**UNITED STATES**
**ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE ADMINISTRATOR**

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| **In the matter of** | ) | |
| | ) | |
| **Bricks, Inc.,** | ) | **Docket No. CWA-5-2000-012** |
| | ) | |
| **Respondent** | ) | |

# INITIAL DECISION

By: Carl C. Charneski
Administrative Law Judge

Issued: October 9, 2002
Washington, D.C.

Appearances

For Complainant: Thomas C. Nash, Esq.
Heidi Bogda-Cleveland, Esq.
U.S. Environmental Protection Agency
Region 5
Chicago, Illinois

For Respondent: Shelia H. Deely, Esq.
Mark A. Latham, Esq.
Gardner, Carton & Douglas
Chicago, Illinois

## I. Statement of the Case

This case arises under the Clean Water Act ("CWA" or "Act"). 33 U.S.C. § 1251 *et seq.* The United States Environmental Protection Agency ("EPA") initiated this enforcement matter by filing a complaint against Bricks, Inc. ("Bricks"), pursuant to Section 309(g)(1)(A) of the Act. 33 U.S.C. § 1319(g)(1)(A). The government charges that respondent violated Section 301 of the Clean Water Act, 33 U.S.C. § 1311, by discharging a pollutant into the "waters of the United States," without having obtained a permit to do so from the United States Army Corps of Engineers ("Corps of Engineers" or "Corps"), pursuant to Section 404(a) of the Act. 33 U.S.C. § 1344(a). For this alleged violation, EPA seeks a civil penalty of $68,750 under the authority of Clean Water Act Section 309(g)(2)(B). 33 U.S.C. § 1319(g)(2)(B).

This events of this case occurred as Bricks began to develop a farmland area in preparation for the construction of commercial facilities. Insofar as these development activities are concerned, EPA alleges that Bricks discharged approximately 8,000 cubic yards of fill into 1.05 acres of wetlands. EPA further alleges that these wetlands are adjacent to an unnamed tributary to the Blackberry Creek, which is a tributary to the Fox River, an interstate waterway. Compl. at ¶¶ 13 &14. EPA asserts that a Section 404(a) permit was needed under these circumstances because these waters are "waters of the United States" as defined in 40 C.F.R. 230.3(s) and 232.2, and "navigable waters" as defined in Section 502(7) of the Clean Water Act. 33 U.S.C. § 1362(7). Compl. ¶ 15.

Bricks denies that it violated the Clean Water Act. First, citing the United States Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), Bricks argues that EPA lacks jurisdiction in this case because the wetlands at issue are not "waters of the United States." Second, respondent argues that its filling of the wetlands was lawful because it was authorized under either Nationwide Permit ("NWP") 14 or NWP 26. Third, Bricks argues that EPA cannot maintain the present action because, in its view, the Corps of Engineers waived any objection that it might have had to the filling activity when it failed to timely respond to respondent's notification that some wetland areas would be filled. Finally, Bricks argues that the civil penalty sought by EPA is excessive.

A hearing was held in this matter on January 24-25, 2001, in Chicago, Illinois. For the reasons that follow, it is held that Bricks violated Section 301(a) of the Clean Water Act in discharging fill into wetlands without a Section 404(a) permit. A civil penalty of $65,000 is assessed for this violation.

## II. Statutory and Regulatory Provisions

Congress enacted 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).

Section 301(a) of the Clean Water Act in part provides that "[e]xcept as in compliance with this section and [Section 404] of this title, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). Section 502(6) of the Act defines the term "pollutant" to include "dredged spoil, solid waste, incinerator residue, sewage, 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) goes on to define "discharge of pollutant" to include "... any addition of any pollutant to navigable waters from any point source...." 33 U.S.C. § 1362(12). A "point source" is "any discernible, confined and discrete conveyance ... from which pollutants are or may be discharged." Section 502(14), 33 U.S.C.

§ 1362(14).[1]

As noted, Section 404(a) of the Act provides for an exception to Section 301(a)'s prohibition to the discharge of pollutants. Section 404 is titled, "Permits for dredged or fill material," and it states that the Secretary of the Army, acting through the Chief of Engineers, "may issue permits ... for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). The Corps defines "fill material" to mean "any material used for the primary purpose of replacing an aquatic area with dry land or changing the bottom elevation of an *[sic]* waterbody." 33 C.F.R. 323.2(e).

While Section 404(a) allows for the permitted disposal of fill material into navigable waters, Section 502(7) defines "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. §1362(7). Regulations promulgated by the United States Army Corps of Engineers at 33 C.F.R. 328.3(a) define the phrase "waters of the United States" to include:

> (1) All waters which are currently used, or were used in the past, 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;
>
> * * *
>
> (5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section; [and]
>
> * * *
>
> (7) *Wetlands adjacent to waters (*other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

*Emphasis added.*[2]

The term "wetlands" as contained in the Corps' regulations at 33 C.F.R. 328.3(c) and

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[1] "Point sources" include earthmoving equipment such as bulldozers, backhoes, and dump trucks. *Concerned Area Residents for Environment v. Southview Farm*, 34 F.3d 114, 118 (2nd Cir. 1994).

[2] The phrase "waters of the United States" is similarly defined by the U.S. EPA regulations at 40 C.F.R. 232.2.

EPA's regulations at 40 C.F.R. 232.2 is defined by EPA at 40 C.F.R. 232.2. There, the term "wetlands" is described 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 soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

40 C.F.R. 323.3.

In addition, the term "adjacent" which appears in 33 C.F.R. 328.3(a)(7) in the phrase "[w]etlands adjacent to water" is defined by the Corps as "bordering, contiguous, or neighboring." 33 C.F.R. 328.3(c). Also, "[w]etlands 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.*

## III. Facts

### A. The Gateway Commercial Site

Bricks, Incorporated, is engaged in the business of land development and new construction. Tr. 426. It owns the Gateway Commercial Site located in North Aurora, Illinois. This site consists of an eastern and western portion, with the eastern portion further consisting of a northern and southern portion. CX 4. The western portion of the site contains approximately 55 acres and the eastern portion contains approximately 15 acres. Tr. 430-431. The events of this case involve the eastern portion of the Gateway Commercial Site only.

The eastern and western portions of the site are separated by Deerpath Road, which basically runs North and South. Orchard Road, a four-lane county highway which also runs North and South, borders the commercial site on the East. Interstate 88 ("I-88") runs East and West and intersects both Orchard Road and Deerpath Road. Interstate 88, also known as the "East-West Tollway," serves to separate the northern and southern portions of the Gateway Commercial Site that are to the East of Deerpath Road. CX 4; Tr. 197; *see* Exhibit 1 to Respondent's Pre-Construction Notification (CX 4).

### B. Development of the Aurora Commerce Center

In 1997, Bricks sought to develop the eastern portion of the Gateway Commercial Site that was bordered by Orchard Road on the East, Deerpath Road on the West and I-88 on the South. This project was known as the Aurora Commerce Center. The area of land to be developed for this project had been used for farming for more than 100 years. In fact, crops

were harvested there as recently as 1998. Tr. 498, 520-521.

**1. The EPT Wetlands Delineation**

It is undisputed that the eastern portion of respondent's commercial site contains wetlands. Tr. 430. Accordingly, in preparation for the Aurora Commerce Center project, Bricks hired an environmental consulting firm by the name of Environmental Planning Team Chicago ("EPT") to perform a wetlands delineation. The EPT delineation focused upon the North and South parcels of land bordered by Orchard Road on the East and Deerpath Road on the West and separated by I-88. As noted, the Aurora Commerce Center was to be situated in the northern parcel. EPT published a "Wetland Delineation Report" in April of 1997, setting forth its findings. *See* CX 4.

**a. The Delineation Procedure**

In performing its delineation, EPT followed the methodology established by the U.S. Army Corps of Engineers in the Corps' 1987 Wetlands Delineation Manual (the "1987 Manual").[3] *See* RX 1. EPT conducted its delineation of the Bricks site on April 19, 1997. During this procedure, it observed the vegetation, soil, and hydrology of the land, "the mandatory technical parameters for the unified federal method." CX 4 (Report at 2). Wetland plants were classified using the Swink-Wilhelm methodology, producing a ranking for the site. If wetland plant species were found to comprise 50 percent or greater of the plant cover, then wetland vegetation was determined to be present. In that event, EPT proceeded to investigate whether the remaining two wetland criteria, *i.e.*, hydric soils and hydrology, were also present.

Insofar as the hydric soils criterion was concerned, field indicators included gleyed and low chroma matrix and mottle colors, and iron and manganese concentrations. These field indicators were verified in all wetland areas by probing soils with a "dutch auger." The soil probes were taken "to determine the correlation between topographic position, vegetation, and soil characteristics." CX 4 (Report at 2).

The field indicators for hydrology included "visual observation or photographic evidence of soil saturation or innundation during the growing season, oxidized channels associated with living roots and rhizomes, water marks, drift lines, waterborne sediment deposits, water stained leaves, surface scoured areas, and wetland drainage patterns." CX 4 (Report at 2-3).

**b. The Delineation Results**

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[3] The purpose of the 1987 Manual "is to provide users with guidelines and methods to determine whether an area is a wetland for purposes of Section 404 of the Act." RX 1 at 1. Specifically, the scope of the Manual is limited "to wetlands that are a subset of 'waters of the United States' and thus subject to Section 404." *Id.* at 2.

In its report, EPT found "jurisdictional wetlands" on the parcel of land subject to the delineation.[4] CX 4 (Report at 3-5). The report stated:

> There is a moderate sized wetland located on each of the two parcels that make up the site located along Deer Path and Orchard Roads at the intersection of I-88 (East-West Tollway). The wetlands are part of a larger complex located to the south of I-88.
>
> Approximately 11.228 acres of jurisdictional wetlands are found on the Bricks parcel in North Aurora, Illinois. There are 5.026 acres of wetland located north of the I-88 Tollroad and 6.202 acres located south of I-88. The exact acreage of the site was determined by surveying the staked wetland area (see enclosed land survey). The wetlands are impacted by current farming practices and recent construction activities for highway improvements for Orchard Road. The wetlands are considered to be disturbed. If over 1/3 of an acre but less than three acres of the wetland are to be filled at this site, the fill action would require an approval under the nationwide permit system authorized by the Corps of Engineers. If more than three acres were to be filled, the site would require an individual permit from the Corps of Engineers. In either event, mitigation would be required for any fill action that exceeds one third (1/3) of an acre of fill.

