

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219
BEFORE THE ADMINISTRATOR

C&S ENTERPRISE, L.L.C. Respondent	RESPONDENT'S INITIAL POST HEARING BRIEF Docket No. CWA-07-2018-0095
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COMES NOW the Respondent, C&S Enterprise, LLC, by and through its attorney, Eldon L. McAfee, and submits this Initial Post Hearing Brief.

STATEMENT OF THE CASE.

Almost every fact in this case was disputed, from who owned the hog building to the ultimate fact of the condition of the drainage way and whether it qualified as a water of the U.S. But one fact became clear during the presentation of evidence at the hearing, Scott Morrow on behalf of C&S Enterprise, LLC, had no idea that by installing tile, putting in catch basins, and doing other maintenance and cleanup work on this farm, a farm he said had become rundown when C&S Enterprise bought it from an estate in 2008, that he would be charged with violating the Clean Water Act. He worked with United States Department of Agriculture Natural Resources Conservation Service (NRCS) on the work he did and received their verbal approval. Unfortunately, he did not get formal written approval from NRCS or the U.S. Army Corps of Engineers. He now realizes that had he done that, there would not have been this enforcement action by EPA. But he did not believe he needed to do that based on his history of working with NRCS and the verbal approvals he had received for other work.

But just as importantly as receiving verbal approval, as an experienced farmer, he had no idea the drainage way in this case would be considered to be a water of the U.S. He had walked through it during his years of deer hunting on the farm and he farmed the area after he bought the farm. He firmly believed that by installing the tile and doing the other work, he was improving his farm and the environment, not harming it as alleged by EPA. He testified, as did Respondent's expert witness Mr. Gerald Hentges, that the tiling and catch basins improved the environment by directing the substantial surface water flow to the tile line and catching the remaining surface flow in the basins and returning any sediment or residue to the fields where it started.

This background is important to consider as the testimony and evidence is evaluated to determine if a violation of the Clean Water Act occurred in this case.

STATEMENT OF FACTS.

Scott Morrow is a member of C&S Enterprise, LLC along with his wife Carol. Tr. 440:25. C&S Enterprise, LLC was formed in 1994. Tr. 444:1.

Mr. Morrow grew up on a farm in the area and began farming with his Dad after high school. Tr. 441:13-24. In the mid-1960's his Dad rented the farm at issue in this case and Scott has hunted on this farm since about 1974. Tr. 445:21-446:20.

He also went into construction work and continues that business today as Morrow Construction Company. Tr. 442:1-25, 443:1-20. He farmed with his Dad from 1978 until 1986, then quit farming and concentrated on his construction business. Tr. 443:6-11. In 2006 he got the urge to farm again and he and his wife and another couple purchased a farm. Tr. 444:19-23.

C&S Enterprise, LLC purchased the farm that is at issue in this case and took possession on March 1, 2008. Tr. 445:13. The farm was run-down and with the approval of NRCS he cleared scrub brush, trees and took out fence rows. Tr. 449:18 – 451:3. He was the able to conduct normal farming within the area of the drainage way at issue in this case¹ prior to July 2015. Tr. 501:17-25; AX-30, p. 6. There was not a defined channel at the time he planted crops in it. Tr. 506:14-17; 507:9-17.

In November of 2009 he worked with NRCS and put in pattern tiling as shown on AX-10, page 7. Tr. 457:13 – 19, 460:9- 465:23. At that time, Mr. Morrow discussed tiling the drainage way at issue in this case with Ms. Regina Leer of NRCS and she approved with the caution that he should make sure he had enough tile capacity to handle the water. Tr. 465:7-25. Mr. Morrow did additional work on the farm prior to the 2015 work that is the subject of this case, including shaping of the drainage way by the crossing. Tr. 473:7- 475:8. In March of 2015 Mr. Morrow cut trees and in April of 2015 he installed tile. Tr. 477:15- 479:3.

Before installing the tile in 2015, Mr. Morrow contacted NRCS for a wetlands determination in the spring of 2011. Tr. 479:8 – 17. As a result of that request, he received RX-4, a wetlands determination from FSA dated Dec. 13, 2013 that stated “[t]ract does not contain a wetland.” Tr. 479:18 – 480:24.

Subsequently, after the 2015 project was completed, Mr. Morrow also received a wetlands determination from NRCS that found the tract did contain a wetland and certified that determination on Oct. 29, 2015. Tr. 481:6 – 13; Tr. 486:13 – 487:3. He received that determination in March 28, 2016. Tr. 488:6 – 11; AX-11, p. 3-5. Mr. Morrow appealed that determination but lost the appeal. Tr. 481:14 – 16; AX-11, p. 11-12.

After completing the work on the drainage way in April of 2015, Mr. Morrow decided at the end of May to sell off a parcel of his farm for a hog confinement building. Tr.489:16 – 489:24. He did not plan to sell the parcel for a hog confinement building at the time he did the work on the drainage way. Tr. 489:25 – 490:3. He was generally aware of a required separation

¹ The drainage way was referred to at the hearing by various witnesses as a tributary, unnamed tributary, waterway, grassed waterway, ditch, and gully.

distance of 500 feet from a water source, but did not “solely or particularly” clear the area for that purpose and would have closed the gully even if there wasn’t a hog building involved. Tr. 493:2-5; 10-18; 516:9-10. And he did not talk to Bert Noll of Iowa DNR about the distance requirement or request a determination from DNR about the distance. Tr. 493:19-25.

BACKGROUND OF APPLICABLE LAW

1. Section 301(a) of the CWA, 33 U.S.C. § 1311(a) prohibits the discharge of pollutants except in compliance with, inter alia, Section 404 of the CWA, 33 U.S.C. § 1344. Complaint, ¶5.

2. The CWA prohibits the discharge of “pollutants” from a “point source” into a “navigable water” of the United States, as these terms are defined by Section 502 of the CWA, 33U.S.C. §1362. Complaint, ¶6.

3. Section 404 of the CWA, 33 U.S.C. § 1344, specifically requires a person to obtain a permit from the Secretary of the Army act in through the Chief of Engineers, commonly referred to as United States Army Corps of Engineers for any discharge of “dredged or fill material” into the “navigable waters” of the United States. Complaint, ¶7.

4. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters,” in part, as “waters of the United States,” which are defined at 40 C.F.R. §232.2 and 33 C.F.R. Part 328, and which include *inter alia*: (i) all waters which are currently used, were used in the past, or may be susceptible to use an interstate or foreign commerce; (ii) tributaries to such waters; and (iii) wetlands adjacent to such waters or their tributaries. Complaint, ¶8.

5. 40 C.F.R. §232.2 and 33 C.F.R. § 328.3(b) define “wetlands” as “[t]hose areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated conditions.” Complaint, ¶9.

6. 40 C.F.R. §232.2 defines “Discharge of fill material” as “the addition of fill material into waters in the United States.” Complaint, ¶10.

7. 40 C.F.R. §232.2 defines “fill material” as any pollutant that “replaces portions of the ‘waters of United States’ with dryland or which changes the bottom elevation of a water body for any purpose.” Complaint, ¶11.

8. Section 309(g) of the CWA, 33 U.S.C. §1319(g), authorizes the assessment of civil penalties against any person who violates Section 301 of the CWA, 33 U.S.C. §1311. Complaint, ¶12.

9. 7 C.F.R. § 12.32 provides: “*Converted wetland identification criteria.*”

(a) Converted wetland shall be identified by determining whether the wetland was altered so as to meet the definition of converted wetland. In making this determination, the following factors are to be considered:

(1) Where hydric soils have been used for production of an agricultural commodity and the effect of the drainage or other altering activity is not clearly discernible, NRCS will compare the site with other sites containing the same hydric soils in a natural condition to determine if the hydric soils can or cannot be used to produce an agricultural commodity under natural conditions. If the soil on the comparison site could not produce an agricultural commodity under natural conditions, the subject wetland will be considered to be converted wetland.

(2) Where woody hydrophytic vegetation has been removed from hydric soils for the purpose of or permitting the production of an agricultural commodity, the area will be considered to be converted wetland.

(b) A wetland shall not be considered to be converted if:

(1) Production of an agricultural commodity on such land is possible as a result of a natural condition, such as drought, and it is determined that the actions of the person producing such agricultural commodity does not permanently alter or destroy natural wetland characteristics. Destruction of herbaceous hydrophytic vegetation (i.e., plants other than woody shrubs or trees) as a result of the production of an agricultural commodity shall not be considered as altering or destroying natural wetland characteristic if such vegetation could return following cessation of the natural condition which made production of the agricultural commodity possible; or

(2) Such land is correctly identified as farmed wetland or farmed-wetland pasture.”

10. 40 C.F.R. §232.3, Activities not requiring permits, provides, in relevant part:
“*[e]xcept as specified in paragraphs (a) and (b) of this section, any discharge of dredged or fill material that may result from any of the activities described in paragraph (c) of this section is not prohibited by or otherwise subject to regulation under this part.*

(b) Any discharge of dredged or fill material into waters of the United States incidental to any of the activities identified in paragraph (c) of this section must have a permit if it is part of an activity whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject, where the flow or circulation of waters of the United States may be impaired or the reach of such waters reduced. Where the proposed discharge will result in significant discernable alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration.

(c) The following activities are exempt from section 404 permit requirements, except as specified in paragraphs (a) and (b) of this section:

(1)

(i) Normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices, as defined in paragraph (d) of this section.

(ii)

(A) To fall under this exemption, the activities specified in paragraph (c)(1) of this section must be part of an established (i.e., ongoing) farming, silviculture, or ranching operation, and must be in accordance with definitions in paragraph (d) of this section. Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation.

(B) Activities which bring an area into farming, silviculture or ranching use are not part of an established operation. An operation ceases to be established when the area in which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operation. If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit whether or not it was part of an established farming, silviculture or ranching operation.

...

(3) Construction or maintenance of farm or stock ponds or irrigation ditches or the maintenance (but not construction) of drainage ditches. Discharge associated with siphons, pumps, headgates, wingwalls, wiers, diversion structures, and such other facilities as are appurtenant and functionally related to irrigation ditches are included in this exemption.

...

(d) For purpose of paragraph (c)(1) of this section, cultivating, harvesting, minor drainage, plowing, and seeding are defined as follows:

(1) Cultivating means physical methods of soil treatment employed within established farming, ranching and silviculture lands on farm, ranch, or forest crops to aid and improve their growth, quality, or yield.

(2) Harvesting means physical measures employed directly upon farm, forest, or ranch crops within established agricultural and silvicultural lands to bring about their removal from farm, forest, or ranch land, but does not include the construction of farm, forest, or ranch roads.

(3)

(i) Minor drainage means:

(A) The discharge of dredged or fill material incidental to connecting upland drainage facilities to waters of the United States, adequate to effect the removal of excess soil moisture from upland croplands. Construction and maintenance of upland (dryland) facilities, such as ditching and tiling, incidental to the planting, cultivating, protecting, or harvesting of crops, involve no discharge of dredged or fill material into waters of the United States, and as such never require a section 404 permit;

...

(ii) Minor drainage in waters of the United States is limited to drainage within areas that are part of an established farming or silviculture operation. It does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland (e.g., wetland species to upland species not typically adequate to life in saturated soil conditions), or conversion from one wetland use to another (for example, silviculture to farming).

In addition, minor drainage does not include the construction of any canal, ditch, dike or other waterway or structure which drains or otherwise significantly modifies a stream, lake,

swamp, bog or any other wetland or aquatic area constituting waters of the United States. Any discharge of dredged or fill material into the waters of the United States incidental to the construction of any such structure or waterway requires a permit.

(4) *Plowing means all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, discing, harrowing, and similar physical means used on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. Plowing does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dryland. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing. Rock crushing activities which result in the loss of natural drainage characteristics, the reduction of water storage and recharge capabilities, or the overburden of natural water filtration capacities do not constitute plowing. Plowing, as described above, will never involve a discharge of dredged or fill material.*

(5) *Seeding means the sowing of seed and placement of seedlings to produce farm, ranch, or forest crops and includes the placement of soil beds for seeds or seedlings on established farm and forest lands.*

...”

