Sample Points A, A1, and C) shared the characteristics of the reference site prior to their disturbance. Tr. 159-160; CX 33 (1987 Corps Manual) at 83-93.

Specifically, at Point B, the EPA team filled out a Routine Wetland Determination sheet. CX 31. Lapp explained, "we did what was called a routine sampling methodology, as per the '87 manual." Tr. 104. Lapp elaborated:

> What the routine sampling methodology entails is that, in a topographically uniform, vegetatively consistent area, you would take what's called a 30-foot radius plot. Within that plot you would look at soils there, you would look at any primary or secondary indicators of hydrology at that location and then you would look at your vegetative

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hydric soil profile, the soil generally turns lighter and grayer. These lighter soils are predominately mineral soils with little decomposing matter. Other features, such as "redox concentrations" -- *i.e.,* red splotches, can also be found in the deeper, grayer soil. This is the result of iron becoming soluble in water and reacting with oxygen. Tr. 505-506, 509-510.

[23] Again, the selection of the location of Sample Point B was a collaborative effort involving Lapp, Vasilas, and Stokely. Tr. 400.

> strata, which would be your trees, samplings *[sic]*, shrubs, and then your herbaceous layer. Within that 30-foot radius plot, you would take a five-foot radius plot that you would look at, record the aerial cover and the dominance, and then, according to the manual, if you have certain colors, certain indicators in the soil that would meet the hydric soil parameter within the manual, you would look at primary and secondary indicators of the hydrology, and then if you had a greater than 50 percent, what's called facultative, wetter type of vegetation, that would then qualify and meet the vegetative parameter.

Tr. 104-105. At Point B, the EPA team found the three wetland parameters (hydric soil, wetland vegetation, wetland hydrology) listed in the 1987 Corps Manual. Tr. 107, 530.[24]

Specifically, Lapp's Lewis Farm investigation report concluded, in part, as follows:

> Site Investigation: Sampling was conducted at three (3) primary locations, denoted as A thru C, at the site. Sample locations were noted on an overlay of an aerial photo of the site. Soils were described at these locations and a routine wetlands determination was conducted at Sample location B. If the same soil type was encountered at a sample location which was previously described, only those conditions unique to the sample location were documented. See attached data sheets and soil descriptions for recorded site specific data.
>
> Sample point A was located in a "prepped path" on the west side of the eastern most ditch. At this local [*sic*] the soil was described (see attached data sheet) to a depth of thirty-six plus (36+) inches and the original soil surface was covered with a layer of fourteen (14) inches of wood chip bedding and soil. It was at this sample location where Mr. Paxton of VICO construction described the soil movements caused by the track equipment at the site (see site description section of the general portion of the site investigation report). A second soil sample was described at this general location A(1) which was a spoil pile along ditch and approximately eighty-five (85) feet southwest of sample location A. This sample indicated that an eleven (11) inch mixed layer of wood chips and soil were placed on the original soil surface. The sample locations were in an area which the site consultant an[d] owner agreed that wetlands exist. Photograph Roll #5 (18 thru 25).

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[24] Lapp recalled that he had a discussion on site with respondents' wetlands consultant, Needham, and that Needham agreed that "this was a wetland sampling." Tr. 104.

> Sample point B was located in the wooded section between the eastern and western ditches. This location was selected as a reference wetlands site location and sampling was conducted using the routine methodology as described in the 1987 Corps Manual. The site met the three parameters as required by the 1987 Manual and is a wetlands. Vegetation, soils and hydrologic information are attached. Mr. Greg Culpepper and Mr. Robert Needham both agreed that this sample point was located in a wetlands. Photograph Roll #6 (1 and 2).
>
> Sample point C was located on the northern side of the western ditch. The area was cleared and was representative of wood chip and soil fill located in the cleared "prepped path" areas of the site. The sample location was typical of the raised elevation in the "prepped path" area and contained a nine (9) inch layer of fill material. The depth to the bottom of the ditch in this local [*sic*] was approximately 40 inches. Vegetation sprouting in the filled area was Acer rubrum, Liquidambar styraciflua, Arundinaria gigantea, Quercus nigra, Nyssa sylvatica and Clethra alnifolia. Photograph Roll [*sic*] (3 thru 8).
>
> Addenda: Sample location data was recorded on aerial photograph overlays. General site descriptions and locations were documented by Mr. Lapp including the vegetative aerial percent coverage and species identification at sample location B. Soil descriptions were determined by Ms. Vasilas and transcribed by Mr. Lapp except at sample location B. Descriptions were transcribed by Mr. Dinsmore at sample location B. Yellow flags were left at each sampling location....

CX 40 at 7. *See* Tr. 509-511, 513, 518-521, for Vasilas's description of sample findings.

In sum, Lapp concluded that there were wetlands on the Lewis Farm property. One of respondents' wetlands experts, Charles Wolfe, agreed that wetlands are present on the Lewis Farm site. Tr. 1287-1288. Another of respondents' wetlands experts, Robert Needham, also acknowledged that the Tulloch ditches on Lewis Farm (as represented in Complainant's Exhibit 74) were intended to be constructed in wetlands. Tr. 926-927.[25] In addition, Lapp concluded that there were discharges of material on top of the original wetlands soil, discharges that, in

[25] The EPA Lewis Farm report also represents that, during the inspection, Needham concurred that Sample Point B, the reference sample, was taken in wetlands. CX 40 at 7.

EPA's view, required a Section 404 permit from the Army Corps of Engineers. Tr. 117.[26]

2. <u>The Storm Water Discharges Investigation</u>

In connection with its wetlands inspection, on September 9, 1999, EPA also conducted an inspection of the storm water discharges occurring on the Lewis Farm site. This inspection was led by Kevin Magerr, an EPA environmental engineer from Region III's National Pollution Discharge Elimination System ("NPDES") permit enforcement branch. Tr. 547.[27] Magerr explained that this inspection was part of an Agency's initiative for determining compliance with the Clean Water Act's Section 402 permit requirements for storm water discharges associated with industrial activity. Tr. 551; *see* 33 U.S.C. § 1342. The purpose of the permit is to control the water runoff from the developed area. The industrial activity that concerned EPA in this instance was the Tulloch ditching. Tr. 559-560.

As to the nature of his investigation, Magerr noted that NPDES permits are state issued. (Virginia has its own NPDES program. Tr. 559.) At the time of the events of this case, the applicable regulation (40 C.F.R. 122.26) required an NPDES permit for storm water discharges where the area of industrial activity (here, the construction activities such as clearing, grading, and excavating the ditches) involved five or more acres. Tr. 551-553. In that regard, Magerr explained that storm water permits are to be obtained before construction begins and that they are no longer required once the site has been stabilized. Tr. 554.

The erosion and sediment control plan is a major component of the Storm Water Pollution Prevention Plan, otherwise known as a "SWPPP." Tr. 556, 949. This plan "basically requires the permittee to look at its site and determine where the potential sources of pollution are, and to develop measures to reduce or eliminate those sources through best management practices." *Id.*[28]

For example, a SWPPP may include stabilization practices, such as seeding and mulching, to assist in revegetation. It may also include "track out control" to reduce the amount of dirt and mud tracked out of the construction site and on to public roads, eventually washing into the sewer system and then to a receiving stream. Other elements of a SWPPP are velocity

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[26] Vasilas concurred, stating, "we know it's fill material because it's got that lighter gray soil, and typically you would find the deeper colors at the soil surface if that were the natural soil surface." Tr. 523.

[27] Magerr's duties in the NPDES permit enforcement branch included storm water, combined sewer overflow and sanitary sewer overflow cases. Prior to this position, from 1990 through 1998, he was the storm water coordinator and was primarily responsible for developing and implementing the NPDES Storm Water Program at EPA. Tr. 547-548.

[28] Also, the SWPPP must include an identification of all wetlands. If the entire site were uplands, an NPDES permit would nonetheless still be required. Tr. 570.

controls to keep in check the speed of water in a channel so as to reduce scouring along the channel's banks, and structural practices such as detention and sediment basins. Tr. 557-558.[29]

Prior to the September 9 inspection, Magerr reviewed the Erosion & Sediment Control Plan, also referred to as the E&S Plan, for the Lewis Farm property. Tr. 560. Respondents' E&S Plan is a three-page document prepared by Hoggard Eure Associates. Tr. 950; RX 14 & CX 41. The plan was approved by the City of Chesapeake. *Id.*

The total area of Lewis Farm to be disturbed, at least as indicated on the E&S Plan, was 4.885 acres. Tr. 952. According to Haste, the plan's engineer of record, the disturbed area included the widths of the four paths carved out of the forest, as well as the stockpile located in the uplands area. Tr. 952-953. Page one of the plan lays out the general terms of the construction activity. (The "who, what, when [and] where." Tr. 561.) This page also includes some of the erosion and sediment control devices to be implemented at the construction site. Tr. 564. Page two lays out "the ditching that was being proposed, the amount of clearing that was going to be done, [and] where ... spoil piles would be." Tr. 564. Page three of the E&S Plan is the "specification page." This page contains the site specifications that are outlined in Virginia's Sediment and Erosion Control Manual. *Id.* For instance, page three sets forth the specifications for the construction entrance and the location of check dams. Tr. 565.[30]

Upon visiting the Lewis Farm property on September 9, 1999, Magerr learned that Amelia Venture did not have a Section 402 NPDES permit for the discharge of storm water associated with construction activity. Tr. 576. In Magerr's opinion, the construction activity satisfied the then-applicable five-acre threshold of 40 C.F.R. 122.26(b)(14)(x) (1998). He calculated 4.88 acres of disturbed area, plus almost one additional acre to account for the stockpile. Tr. 573-574. Magerr also stated that the conditions he observed on site were not consistent with provisions of the Lewis Farm Erosion and Sediment Control Plan that he had reviewed. In that regard, he identified compliance problems with the construction entrance, silt fencing, and check dam provisions of the E&S Plan. Tr. 576-578.