CX 4 (Report at 5).

**2. ENCAP and the Pre-Construction Notification**

Subsequent to the EPT wetlands delineation, Bricks continued its preparation for the development of the portion of the Gateway Commercial Site that is West of Orchard Road, East of Deerpath Road, and North of I-88, the area earlier referred to as the Aurora Commerce Center project. In July or August of 1999, respondent provided the EPT wetlands delineation to its engineering consultant, Manhard Consulting, Inc. ("Manhard"). Tr. 434. It was either late 1998, or early 1999, when Bricks finalized its engineering drawings for the development of the Aurora Commerce Center. Accordingly, respondent then directed Manhard to obtain from the Corps of Engineers the necessary permits to work in any jurisdictional wetlands area. To accomplish this task, Manhard hired Environmental Consultants and Planners ("ENCAP"), a firm that dealt primarily with wetlands. Tr. 374, 436-437.

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[4] "Jurisdictional wetlands" are wetlands which satisfy the hydrophytic vegetation, hydric soils, and wetland hydrology of the Corps' 1987 Wetlands Delineation Manual. *See* RX 1.

One of the things that ENCAP was hired to do was to verify the EPT wetlands delineation in the area of the Aurora Commerce Center project. Tr. 377-378. In that regard, two ENCAP employees walked the perimeter of the EPT delineation and concurred with EPT's wetlands determination. Tr. 379. Thomas Kehoe was one of these ENCAP employees. He testified that the EPT delineation seemed to reasonably approximate the wetland and upland areas. Tr. 379. Also, in Kehoe's view, the EPT report appeared to follow the standard procedures for delineating wetlands as set forth in the Corps' 1987 Manual. Tr. 412.

During this verification process, the ENCAP employees did not dig any holes or take any soil borings, nor did they take data points or measurements of the delineated wetlands. It was simply a visual confirmation that the scope of the wetlands were as generally depicted in the EPT Wetland Delineation Report. Tr. 411-412.

Thereafter, on July 21, 1999, ENCAP submitted a Pre-Construction Notification ("PCN") to the U.S. Army Corps of Engineers. The Pre-Construction Notification read in part:

> ENCAP, Inc. has been retained by Bricks Incorporated to submit a preconstruction notification for the filling of 0.3 acre of wetland on the above referenced property.[5]
>
> Environmental Planning Team Chicago performed a wetland delineation on the subject property on April 19, 1997. A certified wetland determination was performed on the site by the Kane County Natural Resources Conservation Service on March 11, 1998. A subsequent site visit was performed by ENCAP, Inc. on April 19, 1999, to verify the Environmental Planning Team's delineation. A total of 3.27 acres of wetland were identified within the eastern portion of the site.
>
> Proposed site development within the eastern portion of the site consists of constructing a site access road, two (2) hotels, two (2) commercial facilities and associated detention basins. Approximately 0.3 acre of wetland will be impacted by the access road. This road is necessary to provide access to both Orchard Road and Deerpath Road.... The remainder of the wetland will be avoided. The site detention basins are designed to outlet beyond the limits of wetland....
>
> Upon completion of development, a 30-foot buffer ... will

[5] The property referenced by ENCAP is the "Aurora Commerce Center, Kane County, Illinois."

be maintained around the existing wetland....

Proposed site development within the western portion of the site consists of mass grading for future development. No wetlands were identified within this portion of the site.

Please confirm that this project is covered under the Nationwide Permit #14....[6]

CX 4.

The Corps received ENCAP's Pre-Construction Notification cover letter, set forth above, on July 22, 1999. The Corps received the balance of the Pre-Construction Notification, including the EPT Wetlands Delineation Report, on July 26, 1999.[7]

**3. Bricks' Construction Activities**

Prior to engaging in any actual land development activities at the Aurora Commerce Center site, Bricks directed Mahard, its environmental consultant, to stake out the perimeter of the wetlands as identified in the EPT delineation. Tr. 439-440. After this was done, Bricks installed silt fencing in order to prevent dirt and sediment from entering the wetlands during the construction phase. The silt fencing also was to serve as a physical boundary preventing construction equipment from accessing the wetlands. Tr. 444-445.

Construction at the Aurora Commerce Center site began around the first week of August, 1999. Tr. 449. A site access road across a wetland area was constructed in order to allow for the excavation of the 9- to 15-foot deep storm water detention basins and the construction of the site pads for the commercial structures. Tr. 451-452. The site access road was started on either August 15 or 18, 1999, and it was completed sometime between August 23 and 25, 1999. Tr. 453, 455. This site access road was intended to be temporary. Tr. 451.

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[6] To provide flexibility in administering the Section 404 permit program, Section 404(e) authorizes the Corps to promulgate general permits on a state, regional, and nationwide basis. Nationwide Permits are issued by the Chief of Engineers in Washington, D.C. "A nationwide permit ... is essentially a permit by rule; compliance with the rules setting forth the nationwide permit satisfies § 404.... Nationwide Permits reflect a judgment that filling in accordance with the nationwide criteria imposes so minimal an impact that the full review given individual permits is not warranted." Environmental Law Reporter, *Wetlands Deskbook*, 2nd Ed. (1997), at 31; *see* 33 CFR 330.1(b).

[7] There is a dispute between the parties as to when the PCN was filed with the Corps. As explained, *infra*, this dispute is resolved in favor of EPA.

Around the time that Bricks was finishing construction of the site access road which crossed the wetland area, the Corps of Engineers responded to Bricks' Pre-Construction Notification. In a letter dated August 23, 1999, the Corps acknowledged receipt of respondent's "Application to Fill 0.30 Acres of Wetland for Commercial Development Located along Orchard and Deerpath Road, North of I-88 in North Aurora, Kane County, Illinois." The Corps' letter went on to state:

> *... A preliminary evaluation of your project indicates that it may require authorization under Nationwide Permit 26, or require an Individual Permit....* You are advised not to undertake any activity in connection with the proposed work in any water of the United States until the required Department of the Army authorization has been obtained....

CX 5 *(emphasis added).*

**4. The Corps of Engineers' Initial Inspection**

On August 24, 1999, Kenneth Wozniak, Chief of the Enforcement and Compliance Section of the U.S. Army Corps of Engineers in Chicago, visited the Aurora Commerce Center site. Wozniak had been informed of Bricks' development activity by an employee of the Kane County Development Department. Upon learning this information, Wozniak checked the Corps' computer records and discovered that Bricks had a pending "application" for work at the site.[8] He believed that the pending application was for the construction of a road. This discovery prompted Wozniak to inspect the Bricks property. On the inspection, Wozniak took a copy of Bricks' Pre-Construction Notification, which included the EPT Wetland Delineation, a soil map, and an aerial photograph of the Aurora Commerce Center site. Tr. 30, 32, 35, 53.[9]

Once on site, Wozniak observed that fill had been placed in a wetland area. Specifically, Wozniak observed that a road had been placed by Bricks through a wetland. This was respondent's site access road. *See* CX 6 (Photograph 6-D). He determined that the site intersected by the access road was a wetland based upon the three criteria of the Corps' 1987 Wetlands Delineation Manual – *i.e.*, hydrophytic vegetation, hydric soils, and wetland hydrology. Tr. 34-35. Wozniak's wetlands determination was based upon his visual observations only; he did not perform a wetlands delineation of the Bricks property. Tr. 41-42;

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[8] What Wozniak referred to as an "application," was actually respondent's Pre-Construction Notification. Tr. 43.

[9] The aerial photograph had been taken by the National Resources Conservation Service. *See* CX 4 (Report at 3). Wozniak testified that he received training in wetland delineation and aerial photography interpretation. Tr. 31.

CX 6 (Photograph 6-F).[10] Also, Wozniak did not determine the boundaries of the wetland. Tr. 42.[11]

Upon returning to his office, Wozniak prepared a report of the August 24 inspection. This inspection report included photographs that he had taken while on the Aurora Commerce Center site. Wozniak's August 24, 1999, inspection report read as follows:

> I inspected the site after receiving a report from Ken Anderson, Kane County Development Department. The site was under construction and wetland was filled. A road was placed through the wetland[.] No individuals were available on the project site. The wetland was dominated by Phalaris arundinacea, Typha latifolia, Phragmites communis berlandieri and Salix exigua. The soils were Drummer (152). The filled area was in the approximate area as shown on the July 15, 1999, plan entitled "Orchard Auto Mall/Aurora Commerce Center," by Manhard Consulting. Existing wetland vegetation and soils were observed in portions of the graded road. See attached photographs.

CX 6.

**C. The Cease and Desist Order**

As a result of Wozniak's inspection, the Corps of Engineers issued to Bricks a Cease and Desist Order, dated August 26, 1999. The order stated:

> On August 24, 1999, a representative of the Regulatory Branch observed that fill and/or dredged material has been discharged into a wetland located along Northwest of Orchard Road and I-88[,] North Aurora, Kane County, Illinois.... The fill is associated with a site access road. We are in receipt of your application dated July 21, 1999.
>
> Pursuant to Section 404 of the Clean Water Act (33 U.S.C.

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[10] While Wozniak testified that Photograph 6-F depicted "wetland vegetation," he was unable to state whether the water appearing in the photograph constituted "wetland hydrology" within the meaning of the Corps' 1987 Manual. Tr. 51, 57.

[11] Wozniak testified that the size of a wetland is not determined on the first Corps of Engineers' site inspection. The purpose of the initial inspection is solely to determine whether there is a violation and, if so, to stop any additional work. Tr. 52.

> 1344), the U.S. Army Corps of Engineers regulates the discharge of dredged or fill material into waters of the United States. These waters include, but are not limited to, lakes, rivers, streams and wetlands, such as swamps, marshes and bogs. A review of our records indicates that the work described has not been authorized by the U.S. Army Corps of Engineers. Therefore, the work is a violation of Section 301 of the Clean Water Act (33 U.S.C. 1311). Violators may be subject to civil or criminal penalties and fines of up to $25,000 per day or imprisonment and may also be required to restore the site.
>
> *You are hereby ordered to cease and desist all work on the project until this violation is resolved.* You may resolve your violation by either: a) voluntarily removing the dredged and fill material from the wetland within 60 days ... or b) submitting an after-the-fact permit application to retain the fill material in the wetland within 30 days.
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> * * * *
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> This matter is being coordinated with the U.S. Environmental Protection Agency which has independent enforcement authority under the Clean Water Act....