Referenced in Respondent’s Answer, Defenses to Proposed Civil Penalty.

11. *Rapanos v. United States*, 547 U.S. 715 (2006)

ARGUMENT

I. C&S RECEIVED PERMISSION FROM NRCS TO PERFORM THE WORK ON THE DRAINAGE WAY IN 2015 AND A “NO WETLANDS” DETERMINATION FROM FSA IN 2013.

Scott Morrow testified that in November of 2009 he worked with the USDA Natural Resources Conservation Service (NRCS) and put in pattern tiling as shown on AX-10, page 7. Tr. 457:13 – 19, 460:9- 465:23. At that time, Mr. Morrow discussed tiling the drainage way at issue in this case with Ms. Regina Leer, an employee of NRCS, and she approved of the planned activity with the only caution being that he make sure he had enough tile capacity to handle the water. Tr. 465:7-25. When asked if Ms. Leer was qualified to make wetland determinations, Mr. Morrow responded that to his knowledge, she was not. Tr. 512:7-10. On the other hand, when asked if Ms. Leer was authorized to provide permission to landowners for this kind of work, Mr. Morrow responded that she must be because she gave us permission on a lot of different situations. Tr. 512:11-14.

Before installing the tile in April of 2015, in the spring of 2011 Mr. Morrow contacted NRCS for a wetlands determination. Tr. 479:8 – 17. Based on previous experience, Mr. Morrow knew that FSA and NRCS “work hand-in-hand” and that he had to start the process with FSA and that they would relay it over to NRCS. Tr. 480:11-19. As a result of that request, in December of 2013 he received RX-4, a wetlands determination from the Farm Service Agency (FSA) dated Dec. 13, 2013 that stated “[t]ract does not contain a wetland.” Tr. 479:18 – 480:24.

While the Complainants dispute that this determination is a valid wetlands determination, it nonetheless is a determination from a USDA agency that Mr. Morrow, a farmer with experience with both agencies, had no reason to doubt and justifiably relied on. Following these approvals from NRCS and FSA, in March of 2015 Mr. Morrow cut trees and in April of 2015 he installed the tile. Tr. 477:15- 479:3.

Mr. Morrow reasonably followed and relied on the advice of NRCS representative Regina Leer. He also reasonably followed and relied on the wetlands determination from FSA. Mr. Morrow cannot now be punished by EPA for following and relying on this advice and determination.

II. THE DRAINAGE WAY IS NOT A WATER OF THE UNITED STATES.

A. THERE IS NO JURISDICTIONAL CONNECTION OF THE DRAINAGE WAY TO DEEP CREEK.

The Clean Water Act dictates what is a water of the United States. That statutory requirement has been interpreted by the United States Supreme Court in the case of *Rapanos v. United States*, 547 U.S. 715 (2006). The tests under that decision are the Scalia test (geographic features and continuous flow) and the Kennedy test (significant physical, biological, or chemical effect – significant nexus to a traditionally navigable water). The evidence presented by Respondents show that the drainage way does not meet the criteria for a water of the U.S. under either of these judicially established tests.

Respondent's expert Mr. Gerald Hentges testified that the requisite indicia of a water of the U.S, geographic features or significant nexus, were not present in the lower portion of the drainage way at many points in time relevant to this case as evidenced by the following exhibits:

1. AX-31, App. B, p. 3, dated c 1950.² Mr. Hentges testified that over time with the construction of the roadway and farming practices the flow increased in the upper and lower portion, but at the time of this photo most of the runoff is infiltrating before it reaches the lower portion and it is sheet flowing out over the field because he could not see a flow path or drainage way. Tr. 587:7- 588:1.
2. RX-5, p. 3, dated 1960. This photo taken 10 years later than AX-31, App. B, p. 3 begins to show some erosion and the drainage way beginning to take shape. Tr.

² There was considerable testimony regarding a letter dated Oct. 7, 2015 from Mr. Marlyn Shafer of the Army Corps of Engineers to Mr. Morrow in which he gives a background of the area based on his review of historical aerial photography. AX-18. In that letter he notes: "Dating back to the 1930's, the drainage way on the slopes was wooded and well defined. The drainage way flowed over the bottom grassland where there appeared to be no well defined channel." AX-18, p. 1. The Complainant argues in its Initial Post Hearing Brief that any manipulation of the drainage way cannot sever jurisdiction. First, that position ignores natural forces that severed jurisdiction. Second, any manipulation by Mr. Morrow was not done to sever jurisdiction but rather to maintain an existing drainage way and continue to farm it as it had been before him. See Section III of this Brief and the citations to the transcript in that section. Finally, if there was a conversion or manipulation into a drainage way before the enactment of the Clean Water Act, and it was subsequently maintained as a drainage way, as it was in this case, then it would "probably" not be a jurisdiction water. See testimony of Dr. Garcia regarding AX-18. Tr. 225:18- 258:1.