Specifically, Magerr testified that the construction entrance was "not to specs." He stated that there was no washrack and no construction entrance stone to remove mud from the tires of vehicles. Tr. 577, 580. In addition, Magerr testified that there were no silt fences on the

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[29] Gary Haste of the engineering firm Hoggard Eure Associates testified that an erosion and sediment control plan meets a good portion of the requirements of the Storm Water Pollution Prevention Plan by requiring measures to be taken in the fields during construction, restoration, and temporary stabilization of the property. Tr. 954-955.

[30] There were two "rock check dams" constructed in the ditches. The E&S Plan called for four dams, but only two were constructed because only two Tulloch ditches were dug. Check dams are constructed so as to let the water flow through them. They were constructed in the uplands area of Lewis Farm. Tr. 705, 1086, 1089; RX 14.

stockpile and that the check dams were not in the location indicated on the E&S Plan. Tr. 578-580. Magerr also testified that the banks of the two Tulloch ditches that had been dug showed signs of erosion and that the banks of these ditches were not stabilized. According to Magerr, the ditches were not "vee" shaped, but rather "U" shaped, and that the banks had sloughed off. Tr. 585-588, 602-603. Relative to this assessment, Magerr stated that a stream that he observed seemed to be "heavily braided" -- *i.e.,* there was a lot of sediment in the stream. Tr. 593, 670; CX 41.

III. Discussion on Liability

A. Count I

EPA alleges that respondents violated Section 301(a) of the Clean Water Act by discharging fill material, in the form of wood chips, into the "waters of the United States" without a Section 404 permit from the U.S. Army Corps of Engineers. 33 U.S.C. §§ 1311(a) & 1344(a).[31] As discussed below, EPA has established by a preponderance of the evidence that there are wetlands on the Lewis Farm site, that these wetlands are "jurisdictional wetlands" subject to the provisions of the Clean Water Act, that Amelia Venture and Vico discharged the wood chips onto these wetlands, and that this discharge constitutes a violation of Section 301(a). 40 C.F.R. 22.24(a).[32] We begin with a review of the applicable Clean Water Act provisions.

1. Statutory and Regulatory Scheme

Section 301(a) of the Clean Water Act in part provides that "the discharge of any pollutant by any person shall be unlawful" unless in compliance with a Section 404 permit issued by the U.S. Army Corps of Engineers. 33 U.S.C. § 1311(a). Section 502(6) in part defines the term "pollutant" to include "dredged spoil, solid waste, incinerator residue, sewage,

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[31] "Section 404 originated as part of the Federal Water Pollution Control Act Amendments of 1972, which constituted a comprehensive legislative attempt 'to restore and maintain the chemical, physical, and biological integrity of the nation's waters.' CWA § 101, 33 U.S.C. § 1251." *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 132 (1985).

[32] EPA asserts an alternative basis for finding a Clean Water Act violation in this case relative to Count I. It alternatively argues that the wood chips are a "pollutant" and that respondents violated Section 301(a) by not obtaining a Section 402 NPDES permit prior to their discharge to "waters of the United States." 33 U.S.C. § 1342. For example, EPA submits, "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 West Virginia Coal Ass'n v. Reilly,* 728 F. Supp. (S.D.W.Va. 1989), *aff'd* 932 F.2d 964 (4th Cir. 1991)(Table)." Compl. Br. at 60. Given the holding here that EPA has proven a Section 301(a) violation based upon its Section 404 argument, there is no need to address the complainant's Section 402 argument.

garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). Section 502(12) of the Act further defines the term "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Section 502(14) describes a "point source" as "any discernible, confined and discrete conveyance ... from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Finally, the term "navigable waters," critical to the resolution of this case, is defined as "the waters of the United States, including the territorial seas." Section 502(7), 33 U.S.C. § 1362(7).

In addition, both the Corps and EPA similarly define the phrase "waters of the United States." Their definition is as follows:

> (1) All waters which are currently being used ... or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (2) All interstate waters including interstate wetlands;
>
> (3) All other waters such as intrastate lakes, rivers, steams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters: (i) which are or could be used by interstate or foreign travelers for recreational or other purposes; or (ii) from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (iii) which are or could be used for industrial purposes by industries in interstate commerce;
>
> (4) All impoundments of waters otherwise defined as waters of the United States under the definition;
>
> (5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;
>
> (6) The territorial seas;
>
> (7) Wetlands adjacent to waters (other than the waters that are themselves wetlands) identified in paragraphs (1)-(6) of this section;
>
> (8) Waters of the United States do not include prior converted cropland .... Water Treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds ...) are not waters of the United States.

33 C.F.R. 328.3(a); 40 C.F.R. 232.2.

Against the backdrop of this statutory scheme, EPA argues that respondents' act of grinding the slash and tree stumps in the four paths into wood chips, and then discarding those wood chips in substantial amounts into the wetlands, without a Section 404 permit, constitutes a violation of Section 301(a). For their part, respondents admit that they did not have such a Section 404 permit. Stip. 6. They argue, however, that they didn't need one because the discharged wood chips are not fill material. Respondents also argue that the government cannot prevail in this case, in any event, because it lacks Clean Water Act jurisdiction over the Lewis Farm wetlands.

2. <u>The Wetlands</u>

Both the Corps and EPA define "wetlands" as "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. 328.3(b); 40 C.F.R. 232.2.

As discussed earlier, the overwhelming weight of the evidence establishes that wetlands are present on the Lewis Farm site. The presence of these wetlands has been shown through the National Wetlands Inventory Map (CX 43, Fig. 12; RX 39C), as well as through Amelia Venture's wetlands delineations conducted in connection with the proposed New Boone Farm development (RXs 6 & 7). Tr. 410-411. *See* n.3, *supra* (wetlands extending in "rather large area" south and west of Lewis Farm). There is also a strong consensus among the witnesses that there are wetlands on Lewis Farm. For instance, even respondents' two experts agree that wetlands are present on the site. *See* Tr. 827, 829, 926 (Robert Needham); *see also*, Tr. 1288, 1290-1291, 1413 (Charles Wolfe). The views of respondents' experts are in line with the observations and conclusions reached by EPA's witnesses. *See* Tr. 103-107 (Jeffrey Lapp); Tr. 175-177 & CX 74 (Gregory Culpepper); Tr. 406-413 (Peter Stokely); Tr. 504, 510-511 (Lenore Vasilas). After all, Amelia Venture's admitted purpose for digging the Tulloch ditches at issue here was to drain the wetlands on site. Tr. 881- 882, 1104. Indeed, even Needham agreed that the proposed ditches appearing on Complainant's Exhibit 74 were intended to be constructed in wetlands. Tr. 926-927.

3. <u>The Lewis Farm Wetlands Are "Jurisdictional Wetlands"</u>

The essence of respondents' jurisdictional argument is that "the Site contains isolated wetlands not adjacent or with a significant nexus to navigable waters or tributaries to navigable waters." Resp. Br. at 24. Thus, respondents maintain that Count I should be dismissed.

Regarding this jurisdictional argument, EPA correctly points out that the dispute as to Count I boils down to whether "the wetlands on the Lewis Farm site are adjacent to other waters of the United States as defined in 40 C.F.R. § 232.2 and 33 C.F.R. § 328.3(a)(1)-(6)." Compl. Br. at 53. The U.S. Army Corps of Engineers' regulations define "adjacent" to mean "bordering,

continuous, or neighboring." 33 C.F.R. 328.3(c). This regulation also states, "wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are 'adjacent wetlands.'" *Id.*

The evidence presented on this jurisdictional question supports the position advanced by EPA. This evidence establishes that the wetlands on Lewis Farm are adjacent to "waters of the United States" and fall within the coverage of the Clean Water Act.

As noted, Lewis Farm is bordered on the north by an intermittent stream which has been identified as the western tributary to Drum Point Creek. Tr. 128, 411-413; CXs 43, 74, & 75. The western tributary to Drum Point Creek is depicted as a dotted blue line on Complainant's Exhibit 73, the U.S. Geological Service Bowers Hill Quadrangle topographic map. Tr. 175-176. It also has been marked on Respondents' Exhibit 7 by Corps environmental scientist Culpepper. Tr. 175-176. In marking the position of this intermittent stream, Culpepper explained: "[T]hat's roughly the limits of the stream. *The streams interact with wetlands and convert into wetlands up in the western reaches of the site.*" Tr. 176 (emphasis added).[33]

The western tributary to Drum Point Creek separates the Gateway Commerce Park, just to the north of the Amelia Venture property, from the Lewis Farm site. Tr. 341. Stokely, EPA's aerial photograph expert, in testifying with respect to Complainant's Exhibit 75 also identified "fingers of wetlands" extending from Drum Point Creek "in a contiguous way to a large wetland area encompassing the Lewis Farm property." Tr. 411.

Charles Wolfe, one of respondents' wetlands experts, agreed that the wetlands identified on Complainant's Exhibit 66 "hug" this unnamed tributary (*i.e,* the western tributary) to Drum Point Creek. Tr. 1403-1404, 1421; RX 39C. Of particular note is the following exchange that occurred between Wolfe and counsel for EPA:

> Q. Would you say that the wetlands at the Lewis Farm property are adjacent to the intermittent drainage which drains to Drum Point Creek north of the property?
>
> A. Yes, ma'am, I would say that.