CX 7 *(emphasis added).* This order was sent by the Corps to Ronald Dunbar by "Certified Mail - Return Receipt Requested."

**D. Post-Cease and Desist Order Inspections**

**1. The Kane/DuPage Soil Conservation District Inspection**

On August 30, 1999, after the Corps had issued its Cease and Desist Order to Bricks, Randolph Briggs, a Resource Conservationist with the Kane/DuPage Soil Conservation District, inspected the Aurora Commerce Center site. Tr. 175, 177.[12] During this August 30 inspection, Briggs observed what he characterized as "an awful lot of soil stripping and stockpiling." Tr. 180. He testified that this material was being brought into the site and deposited into a wetland area. Tr. 180-181.

[12] The Kane/DuPage Soil Conservation District is a state and local government unit which is funded by the Illinois Department of Agriculture. Tr. 175. Briggs' job is to oversee the preparation of Natural Resource Inventories throughout Kane and DuPage Counties, including soil erosion and sediment plan control. Tr. 176.

Briggs did not perform a wetland delineation, basing his opinion, instead, on his observation of the soil, vegetation, and the general hydrology of the area. Tr. 188-189, 204, 212. He explained that he did not have to do soil borings to make this determination, "because you could pick it up and run it through your fingers and tell what it was." Tr. 212. Because the area had been altered and the soil was on the surface, "[i]t was easy to do." *Id.* In addition, during this inspection, Briggs took a number of photographs of the Bricks project site. Tr. 180; CX 27.[13]

**2. The Corps of Engineers' September 10, 1999, Inspection**

The Corps of Engineers conducted two follow-up inspections after the issuance of the Cease and Desist Order relating to the Aurora Commerce Center project. The first inspection was conducted on September 10, 1999. This inspection was performed by Cathy Chernich, a Project Manager with the Corps. As a Project Manager, Chernich processes permit applications relating to discharges to the waters of the United States, as well as conducting compliance inspections. Tr. 59-60, 83.

During the September 10 inspection, Chernich observed that fill had been placed by respondent in wetland areas. Tr. 83. She testified that these wetland areas contained cattails, river bulrush, and Solidago species, all hydrophytic plants. Chernich also identified the presence of drummer soil, which is a hydric soil. Tr. 84-86.[14] As for the wetland areas impacted by the fill activities, Chernich identified the site access road, as well as areas in Detention Basins B and D. Tr. 84, 94; *see* CX 2.

In addition, Inspector Chernich testified that she observed the wetland plant species outside the silt wetland boundary fence. This indicated to her that the silt fencing was not properly placed at the outside boundary of the wetland, but rather encroached upon the wetland. Tr. 86-87.

As a result of Chernich's September 10 inspection, the Corps sent another letter to Bricks, dated September 13, 1999, regarding the subject of an After-The-Fact permit. In this letter, the Corps reiterated its position that Bricks needed authorization under Section 404(a) of the Clean Water Act to conduct its filling activities in the Aurora Commerce Center site wetlands. In addition, Chernich asked Bricks to submit a "revised survey of all wetland fill

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[13] As discussed, *infra*, EPA asserts that the photographs taken by Briggs show that respondent continued to perform work in the wetland area after being ordered by the Corps of Engineers to cease and desist.

[14] Inspector Chernich did not, however, perform an actual wetland delineation on September 10. Tr. 155.

areas." CX 13. Chernich was not requesting a revised Wetlands Delineation, but rather a revised survey showing the impact of the project, plotted onto the Delineation. Tr. 89.

**3. The Multi-Agency Inspection of October 19, 1999**

Another site inspection of the Aurora Commerce Center site took place on October 19, 1999. Some of the participants in this inspection were EPA, the Corps of Engineers, the Kane/DuPage Soil Conservation District, Bricks, and ENCAP. Chernich represented the Corps. Tr. 517-520.

Chernich testified that from the time of her September 10 inspection of the property, to the time of the October 19 inspection, additional fill had been placed in the wetland area. Specifically, she referred to the wetland area around the site access road, as well as to wetland areas along Detention Basin B and Detention Basin D. Tr. 121-122.

On the October 19 inspection, EPA was represented by Amy Nerbun, an enforcement officer with the Agency's Water Division, Watersheds and Non-Point Source Programs Branch. Tr. 224. Nerbun's duties with EPA include the making of wetlands jurisdictional determinations. Tr. 226.

During this October 19 inspection, Inspector Nerbun took photographs which were admitted into evidence as Complainant's Exhibit 17. Prior to going out to the Aurora Commerce Center site, Nerbun reviewed the photographs taken earlier in time by Corps employees Wozniak and Chernich. Inspector Nerbun concluded that additional work had been done from the time that those earlier photographs had been taken, to the time of the October 19, 1999, inspection. Tr. 231.

In addition, Nerbun observed that the wetlands had been disturbed in two separate areas. One area involved the .3 acres that was noted in respondent's Pre-Construction Notification. This .3 acres of wetlands was associated with the construction of the site access road. The other wetland area observed by Nerbun was 1.05 acres and this was based upon the revised delineation, or revised survey, performed by ENCAP at Inspector Chernich's request. Tr. 228, 230; *see* CX 2 (map of the Bricks site containing markings showing the two wetland areas). During this inspection, Nerbun observed that grading had been done in the wetland area associated with the site access road.

On October 19, Nerbun informed Bricks that it was in violation of the Cease and Desist Order because the company was continuing to add fill to the wetlands. Tr. 233. In addition, she informed respondent to tell its equipment operators, who were working in Detention Basin B at the time, to stop grading and moving any earth in the wetland area located nearby. Tr. 234.

### 4. The EPA Inspection of November 10, 1999

EPA Inspector Nerbun returned to the Aurora Commerce Center site for a second inspection on November 10, 1999. She was met by Thomas Kehoe of ENCAP and the two proceeded to walk the site. The purpose of Nerbun's visit was to verify the boundaries that were certified by ENCAP, "and then also to determine what could realistically be removed, what fill could be removed without changing the project." They used the EPT/ENCAP wetland delineation and the staked wetland boundaries, as surveyed by Manhard Consulting, to make this determination. Tr. 239-240.

With respect to Detention Basins B, C, and D, Inspector Nerbun identified the portions of the detention basin slopes that should be removed by Bricks. Specifically, Nerbun determined that the western half of the berm of Detention Basin D was "very large" and, therefore, that a 10-foot strip along the detention basin could be removed. Tr. 240. Inspector Nerbun also found fill across from detention Basin C which she did not believe was necessary for the project. Nerbun identified this fill for removal. Tr. 240-241. As for Detention Basin B, Nerbun stated that "[t]he fill was eroding down covering the silt fence and spilling into the wetland." Accordingly, the inspector wanted "[t]he slopes back 3 to 1, and [to] make sure that the silt fence was in correctly." Tr. 241.

#### i. The Section 309(a) Enforcement Order

As a result of its inspection of the Bricks site on November 10, 1999, EPA issued an enforcement order to respondent pursuant to Section 309(a) of the Clean Water Act. 33 U.S.C. § 1319(a). RX 2. The order was dated November 30, 1999, and it informed Bricks that respondent was in violation of Section 301 of the Act. 33 U.S.C. § 1311. The order also outlined the corrective actions that Bricks must take in order to come into compliance.

Specifically, the order directed Bricks to immediately cease discharging fill material into wetlands on the Aurora Commerce Center site, except in compliance with a permit issued pursuant to Section 404. 33 U.S.C. § 1344. ¶ 1. Bricks was also directed to remove the fill from the wetlands identified in Exhibit 2, which was attached to the order. ¶ 3.[15]

In addition to the site work referenced above, the Section 309(a) enforcement order placed certain filing requirements upon respondent. First, Bricks was required to submit a Restoration Plan for the wetlands affected by the unauthorized discharge of fill material. The restoration was intended to return the wetland area to its "original condition and contours."

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[15] The fill to be removed included: (1) the outer 10 feet along the western edge of Detention Basin D; (2) the fill within the wetland boundary on the northeast side of the access road beyond the side slopes; and (3) the fill along the southwest portion of the wetland, from the access road south to I-88, was to be graded so that the slopes are no steeper than 3:1.

¶ 4.[16]

Second, Bricks was required to submit to EPA a completed application to the Corps of Engineers requesting the issuance of either an After-The-Fact ("ATF") permit, or any other applicable permit, issued by the Corps allowing the retention of any fill not removed from the wetlands pursuant to the Restoration Plan. The order further provided that the ATF application was to contain a compensatory mitigation plan, acceptable to both the Corps and to EPA, that "offset project impacts at a minimum ratio of 5:1." ¶ 7.

Finally, the Section 309(a) enforcement order advised respondent that compliance with its provisions did not preclude EPA from initiating any other appropriate Section 309 enforcement action. ¶¶ 12-14.

**5. The EPA Inspection of March 22, 2000**

Inspector Nerbun conducted her third inspection of the Aurora Center Commerce site on March 22, 2000. This essentially was a follow-up to her inspection of November 10, 1999. The purpose of this inspection was to verify that the fill had been removed from the wetland area in compliance with EPA's Section 309(a) enforcement order. Tr. 241-242. Nerbun inspected Detention Basins B, C, and D and determined that Bricks had removed the fill and contoured the slopes as required by the order. Also, according to Inspector Nerbun, Bricks was working on the After-The-Fact permit application. Tr. 242.

Finally, during this March 22 inspection, Nerbun observed that Bricks had removed the site access road crossing, although not required to do so by EPA. The inspector was concerned that the silt fencing had collapsed in some places along this area and, therefore, was not controlling erosion. Tr. 242-243.

**6. The EPA Inspection of May 23, 2000**

Inspector Nerbun conducted her fourth and final inspection of the Aurora Commerce Center site on May 23, 2000. Tr. 243. Nerbun testified that she wanted to check the areas where fill was removed by Bricks to see if the wetland was recovering. Also, she wanted to see whether those areas did in fact meet the jurisdictional criteria of the Corps' 1987 Wetlands Delineation Manual. Tr. 249, 253.

Accordingly, on May 23, 2000, Inspector Nerbun performed her own wetland delineation of the affected areas. As part of that delineation, she took data points along Detention Basin C and Detention Basin D. The data forms filed out by Inspector Nerbun during the May 23 inspection are set forth in Complainant's Exhibit 22. Nerbun found that hydric soil and

[16] The enforcement order actually required respondent to restore the damaged wetlands "as nearly as possible to its original condition." ¶ 6.

hydrophytic vegetation were present, and she also determined that the wetland hydrology requirement of the Corps' 1987 Manual was satisfied. Tr. 253-255, 257-260.