- 588:20-22. The lower portion near Deep Creek is still very linear, lacking depth and velocity. Tr. 589:2-4.
3. AX-26, dated Mar. 14, 2010. In this photo taken fifty years after RX-5, p. 3, there appeared to be some flow paths present in the lower portion, but nothing in this exhibit indicates a channel or defined bed and bank or ordinary high-water mark. Tr. 576:8 – 16.
 4. AX-26, p. 2, dated July 3, 2010. The drainage flow path with water is visible, but nothing to indicate the presence of a channel. Tr. 576:17 – 25. And, despite a dark area in the photo testified to by Mr. Stokely, no way to determine if a defined bed and bank ordinary high water mark are present because of the size of the blue area compared to Deep Creek. Tr. 577:1-25. He determined that from the photo by comparing to Deep Creek in the photo which appeared to show an elevational change that is likely a channel. Tr. 577:18-25.
 5. AX-26, p.3, dated Dec. 18, 2010. No appearance of water flowing. Tr. 578:2-6. A flow path is visible as a linear feature in the center of the photo, it is not visible otherwise. Tr. 578:6-8. This is an indication of recent water flow and deposit of sediment which occurs in different spots in the drainage way over time. Tr. 578:8-15. Even a small amount of water runoff will flow and it'll flow in the same general area, creating a flow path. Tr. 578:16-22.
 6. AX-26, p. 4, dated Jan. 4, 2011. Flow is not apparent, but the same linear feature is with the lack of that feature in other portions of the vegetated drainage way. Tr. 579:2-5.
 7. AX-26, p.5, dated July 19, 2011. No apparent flow in the drainage way, with non-continuous flow path portions, and no clear indication of a channel. Tr. 579:6-12; AX-10 (closer view of same area).
 8. AX-26, p.6, dated June 26, 2013. A discontinuous flow path is apparent by the dark line indicating perhaps standing water was left behind after an event. Tr. 580:7-13.
 9. AX26, p. 7, dated July 12, 2013. In this summer time photo showing vegetation and growing crops, there's a discontinuous flow path with no flowing water. Tr. 581: 8-11.
 10. AX-26, p. 8, dated September 16, 2014. This photo shows what may be more than one flow path parallel to each other, an indication of what may be erosion deposition Tr. 581:12-20.
 11. AX-26, p. 9, dated March 9, 2015. Taken right after C&S Enterprise took possession of the property, it appears there is runoff in this photo, but hard to tell from the photo if it is continuous, which may be because this is standing water right after a runoff event. Tr. 582:4-15. Mr. Hentges noted that there is a flow path present in the upper and lower portions – “a bit discontinuous in the lower portion” and no clear indication of a channel. Tr. 582:15-20.
 12. AX-10, pp. 16, 17, 18, and 19, all dated March 20, 2015. Mr. Hentges testified that these photos of the same area on the same day were emphasized by EPA because they all show a flow path. This, he testified, is a runoff event is in process or recently occurred. He also testified that because they were taken from different angles they show a variable scale which must be taken into account when viewing. It agreed that it appears there is water in the photos, but in all of the photos there's no real indication of the presence of a channel in the lower portion of the drainage

way and no indication of a defined bed and bank or ordinary high-water mark. Tr. 589:22 – 591:24. Mr. Hentges noted that based on his field experience it is not uncommon to have a channel form when a grass waterway/drainage way gets near a creek due to the change in elevation and increase flow of depth. Tr. 592:1-13; Tr. 582:21-583:6.

Before considering Mr. Hentges' conclusions about these and other photos in this case, it must be noted that in reviewing these exhibits prior to trial, Mr. Hentges reviewed digital copies which allowed him zoom in for a closer view and to look at various aspects of the drainage way. Tr. 579:24 – 580:6. He also agrees with Mr. Stokely that when looking for water in these photos you look for a dark tone. Tr. 580:14-24. However, he differs from Mr. Stokely in that he says dark tones are not always a reliable indicator of water because, in a given situation, a lot of other things can cause dark tones, such as wet soil or shadows. Tr. 580:14- 581:2.

When asked whether he could tell from these photos whether there is bed and bank in the lower portion of the drainage way Mr. Hentges responded:

“No, there's really not. And it's a standard issue with the review of all aerial photography. It just simply doesn't always indicate the location of wetlands or other waters in the U.S. I looked at a lot of it and you really need the field data, the photographs of the, of the direct condition, and the measurements -- the documentation of a bed and a bank and a high-water mark.” Tr. 583:11-22.

Mr. Hentges was then asked about his lack of specific training in reviewing aerial photography:

“Q Now, you were present yesterday during Mr. Stokely's testimony and you heard the experience Mr. Stokely has with reviewing aerial photography -- the training. Have you had any training specifically in that area?

A No, I have not.

Q Okay.

A But I've looked at hundreds of reports, where project managers provide the aerial photography. And it, it, it really -- oftentimes, you can feel a certain feature or condition is present and yet, the field data and ground photographs don't bare it out.” Tr.583:23-584:9.

Mr. Hentges' noted that the ultimate determination of whether an aquatic feature is jurisdictional under the Clean Water Act is up to the Court. Tr. 593:3-15. That said, he went on:

“But I think as far as everything I've looked at all put together – you know, topography, aerial photographs -- it's apparent to me that it's the fluvial mechanics of the situation that, that cause erosional feature in the higher elevations. And that the lower portion is simply vegetated drainage way. I have no doubt that a certain storm of a, of a high runoff volume could cut channels in the lower portion.

It's also apparent in the information that -- and the physical layout of the site that those channels are filled with sediment and taken away by nature. So, whatever's created

through certain runoff events or by channeling overtime has always been taken away, filled in, and the flow path changed.” Tr. 593:15-594:4.

Mr. Hentges went on to testify as to the real issue with EPA’s allegations in this case, and specifically Mr. Stokely’s testimony:

“So, but, but, but it points to a bigger problem, and that's that people often try to make these determinations based on aerial photographs and topographic maps, when, in fact, the only way to document a defined channel bank, defined channel bed, and ordinary high-water mark is through a site visit to observe it.” Tr. 594:5-11.

The obvious question to Mr. Hentges following that statement was:

“Q How could that have been done here when the -- when it had been disturbed? You weren't able to do that, right?

A No, that's correct. The standard procedure listed in the federal guidance is to go to a reference site. That would be a site with similar soils, similar topography, a similar type of, of drainage, and observe these characteristics firsthand at those sites -- site or sites. And then, make a -- you know, from, from that information you can make a reasonable determination, that that's what this site looked like before it was disturbed. So, reference sites are the standard listed in the Corps of Engineers guidance and FSA wetland method guidance that you would do if you're trying to evaluate a site that's been disturbed.

Q Was that done in this case?

A I don't see any evidence in the file that it was.

Q In fact, let's go to AX-31, page five, which is Mr. Stokely's report. You see a paragraph there, paragraph D?

A Yes.

Q And what's the heading on that paragraph?

A Similar tributaries.

Q And tell me what that paragraph discusses.

A Well, it, it just indicates that there are a multitude of similar size, first-order tributaries in the English River System, and that, you know, there's more than similar to the one that we're discussing. And figure 11 shows a map of those relative to the site.