Tr. 1413.[34]

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[33] During the Corps' January 11, 1999, visit to Lewis Farm, Culpepper and Martin took a series of photographs tracing the drainage of the four branches of the western tributary to Drum Point Creek from north and west of the Lewis Farm to Drum Point Creek. Tr. 231-248, 341-366; CXs 70, & 71A-71N.

[34] Wolfe's opinion that the intermittent nature of this stream constitutes a jurisdictional break with respect to the adjacent wetlands is rejected. *See* Tr. 1416-1417.

Moreover, surface water from the property drains northward and enters into this intermittent stream. Lapp, EPA's wetlands team leader, testified that the team followed a drainage ditch on Lewis Farm which led to this western tributary. While testifying, Lapp referred to Complainant's Exhibit 74 and it is clear from his use of this exhibit that the drainage ditch to which he referred was in a wetland area. In addition, in interpreting the topographic lines on the exhibit, Lapp stated that "the site is tilted and flowing" toward what he labeled as Drum Point Creek. Tr. 112.[35] This statement is consistent with Wolfe's description of the Lewis Farm wetlands as being "hydric, high-elevation hydric soil, flat wetlands with some ravines." Tr. 1288. Wolfe also stated that the "rainfall that would fall onto these sites would generally have a tendency to move from these sites in a downhill direction to drainage ways or percolate down through the soil and run off the site." Tr. 1289.

Next, the water flow proceeds from this western tributary to Drum Point Creek to Drum Point Creek. It is undisputed that the western tributary is not tidally influenced.[36] As the western tributary makes its way east, it passes under Gum Court, Interstate 664, and Gum Road through a series of box culverts. It then flows into Drum Point Creek at a point approximately 2000 feet east of Lewis Farm. This is where the western tributary and the northern tributary converge to form Drum Point Creek. Tr. 227-228, 1294-1295; CX 73.[37]

While the western tributary to Drum Point Creek is not tidally influenced, Drum Point Creek becomes subject to the ebb and flow of the tides near the point of convergence between the western and northern tributaries. Tr 279; CX 73. Drum Point Creek flows into the Western Branch of the Elizabeth River (Tr. 112-113), which flows into the James River, eventually reaching the Chesapeake Bay. Tr. 120; CX 73. Clearly, the Western Branch of the Elizabeth River, the James River and the Chesapeake Bay are navigable-in-fact and thus constitute "waters of the United States." Tr. 225-226, 1292-1293. It also is undisputed that portions of Drum Point Creek are navigable-in-fact and are tidally influenced, and even contain marina docks. Tr. 226-227, 376.

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[35] While referring to Drum Point Creek, Lapp actually labeled its western tributary.

[36] *See* Tr. 253 (CX 71, Photograph S showing the "interface of the tidal waters and the non-tidal tributary upstream of it.")

[37] Corps employee Culpepper testified: "Starting up at the western end of Drum Point Creek, basically in the wetlands west of what's shown as the intermittent stream on the map, water flows down into the intermittent stream in an easterly direction under Gum Court and then it proceeds under Interstate 664, past Gum Road, or under Gum Road, and then out where it becomes tidal, and then the tidal waters ebb and flow under Taylor Road down into Drum Point Creek, which flows into the Western Branch of the Elizabeth River." Tr. 228. *See* Tr. 246-247 (CX 73, Photographs M & N, showing box culvert that allows the western tributary of Drum Point Creek to pass under Gum Court), 285-286; *see also* Tr. 248 (CX 73, Photograph O, showing two box culverts through which stream flows under Interstate I-664).

In sum, the record evidence shows water flow from a non-tidally influenced, non-navigable tributary adjacent to wetlands on the Lewis Farm, albeit intermittently, to a tidally influenced, navigable creek. The flow of this water continues to navigable stream and river systems and on to the Chesapeake Bay.

The fact that the western tributary to Drum Point Creek flows intermittently does not defeat Clean Water Act jurisdiction. In *United States v. Edison*, 108 F.3d 1336, 1342 (11th Cir. 1997), the Court recognized that "as long as the tributary would flow into the navigable body of water 'during significant rainfall,' it is ... a 'water of the United States' under the Act." Moreover, in *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001), the Court classified canals as tributaries despite their intermittent flow. In doing so, the Court defined "tributary" as a "stream which contributes its flow to a larger stream or other body of water." *Id.*[38]

Respondents nonetheless argue that they are entitled to judgment. Citing the United States Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), respondents submit that the types of wetlands involved in this case have been excised from Clean Water Act jurisdiction. Respondents are wrong.

In *SWANCC*, the Supreme Court held that the U.S. Army Corps of Engineers exceeded its authority under the Clean Water Act in promulgating the Migratory Bird Rule (51 Fed. Reg. 41,217 (1986)), by which the Corps asserted jurisdiction over a series of isolated ponds that had developed on "an abandoned sand and gravel pit ... which provides habitat for migratory birds." 531 U.S. at 162. In *SWANCC*, the Corps argued that such ponds constituted "waters of the United States" by qualifying as an "other water" pursuant to 33 C.F.R. 328.3(a)(3).[39] The Corps

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[38] Also, in *United States v. Ashland Oil and Transportation Co.,* 504 F.2d 1317 (6th Cir. 1974), the Court explained why inclusion of tributaries within the definition of "navigable waters" is necessary to the implementation of the Clean Water Act:

> It would, of course, make a mockery ... if authority [under the Clean Water Act] to control pollution was limited to the bed of the navigable stream itself. The tributaries which join to form the river could then be used as open sewers as far as federal regulation was concerned. The navigable part of the river could become a mere conduit for upstream waste.

504 F.2d at 1326. The Court also noted: "Pollution control of navigable streams can only be exercised by controlling pollution of their tributaries." *Id.*, at 1327.

[39] Section 328.3(a)(3) defines "waters of the United States," in part, as "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), ... wetlands, ... or ponds,

did not argue that its jurisdiction over the ponds was based in any way on a hyrdological connection to other waters of the United States.

In respondents' view, *SWANCC* stands for the proposition that wetlands that are not adjacent to navigable waters, or to primary tributaries of navigable waters, do not fall within the coverage of the Clean Water Act. Resp. Br. at 25-27. Stating that because "[t]he wetlands on the Lewis Farm site are not contiguous or adjacent to navigable waters or to primary tributaries to navigable waters," respondents submit that the wetlands are the kind of "isolated wetlands" which the *SWANCC* decision found non-jurisdictional. *Id.* at 21.[40]

Respondents' reading of *SWANCC* is too restrictive. Contrary to the inferences which the respondents seek to draw, *SWANCC* does not speak to wetlands that are adjacent to non-navigable-in-fact tributaries to navigable waters, nor does it speak to primary tributaries. Indeed, as argued by EPA, "[t]he overwhelming majority of cases decided since *SWANCC* have held that *SWANCC* is limited to application of the Migratory Bird Rule and/or that *SWANCC* does not preclude a finding that non-navigable tributaries and their adjacent wetlands are within the jurisdiction of the Clean Water Act." Compl. R.Br. at 8 (fn. omitted).

In addition, respondents also rely upon *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997). They cite to this case for the proposition that "one would expect that the phrase 'waters of the United States' when used to define the phrase 'navigable waters' refers to waters which, if not navigable in fact, are at least interstate or closely related to navigable or interstate waters." Resp. Br. at 25, citing 133 F.3d at 257.

As is the case with *SWANCC*, respondents' reliance upon *United States v. Wilson* is misplaced. First, the *Wilson* case involved Section 328.3(a)(3) as the government's asserted jurisdictional basis. In the present case, however, the government asserts that Sections 328.3(a)(1), (2), (5) and (7) provide jurisdiction. Second, in a subsequent proceeding following the remand of *United States v. Wilson*, contrary to the legal proposition cited by respondents, the Fourth Circuit actually upheld the Corps' assertion of jurisdiction in that matter on the basis of 33 C.F.R. 328.3(a)(1), (5), and (7). *United States v. Interstate General Co.*, No. 01-4513, slip op. at 7-8 (4th Cir. July 2, 2002).

Another Fourth Circuit case deserving attention is *United States v. Newdunn Assocs.,*

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the use, degradation, or destruction of which could affect interstate or foreign commerce...."

[40] Respondents also emphasize that the Supreme Court's earlier decision in *U.S. v. Riverside Bayview Homes,* 474 U.S. 121, 135 (1985), was limited to wetlands which actually abutted a navigable waterway. They argue that thereafter, "[t]he EPA and the Corps *de facto* extended their authority by applying regulations so that waters claimed to be 'hydrologically connected' to navigable waters are considered jurisdictional, even when they are not adjacent to navigable waters." Resp. Br. at 24-25.

195 F. Supp. 2d 751 (E.D.Va. 2002 ("*Newdunn I*"), *rev'd sub nom Treacy v. Newdunn Assocs.*, 344 F.3d 407 (4th Cir. 2003) ("*Newdunn II*"). In *Newdunn I*, the District Court interpreted *SWANCC* as invalidating the U.S. Army Corps of Engineers' 1986 definition of "waters of the United States." *Id.* at 764-765. In so doing, the Court in that case held that the subject wetlands were not within the Corps' jurisdiction because they were connected to navigable waters only by way of a tributary that ran across numerous culverts. *Id.* at 757-759. This lower court decision lends support to the respondents in this case.

In *Newdunn II*, however, the Fourth Circuit reversed the District Court. There, the Fourth Circuit held that the Corps' jurisdiction over non-Section 328.3(a)(3) "waters of the United States" remains valid even in light of *SWANCC*. The Fourth Circuit found that the Corps had jurisdiction in that case where the connecting tributary, an intermittent water body, traveled a long distance through natural and artificial culverts. 344 F.3d at 417.