Accordingly, in Inspector Nerbun's view, all three wetland requirements were met – *i.e.*, the hydric soil, hydrophytic vegetation, and wetland hydrology criteria. This confirmed to Nerbun that the ENCAP delineation/survey accurately depicted the wetlands on the project site. Tr. 260.

**D. The After-The-Fact Permit**

The Corps of Engineers issued an After-The-Fact permit to Bricks on June 7, 2000.[17] The Corps authorized Bricks' discharge of fill material under Nationwide Permit #26. The "Project Description" portion of the ATF stated:

> After-The-Fact Permit to Discharge Materials into 1.05 Acres of Wetland for Development of Aurora Commerce Center located along Orchard and Deerpath Roads in North Aurora, Kane County, Illinois. The project involved the unauthorized filling of 1.05 acres of wetland for installation of a road crossing to facilitate development of Aurora Commerce Center. To compensate for impacts to on-site wetlands, mitigation shall occur according to the following: 1.05 acres of wetland impacts shall be mitigated for at a 5:1 mitigation ratio, totalling 5.25 acres of compensatory mitigation. Mitigation shall occur on-site with the creation of approximately 3.40 acres of wet-meadow plant community and the vegetative enhancement of approximately 7.49 acres of emergent wetland. Mitigation credits received are as follows: 100% credit for wetland creation of 3.40 acres of wet-meadow and 25% credit for wetland enhancement to 7.49 acres of emergent wetland, totaling a final mitigation ratio of 5.27:1.

CX 25.

Chernich was the Project Manager on Bricks' After-The-Fact permit application. She required a high level of mitigation because the initial activity by Bricks was unauthorized, and also because the company continued working in the wetland areas after issuance of the Cease and Desist Order. Tr. 156-158. The ATF permit was signed by Ronald Dunbar, the company's vice-president of new construction. Dunbar was responsible for all daily operations at this

[17] Unfortunately, neither Bricks' ATF permit application, nor ENCAP's revised wetlands delineation which was a part of that permit application, were introduced into evidence in this case.

development. Tr. 428-429. Dunbar was advised by the Corps that this Nationwide Permit authorization contained certain "conditions," and that his signature "constitutes specific agreement to all terms and conditions of the permit." CX 24.

### E. The EPA Complaint

As noted earlier, in the complaint filed against Bricks in this case, EPA charges that respondent, "using bulldozers and/or other various earth moving machinery, discharged approximately 8,000 cubic yards of fill into 1.05 acres of the wetlands located on the site." Compl. ¶ 13. The complaint further charges that "[t]he wetlands ... are adjacent to an unnamed tributary to Blackberry Creek, which is a tributary to the Fox River, which is an interstate water," and falls under the definition of "waters of the United States." Compl. ¶¶ 14 & 15. The complaint asserts that the placement of the material in the wetlands constitutes a "discharge of pollutants" and that because respondent did not have a Section 404(a) permit authorizing such a discharge, it violated Section 301 of the Clean Water Act. 33 U.S.C. §§ 1311 & 1344(a).

## IV. Issues Presented

This case presents the following issues:

1. Whether the Aurora Commerce Center site wetlands are "jurisdictional wetlands" under the Corps' 1987 Manual.

2. If so, whether the wetlands fall within the definition of "waters of the United States," thus requiring a Section 404(a) permit for the discharge of fill material, or wether they are "isolated wetlands," in which case a permit is not required.

3. If a Section 404(a) permit is required here, whether respondent had such a permit or whether it discharged fill material in violation Section 301 of the Clean Water Act.

4. If respondent violated Section 301, what is the appropriate penalty?

## V. Discussion

EPA has the burden of proof to establish, by a "preponderance of the evidence," that the violation occurred "as set forth in the complaint and that the relief sought is appropriate." 40 C.F.R. 22.24(a); *City of Marshall, Minnesota*, Appeal No. 00-9, slip op. at 11 (EAB, Oct. 31, 2001), 10 E.A.D. ___. In order to establish a violation of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), EPA must demonstrate that Bricks discharged a "pollutant" into "navigable

waters," without a Section 404(a) permit. 33 U.S.C. § 1344(a). As discussed below, EPA has carried its burden of proof.

**1. The Aurora Commerce Center Site Wetlands Are "Jurisdictional Wetlands" Under The Corps' 1987 Manual.**

The Aurora Commerce Center site wetlands are "jurisdictional wetlands" because they satisfy the hydrophytic vegetation, hydric soils and wetland hydrology criteria of the Corps' 1987 Wetlands Delineation Manual. Moreover, the evidence in this case establishes that the wetlands area encompasses the .3 acres at the site access road, as well as the 1.05 acres along the storm water detention basins. *See* CX 2. The basis for this finding is set forth below.

**a. Bricks' Wetlands Delineations**

The first delineation was performed for Bricks by Environmental Planning Team Chicago, also known as "EPT." With respect to the eastern portion of the Bricks site (*i.e.* West of Deerpath Road and East of Orchard Road), EPT found 11.228 acres of wetlands. Of this amount, 5.026 acres of wetland were located North of I-88, *i.e.*, the area of the Aurora Commerce Center site, and 6.202 acres were located South of I-88. CX 4 (Report at 3-5).

With EPT having identified the presence of wetlands on the Aurora Commerce Center site, Bricks next identified the wetland areas expected to be affected by its land development activities. This was done in the Pre-Construction Notification which Bricks submitted to the Corps of Engineers. In its PCN, Bricks reported that approximately 0.3 acres of wetland would be impacted by a site access road that would connect Orchard and Deerpath Roads. Accordingly, respondent asked the Corps to confirm that the project was covered under the former Nationwide Permit No. 14. CX 4.

Bricks' initial estimate that only 0.3 acres of wetlands along the site access road would be affected by its land development of the site was incorrect. Respondent failed to account for the wetland areas adjacent to Detention Basins B, C, and D, which were disturbed by the addition of fill material. These detention basins are 9- to 15-foot deep and are designed to collect storm water runoff. Tr. 451-452.

After the Corps of Engineers had issued its Cease and Desist Order to Bricks, ENCAP, on behalf of respondent, conducted what amounted to a revised wetland delineation.[18] ENCAP

[18] ENCAP employee Kehoe stated that they performed a "boundary interpretation" to go with the ATF permit, and not a "revised delineation." Tr. 416. Whether this revision is referred to as a "revised wetland delineation," or a "revised wetland survey," is of no consequence to the disposition of this case. This revision was done by Bricks at the direction of EPA. In that regard, in a letter to respondent dated September 13, 1999, EPA stated the following:

did not utilize common delineation procedures due to the disruption of the environment. Tr. 417. This revision/boundary interpretation shows what the Corps of Engineers and the EPA inspectors observed first-hand, *i.e.,* that the wetland areas impacted at the Aurora Commerce Center site considerably exceeded the .3 acres reported by respondent in its PCN.

For example, using the site map identified as Complainant's Exhibit 2, EPA Inspector Nerbun showed that the wetland areas affected by respondent's construction activities included the .3 acres along the site access road and the 1.05 acres along the storm water detention basins. In that regard, Nerbun testified that this map was presented to her by ENCAP employee Kehoe during EPA's October 19, 1999, inspection. Tr. 229. According to the inspector, the "black marker with striped lines" depict the impacted wetland areas as identified in ENCAP's revised wetlands delineation. Tr. 228, 230.

In fact, Kehoe prepared this map based on an engineering plan provided to ENCAP by Manhard, Bricks' environmental and engineering consultant. In order to identify the wetlands, Kehoe used data from the National Resource Conservation Service ("NRCS"). He explained that one of the functions of the NRCS was wetland identification and that ENCAP's use of their data allowed them to resolve matters "in a timely fashion." Tr. 395-400.[19] Kehoe explained that

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> * * * * *
>
> b) it appears that additional farmed wetland have been directly impacted as a result of grading and filling activities. A revised survey of all wetland fill is required and shall include the following areas: fill areas for the road crossing and adjacent sideslopes[;] grading of the western boundary of the farmed wetland located south of the road crossing[;] fill materials located to the north of the road crossing[;] and filled and graded areas for construction of the southeast detention basin....
>
> c) *You shall overlay a copy of the revised survey onto the project's engineering plans and submit the revised wetland impact acreages to this office.*
>
> * * * * *

CX 13 *(emphasis added)*.

[19] Complainant's Exhibit 18 is also a map of the surveyed boundaries of the respondent's Wetland Delineation. Inspectors Chernich and Nerbun had asked that the wetland boundaries be field staked and surveyed. This was done by Manhard, under ENCAP's direction. Manhard and

he would not call anything that ENCAP submitted to the Corps a "Revised Delineation." Tr. 416. Rather, "[w]e made a Boundary Interpretation to go with the After-The-Fact Permit." *Id.*

As earlier stated, it does not at all matter what ENCAP called their work. The fact is that the revision performed by ENCAP, and memorialized on Complainant's Exhibit 2, goes to establish that the extent of the affected wetlands included the areas of the site access road and the detention basins.

**b. The Corps' And EPA's Wetlands Determinations**

As noted, the Corps of Engineers, EPA, and County inspectors visited the Bricks site. The testimony of these government inspectors is important because it adds further support to the finding that wetlands area of the Aurora Commerce Center project extended considerably beyond the area of the site access road.

Corps Inspectors Wozniak and Chernich determined that the Aurora Commerce Center site contained jurisdictional wetlands. Wozniak testified that on his sole inspection he observed hydrophytic vegetation, hydric soils, and wetland hydrology on the project site. Tr. 34-35, 41. Chernich conducted two inspections of the Aurora Commerce Center site. Like Wozniak, she did not perform a wetlands delineation on either visit. She did, however, observe hydrophytic plants such as cattails, bulrush, and Salidago species, as well as drummer soils, which are a hydric soil. Tr. 84, 155-156.

Also, Briggs, the Resource Conservationist with the Kane-DuPage Soil Conservation District, likewise visited the Bricks site and observed wetlands. Briggs observed hydric soil and he took photographs of hydrophytic vegetation which included bulrush, reed canary grass, and cattails. Tr. 187-189. *See* CXs 27F & G (both photographs). Briggs added that he did not have to do soil borings "because you could pick it up and run it through your fingers and tell what it was." Tr. 212. It was drummer soil. *Id.*[20]

The most comprehensive testimony as to the nature of the wetlands on the Aurora Commerce Center site came from EPA Inspector Nerbun. As noted, on one of her inspections,

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ENCAP placed "X's" on the map to represent the boundary of the staked wetland. The "X's" were connected by Inspector Nerbun. Tr. 237. Complainant's Exhibit 18 is significant because it supports the revision of the wetland boundaries depicted on Complainant's Exhibit 2.