Q As you've mentioned figure 11, I have placed that on the screen, AX-31, page 21. Is that what you're referring to?

A Yes. So, it appears to me that there were several similar-sized drainage ways in the area of this site that could have been evaluated and then used to make reasonable interpretation of, of what was disturbed at Mr. Morrow's site.

Q And as you were testifying previously – I was getting an exhibit here, so if I miss something, I apologize -- but you referred to a Corps -- an Army Corps of Engineers Guidance?

Q Yeah. The 1987 Army Corps of Engineers Wetland Delineation Manual also discusses waters of the U.S. But in general, I mean, there's water in the U.S. including wetlands. So, the reference site is -- and the procedures for using it are listed in that manual.” Tr. 594:12 – 596:11.

The basis of Mr. Hentges' testimony are two portions of Mr. Stokely's report. First, AX-31, p. 5:

"D. Similar Tributaries

The unnamed tributary on the C&S Enterprise L.L.C site is one of a multitude of similarly sized first order tributaries to the English River. To determine how many similar tributaries there are, I used the tools in the GIS software to query all the NHD tributaries in the English River watershed that are of a similar length as the tributary on the Site. The NHD mapped the tributary on the to be approximately 3178 feet in length. For the purposes of this exercise I identified those tributaries that are no less or no greater than 30% of 3178 linear feet resulting in tributaries between 2224 and 4432 linear feet to be similar to the unnamed tributary. Using the query tools in the GIS software and inputting the range above, the software identified 521 similarly situated tributaries (Figure 11). Of course, there are many more than 521 first order tributaries to the English River identified by the NHD, and these can be also seen on Figure 11."

Secondly, AX-31, p. 21:

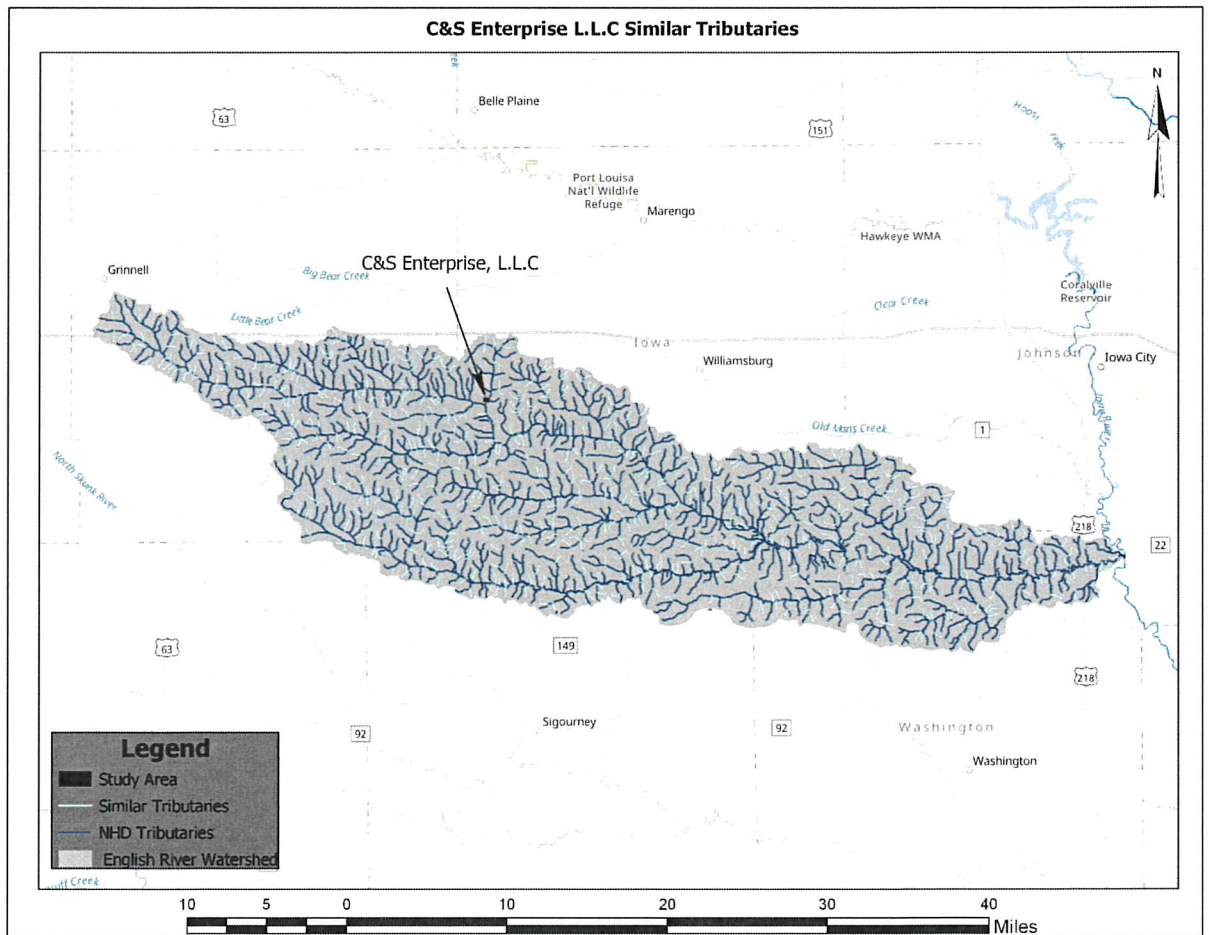


Figure 11

Similarly Situated Tributaries

As Mr. Hentges testified, these two portions of Mr. Stokely's report confirm that Mr. Stokely's aerial photo observations and conclusions should have been confirmed using an on-site analysis of similar areas. Mr. Stokely is obviously well qualified to interpret aerial imagery, but because Mr. Stokely did not do a site visit to the area, he did not conduct the proper investigation to substantiate his aerial photo analysis. In fact, on cross examination, EPA did not question whether the field verification procedures Mr. Hentges testified to were proper, rather EPA questioned Mr. Hentges as to whether he followed this procedure on his March 31, 2018 site visit:

“Q Can we go back and look at what this looked like before the fill?