In so holding, the *Newdunn II* Court summarized the current state of the law in the Fourth Circuit as it affects the U.S. Army Corps of Engineers' exercise of Clean Water Act jurisdiction over wetlands. This summary, which strongly supports the position advanced by the complainant in this case, is as follows:

> This circuit has recently concluded that, pursuant to these regulations, the Corps intends to assert jurisdiction over "any branch of a tributary system that eventually flows into a navigable body of water." *United States v. Deaton*, 332 F.3d 698, 711 (4th Cir. 2003). In *Deaton*, the Corps claimed authority to regulate wetlands bordering a "roadside ditch" that took a "winding, thirty-two mile path to the Chesapeake Bay." *Id.* at 702. Along the way to the Bay, water flowed from the Deaton's wetlands to the roadside ditch, and then into a "culvert" on the other side of the road. *Id.* Water from the culvert drained into a second ditch, which flowed into Beaverdam Creek. Beaverdam Creek was "a direct tributary of the Wicomico River, which [was] navigable." *Id.* The distance from the Deaton's wetlands to a navigable-in-fact river was approximately eight miles. The *Deaton* court upheld the Corps' exercise of jurisdiction over all these waters, finding that "the Corps's regulatory interpretation of the term 'waters of the United States' as encompassing nonnavigable tributaries of navigable waters does not invoke the outer limits of Congress's power or alter the federal-state framework. *Id.* at 708. In dismissing a *Commerce Clause* challenge to the Corps' regulations, the *Deaton* court summarized Congress' well-articulated purpose for crafting the CWA and concluded, "The Corps has pursued this goal by regulating nonnavigable tributaries and their adjacent wetlands. This use of delegated authority is well within Congress's traditional power over navigable waters." *Id.* at 707. *In sum, the Corps'*

> *unremarkable interpretation of the term "waters of the United States" as including wetlands adjacent to tributaries of navigable waters is permissible under the CWA because pollutants added to any of these tributaries will inevitably find their way to the very waters that Congress has sought to protect.*

344 F.3d at 416-417 (emphasis added).

4. <u>The Unlawful Discharge of Wood Chips</u>

Count I of the complaint alleges a violation of Section 301(a) of the Clean Water Act because respondents discharged fill material onto wetlands that are waters of the United States without a Section 404 permit from the Corps. 33 U.S.C. §§ 1311(a) & 1344. EPA has proven this allegation.

First, it has been established that the activities at issue in this case took place in "waters of the United States." These activities involve the deposit of wood chips onto the Lewis Farm wetlands. Second, the wood chips and woody debris are "pollutants" within the meaning of Sections 301(a) and 502(6) of the Clean Water Act, which includes "biological material." 33 U.S.C. §§ 1311(a) & 1362(6). On the facts of this case, these wood chips constitute fill material. *See United States v. Tilton,* 705 F.2d 429, 430 (11th Cir. 1983)[41] Third, the Kershaw used to grind the "slash" in the cleared paths, as well as the use of a stump grinder, are "point sources" within the meaning of Sections 301(a) and 502(14) of the Act. 33 U.S.C. §§ 1311(a) & 1362(14).[42] *See Borden Ranch P'ship v. Army Corps of Eng'rs,* 261 F.3d 810 (9th Cir. 2001) (finding congressional intent that courts interpret definition of "point source" broadly), *aff'd* 123 S.Ct. 599, 600 (2002) (per curium); *see also,* Tr. 331 & CX 26 (Photograph 2).

In sum, the discharge of this fill material onto the wetlands on the Lewis Farm property constituted the discharge of "pollutants" from a "point source" requiring a Section 404 permit. As explained below, this finding of unlawful discharge is based solely on the wood chips deposited on the Lewis Farm wetlands. There is no finding of violation relating to any material excavated from the Tulloch ditches.

We begin with the definition of the term "fill material." This term is not defined in the Clean Water Act. It is, however, defined by both the Corps and EPA, although somewhat

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[41] *See Phoenix Construction Services, Inc.,* 11 E.A.D. __, CWA Appeal No. 02-07 (April 15, 2004) (The term "'pollutant' has an expansive definition, and has been interpreted to included dredged and fill material."), slip op. at 6 n.4, citing, among others*, United States v. Pozgai*, 999 F.2d 719, 725 (3rd Cir. 1993), *cert. denied,* 510 U.S. 1110 (1994).

[42] A "point source" is "any discernible, confined and discrete conveyance ... from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

differently. At the time of the events of this case, the Corps definition provided in part that "fill material" was "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of an [*sic*] waterbody." 33 C.F.R. 323.2(e) (1998). The EPA defined "fill material" in part 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).[43]

While the Corps and EPA had slightly differing definitions of "fill material" when the events of this case took place, their definitions of the term "discharge of fill material" was identical. Their respective regulations provided:

> 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) & 40 C.F.R. 232.2.

The observations of the U.S. Army Corps of Engineers' environmental scientists, Culpepper and Martin, while on the Lewis Farm property is significant for purposes of establishing a Section 301(a) violation here. As noted, these individuals visited the property on January 11, 1999, during the grinding of the slash in at least Paths One and Two that remained after the trees had been cut down and hauled off the site, but before the two Tulloch ditches were dug. Tr. 205, 338-339.

Culpepper testified that he looked primarily at Path Two. Tr. 200. He observed a layer of wood chips two to four inches deep.[44] During this visit, Culpepper took at least one measurement

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[43] The Corps and EPA have since engaged in joint rulemaking whereby both Agencies have adopted the EPA definition of "fill material." 67 Fed. Reg. 31129 (May 9, 2002).

[44] The Corps report of this visit states that the wood chips were one to six inches deep. CX 26. Culpepper explained the discrepancy: "[A]fter I thought about it in more detail, that reflected what I saw in the field." Tr. 206.

to determine the depth of the wood chips. Tr. 192, 206. Martin testified that in one of the corridors he observed a layer of wood chips two to five inches deep. Tr. 336.

Martin also took a photograph in one of the paths after the Kershaw had ground the slash into chips. He testified that this photograph shows approximately two to five inches of wood chips spread into the wetlands. CX 26 (Photographs 9 & 10). Martin summarized the Corps' visit to Lewis Farm as follows:

> At the time I saw Lewis Farm, there was no excavation of material on the site, no use of bulldozers or root rakes or I saw no evidence of anything of that nature.
>
> The other thing is that the mowing or reduction of woody material was more than just shrubs and saplings along the length of the corridor. It included trees as well. *There was perhaps more chips or woody debris that I had expected.* Otherwise, yes, it was in conformance.

Tr. 338-339 (emphasis added).

In fact, Martin wasn't the only person surprised by the amount of slash left in the paths. In that regard, Needham testified:

> As I mentioned yesterday, there were two types of mowers that I have seen: The Kershaw and the Hydroax. The Hydroax is a circular blade like a lawn mower we would use in our back yard. The Kershaw is a drum type. The Kershaw went in to mow saplings, shrubs, these treetops are laying in there, and it chopped them all up as it went ahead and cleared them out of the way.
>
> *I heard a lot of discussion about the reasons for all that. This site provoked a call from some of the equipment operators to me while I was in my office in Wilmington. The question started off with there's a lot more tree limbs here because of the size of the timber than some of the other sites they have been working on, and the question was posed: "Can we go in there with a root rake and push them off to the side?"*
>
> It was like "Absolutely not. We're referenced in the letter that we're not going to have a root rake in the wetlands or anything."
>
> Then it was like, "Well, how about a bulldozer and keep the blade up?"

> It's like, "No. The bulldozer is mentioned, and we're not going to do any of that."
>
> Then it was like, "Well, do we just drive up over this them [*sic*] and crush them all down and drive out?" And that was the one I hesitated on. And why? Because you would sort of think about, well, that would be one way to do it is just drive over the stuff.
>
> It was like, "No." We went back to -- I went back to Mr. Evans' letter where he cautioned that he would consider it corduroy road fill.
>
> Now, traditionally when I worked for the Corps and saw power companies build corduroy roads in swampy areas, they would lay them literally side by side as a log path. I thought that, you know, if we drive over all of these treetops and mash them in the ground, it will be this crisscrossed mesh of limbs that someone may say that the intent was to provide a corduroy road; and rather than line them all up, we simply put them diagonally.
>
> *I said, "You know, the letter says we can mow. I think I would just mow everything up." That's the reason the Kershaw was in there mowing and trying [to] grind all the tops up*, because it was my instruction that we didn't want to crawl over these things and enter into the controversy that we had built a corduroy road.

Tr. 841-843 (emphasis added).

In addition, the testimony of Culpepper and Martin regarding the breadth of the wood chip discharge in the Lewis Farm wetlands was corroborated by the testimony of the EPA personnel who subsequently inspected the site. For instance, Lapp testified that there were approximately 11 inches of wood chips and soil mix at Sample Point A1. Tr. 97. He also testified that there was woody debris at Sample Point C and "that was consistent of the material that was on the surface throughout." Tr. 108.[45]

Accordingly, on the basis of the substantial amount of wood chips deposited onto the Lewis Farm wetlands without a Section 404 permit, it is held that respondents unlawfully discharged a pollutant into "waters of the United States" in violation of Clean Water Act Section

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[45] Lapp did acknowledge though that Complainant's Exhibit 27 did not contain any notations of wood chips at Sample Point C. Tr. 139. Also, there is no question that there were no wood chips at Sample Point B, as that was the undisturbed reference sample taken in the wooded area. Tr. 141.

301(a).
33 U.S.C. § 1311(a).[46]

Aside from the merits relating to the Section 301(a) violation in Count I, respondents argue that EPA is estopped from pursuing those charges. In that regard, Amelia Venture and Vico claim that "[t]he United States Army Corps of Engineers ("Corps") pre-approved the activities that were conducted on Site both orally and in writing, a determination upon which the Respondents relied." Resp. R.Br. at 1. As explained below, this estoppel argument has no merit.