[20] In addition, Briggs reviewed the National Resource Conservation's Farmed Wetland mapping to identify the areas on the project site which are reported as Farmed Wetland and Non-Inventoried Hydric. Tr. 181. To determine the presence of wetlands, the NRCS uses a 10-year photographic review, as well as an on-site inspection of the vegetation, utilizing the same criteria as the Corps of Engineers. Tr. 215.

she reviewed a map provided by ENCAP (CX 2) which showed the 1.05 acres of impacted wetlands along Detention Basins B, C, and D. Tr. 228, 230. In Nerbun's opinion, the Pre-Construction Notification of Bricks which listed only the .3 acres of affected wetlands in the area of the site access road was "outdated." Tr. 230.

Inspector Nerbun observed cattail remains on the South end of Detention Basin D. Tr. 232. She also identified wetland plants in the area of the site access road. Tr. 235-236. In addition, Nerbun took photographs showing the wetland characteristics of the area. For example, Photographs 10, 11, and 12 of Complainant's Exhibit 23 show cattail plants on the West side of Detention Basin D. Tr. 246, 249.

Inspector Nerbun made her fourth visit to the site on May 23, 2000. The purpose of this inspection was to check "the areas where fill was removed to see if the wetland was recovering, and see if those areas did, in fact, meet the jurisdictional criteria of the Corps[' 1987] Manual because the [delineation] originally accepted from ENCAP was accepted after the fact." Tr. 249.

On May 23, using the 1987 Manual, Nerbun found all three wetland criteria -- *i.e.*, hydrophytic vegetation, hydric soils, and wetland hydrology. The inspector took data points in the areas of Detention Basins C and D.[21] The data forms of Inspector Nerbun are contained in Complainant's Exhibit 22. Tr. 253-255, 260. Nerbun also took a number of photographs of Detention Basin D showing wetland vegetation, verifying her finding on this criterion. CXs 21A-E.[22] As for the wetland hydrology, Nerbun used a soil probe and discovered water at 9 inches, and found that the soil was saturated in the upper 12 inches and that it contained oxidized root channels. Tr. 258.[23] Insofar as the hydric soils are concerned, the inspector found glade soils, which are indicative of hydric soils. Tr. 259.

Inspector Nerbun stated that the significance of her findings was that it confirmed ENCAP's wetlands delineation as set forth in Complainant's Exhibit 2. Tr. 260. Inspector Nerbun is correct. The record establishes that as set forth in Complainant's Exhibit 2, the Aurora Commerce Center site contained .3 acres of wetlands along the site access road, and 1.05 acres of wetlands adjoining Detention Basins B, C, and D. Moreover, these wetlands satisfied the criteria of the Corps of Engineers' 1987 Manual.

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[21] The inspector actually took three data points, but only recorded two because two of the data points were identical. Tr. 345.

[22] Specifically, in Complainant's Exhibit 22, Nerbun listed five plant species, all of which are wetland species. Tr. 351.

[23] Inspector Nerbun testified: "In order to get the hydrology determination you need either one primary indicator or two or more secondary indicators, and I have both, in this case." Tr. 258.

**2. The Aurora Commerce Center Site Wetlands Are Not "Isolated Wetlands," But Fall Within The Definition Of "Waters Of The United States."**

The fact that the involved wetlands meet the criteria of the Corps' 1987 Manual does not, however, resolve this matter. Respondent argues that the provisions of Section 404(a) of the Clean Water Act, 33 U.S.C. § 1344(a), do not apply in this case because these wetlands are "isolated" and, as such, do not qualify as "waters of the United States." Respondent is wrong.[24]

**a. The "SWANCC" Decision**

Citing the United States Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*"SWANCC"*), Bricks argues that the wetlands on its site are "isolated wetlands," -- *i.e.*, they are not waters of the United States, or in any way connected to a navigable body of water. Accordingly, in Bricks' view, EPA has no jurisdiction in this case. Under such a scenario, respondent could lawfully discharge fill into the wetlands of the Aurora Commerce Center site without the need of a Section 404(a) permit from the Corps. Resp. Br. at 4-9.

Not surprisingly, EPA takes great exception to Bricks' reading of *SWANCC.* EPA asserts that the holding in *SWANCC* is a narrow one limited to the specific facts of that case -- *i.e.*, the Migratory Bird Rule. The Agency notes, moreover, that the case upon which respondent so heavily relies didn't even involve wetlands. Accordingly, EPA asserts that *SWANCC* does not represent a reversal of the Court's broad view that wetlands adjacent to waters of the United States fall within Federal jurisdiction. Compl. R.Br. at 4-5. As discussed below, it is EPA's reading of *SWANCC* that is accepted.

The facts of the *SWANCC* case involve a consortium of 23 suburban cities and villages which sought to develop a disposal site for baled nonhazardous solid waste. The site selected was an abandoned sand and gravel pit which contained permanent and seasonal ponds. The site did not contain any wetlands, as defined by the Corps' regulations at 33 C.F.R. 328.3(b)(1999). 531 U.S. at 163-164. While the consortium was able to obtain the necessary local and State approval, including the required water quality certification from the State Environmental Protection Agency, it was unable to procure a Section 404(a) permit from the Corps of Engineers. The Corps insisted that a Section 404(a) permit was necessary for the nonhazardous waste disposal, but refused to issue one on the basis of the "Migratory Bird Rule." *See* 51 *Fed. Reg.* 41217 (1986). The Corps asserted jurisdiction over the balefill site because it was, or would

[24] After completion of the post-hearing briefing, the parties have brought to this Tribunal's attention several Federal district courts decisions. Those decisions have been considered.

be used, as a habitat by migratory birds which cross state lines. 531 U.S. at 164-165.[25]

The United States Supreme Court, however, rejected the Corps' position and concluded that "the 'Migratory Bird Rule' is not fairly supported by the [Clean Water Act]." 531 U.S. at 167. The Court also declined to extend to extend the Corps' jurisdiction "to ponds that are *not* adjacent to open water." 531 U.S. at 168 *(Court's emphasis).*

Despite the fact that *SWANCC* involved the Migratory Bird Rule and isolated ponds, but not wetlands, the Court there offered language which is instructive on the wetlands jurisdictional issue presented in this case. The Court commented:

> This is not the first time we have been called upon to evaluate the meaning of § 404(a). In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), we held that the Corps had § 404(a) jurisdiction over wetlands that actually abutted on a navigable waterway. In so doing, we noted that the term "navigable" is of "limited import" and that Congress evidenced its intent to "regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Id.*, at 133. But our holding was based in large measure upon Congress' unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters. See *id.*, at 135-139. We found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands "inseparably bound up with the 'waters' of the United States." *Id., at 134.* It was the significant nexus between the wetlands and "navigable waters" that informed our reading of the CWA in *Riverside Bayview Homes*.

531 U.S. at 167.

Thus, contrary to the assertion by respondent, the *SWANCC* decision does not signal a retreat by the Court from the position that it articulated in *Riverside Bayview Homes, supra.* As the District Court in *United States v. Interstate General Company*, 152 F.Supp.2d 843 (D.Md. 2001) noted:

> The *SWANCC* case is a narrow holding in that only 33 CFR

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[25] Bricks asserts that EPA is seeking to establish jurisdiction in this case, at least in part, on the basis of the Migratory Bird Rule. Resp. Br. at 5. Bricks is wrong. The Migratory Bird Rule has nothing to do with this case. *See, e.g.*, Complaint at ¶¶ 13-16.

> § 328.3(a)(3), as applied to the ... Migratory Bird Rule, is invalid.... Because the Supreme Court only reviewed 33 CFR § 328.3(a)(3), it would be improper for this Court to extend the Court's *SWANCC* ruling any farther than they clearly intended.

152 F.Supp.2d at 847.

The District Court in *United States v. Buday,* 138 F.Supp.2d 1282 (D.Mont. 2001), offered a similar view regarding the impact of *SWANCC*. There, the Court noted that while the Supreme Court in *SWANCC* did not strike any part of 33 CFR 328.3(a)(3), "the decision raises serious questions about the continued validity of that subsection." 138 F.Supp.2d at 1287. The Court further commented:

> But this Court need not solve these puzzles. 33 C.F.R. § 328.3(a)(3) is based on a different inflection of the theory of Congress' powers over the waters of the United States. Subsection (a)(3) focuses on the *effects* that "intrastate waters ..." could have on interstate commerce, not on their use as *channels* for intestate commerce.... The other subsections of the same regulation focus on the use or potential use of water as a channel for interstate commerce, and the Supreme Court has found those subsections consistent with Congress' intent in the Clean Water Act and with the Commerce Clause. In short, those subsections relate directly to navigability, the absence of which concerned the Court in *Solid Waste Agency.*

138 F.Supp.2d at 1287-1288 *(emphasis in original).*[26]

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[26] Other courts, however, have held to the contrary. For example, in support of its argument that there is no Clean Water Act jurisdiction, respondent cites *United States v. Newdunn Associates,* 195 F.Supp.2d 751 (E.D.Va. 2002) and *United States v. Rapanos,* 190 F.Supp.2d 1011 (E.D.Mich. 2002). In each of these cases, the court found that the government failed to establish that the involved wetlands were "adjacent" to "navigable waters." For example, in *Newdunn,* the Court substantially relied upon *SWANCC* to determine that "multiple drainage ditches, a culvert under a highway, and miles of non-navigable waters" are insufficient to establish a jurisdictional connection to navigable waters. 195 F.Supp.2d at 767. The *Rapanos* Court likewise cited *SWANCC* in holding that the government failed to make a connection between the wetlands at issue and navigable waters, "roughly twenty linear miles away." 190 F.Supp.2d at 1015-1017.

Notwithstanding these decisions, given this Tribunal's reading of *SWANCC,* as discussed above, and given the particular facts of this case, neither *Newdunn,* nor *Rapanos,* warrant a

**b. The Aurora Commerce Center Site Wetlands And Their Connection To The Fox River.**

Whether there is a hydrological connection between the jurisdictional wetlands on the Bricks site and the Fox River, a navigable waterway, is a close question. Nonetheless, considering the entire record, it is held that EPA has made the requisite hydrological connection so that under the holding of *Riverside Bayview Homes*, 474 U.S. 121 (1985), these wetlands are "waters of the United States." Accordingly, EPA has Clean Water Act jurisdiction over the involved wetland area.