A No. You'd have to look at a reference site, and evidently, there's like 500 of them in the area.

Q Did you look at any reference sites?

A No, but I did eyeball that -- some of the drainage ways, you know, trying to figure out how much area they drained, and is that -- is there a stream coming out of there. And the ones I drove past that are in the area, they all looked dry. And maybe it was the time of the year I was there, but I, I did not get out and look close at any of them.” Tr. 639:9-20.

Mr. Hentges concluded analysis of this on this procedure by emphasizing that the proper procedure was not followed in this case by the Army Corps of Engineers:

“Q What did the Army Corps of Engineers do in this case?

A It appears to me, from reviewing the record, that they just accepted the NRCS wetland determination. On, on farmed ground the NRCS is normally the regulatory authority that would do a wetland or water the U.S. determination. They often refer to the Corps when it's a stream (phonetic). But it's also listed in the FSA manual under -- I believe under 40 CFR, Section 12, that if an area is disturbed, then a reference site should be used. And it -- I believe it references the Corps of Engineer manual.”³ Tr. 596:22-597:9.

The reference material that Mr. Hentges cites shows that EPA and the Army Corps of Engineers did not properly conduct their investigation and analysis in this case. Even beyond that,

³ The regulation is not in 40 CFR but rather is 7 CFR 12.32 which provides (underline added for emphasis):

“§ 12.32 Converted wetland identification criteria.

(a)Converted wetland shall be identified by determining whether the wetland was altered so as to meet the definition of converted wetland. In making this determination, the following factors are to be considered:

(1) Where hydric soils have been used for production of an agricultural commodity and the effect of the drainage or other altering activity is not clearly discernible, NRCS will compare the site with other sites containing the same hydric soils in a natural condition to determine if the hydric soils can or cannot be used to produce an agricultural commodity under natural conditions. If the soil on the comparison site could not produce an agricultural commodity under natural conditions, the subject wetland will be considered to be converted wetland.

(2) Where woody hydrophytic vegetation has been removed from hydric soils for the purpose of or permitting the production of an agricultural commodity, the area will be considered to be converted wetland.

(b) A wetland shall not be considered to be converted if:

(1) Production of an agricultural commodity on such land is possible as a result of a natural condition, such as drought, and it is determined that the actions of the person producing such agricultural commodity does not permanently alter or destroy natural wetland characteristics. Destruction of herbaceous hydrophytic vegetation (i.e., plants other than woody shrubs or trees) as a result of the production of an agricultural commodity shall not be considered as altering or destroying natural wetland characteristic if such vegetation could return following cessation of the natural condition which made production of the agricultural commodity possible; or

(2) Such land is correctly identified as farmed wetland or farmed-wetland pasture.”

his testimony as an environmental professional and expert witness in this case illustrates that the professionals testifying for the Complainant should have, in this case where the area had been disturbed, examined reference sites to render their opinions to a reasonable degree of scientific certainty.

In their Initial Post Hearing Brief, Complainant criticize Mr. Hentges for his lack of training in aerial photo interpretation, as well what they see as his lack of qualification to make legal determinations as to jurisdictional waters. The record in this case will speak for itself as to Mr. Hentges' qualifications and his opinions, but it is clear his "boots on the ground" experience in the field is invaluable in analyzing the information presented by aerial images and in giving his opinions as to whether the drainage way has the necessary criteria to be a water of the U.S.

B. THE DRAINAGE WAY IS NOT A CONTINUOUS WETLAND TO DEEP CREEK.

Another component to determine if the drainage way is a water of the U.S. is to determine if there is a wetland that establishes a continuous wetland connection to Deep Creek. Mr. Hentges testified that despite NRCS's determination that a wetland was present, that finding was not supported by information available to NRCS, the Army Corps of Engineers and EPA.

First, Mr. Hentges noted that AX-27, page 1, is a download from the USDA soil survey website that shows the drainage way, the upper erosional feature as well as the lower portion. Tr. 597:10 – 19. It appears this photo was taken after the drainage way was disturbed. Tr. 597:21 – 22. AX-27, page 1, labels the soil types in the area of the drainage way, with yellow lines outlining the evaluated area and orange lines between the soil types, which are identified by numbers. Tr. 597:25 – 598:4.

Mr. Hentges explained the importance of soil type to a wetlands determination: "Q And why is the soil type important? A Well, for wetlands, the, the soil needs to be hydric. And hydric soil is one of the three criteria for wetlands. The other two are hydrology and vegetation." Tr. 598:5-9. He then analyzed the exhibit on hydric soils:

"A Well, when, when I look this up, the upper portion of the drainage way was labeled, like, a 5B or a 5C, and it was the soil type Ackworth-Colo (phonetic). And the lower portion was labeled 220, which is Nodaway soil.

Q I'll turn it over to page two of AX-27. Is that what you -- do you need to see that?

A Yes. The Ackmore-Colo was 5B, and the -- that's the upper portion of the drainage. The Nodaway so lome (phonetic)⁴ is the 220. That's the lower portion, and when I looked this up, there was another 23 column, which indicated hydric status, so if you look at the rows for 5B Ackmore-Colo, where it said hydric status, that was marked no.

In Iowa County, the Ackmore-Colo complex is not a hydric soil. But if you go down a row, it shows that the Colo and the Colo frequently flooded soils, which are inclusions inside this broad soil complex do have hydric criteria, and on the table I downloaded, where it said hydric status, both those were marked yes, and the very same situation existed with the Nodaway 220. Under hydric status it was marked no, yet the Quiver and the Colo occasionally flooded. Inclusions were marked yes. And then these same hydric criteria

⁴ The term "so lome" should be "silt loam" as it appears in AX-27, page 2, "220- Nodaway silt loam,".

were given for those components, those inclusions that are marked yes on the table I downloaded.