First, establishing a claim of estoppel against the government is no small task. Respondents must show affirmative misrepresentation by the government on which they reasonably relied to their own detriment. *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 60-63 (1984); *United States v. Hemmen*, 51 F.3d 883, 892 (9th Cir. 1995); *B.J. Carney Indus., Inc.*, 7 E.A.D. 171, 196 (EAB 1997).

Second, evaluating the evidence in this case against the preceding standard shows that respondents' efforts fall considerably short of the mark. What the record shows is that the Corps discussed Tulloch ditching matters with Southern Pines in Respondents' Exhibit 3, and that the Corps' views expressed in that correspondence pertained only to the Southern Pines site. In that correspondence, the Corps rather clearly set forth that its views were site-specific to Southern Pines. *See* n.18, *supra.* The Corps' statements in Respondents' Exhibit 3 cannot be fairly read to include the subsequent activities on Lewis Farm.

Moreover, respondents have failed to show that Corps employees Culpepper and Martin made any representations to them during their visit to the Lewis Farm property, let alone that

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[46] EPA further argues:

> In addition to the discharge of wood chips and ground up woody debris, Respondents also have discharged dredged material to the surface of the wetlands. There was significant soil movement throughout the property. At all three of EPA's sample points, Ms. Vasilas found grey-colored soil indicative of soils lower in the soil profile.... This material clearly was not incidental fallback, as it was placed on top of the original soil surface and had not, therefore, fallen back "in the same general location" (i.e., the ditch bottom) from which most of it was removed.

Compl. Br. at 65-66 (citation omitted). To the extent that EPA seeks to further support a finding of a Section 404 violation under Count I on the basis of this argument, it is rejected. The limited number of samples taken by EPA on the Lewis Farm site, and the limited testimony regarding the operation of Vico's, and its subcontractor Paxton's, machinery on the wetlands simply isn't sufficient to support such a finding of violation.

respondents reasonably relied upon those representations to their detriment. Indeed, the testimony of David Blevins, Vico's supervisor for the Lewis Farm job, suggests that respondents were well aware that the Corps did not make Tulloch ditch decisions at the field inspection level. Blevins testified:

> Q. And the time you talked to Mr. Culpepper was in August 2 to August 24, 1999 time frame; is that right?
>
> A. I knew that there was an effort to shut us down, a stop -- a cease and desist order, and I talked to Mr. Needham about it, and in that process, that's when I understood that it was not Mr. Culpepper's decision to make and that it was to be decided by a higher power, and that's why I anticipated we were going to keep digging.

Tr. 1143. In sum, respondents estoppel argument has no record support.

B. Count II

Here, EPA charges that respondents violated Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), by discharging storm water associated with construction activity without a Section 402 permit. 33 U.S.C. § 1342. *See* Amend. Compl., ¶ 32.

1. Statutory and Regulatory Scheme

In 1972, Congress enacted significant amendments to the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). One major focus of the Act is the control of "point source" pollution. As noted with respect to the Section 404 permit discussed earlier, a "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel ... from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

The Clean Water Act also established the National Pollutant Discharge Elimination System which requires permits for the discharge of pollutants from a point source. This NPDES permit requirement is found in Section 402 of the Act. To that end, the Clean Water Act empowers EPA or states authorized by EPA to act as NPDES permitting authorities to issue Section 402 permits. 33 U.S.C. §§ 1342(a)-(b). As long as the permit issued contains conditions that implement the requirements of the Clean Water Act, the permitting authority may allow the discharge of any pollutant. 33 U.S.C. § 1342(a)(1). *See City of Abilene v. United States Environmental Protection Agency,* 325 F.3d 657, 659 (5th Cir. 2003); *Natural Resources Defense Council v. United States Environmental Protection Agency,* 966 F.2d 1292, 1295 (9th Cir. 1992).

Congress subsequently enacted the Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (1987), which amended the Clean Water Act. This 1987 amendment set up a new scheme

for the regulation of storm water runoff. Specifically, Section 402(p), as amended, established deadlines by which certain storm water dischargers are to apply for permits, the EPA or States are to act on the permits, and the dischargers are to implement their permits. 33 U.S.C. § 1342(p). Section 402(p) also set a moratorium until 1994 on the permitting requirements for most storm water discharges. Excepted from this moratorium, however, were discharges of storm water associated with "industrial activity." *Natural Resources Defense Council v. United States Environmental Protection Agency,* 966 F. 2d at 1296.

In 1990, EPA promulgated regulations implementing the storm water discharge permit requirement of Section 402(p). 55 Fed. Reg. 47,990 (Nov. 16, 1990). These regulations, which are known as "Phase I" regulations, were codified at 40 C.F.R. Part 122.26. Among other things, 40 C.F.R. Part 122.26 requires an NPDES permit for any discharge associated with industrial activity. Construction activity falls within the regulatory definition of industrial activity.

The phase I regulations define "construction activity" as "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." This definition and its five-acre requirement were in effect when the events at issue in this case occurred on Lewis Farm. After these events took place, EPA promulgated the "Phase II" regulations. The Phase II regulations provide that construction sites of one to five acres fall within the definition of "industrial activity." *See* 64 Fed. Reg. 68,722 (Dec. 8, 1999). Compl. Br. at 66-68. This case, however, involves the five-acre threshold of the Phase I regulations and not the one to five-acre threshold of the Phase II regulations.

EPA identifies the violative activity in this case as the land disturbance which took place on Lewis Farm associated with the construction of the Tulloch ditches. EPA maintains that this land disturbance included the clearing, grading, and excavation of an area greater than five acres. *See*
40 C.F.R. 122.26(b)(14)(x) (1998). Because respondents did not have a NPDES permit prior to this construction activity, EPA alleges a Clean Water Act violation. At the time of the events in this matter, the Commonwealth of Virginia was authorized to implement its own NPDES program. Tr. 553. The Commonwealth's definition of "construction activity" mirrors the Federal definition. 9 VAC25-31-10.

2. <u>The Five Acre Requirement</u>

The initial inquiry here is whether respondents disturbed at least five acres of land. Respondents argue that as per Amelia Venture's Erosion and Sediment Control Plan (CX 41), only 4.885 acres were disturbed. If this were the case, then there would have been no requirement for respondents to obtain a NPDES permit. That, however, is not the case.

The key to resolving this five-acre threshold issue lies with the testimony of EPA Inspector Kevin Magerr. Using a ruler and a calculator while on the witness stand, and with the aid of the scale contained in the Amelia Venture E&S Plan, Magerr determined that 5.85 acres of land were

disturbed on the Lewis Farm site. Tr. 566-569. In making this calculation, he concluded that the four cleared paths were 4500 feet in length and 35 feet in width, which equals 215,250 square feet. Next, Magerr calculated the area of the spoil pile located in the uplands. The spoil pile dimensions were 200 feet by 200 feet, which equals 40,000 square feet. Accordingly, the square footage of the proposed ditching when added to the square footage of the spoil pile equaled 255,250 square feet. Dividing this sum by 43,560, the number of square feet in an acre, Magerr determined that the area actually disturbed on the Lewis Farm site was 5.85 acres. Tr. 566-569, 573.[47] Even though more than five acres of land had been disturbed, Amelia Venture did not obtain a NPDES permit as of the time of the EPA storm water discharge inspection.

Respondents offer no convincing argument as to why the calculations of Magerr should not be accepted. In that regard, respondents do not directly challenge the calculations performed by Magerr on the stand. Instead, they simply assert that "the area of the proposed four ditches, the area of the swaths that were mowed and timbered, the area of the access paths, and the area of the spoil pile were measured by Respondents' surveyor" to be 4.8 acres. Resp. Br. at 47. Respondents, however, offer no record citation to support this assertion. In fact, they fail to explain who surveyed the disturbed land site and when that survey was conducted. In sum, respondents' contention that the area of disturbed land was 4.88 acres is clearly contrary to the record evidence.[48]

Respondents also argue that in proceeding on the Section 402 violation theory, EPA is attempting to circumvent the D.C. Circuit's holding in *Nat'l Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998), which upheld the legality of Tulloch ditching. Resp. Br. at 45. There is no merit to this argument. This case involves two alleged violations of separate and distinct provisions of the Clean Water Act -- Section 402 and Section 404.

3. <u>The Violation</u>

The Clean Water Act prohibits the discharge of a pollutant into waters of the United States

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[47] Magerr did not include in his calculation the corridors connecting the transect wells (estimated at 6900 feet in length and eight feet in width). Tr. 572.; CX 4. Nor did he include the construction entrance to the Lewis Farm site, or the roadway used by the vehicles in the construction of the ditches, even though he believed that kind of activity should have been included. Tr. 574-575. Inclusion of any of these items would have increased the measure by which respondents exceeded the five-acre regulatory threshold.

[48] Because it has been found that greater than five acres of land was disturbed, there is no need to address EPA's "common plan" argument --*i.e.,* that "Respondents' activities were part of a common plan for development or sale of greater than five acres." Compl. Br. at 70. *See* 40 C.F.R. 122.26(b)(14)(x) (1998).

from a point source. 33 U.S.C. §§ 1311(a), 502(7) & 502(12).[49] The National Pollutant Discharge Elimination System permit provisions of Section 402, however, provide for an exception to this prohibition. 33 U.S.C. § 1342. EPA alleges that Amelia Venture and Vico engaged in "industrial activity" without a Section 402 NPDES permit from November 1998, to September 21, 1999. EPA further alleges in the amended complaint that, during this time, respondents violated Section 301(a) in failing to prevent storm water discharges into the wetlands on Lewis Farm and into the western tributary to Drum Point Creek. Amend. Compl., ¶ 27.