The Fox River is located approximately 3 miles directly East of the Aurora Commerce Center site. However, the drainage from the Bricks project site goes into the Blackberry Creek, which in turn enters the Fox River approximately 15 miles to the South of the property. Tr. 498, 504; *see* RX 7-1.

As noted earlier, the Aurora Commerce Center site is bordered on the East by Orchard Road, on the West by Deerpath Road and on the South by I-88. There is an auto-mall and a large storm water detention basin to the East of Orchard Road. Water flows from this auto-mall area, under Orchard Road by way of box culverts, and onto the Aurora Commerce Center site. Tr. 190, 195-198, 404; *see* CX 30 & RX 6. The Bricks site is located in a fairly small watershed, approximately 4 to 5 square miles in size. This property is in the central channel which drains the tributaries to the northeast. This water flow continues South through the Aurora Commerce Center site and passes through culverts underneath I-88. Tr. 200-201, 404.

Before the water flow reaches the I-88 culverts, as the water moves South on the eastern portion of the Bricks property, it travels through what respondent refers to as a "ditch," and what complainant refers to as a "channel." In that regard, EPA witness Briggs testified that, over the years, farmers had straightened out a ditch on the property. Tr. 198. While Briggs agreed that the ditch was "man-made," he explained that "over periods of time the flow has started to naturalize in it so it has not been a maintained ditch, if to say that a ditch is regularly scraped out and cleaned." Tr. 199. Briggs also testified that this watercourse did not maintain its "ditch character." Instead, "[t]his one has channelization developing it." *Id.* ENCAP employee Kehoe also testified, "every time I have been out there, there was water within a ditch that pretty much runs through the center of that designated area." Tr. 404.

Once the water flows underneath Interstate 88, it leaves the Aurora Commerce Center site. (There has been no showing that I-88 impedes the flow of this water.) Also, as noted earlier, the EPT wetlands delineation determined that the Bricks parcel to the South of I-88 contained 6.202 acres of jurisdictional wetlands. CX 4 (Report at 5). This is the area to which water flowing from the auto-mall, through the wetlands on the project site North of I-88, travels

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different result.

on its way to the Fox River. *See* CX 4 (EPT Report at 3).

After passing underneath I-88, the water flows for approximately 1-1/2 miles until it reaches the East Run of Blackberry Creek. Respondent's witness Thomas Slowinski testified that "the majority of that area ... is part of the Orchard Valley Golf Course where wetlands were converted to lakes and wetlands." Tr. 506. The East Run of Blackberry Creek is a non-navigable tributary which flows into the Blackberry Creek at a point approximately 3 miles South of the Bricks property. Tr. 204-205, 499, 505-506; *see* RX 7-1. Blackberry Creek also is non-navigable. Tr. 504.[27]

Bricks witness Slowinski testified that "there is no stream channel south of I-88." Tr. 506-507. EPA witness Randolph Briggs, however, offered a different description of the area South of Interstate 88. Briggs testified that for the year prior to the hearing in this matter, he has been reviewing and monitoring a project just South of the interstate. This project deals with wetland restoration and wetland construction. Tr. 205-206. Disagreeing with the view offered by Slowinski, Briggs stated that a channel in this area has been flowing continuously, "it has never dried up." Tr. 206. He explained that it is a defined, man-made channel that "S" curves through the area. Tr. 206-207.

Given the fact that Briggs had been monitoring a wetland restoration project in this area for the prior year, his testimony regarding the defined nature of the channel, or ditch, is credited over the testimony of Slowinski. Moreover, the existence of a man-made channel seems to be consistent with the restoration and construction activity South of I-88, which both witnesses referenced. For example, Slowinski did not testify that construction of the golf course obliterated the wetlands in that area. Instead, as noted, he testified that the existing wetlands were converted into "lakes and wetlands." Tr. 506. Again, this testimony must be understood in the context that the drainage in this area proceeds into the Blackberry Creek. Even Slowinski concedes this point. Tr. 498.

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[27] EPA elected not to cross-examine Slowinski. Tr. 511, 515. Yet, EPA attached to its Reply Brief several pages of a deposition taken of Mr. Slowinski in an unrelated state court proceeding, which did not even involve EPA, in an attempt to discredit the witness. *See* Compl. R.Br. at 7. Bricks moves to strike the deposition pages offered by EPA, as well as EPA's reference to that deposition testimony in the Agency's reply brief. In addition, Bricks seeks an award of attorneys' fees associated with the filing of this motion.

Bricks' motion to strike is *granted.* Complainant's reliance upon the deposition testimony of Slowinski, in a different proceeding, without any notice to respondent of its intent to do so, and *after* the hearing in this matter was concluded is greatly misplaced. Bricks' request for an award of attorneys' fees, however, is *denied*. This Tribunal is not aware of any authority to award fees to respondent under these circumstances; nor has respondent cited to any such authority.

EPA Inspector Amy Nerbun also testified regarding the surface water connection between the Aurora Commerce Center site wetlands and the Fox River. Testifying with respect to the Blackberry Creek Watershed Management Plan (Complainant's Exhibit 16), Nerbun stated that a drainage swale connects the Aurora Commerce Center site wetlands to a tributary of the Blackberry Creek. In her view, therefore, the wetlands on the Bricks project site were not isolated. Tr. 299-301, 311.[28]

Nerbun also correctly pointed out that the Blackberry Creek Watershed Plan affirmed the surface water connection between the wetlands on the Bricks site and the Fox River made in other documents involved in this case. Tr. 311. For example, Complainant's Exhibit 2, the map showing the EPT Wetlands Delineation and ENCAP's survey of that delineation, references "Blackberry Creek Tributary A" at the point where the Bricks project site is bordered by I-88. Also, in Complainant's Exhibit 2, immediately to the West of Detention Basin D is the notation "EAST BRANCH OF THE BLACKBERRY CREEK."[29]

In sum, no one piece of evidence in this case establishes a sufficient nexus between the wetlands on respondent's Aurora Commerce Center site and the Fox River to support the proposition that the filling of those wetlands invokes Clean Water Act jurisdiction. However, building upon the testimony of complainant's witnesses Briggs and Nerbun, and the testimony of respondent's witnesses Kehoe and Slowinski, as well as Complainant's Exhibit 2, it is held that EPA has established, by a preponderance of the evidence, that the wetlands on the Bricks site are "waters of the United States" as defined at 33 C.F.R. 328.3(a) and 40 C.F.R. 232.2, and "navigable waters" as defined at Section 502(7) of the Clean Water Act. 33 U.S.C. § 1362(7).

Bricks, however, argues that this surface water connection cannot be accepted to establish jurisdiction under the Clean Water Act because such a connection relies, in part, upon man-made ditches. Respondent contends that "[e]ven if the government could prove its case that the ditch somehow connected directly to the Fox River ... the ditch cannot be properly termed a tributary anyway because it is unnatural." R.Br. at 11. Respondent is wrong.

Prior to the United States Supreme Court's decision in *SWANCC*, the Eleventh Circuit

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[28] The Blackberry Creek Watershed Plan was offered into evidence by EPA for the limited purpose of showing the gravity of the violation and the respondent's negligence, and it was admitted into the record for that limited purpose. Tr. 294, 310. The contents of the watershed plan itself, Complainant's Exhibit 16, has little effect upon the outcome of this case. It is the witness' testimony that is significant here.

[29] Complainant's Exhibits 3 & 18 and Court Exhibit 1 are nearly identical survey maps containing the same Blackberry Creek references.

addressed the issue now raised by Bricks. In *U.S. v. Eidson,* 108 F.3d 1336 (11th Cir. 1997), *cert. denied,* 522 U.S. 899 (1997) and 522 U.S. 1004 (1997), the Court stated:

> There is no reason to suspect that Congress intended to regulate only the natural tributaries of navigable waters. Pollutants are equally harmful to this country's water quality whether they travel along man-made or natural routes. The fact that bodies of water are 'man-made makes no difference'.... Consequently, courts have acknowledged that ditches and canals, as well as streams and creeks, can be 'waters of the United States' under § 1362(7).

108 F.3d at 1342.[30]

While *Eidson, supra,* was decided pre-*SWANCC,* courts have reached the same holding post-*SWANCC.* For example, in *Headwaters, Inc., v. Talent Irrigation Dist.,* 243 F.3d 526 (9th Cir. 2001), the Court, citing *Eidson,* upheld a district court determination that "irrigation canals were 'waters of the United States' because they are tributaries to the natural streams with which they exchange water." 243 F.3d at 533. The Court further commented:

> Our conclusion is not affected by the Supreme Court's recent limitation on the meaning of "navigable waters" in [*SWANCC*] .... The irrigation canals in this case are not "isolated waters" such as those the Court [in *SWANCC*] concluded were outside the jurisdiction of the Clean Water Act. Because the canals receive water from natural streams and lakes, and divert waters to streams and creeks, they are connected as tributaries to other "waters of the United States."

243 F.3d at 533.[31]

The District Court in *United States v. Krilich,* 152 F.Supp.2d 983 (N.D.Ill. 2001) offers similar instructive guidance. There, the Court stated:

> Cases subsequent to *SWANCC* have not limited the definition of

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[30] *See, e.g., United States v. Velsicol Chem. Corp.,* 438 F. Supp. 945, 947 (W.D. Tenn. 1976)(sewers); *United States v. Holland,* 373 F. Supp. 665, 673 (M.D. Fla. 1974)(mosquito canals), both cited in *Eidson, supra.*

[31] Other post-*SWANCC* decisions have cited *Eidson* with approval. *See U.S. v. Buday,* 138 F.Supp.2d 1282, 1289 (D.Mont. 2001); *Aiello v. Town of Brookhaven,* 136 F.Supp.2d 81, 119 (E.D.N.Y. 2001).