So, and in talking to the -- to my senior delineators that do this work every day, they said yeah, that's, you know, over in the part of the state the Nodaway's not hydric, but it can have these inclusions, and the inclusions often occur along drainage ways and in flood plains in low areas, but the general information downloaded from the NRCS site indicates that, in a blanket way, these soils are not hydric. They have to have the inclusions present, and my experience with these inclusions -- now, I haven't run across the Quiver that I recall, but the Colo we see all the time -- and in a drainage way like this, they would be present because, you know, they're forming in wet spots, low areas, areas that are frequently flooded, but they wouldn't be continuous. They would be broken up and they would be a tenth of an acre of a wetland here or a couple hundredths over there. And, and they would -- they do not normally line the whole drainage way.

So, in, in my opinion, in, in, in a broad, direct sense, those soils aren't hydric. And it would have taken more investigation, more specific investigation to determine where they were located or if they existed at all.” Tr. 598:12-600:12.

Mr. Hentges then gave his conclusion as to whether the area is not a wetland, based on his analysis of hydric soils, in response to a question on cross examination:

“ . . .Is your conclusion that this entire area along this tributary is not a wetland?

A It's my conclusion that it hasn't been determined whether it is a wetland or not.

Q Okay. But you said there were some hydric soils, pockets of soils within that, that you believe would be wetlands?

A I said that typically, based on my experience, that in these soil complexes there would be inclusions that would be hydric.” Tr. 620:6-15.

In addition to this analysis and conclusion from Mr. Hentges that it hasn't been determined whether the area is a wetland, as previously noted Mr. Morrow testified before installing the tile in 2015, he contacted NRCS for a wetlands determination in the spring of 2011. Tr. 479:8 – 17. As a result of that request, he received RX-4, a wetlands determination from FSA dated Dec. 13, 2013 that stated “[t]ract does not contain a wetland.” Tr. 479:18 – 480:24. However, after the 2015 project was completed, Mr. Morrow also received a wetlands determination from NRCS that found the tract did contain a wetland and certified that determination on Oct. 29, 2015. Tr. 481:6 – 13; Tr. 486:13 – 487:3. He received that determination in March 28, 2016, well after the 2015 project on the drainage way was completed. Tr. 488:6 – 11; AX-11, p. 3-5. Mr. Morrow appealed that determination but lost the appeal. Tr. 481:14 – 16; AX-11, p. 11-12.

Witnesses for EPA, including Mr. Don Carrington of NRCS, testified at hearing that FSA does not perform wetland determinations. And Mr. Hentges testified, in response to questioning from EPA as to whether FSA does wetlands determinations that they do not routinely do them, that NRCS generally does the actual wetlands determinations using the FSA manual. Tr. 627:18-19, Tr. 627:25-628:13. But he aptly noted that it looks like FSA did in this case. Tr. 627:23 – 25.

Again, Mr. Hentges' practical experience in analyzing wetlands determinations shows that NRCS did not properly do its job in this case.

III. C&S ENTERPRISE'S ACTIVITIES IN THIS CASE DO NOT REQUIRE A PERMIT PURSUANT TO 40 C.F.R. 232.3 – ACTIVITIES NOT REQUIRING A SECTION 404 PERMIT.

Under 40 C.F.R. §232.3(c)(1)(i), normal farming activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices are exempt from section 404 permit requirements. This exemption only applies if the activity does not have the purpose of converting an area of the waters of the U.S. into a use to which it was not previously subject, where the flow or circulation of waters if the U.S. may be impaired or the reach of such waters reduced. 40 C.F.R. §232.3(b). Where the proposed discharge will result in significant discernable alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration. *Id.*

Minor drainage is defined as: “[t]he discharge of dredged or fill material incidental to connecting upland drainage facilities to waters of the United States, adequate to effect the removal of excess soil moisture from upland croplands. Construction and maintenance of upland (dryland) facilities, such as ditching and tiling, incidental to the planting, cultivating, protecting, or harvesting of crops, involve no discharge of dredged or fill material into waters of the United States, and as such never require a section 404 permit;” 40 C.F.R. §232.3(d)(3)(i)(A).

The record in this case is replete with activities that C&S Enterprise conducted in compliance with this section:

1. He was the able to conduct normal farming within the area of the drainage way at issue in this case prior to July 2015. Tr. 501:17-25; AX-30, p. 6. There was not a defined channel at the time he planted crops in it. Tr. 506:14-17; 507:9-17.
2. In November of 2009 he worked with NRCS and put in pattern tiling as shown on AX-10, page 7. Tr. 457:13 – 19, 460:9- 465:23. At that time, Mr. Morrow discussed tiling the drainage way at issue in this case with Ms. Regina Leer of NRCS and she approved with the caution that he should make sure he had enough tile capacity to handle the water. Tr. 465:7-25.
3. Mr. Morrow did additional work on the farm prior to the 2015 work that is the subject of this case, including shaping of the drainage way by the crossing. Tr. 473:7- 475:8.
4. In March of 2015 Mr. Morrow cut trees and in April of 2015 he installed tile. Tr. 477:15- 479:3. Dr. Garcia testified that the installation of the tile did not qualify as minor drainage because it wouldn't be upland but rather a tributary:

“JUDGE BIRO: Under the Clean Water Act, I understand that minor drainage of certain farmlands, to use them for farming, does not come within the Clean Water Act?

DR. GARCIA: Minor drainage, that's correct.

JUDGE BIRO: Okay. Would tiling of the property, in this case, fall within miner drainage?

DR. GARCIA: No, it would not.

JUDGE BIRO: Can you explain to me why?

DR. GARCIA: I believe the 404-exemptions, the F-exemptions, I believe, you are referring to --

JUDGE BIRO: Mm-hmm.

DR. GARCIA: -- I believe it specifically prohibits the placement of tiles within tributaries.

JUDGE BIRO: I don't think so. The definition of minor drainage, "a discharge of dredged or fill material incidental to connecting upland drainage facilities to waters of the United States, adequate to affect the removal of excess soil moisture from upland property."

DR. GARCIA: Okay. Yeah. So, in this case, this wouldn't be upland, it would have been a tributary, so that's why. It wouldn't be exempted.

JUDGE BIRO: It wouldn't have been an upland.

DR. GARCIA: Correct.