It is undisputed that respondents' land disturbing activities fall within the definition of "industrial activity" as forth in 40 C.F.R. 122.26(b)(14)(x) (1998). Indeed, Amelia Venture's land disturbance application to the City of Chesapeake described this activity on Lewis Farm as "[c]learing, filling, excavating, grading or transporting or any combination thereof." RX 15. It also is undisputed that Amelia Venture had not obtained a NPDES permit prior to the start of the construction. *See* Tr. 576. Thus, the question to be answered is whether there were storm water discharges on the Lewis Farm associated with this industrial activity. 33 U.S.C. §§ 1342(p)(1) & (2)(B).

The evidence in this case supports EPA's position that storm water associated with industrial activity was discharged into the two Tulloch ditches. (It has previously been held that the Tulloch ditches drain into the T-ditch and then on to the western tributary of Drum Point Creek.) The critical testimony on this matter comes from EPA environmental engineer Kevin Magerr, the leader of the storm water discharge investigation of September 9, 1999.[50]

During this September 9 inspection, Magerr observed rills and gullies conveying storm water runoff to the ditches.[51] He described the ditches as being "U"-shaped, rather than "V"-shaped which indicated that the banks of the Tulloch ditches had worn down due to erosion. Tr. 585-588; CX 39 (Disk 6, Photographs 13-16). Magerr also cited Disk 6, Photograph 10 (CX 39) to show sediment and water in the ditch. Tr. 584. Testifying as to Disk 6, photograph 11, of Complainant's Exhibit 39, Magerr stated "the bank ... has sluffed [*sic*] off." Tr. 585. He added,

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[49] The term "point source" includes ditches, such as the Tulloch ditches excavated in Paths One and Two on Lewis Farm. 33 U.S.C. § 1362(14), 40 C.F.R. 122.2. *See North Carolina Shellfish Growers Ass'n v. Holly Ridge Assocs., LLC,* 278 F. Supp. 2d 654, 679 (E.D.N.C. 2003); *Molokai Chamber of Commerce v. Kukui (Molokai), Inc.*, 891 F. Supp. 1389, 1401 (D.Haw. 1995).

[50] Magerr also testified about problems that he observed relative to the construction entrance and "check dams" on Lewis Farm. *See, e.g.,* Tr. 557,-558, 576-577. Those matters were not addressed by EPA in its opening brief and received only nominal treatment in its reply brief. *See* Compl. Br. at 72-73; Compl. R.Br. at 43. Accordingly, it is deemed that complainant no longer relies upon these items to prove the alleged violation.

[51] Magerr uses the term "rilling" in his testimony. This term is used to describe small gullies that resulted when the soil was washed away. Tr. 587.

"the entire bank has collapsed in to the -- to the left you can see a lot of the wood chips that have slid down the bank indicating that they were running off in to that channel." *Id.* He also cited Disk 6, Photograph 9 (CX 39) to show the amount of sediment that had washed into the channel. "This gentleman had stepped in to it and you just - you just completely sunk down." Tr. 589.

Magerr also observed that the stockpile in the uplands did not contain the silt fences as required by the controlling E&S Plan. Tr. 577-578. Silt fences are designed to prevent sediment runoff. Vico employee James Bohlander also testified that the stockpile lacked silt fencing. Tr. 698. In Disk 6, Photograph 8 (CX 39), the EPA inspection team captured the condition of the stockpile. Magerr explained:

> That's a picture of the spoil piling area. As you can see in this picture, the area doesn't have any silt fencing. The pile is not stabilized. In the foreground there's a drainage -- sort of a drainage swale that is directly linked to an existing ditching area. So basically what I was trying to show there is that there's a -- there's a potential here of sediment running off and getting in to that ditch.

Tr. 583.

Aside from the preceding observations which show that storm water runoff had occurred and that it carried away soil to waters of the United States, Magerr performed a mathematical computation to prove the occurrence of runoff. Using a formula contained in the "Soil Conservation Service Technical Reference Manual" (CX 35) for "Estimating runoff," Magerr testified given the nature of the disturbed land on Lewis Farm, there would be storm water runoff in the event of 0.32 inches of rain in a 24-hour period. This formula considered various factors that concern the capacity of the soil to contain water. Tr. 611. After discussions with soil expert Vasilas, Magerr used soil type "B" in his calculation. In order to account for the condition of the disturbed land which he observed on the Lewis Farm site, Magerr used a numeric value for "[n]ewly graded areas." Tr. 613, 630.

In addition, weather data collected at the Suffolk Lake Kilby weather station (CX 59) shows that a considerable number of rainfall events exceeding 0.32 inches occurred between December, 1998, when construction began on the Lewis Farm property, and September, 1999, when respondents sought a NPDES permit. Tr. 609-614, 682-684. *See* Compl. Br. at 72-73.

Respondents seek to counter the testimony of Magerr with Lawrence Cahoon, Ph.D. Dr. Cahoon was qualified as an expert on the subject of "the quality of water on unimproved sites." Tr. 1151. Cahoon visited the Lewis Farm property in March of 2000, April of 20002, and December of 2002. Tr. 1152. Summarizing the impact of Dr. Cahoon's testimony, respondents submit: "The only water quality expert to testify at trial, Lawrence Cahoon, took samples on Site and after three visits to the Site concluded that the quality of water exiting the Site was excellent and that no appreciable sediment was present in the ditches even during downpours. Tr. at 1162, 1176." Resp. R.Br. at 10.

Inasmuch as Dr. Cahoon's April, 2002, and December, 2002, visits were more than two and one-half years after EPA's September 9, 1999, storm water discharge inspection, any observations and water turbidity readings (*i.e.*, a measure of the quantity of suspended particles in water) that were then taken are too far removed in time to be of any relevance to this case. Dr. Cahoon's March 2000, visit, some six months after the EPA inspection, cannot be dismissed so easily.

During his March, 2000, visit to Lewis Farm, Dr. Cahoon inspected the ditches, and took turbidity readings, as well as photographs. The results of this inspection are contained in his inspection report. RX 33. In Tulloch Ditch Two, Dr. Cahoon took a turbidity reading of 3.44 NTUs ("nephelometric turbidity units"). He described this number as being "very, very low" and that the water was "essentially about as clear as it can be." Tr. 1154.[52] Dr. Cahoon also offered testimony regarding the general nature of the water, ditch banks, and check dams in the five photographs appearing in Respondents' Exhibit 33 which pertain to Lewis Farm. Tr. 1154-1162.

On balance, the testimony of Dr. Cahoon regarding his March, 2000, visit to the Lewis Farm site is not enough to rebut the testimony of EPA environmental engineer Magerr. First, Dr. Cahoon's visit occurred more than six months after Magerr's inspection. Thus, by the time that Dr. Cahoon first arrived on the scene the site conditions had changed. There was time (6 months) for the banks to become more stable. Second, Dr. Cahoon's observations regarding his March, 2000, visit do not in any way discredit the observations of Magerr, critical in this case, that on September 9, 1999, the ditch banks were unstable in areas, that the stockpile lacked silt fencing, and that erosion was causing soil and wood chips to enter the ditches.

Accordingly, the testimony of Magerr is credited. That testimony, which covers his observations, storm water runoff calculation, and photographic documentation supports a finding that respondents violated Section 402 of the Clean Water Act, as alleged in Count II.

IV. Civil Penalty

Section 309(g)(1)(A) of the Clean Water Act, 33 U.S.C. § 1319(g)(1)(A) provides for the assessment of a civil penalty for a violation of Section 301(a). 33 U.S.C. § 1311(a). Section 309(g)(2)(B) further provides that a daily penalty of $10,000, not to exceed $125,000, may be assessed. 33 U.S.C. § 1319(g)(2)(B). These penalty amounts have been increased to $11,000 and $137,500 respectively. 31 U.S.C. § 3701 (Debt Collection Improvement Act of 1996); 40 C.F.R. 19, Table 1 (1999). In addition, Section 309(g)(3) of the Act states:

> In determining the amount of any penalty assessed under this

[52] Dr. Cahoon compared this reading to the 50 NTU standard for fresh water in North Carolina. Tr. 1154. Virginia has not adopted a numerical standard for turbidity. Tr. 1179.

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

33 U.S.C. § 1319(g)(3).

In this case, for the Section 404 violation and for the Section 402 violation, EPA seeks a civil penalty totaling $137,500. For the reasons set forth below, a penalty of $126,800 is assessed against respondents. Of this amount, $100,000 is assessed for the Section 404 violation of Count I and $26,800 is assessed for the Section 402 violation of Count II.

1. <u>Nature, Circumstance, Extent and Gravity</u>

The adverse consequences of the Section 404 violation in this case are significant. In that regard, EPA wetlands team leader Jeffrey Lapp spoke toward the significant environmental role which wetlands play. He testified:

> Wetlands are associated with a number of functions which then give value to the public at whole. Part of that would be things such as flood flow, alteration and storage. When you would have high storm events, wetlands tend to act as sinks for the volumes of water, whereby the water comes into a wetland, sits in these areas, is slowly released out into the tributary system. What that does is ameliorate some of the downstream effects of flooding.
>
> Wetlands are attributed to doing ground water purification. When you get water in these systems, you get a slow leak of water downward into the ground water system, and because of the soils, vegetation and things in the wetlands tend to hold sediment and other types of contaminants in the wetland system allowing the water to go through.
>
> Wetlands also provide base flow to the tributary system where, for a longer period of time, as this water slowly comes back into the tribs, you get a flow.
>
> Other things would be erosion stabilization properties. As your shoreline would be stabilized by wetlands vegetation, it prevents erosive forces from being exacerbated. Also, service water purification. When you have storm events, water that's laden with sediment would come into these wetlands systems, the water would

> then slow down sediment, which would slowly precipitate out, and the water would proceed to the tribs with less than a sediment load than it previously had.