> waters of the United States to those immediately adjacent to navigable (in the traditional sense) waters. *See Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001) (irrigation ditches that connect to streams that flow to navigable waters are waters of the United States); *Interstate General*, 152 F.Supp.2d at 844, 846 (wetlands that are adjacent to nonnavigable creeks that connect to a navigable river via at least six miles of intermittent streams and drainage ditches are waters of the United States); *Idaho Rural Council v. Bosma*, 143 F.Supp.2d 1169, 1172-74, 1177-79 & n.4(D.Idaho 2001)(spring that runs into pond that drains across a pasture into a canal that flows to a creek, that is either navigable or flows into a navigable river, is a water of the United States); *United States v. Buday*, 138 F.Supp.2d 1282 (D.Mont. 2001)(wetlands adjacent a creek that flowed into a creek that flowed into a river that was navigable a further 190 miles downstream are waters of the United States); *Aiello v. Town of Brookhaven*, 136 F.Supp.2d 81, 119 & n.30 (E.D.N.Y. 2001)(pond and creek that emptied into lake that flows into navigable bay are waters of the United States).

152 F.Supp.2d. at 992 n.13. *See United States v. Lamplight Equestrian Center*, No. 00-C-6486, 2002 WL 360652, at *6 (N.D. Ill. March 8, 2002)("This court finds the reasoning of the cases following *Headwaters* persuasive, and agrees with those courts that *SWANCC* did not effect so substantial a change in the Corps' jurisdiction.")[32]

Accordingly, given the case law discussed above, respondent's argument that EPA has failed to make the necessary hydrological connection between the involved wetlands and the Fox River must fail. As a result, the wetlands present on the Bricks site qualify as "waters of the United States," thus requiring a Section 404(a) permit for the discharge of fill into these areas.[33]

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[32] In *U.S. v. Buday, supra,* cited by the *Krilich* court, *supra,* it was stated that "the distances that waters travel ... do not provide solid ground on which to build distinctions of ... jurisdiction." 138 F.Supp.2d at 1291. The court in *Buday* further commented, "just as wetlands adjacent to navigable waters fall under the Act, tributaries that are distant from but connected to navigable waters are ecologically capable of undermining the quality of the navigable water." *Id.*

[33] Bricks' citation to *Sierra Club v. U.S. Army Corps of Engineers,* 935 F.Supp. 1556, 1583 (S.D. Ala. 1996), does not require a different result. That case involved wetlands surrounded by an interstate highway, commercial and residential development which the court found were "isolated." Not only are the facts in this case different, but the court in *Sierra Club* was influenced by the Corps of Engineers' identifying the wetlands involved there as being

**3. Bricks Discharged Fill Material Into The Wetlands in Violation of Clean Water Act Section 301(a).**

It already has been held that the wetlands on the Aurora Commerce Center site are jurisdictional wetlands, *i.e.,* they satisfy the criteria of the Corps' 1987 Wetlands Delineation Manual. It also has been held, as just discussed above, that these wetland areas are sufficiently connected to the Fox River so as to constitute "waters of the United States." It is now held that Bricks discharged fill into these Aurora Commerce Center site wetlands, and that it did so without a Section 404(a) permit in violation of Section 301(a) of the Clean Water Act.

The fact that Bricks discharged fill into the jurisdictional wetland areas of the Aurora Commerce Center site has been well documented. Ronald Dunbar, respondent's vice-president, testified that work began on the site access road sometime between August 15-18, 1999. Tr. 453, 455. On August 24, 1999, Kenneth Wozniak of the Corps of Engineers observed that fill had been placed in the wetlands at the site access road. Tr. 41-42; CX 6 (Photographs 6-D & 6-F).

Thereafter, on August 30, 1999, Randolph Briggs of the Kane-DuPage Soil Conservation District observed "an awful lot of soil stripping and stockpiling" on the site. He also observed that this material had been deposited into the wetland area. Tr. 180-181; CX 27 (photographs). Prior to going to the project site on August 30, Briggs reviewed the National Resource Conservation Service's Farmed Wetland mapping. Briggs explained:

> ... [W]hen I went down to the site and compared the approximate boundaries with what I saw on the mapping, and then compared what I saw happening on the site with what I saw on the mapping, I determined that it appeared that there was material being deposited in an area that was considered Farmed Wetland as well as in an area that was considered Non-Inventoried [Hydric].

Tr. 181.

The most compelling testimony that respondent discharged fill into the Aurora Commerce Center site jurisdictional wetlands comes from Corps of Engineers Inspector Cathy

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"isolated." 935 F.Supp. at 1583. Bricks' reliance upon *U.S. v. Sargent County Water Resource Dist.,* 876 F.Supp. 1081 (D.N.D. 1992) and *Rice v, Harken Exploration Co.,* 250 F.3d 264 (5th Cir. 2001) are also found not to be dispositive of this case. In that regard, in *Sargent County Water Dist.* the Court simply did not find, under the specific facts of that case, a surface water connection between wetlands and the Wild Rice River, while *Harken Exploration Co.,* dealt with ground water contamination involving the Oil Pollution Act, and not surface water under the Clean Water Act, which is the case here.

Chernich and EPA Inspector Amy Nerbun. In that regard, on her September 10, 1999, inspection, Chernich determined that Bricks had discharged fill into the project site wetlands in the areas of the site access road and Detention Basins B and D. Tr. 83-86, 94. Marking Complainant's Exhibit 2, Chernich identified the impacted wetland areas which she observed on September 10. Tr. 98. Chernich visited the site again on October 19, 1999, and confirmed the discharge of fill into these wetland areas. Tr. 121-122.

Inspector Nerbun visited the Bricks project site on four occasions between October 19, 1999, and May 23, 2000. *See* pp. 13-15, *supra.* Like Wozniak, Briggs, and Chernich, Nerbun observed that fill had been discharged into the jurisdictional wetlands along the site access road and the storm water detention basins. *See* Tr. 228, 230, 239-243, 249, 253; CX 17 (photographs).

Notwithstanding this evidence as to the discharge of fill into the project site wetlands, and aside from its jurisdictional challenge based upon *SWANCC*, Bricks asserts that EPA cannot maintain the present action in any event. First, Bricks argues that the Corps of Engineers waived its right to challenge the wetlands delineation contained in its Pre-Construction Notification by failing to act upon the PCN within the 30-day review period. In that regard, Bricks asserts that it submitted the PCN for coverage under then existing Nationwide Permit 14 for road crossings on July 21, 1999, and that the Corps did not respond until more than 30 days later.[34]

This argument must fail for a number of reasons. First, NWP 14 does not even apply to this case. While NWP 14 applied to road crossings, it did so only when no more than .3 acres of wetlands were impacted. As described through the testimony of EPA Inspector Nerbun, among others, and as depicted by ENCAP on Complainant's Exhibit 2, more than .3 acres of jurisdictional wetlands were affected by respondent's construction activities.[35]

Second, Bricks' NWP 14 argument must fail because the date-stamp on page 8 of Complainant's Exhibit 4 shows that the Pre-Construction Notification was not received by the Corps until July 26, 1999.[36] Thus, even if NWP 14 were to apply in this case, the Corps' review

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[34] The Nationwide Permits in effect at the time that the events in this case occurred were promulgated at 61 *Fed. Reg.* 65874 (1996).

[35] Because the wetlands were greater than one-third acre, respondent also is wrong in arguing that it could have proceeded under with the project under NWP 26 without any notification to the Corps. *See* Resp. Br. at 10-11; *see also,* 61 *Fed. Reg.* 65916 and 65920 for NWP 26 acreage and notification requirements.

[36] The Corps received the PCN cover letter on July 22, but it did not receive the wetland delineation until July 26. Chernich explained that it often happens that an applicant will submit a PCN piecemeal and that the documents are date-stamped as they are received. Tr. 168. While

period would not have expired until August 25, 1999. This is significant because, by this date, Corps of Engineers employee Chernich had already informed Bricks that it needed a Section 404 permit to proceed. In a letter to Bricks, dated April 23, 1999, Chernich wrote, "[a] preliminary evaluation of your project indicates that it may require authorization under Nationwide Permit 26, or require an Individual Permit." CX 5. Chernich further advised respondent "not to undertake any activity in connection with the proposed work in any water of the United States until the required Department of the Army authorization has been obtained." *Id.* This letter was sent to Bricks on August 23, 1999, "VIA FACSIMILE."

Third, even assuming that the PCN was actually filed with the Corps on July 22 (which was held not to have been the case), the fact of the matter is that by respondent's own admission construction work on the site access road began sometime between August 15 and August 18. Thus, respondent began working in the wetland area even before the 30-day review period (under respondent's time line) expired. If anything, by "jumping the gun," Bricks effectively waived any 30-day review limitation.

Another argument advanced by Bricks is based upon the D.C. Circuit's decision in *National Mining Ass'n v. United States Army Corps of Engineers,* 145 F.3d 1399 (D.C. Cir. 1998)(holding incidental fallback of soil into wetland during dredging operation is not a discharge). In that regard, respondent argues that it did not discharge fill into the wetland area of Detention Basins B, C, and D because it "excavated" the wetland. Resp. Br. at 15.

This argument is flatly rejected. Not surprisingly, respondent offers no record citation to to support such a contention. That would be a formidable task, to say the least, given the overwhelming evidence showing that at least 1.05 acres of still existing wetlands were directly impacted by the discharge of fill material. *See, e.g.*, Tr. 84, 265. This case is not about the "excavation" of wetlands; rather, it is about the "addition" of fill to wetlands. This evidence already has been discussed in detail and needs no repeating here.

**4. What Is The Appropriate Penalty For The Section 301(a) Violation?**

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 whenever the Administrator finds that a person has violated Section 301(a). 33 U.S.C. § 1311(a). Section 309(g)(2)(B) specifically provides for the assessment of a Class II civil penalty not to exceed $10,000 per day for each day during which the violation continues, with a maximum penalty not to exceed $125,000. 33 U.S.C. § 1319

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the Corps' Cease and Desist Order (CX 7) refers to respondent's "application dated, July 21, 1999," the July 26 date stamp on the Pre-Construction Notification (CX 4, p.8) is a more reliable indicator of when the PCN was filed.

(g)(2)(B).[37] In this case, EPA seeks the assessment of a civil penalty in the amount of $68,750, well within the statutory maximum.[38]

In addition to setting a maximum civil penalty for a Section 301(a) violation, in Section 309(g)(3), Congress also set forth the methodology for determining the penalty amount. That section in part provides:

> In determining the amount of any penalty assessed under this subsection, the Administrator ... shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

33 U.S.C. § 1319(g)(3).

Thus, the penalty to be assessed here must be based upon the evidence as measured against the statutory penalty criteria of Section 309(g)(3). As discussed below, that exercise results in the assessment of a $65,000 civil penalty.[39]

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[37] Pursuant to the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, EPA may seek a civil penalty of $11,000 per day, with a maximum penalty of $137,500. 40 CFR 19.4, Table 1 (1999).