JUDGE BIRO: Okay, because it's not upland; it's a tributary, but not upland.

DR. GARCIA: That's correct.

JUDGE BIRO: And that's why it wouldn't be minor drainage?

DR. GARCIA: Right." Tr. 258:7 – 259:13.

Under current law there is no definition of tributary or upland. Therefore, Dr. Garcia's analysis of a tributary vs. upland drainage stands on its own without regulatory support. Contrary to Dr. Garcia's analysis, there is evidence that the tiling in this case, both in 2009 and again in 2015 was done for upland drainage. See RX-9 and AX-10, p. 7, which show the extensive tiling done by C&S Enterprise in 2009. Tr.460:9-465:25. In April of 2015, tiling and other work was done in the drainage way, including modification of the tile outlets established in 2009. Tr:464:14-25; AX-30, p. 7-8. This work in 2015 was done downgradient from and in connection with the 2009 tiling, and upland from Deep Creek.

Furthermore, sufficient evidence was presented to show that the drainage way in this case does not have the physical indicators of a bed and banks and an ordinary high water mark. The work done in 2015 by C&S Enterprise qualifies as minor drainage in that it connected upland drainage to Deep Creek, a water of the U.S. to remove excess soil moisture from upland property.

IV. EPA UNJUSTIFIABLY BELIEVED THAT C&S PERFORMED WORK ON THE DRAINAGE WAY SOLELY TO MEET IOWA LAW TO CONSTRUCT A HOG CONFINEMENT OPERATION AND ERRONEOUSLY TRIED TO PROVE THAT C&S ENTERPRISE OWNED THE HOG CONFINEMENT OPERATION.

At hearing EPA devoted considerable attention to the hog building that was constructed on a parcel of land that C&S Enterprise sold to a hog producer, MCM Pork.⁵ The EPA first called DNR field officer Bert Noll to testify that C&S Enterprise owned the hog building. Tr. 105:16-19, 106:16-17. On cross examination, Mr. Noll admitted that he was "assuming the folks from EPA here were truthful with me on who owned the site and who didn't". Tr. 110:22-111:2. Mr. Morrow testified that he sold the site, the ground, for the hog building to MCM Pork on June 28,

⁵ This considerable attention is evidenced by EPA superimposing a text box labeled "Confinement Building Footprint" and "Confinement Barn Footprint" on aerial photos that were taken before the confinement building was constructed. See AX-10, pp. 1-18, 20-22; AX-24; Tr. 435:11-436:14.

2015. Tr. 490:7-491:17. And that he sold off the ground for a hog building to get the manure as an organic fertilizer for his farm. Tr. 494:1-8.

Mr. Morrow also testified that he did not plan to sell the parcel for a hog confinement building at the time he did the work on the drainage way. Tr. 489:25 – 490:3. He was generally aware of a required separation distance of 500 feet from a water source, but did not “solely or particularly” clear the area for that purpose and would have closed the gully even if there wasn’t a hog building involved. Tr. 493:2-5; 10-18; Tr. 516:9-10. And he did not talk to Bert Noll of Iowa DNR about the distance requirement or request a determination from DNR about the distance. Tr. 493:19-25.

V. EPA’S PROPOSED PENALTY IS UNWARRANTED.

EPA’s proposed penalty of \$40,500 is unwarranted based on the evidence and testimony in this case because EPA has failed to prove a violation of the Clean Water Act. If the Court finds a violation has occurred, that amount of penalty is excessive and only a minimal amount is justified due to Respondent’s history of no previous violations and Respondent’s good faith actions as evidenced at the hearing.

In addition, despite Complainants claims to the contrary, there has been no evidence of substantial environmental harm. In fact, Mr. Morrow testified, and it was corroborated by Mr. Hentges, to the environmental benefits he has observed:

“Q Mr. Morrow, why did you do the work you did in 2015?

A I did it -- I consider myself as a farmer and a steward of the ground. I try to leave it in a better situation than when I got it. I did it to improve it economically and environmentally because, like I say, economically it's more farm-friendly. Environmentally I put in -- we call them basins, and the NRCS uses a lot of those.

I think I've been -- I've heard it referred to as a check dam, a dam, but they're actually called a terrace or a basin through the NRCS. They're very common. They put them in an area where water flows to catch water, to slow it down with stand-pipes up to drain it, to help drain it, to help stop erosion.

I also did it because I have seen with my own eyes on big rains coming off -- off of my property, corn stalks, bean stubble, and grasses that flow directly into Deep Creek.⁶ Since doing this, that has not been the case --, and even silt. Even with no till, you still get silt. Since doing this, my basins have caught all of this debris and silt where I can pick that up, take it back up onto the slopes on the top of the hill where the bean stubble, the corn stalks can deteriorate on my property and pick the clean -- you clean out dry ponds to maintain them. Take that and put it where it needs to be put back in place. Before, it was gone. It went into Deep Creek and wherever else on downstream.” Tr. 499:3- 500:6; Tr. 655:10-656:1.

⁶ EPA cites this statement at page 29 of its Initial Post Hearing Brief, among other statements made by Mr. Morrow and Mr. Hentges, as an admission that the lower portion of the drainage way discharged through a physical connection to Deep Creek. It appears that EPA fails to recognize that farmland is always going to have runoff but that runoff can occur from other than a jurisdictional water.

VI. CONCLUSION.

Complainant has failed to meet its burden of proof that Respondent discharged pollutants to a water of the United States without a Clean Water Act §404 permit. Respondent respectfully requests that this action be dismissed at Complainant's cost and for such further relief as is deemed appropriate in the circumstances.

RESPECTFULLY SUBMITTED this 1st day of March, 2019.

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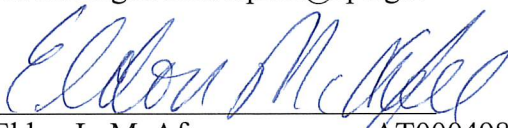
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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March, 2019, I filed via the OALJ E-filing system the original of this Respondent's Post Hearing Brief to the EPA Headquarters Hearing Clerk, and sent by email Mr. Chris Muehlberger, counsel for Complainant.

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