Tr. 44-45.

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

Lapp's testimony is consistent with the Supreme Court's notation as to "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems." *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 133 (1985). There, the Court also approvingly noted both EPA's and the Corps' determination that "wetlands adjacent to navigable waters do as a general matter play a key role in protecting and enhancing water quality." *Id.,* at 133. The Court went on to find not unreasonable the Corps' conclusions that wetlands may serve: "to filter and purify water draining into adjacent bodies of water" (33 C.F.R. 320.4(b)(2)(vii) (1985)); "to slow the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion" (33 C.F.R. 320.4(b)(2)(iv) & (v)); and that "adjacent wetlands may 'serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic ... species.'" (33 C.F.R. 320.4(b)(2)(i)). *Id.,* at 134-135.[53]

2. <u>Ability to Pay</u>

It is well-established that "complainant has the initial burden of production, as well as the burden of persuasion, to establish that the penalty sought for an alleged violation is 'appropriate.'" *Donald Cutler,* CWA Appeal No. 02-01 (Sept. 2, 2004) (EAB), 11 E.A.D. __, slip op. at 13. The Environmental Appeals Board has further stated, "we have held that a respondent's ability to pay may be presumed until it is put in issue by the respondent. *CDT Landfill,* slip op. at 46-47; 11 E.A.D. __; *Wallin,* 10 E.A.D. at 36; *Spitzer,* 9 E.A.D. at 321; *New Waterbury,* 5 E.A.D. at 541." *Donald Cutler,* slip op. at 14.

Respondent Amelia Venture does not argue that it is unable to pay the proposed penalty in this matter. It does argue though that "EPA introduced no evidence about the ability of Amelia

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[53] In *United States v. Riverside Bayview Homes, Inc.,* the Court also noted: "That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment, for where it appears that a wetland covered by the Corps' definition is in fact lacking in importance to the aquatic environment -- or where its importance is outweighed by other values -- the Corps may always allow development of the wetland for other uses simply by issuing a permit. See 33 C.F.R. § 320.4(b)(4) (1985)." *Id.,* at 135.

Venture or Ashton Lewis to pay the proposed penalty." Resp. R.Br. at 13.[54] Citing certain company financial records, respondent Vico does, however, raise an "inability to pay" defense. *Id.* While respondents list these arguments, little effort is made to explain these positions in any detail. As explained below, respondents' ability to pay arguments are rejected.

Insofar as Amelia Venture is concerned, the matter of its ability to pay was never put into play at the hearing in this case. In fact, it was raised for the first time in respondents' post-hearing Reply Brief. In that regard, Ashton Lewis, a managing member of Amelia Venture (Stip. 2), was not even questioned at the hearing about the company's ability to pay a penalty, specifically a lack of such ability; nor did he offer any testimony from which an inference could even be drawn that such might be the case. *See* Tr. 1234-1260. Inasmuch as Amelia Venture did not raise this issue at any time before briefing (even though it was placed in issue at hearing as to co-respondent Vico), Amelia Venture cannot now prevail through its untimely offering.

Insofar as Vico is concerned, a financial analysis performed by EPA's financial expert, Jonathan Shefftz, established its ability to pay the penalty assessed in this case.[55] Shefftz reviewed the company's "Audited Financial Statements for September 30, 2001 and 2000." Tr. 470; RX 45. This was the most up-to-date information available to complainant.[56]

With respect to Respondents' Exhibit 45, Vico's audited financial statements for September 30, 2000, and September 30, 2001, Shefftz cited the company's unrestricted cash and cash equivalents of $610,000, total current assets of almost $12,000,000, and total assets of

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[54] Inasmuch as Ashton Lewis is not a named respondent in EPA's First Amended Complaint, no judgment is being rendered against him individually. Accordingly, any ability or inability of Ashton Lewis to pay a civil penalty is of no consequence.

[55] Shefftz is a senior associate with Industrial Economics, Inc., a economics and public policy consulting firm. Tr. 451-452. He was qualified as an expert in the field of economics. Tr. 456.

[56] At the hearing, Vico sought to introduce into evidence Respondents' Exhibit 50, the audited financial statement for Vico for September 30, 2002, and September 30, 2001. Vico's president, Emile Viola (Tr. 1204), had obtained this financial information from his accountant on February 3, 2003. Respondent then sought to incorporate this exhibit into the record just three days later, on February 6, 2003. This was the last day of the hearing and EPA's financial expert had already completed his testimony and was not available to testify further. Tr. 1456-1457, 1466. In objecting to the admission of this document, counsel for EPA stated in part: "[W]hen Mr. Sims [counsel for respondent] identified that the 2001-2002 financial statement was going to be part of the record, which he did for the first time I believe in the beginning of January, I immediately asked for it, saying we didn't have it and Mr. Shefftz would be testifying." Tr. 1461. Given these circumstances, Respondents' Exhibit 50 was rejected as being untimely. Tr. 1465-1466. In a curious turn of events, however, in its post-hearing brief EPA cites to the financial data contained in this rejected exhibit (RX 50). *See* EPA Br. at 85.

$22,000,000 as indicating the scope of its financial operations. Tr. 471. He also noted that for 2001, there was contract revenue of over $35,000,000 and gross profits on contracts of almost $600,000. *Id.* While Shefftz did acknowledge a loss for the year 2001, but not for the year 2000, he was of the view that "overall, the company's financial position, when both years are examined, appears strong, and either way, compared to the proposed penalty, it seems like there's no basis for an inability-to-pay claim given just how small the penalty is relative to the scope of financial operations as presented here." Tr. 472.

On the basis of his financial review, EPA's financial expert Shefftz reiterated, "based on the information presented here, I don't see any basis for an inability-to-pay claim." Tr. 473. In fact, most telling of Shefftz's financial analysis are his comments that he was "puzzled as to what sort of inability to pay a claim Vico could even contemplate." Tr. 470.

Accordingly, given Shefftz's testimony (which went unchallenged on cross-examination) it is held that Vico has the ability to pay the penalty assessed in this case. *See* Tr. 474-490.

3. <u>History of Such Violation</u>

EPA does not allege that Amelia Venture has a history of Clean Water Act violations. *See* Tr. 121. EPA does allege, however, that "[b]ased upon their past history of violations, Vico was fully aware of the need for a Section 404 permit for discharges at this Site yet chose to ignore the statutory requirement." Compl. Br. at 90.

According to EPA, Vico is guilty of "repeated violations." *Id.* Despite this accusation, complainant provides no citation to the record to support its two-sentence argument. Possibly, EPA was referring to wetlands team leader Lapp's testimony that "I do know that there was an EPA, a prior EPA action with Vico Construction, and I believe there were two prior Corps actions against Vico Construction." Tr. 121. Lapp also testified that the EPA action resulted in the restoration of the impacted wetlands system. *Id.*

Lapp's testimony (which was not even cited by complainant) suffers severely from a lack of detail, as well as from a lack of documentation. Assuming this to be the basis for EPA's claim of "repeated violations," it is an easy call for this Tribunal to make that complainant did not establish a history of violations for Vico.

4. <u>Degree of Culpability</u>

In discharging the wood chips into the wetlands without a Section 404 permit, the respondents were highly negligent. Given the substantial amount of slash reduced to wood chips and deposited into the Lewis Farm wetlands, respondents should have known that the wood chips constituted unlawful fill material. The fact that respondents' wetlands consultant, Robert Needham, may have negotiated certain path clearing and excavation method guidelines with the U.S. Army Corps of Engineers regarding the Southern Pines site and others is of no consequence to the clearing of the four paths and the construction of the Tulloch ditches on Lewis Farm. In that

regard, respondents should have taken the same care in discussing Tulloch ditch matters with the Corps, as it relates to the circumstances at Lewis Farm, that they exercised with respect to other wetland sites in the Tidewater area. They did not.

Moreover, with respect to the specific conditions on Lewis Farm, respondents were on notice as to the substantial amount of slash left in the wetland corridors after the timber had been removed. At that point, Paxton employees performing the "prepping" work for Vico telephoned Needham to inform him that there was more slash on site than they had expected. Needham's response was for the employees to run the Kershaw as planned. The results of the Kershaw operation produced an environmental problem -- the deposit of a substantial amount of wood chips (in this case fill material) in the wetland area. In that regard, Corps employees Martin and Culpepper observed from one to six inches of wood chips in at least one of the wetland paths.

Accordingly, on the facts of this case, given the substantial amount of slash remaining in the four paths after the timbering had been completed, it should have been clear to Needham (and to the respondents) that a substantial amount of wood chips, *i.e.,* fill material, would be discharged into the wetlands as a result of the Kershaw operation.

With respect to the Section 402 permit violation, the respondents were moderately negligent. Appropriate measures were not taken to stabilize the ditch banks or to ensure that the stockpile received the necessary silt fencing.

5. <u>Economic Benefit</u>

"A critical component of any penalty analysis under the Clean Water Act is the economic benefit enjoyed by a permittee as a result of violating the law. The goal of economic benefit analysis is to prevent a violator from profiting from its wrongdoing...." *United States v. Allegheny Ludlum Steel Corp.*, 187 F. Supp. 2d 426 (W.D.Pa. 2002). EPA argues that as a result of the two Section 301(a) violations in this case, respondents experienced a substantial economic benefit ranging between $42,358 and $60,407. Compl. Br. at 75.[57] EPA argues: "Respondents' discharges in waters of the United States without the requisite permits constituted violations of Section 301(a) of the CWA. These violations allowed Respondents to avoid costs that such permitting would have required them to incur. Those 'avoided costs' form the basis of Respondents' economic benefit." *Id.* EPA determined the value of this economic benefit through the analysis of its financial expert, Jonathan Shefftz. Tr. 466-467; CX 42.