[38] As a basis for assessing such a penalty, EPA refers *only* to the agency's proposed penalty calculation in Complainant's Exhibit 28, and to the testimony of the author of that document. *See* Compl. Br. at 42. In its post hearing brief, EPA offers no argument tying in the specific evidence in this case.

[39] In addition to challenging the monetary civil penalty proposed by EPA, Bricks appears to take issue with the mitigation ratio of 5:1. *See* Resp. Br. at 16-17. To the extent that Bricks is seeking relief from this 5:1 ratio, its request is denied. In that regard, Bricks voluntarily agreed to this mitigation. Ronald Dunbar, who signed the After-The-Fact permit on behalf of respondent, admitted to agreeing to these terms. Dunbar testified, "I just -- wanted to -- to resolve the problem," and "I wanted to move forward and, you know, keep it going." Tr. 464; CX 25. Moreover, before the ATF permit was agreed to, Dunbar received a letter from the Corps instructing him to read "the Nationwide Permit authorization conditions carefully before signing," and that his "signature constitutes specific agreement to all terms and conditions of the permit." CX 24. Finally, by order dated January 9, 2001, this Tribunal rejected Bricks' earlier request to nullify the 5:1 mitigation ratio on jurisdictional grounds. Respondent has offered no new argument as to why this ruling should be reconsidered.

**a. Nature, Circumstances, Extent and Gravity**

EPA has done little to show that the nature, extent, circumstances, and gravity of the Section 301(a) violation at issue warrants the assessment of the penalty that it proposes. But for the high degree of respondent's negligence, discussed below, EPA would not have come close in establishing that the penalty in this case should be a sizeable one. In that regard, in Complainant's Exhibit 28, EPA concedes that "[t]he wetland impacted is not of high floristic quality, nor does it provide habitat for any endangered or threatened species." CX 28 at 3. EPA also concedes that "[t]he footprint of the fill is relatively small (1.05 acre)." *Id*.

In this narrative explanation for its proposed penalty (CX 28), EPA offers only two reasons warranting, in its view, "a sizeable penalty." One reason is Bricks' alleged negligence; EPA maintains that respondent "knowingly and flagrantly" committed the violation. (This assertion is addressed, *infra*.) The other reason advanced by complainant in favor of a high penalty involves the characteristics of a wetland. On this point, Complainant's Exhibit 28 states:

> The wetland impacted plays an intrinsic role in flood storage for the Blackberry Creek watershed, which is a rapidly urbanizing watershed. It also provides water quality functions, wildlife habitat, and general aesthetic open space. The wetland vegetation serves to filter various water borne pollutants by biological, chemical, and physical means and provides important stormwater storage functions that play a role in attenuating peak flows and flood elevations.

CX 28 at 4.

EPA, however, offered no evidence to support the above conclusion. No witnesses testified on behalf of the complainant to press home each of these considerations. In fact, on cross-examination, Inspector Nerbun, the author of Exhibit 28 (Tr. 297), testified that the only wildlife which she observed on the project site were Red Wing Black Birds. Tr. 358. Also, Nerbun could not identify any specific water-borne pollutants in the wetland; nor did she know the storm water storage capacity of the wetland. Tr. 359. In addition, while Nerbun relied upon Complainant's Exhibit 16, the Blackberry Creek Watershed Plan, in determining the environmental harm caused by flooding problems (Tr. 291), she was never asked to explain in any detail just how Exhibit 16 supported that proposition. She only offered a conclusion.

Indeed, the only evidence under this penalty criteria category that appears in the record involves erosion of the banks adversely affecting the wetland areas. In that regard, Inspector Nerbun testified that fill was observed "eroding down covering the silt fence and spilling into the wetland." Tr. 241. Thus, EPA has shown some degree of environmental damage. Moreover, the fact that Nerbun made this observation, along with the fact that she saw wetland areas that

were beyond the silt fence boundaries (Tr. 86-87, 152), is sufficient to counter Dunbar's testimony that respondent went to great lengths to use silt fencing in order to protect these wetlands. Tr. 444-445.

**b. Degree of Culpability**

EPA accuses Bricks of "knowingly" violating the Clean Water Act. What EPA proved in this case was that the Section 301(a) violation was the result of a high degree of negligence. It is Bricks' high degree of negligence which supports, in large measure, the civil penalty assessed.

Problems with Bricks' approach to developing the Aurora Commerce Center site surfaced early in the project. For instance, while the Pre-Construction Notification discussed the .3 acres of wetlands along the site access road, it ignored the wetland areas along Detention Basins B, C, and D. *See* CX 2. Those jurisdictional wetlands were obvious to Inspectors Nerbun and Briggs, among others, and, in fact, were later identified in the ENCAP revised delineation, or revised survey. Thus, from the very beginning, Bricks under represented the total acreage of jurisdictional wetlands to be impacted as it developed the project site. Moreover, not only did Bricks discharge fill into greater than the .3 acres of wetlands that it identified in its PCN, but even by its own admission, it "may have jumped the gun, and started work prior to the expiration of the Corps' review period." Resp. Br. at 11. In other words, Bricks started construction without waiting to get approval from the Corps.

Insofar as respondent's negligence is concerned, things went from bad to worse with the worse coming after the Corps had issued its Cease and Desist Order. The record contains a substantial amount of evidence that Bricks continued to discharge fill into jurisdictional wetlands *after* it was told by the Corps to stop, and before it received the After-The-Fact permit allowing it to proceed. Despite Ronald Dunbar's testimony that, after meeting with the Corps, Bricks did not do any more work in the wetlands area (Tr. 458-459), the weight of the evidence is to the contrary.

The Corps of Engineers issued its Cease and Desist Order ("the Order") to Bricks on August 26, 1999. CX 7. Despite this fact, Corps Inspector Chernich testified that during her inspection of the Bricks site on September 10, 1999, she observed that additional fill had been placed into the wetlands *after* the Corps' Order had been issued. Tr. 100-101. This additional fill had been placed in the area of the site access road, as well as Detention Basins B and D. Tr. 112, 121-122. For instance, Chernich stated that on her second visit to the Aurora Commerce Center site she observed that the width of the access road had been increased. Tr. 172. Chernich also stated: "It was clear to me that it was ... extremely difficult to maneuver on the site on [October 19], because of the additional work that had taken place out at the site." Tr. 165-166. Chernich was referring to materials having been placed in the wetlands. Tr. 166. She summarized her October 19 observations as follows:

> It was clear to me that additional work had been done, had been performed in areas to the south of the proposed road crossing, to the north of the proposed road crossing.
>
> It appeared that more work had been done, more material was placed to the north of the road crossing, and then particularly down at Detention Basin D, all along that western border there, a boundary line, there had been more material placed. It was very difficult for me to maneuver around the site. Detention Basin D had become larger....

Tr. 173.

EPA Inspector Nerbun likewise testified that Bricks had performed work in the Aurora Commerce Center site wetlands despite being ordered by the Corps not to do so. Nerbun made that determination during her first visit to the project on October 19, 1999. On the basis of photographs taken by Corps employees Wozniak and Chernich, which Nerbun reviewed prior to going out to the site, she was able to conclude on October 19 that additional prohibited work was taking place. Tr. 231. Nerbun explained:

> ... [A]dditional fill had been placed into the wetland after the Cease and Desist was ordered.
>
> The date of [Wozniak's] inspection on August 24th, Bricks had just started to put the road through. You could still see wetland plant remains mix in with the fill, and that was pretty much at ground level. They had just started to push the dozers through.
>
> And on [Chernich's] inspection on 9/10 show the pictures [*sic*] that there was an increase in height and, to some extent, the footprint of the fill, especially near detention Basin D, and a little bit up here across from the Detention Basin C on the east side of the wetland.
>
> But the biggest, the noticeable difference was the increase in height, and then grading. And then on October the -- October 19th inspection, there was additional fill material that wasn't there that isn't shown in the September 10th photos.

Tr. 235-236.

According to Nerbun, Bricks employees were surprised to learn from her that placing fill on top of existing fill was a violation of the Cease and Desist Order. Tr. 233-234.[40]

In addition, Kane-DuPage County Inspector Briggs likewise testified that Bricks worked in the wetland areas after the issuance of the Cease and Desist Order. While Briggs first inspected the project on August 30, 1999, he thereafter "made numerous visits to the site." Tr. 191. One such visit took place on September 10, 1999, and another on October 19, 1999. *Id.* As for the September 10 visit, Briggs stated:

> There was more material deposited in the area of the roadway because the roadway was completed, at that point, and ... the elevation was higher.

Tr. 192. As for his October 19 visit, again referring to the site access road, Briggs continued:

> ... [T]he elevation was much higher, and they were actually working on the pad which is over next to Orchard Road, and they had actually brought it pretty much up to grade at that point as well as pretty much finished the construction of the Detention basin to the south of it.

*Id.*

In summary, Bricks' continuing to work the land after it was ordered to stop necessitates the assessment of a large penalty. To do less would be to substantially undermine the provisions of Section 301(a) of the Clean Water Act by sending a message to future violators that failure to comply with a Cease and Desist Order may result in only a mild sanction. Such violators may then mistakenly believe that it is in their best interests to continue working in the face of a lawful order to stop.

**c. The Remaining Penalty Criteria**

The remaining Section 309(g)(3) penalty criteria have little, or no, effect upon the penalty assessed. In that regard, the fact that Bricks had no prior wetlands violations was taken into account in the penalty assessment. In addition, there is no evidence in this case that respondent does not have the ability to pay the assessed penalty; nor is there any evidence that respondent achieved an economic benefit from the Section 301(a) violation. Finally, there was no penalty adjustment under the criterion "as justice may require."

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[40] For this reason, it cannot be found that Bricks knowingly violated the Clean Water Act.

## VI. Order

Bricks, Incorporated, is held to have violated Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), by discharging fill material into navigable waters of the United States without a permit issued under Section 404 of the Act. 33 U.S.C. § 1344. Pursuant to Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g), respondent is ordered to pay a civil penalty of $65,000 within 60 days of the date of this order.[41]

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

[41] Payment is to be made by certified or cashier's check, payable to "Treasurer of the United States of America," The First National Bank of Chicago, EPA Region 5 (Regional Hearing Clerk) P.O. Box 70753, Chicago, Illinois, 60673.