First, with respect to the Section 404 permit violation, EPA maintains that had Amelia Venture sought a permit from the U.S. Army Corps of Engineers in the first place it would have sustained certain wetlands mitigation costs. Compl. Br. at 77. In that regard, complainant cites to the following testimony of Corps environmental scientist Gregory Culpepper:

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[57] Inasmuch as Amelia Venture is the landowner and Vico was the contractor performing the work, any economic benefit here would actually adhere to Amelia Venture.

Q. Can you please describe briefly for the Court how that permitting program works?

A. After a delineation has been confirmed by the Corps, and that's confirmed with a letter and a map, then applicants take that information and decide if -- generally, they try to see if their projects can occur without impacting wetlands, and then if they are going to impact wetlands, we review the acreage of wetland impacts and determine what permit that activity can fill. So, if it's a small impact, in this day and time, below a half an acre, we try to get those projects in under a nationwide permit, because it's a lot less involved process. If it involves more wetland impacts, then it will be an individual permit.

Q. You indicated that the applicant is required to avoid impacts to wetlands, or to minimize them. What if there are unavoidable impacts?

A. If they can't avoid the wetland impacts, then that's when we get into the permit process. *If they're impacting wetlands, then generally what's referred to as wetland mitigation, or compensating for those impacts, restoring wetlands in another location, is required as a condition of the permit.*

Tr. 167-168 (emphasis added). Culpepper's testimony, which has not been challenged by respondents, persuasively demonstrates that wetland mitigation would be required here.

Culpepper further explained the process of obtaining "wetlands mitigation" in the Corps' Norfolk District. He testified:

> That allows applicants to pay money into the trust fund in lieu of going out and constructing their own wetland mitigation, so it's a streamlined way for applicants to get their permits and comply with their mitigation, and then that money is paid into a trust fund we administer with the Nature Conservancy of Virginia. We combine a lot of smaller projects together and try to go out and do larger, more significant mitigation projects.

Tr. 169.

In terms of calculating this mitigation, Culpepper stated: "In a nutshell, we look at what it would cost to do the activities, or for the components of a mitigation project, and assign a value to that, to each of those components, and then that creates the per-acre total." *Id.* Culpepper then

stated: "I'm pretty certain in the 1999 time frame, if they were going to the mitigation bank or the Wetlands Trust Fund, it would have been approximately $55,000 per acre." Tr. 170-171.

With this information, EPA's financial expert, Shefftz, conducted his analysis. He concluded that for the Section 404 violation, Amelia Venture experienced an economic benefit ranging between $37,048 and $55,097. The lower end of this range represents mitigation based upon the impact to an estimated 3.9 acres affected in the clearing of Paths One and Two, where the Tulloch ditches were excavated. The higher end of this range is based on mitigation for 5.8 acres. This includes discharges to wetlands in Paths Three and Four, as well as Paths One and Two. It is noteworthy that EPA provides an economic benefit range, and not a specific economic benefit amount. In making his calculations, Shefftz assumed a mitigation cost of $11,900 per acre.[58] Shefftz then multiplied the assumed $11,900 cost per acre by the acreage affected, after which he applied an after-tax cost of 38.9% and the present value compounding rate of 8.8%. CX 43. *See* Compl. Br. at 77-78.

Respondents do not address the "economic benefit" penalty criterion relating to the Section 404 permitting violation in their post-hearing brief. *See* Resp. Br. at 50-51. Nor do respondents address this issue in their reply brief. *See* Resp. R.Br. at 11-14.

Accordingly, on the basis of Culpepper's and Shefftz's testimony, it is held that Amelia Venture sustained an economic benefit of $37,048 for the Section 404 violation. This is the lower end of the economic range presented by EPA.

Next comes consideration of any economic benefit resulting from respondents' failure to obtain a Section 402 permit. This is the Count II violation. Here, EPA again relies, in part, upon the expert testimony of Shefftz to determine that respondents experienced an economic benefit of $5,310 associated with the Section 402 violation. CX 42. According to EPA the avoided costs are $500 to retain an engineer to prepare a Storm Water Pollution Prevention Plan, $3,000 for a construction site entrance, $1,800 for silt fencing, and $1,079 for Inspections, Reporting and Recordkeeping. Compl. Br. at 79-80.[59]

EPA's economic benefit argument relating to the Section 402 violation is problematic. First, in addressing how the evidence in this case supports its theory of violation, complainant essentially ignores the considerations it now says constitute avoided costs. For instance, while there was testimony at the hearing regarding Storm Water Pollution Prevention Plans and the construction entrance to Lewis Farm, exactly how that testimony ties into the Section 402 violation has not been explained by EPA. Instead, EPA has focused its post-hearing briefing efforts almost

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[58] Emile Viola, the president of Vico, owns two mitigation banks. He estimated the 1999 cost of a one-acre credit in one of his mitigation banks to be between $10,000 and $12,000. Tr. 1220.

[59] Shefftz considered an after-tax adjustment and cost of capital which need not be repeated here. *Id.*

exclusively on showing that it satisfied the five-acre requirement, that the banks of the ditches had seriously deteriorated, that there had been storm water runoff, and that sediment had collected in the various ditches. *See* Compl. Br. at 66-73; *see also,* Compl. R.Br. at 42-43.

Given this lack of argument, it is difficult to assess the avoided costs identified by complainant. For example, the bulk of the alleged economic benefit, *i.e.,* $3,000, concerns the construction entrance to the site. While there is testimonial, documentary, and photographic evidence relative to this entrance, there is no adequate explanation by complainant as to the significance of this evidence in terms of either establishing the violation or determining the penalty. *See* n.50, *supra.* There also is a lack of supporting evidence to show that respondents actually avoided $500 in not having an engineer prepare a Storm Water Pollution Prevention Plan. Again, EPA doesn't fully explain how it reached this figure, how it ties into the alleged violation, and why the cost might not be lower given the fact that Amelia Venture did prepare an Erosion and Sediment Control Plan prior to any work being done. Finally, EPA fails to show how any lack of inspections, reporting , and recordkeeping (assuming that to even be the case here) should be considered as avoided costs as a result of non-compliance. EPA simply does not show how any such failure to inspect, report, and record supports its theory of violation under Count II.

The story, however, is different with respect to the silt fencing. The evidence establishes that there was no silt fencing on the stockpile located in uplands, even though silt fencing was required by the terms of Amelia Venture's E&S Plan. The evidence also establishes that was a swale which could allow the soil to migrate from the spoil pile and into Ditch Five, *i.e.,* the rim ditch. This evidence fits neatly into EPA's argument that there was a Section 402 violation here because respondents discharged pollutants associated with storm water, without a NPDES permit, into waters of the United States. Accordingly, Shefftz conclusion that respondents sustained an economic benefit of $1,800 in failing to install the silt fencing is credited and that fact is established. *See* Compl. Br. at 79, citing Tr. 562-563 & CX 42.p.3.

6. <u>Other Matters as Justice May Require</u>

There are no other matters to be discussed as "Justice May Require." Under this criterion, EPA speculates that Amelia Venture will incur "significant"wetlands mitigation costs *if* it proceeds with a Section 404 permit. Compl. Br. at 87. EPA does not specifically explain what it means by this representation. One would expect though that EPA is arguing that this is a reason not to reduce the penalty sought in the complaint, given the fact that it is seeking the maximum penalty. *See* Compl. Br. at 90. In any event, this Tribunal is not even convinced that future wetlands mitigation costs, should they even occur, are a matter that justice would require be taken into account in setting the penalty here.

EPA also discusses Vico's familiarity with the costs of participating in a wetlands mitigation bank, the timing of the Corps' visit to Lewis Farm as it relates to the progress of constructing the Tulloch ditches, and matters relating to respondents' alleged disregard for the NPDES permitting process. Compl. Br. at 88-91. Again, EPA apparently makes these arguments so as to prevent any penalty reduction. These are matters, however, which are not properly

considered under the "as Justice May Require" penalty criterion.

ORDER

It is held that Amelia Venture Properties. LLC, and Vico Construction Corporation violated Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), as alleged in Count I, by discharging fill material into "waters of the United States" without having obtained a permit from the U.S. Army Corps of Engineers, pursuant to Section 404 of the Act. 33 U.S.C. § 1344. It is further held that respondents violated Section 301(a) of the Clean Water Act, as alleged in Count II, by discharging pollutants associated with storm water without having obtained a National Pollutant Discharge Elimination permit pursuant to Section 402 of the Act. 33 U.S.C. § 1342.

For the Section 301(a) violation involving the Section 404 permit, Amelia Venture Properties, LLC, and Vico Construction Corporation are assessed a civil penalty of $100,000. For the Section 301(a) violation involving the Section 402 permit, Amelia Venture Properties, LLC, and Vico Corporation are assessed a civil penalty of $26,800. 33 U.S.C. § 1319(g). Respondents are to pay this combined $126,800 penalty within 60 days of the date of this order.[60]

Unless an appeal is taken to the Environmental Appeals Board pursuant to 40 C.F.R. 22.30, this decision shall become a Final Order as provided in 40 C.F.R. 22.27(c).

Carl C. Charneski
Administrative Law Judge

[60] Payment is to be made by certified or cashier's check, payable to "Treasurer of the United States of America," Mellon Bank, EPA Region 3 (Regional Hearing Clerk), P.O. Box 360515, Pittsburgh, Pennsylvania, 15251.