UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of	)	
	)	
C.L. "Butch" Otter & Charles Robnett,	)	Docket No. CWA-10-99-0202
	)	
Respondents	)	

INITIAL DECISION

By: Carl C. Charneski
Administrative Law Judge

Issued: April 9, 2001
Washington, D.C.

Appearances

For Complainant:

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For Respondent:

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I. Statement of the Case

This case arises under the Clean Water Act (the "Act"). 33 U.S.C. § 1251 *et seq*. The U. S. Environmental Protection Agency ("EPA") alleges that respondents C.L. "Butch" Otter and Charles Robnett discharged dredged and fill material into navigable waters of the United States without authorization from the U.S. Army Corps of Engineers ("Corps," or

"Corps of Engineers"), as required by Section 404 of the Clean Water Act. 33 U.S.C. § 1344. EPA asserts that this unpermitted discharge of pollutants by respondents constitutes a violation of Section 301(a) of the Act. 33 U.S.C. § 1311(a). Accordingly, EPA seeks a civil penalty of $80,000 for this violation. 33 U.S.C. § 1319(g).

Respondents initially denied having violated the Act. They also alternatively argued that the penalty sought by EPA is excessive. An evidentiary hearing, therefore, was held in Boise, Idaho, on June 6-8, 2000. Subsequent to this hearing, respondents abandoned their challenge to the charge that they violated the Clean Water Act. Respondents continued, however, to resist EPA's efforts to obtain a civil penalty for this violation.

For the reasons set forth below, respondents Otter and Robnett are found to have violated Section 301(a) of the Clean Water Act, as alleged by EPA. Furthermore, a civil penalty of $50,000 is assessed against respondents for this violation.

II. Statutory Overview

Section 301(a) of the Clean Water Act prohibits the discharge of pollutants unless specifically provided for by the Act. 33 U.S.C. § 1311(a). The Act defines "pollutant" as, among other things, "dredged spoil." 33 U.S.C. § 1362(6). The term "pollutant" is also included in the regulatory definition of "fill material." This regulatory definition reads, "[f]ill material means any 'pollutant' which replaces portions of the 'waters of the United States' with dry land or which changes the bottom elevation of a water body for any purpose." 40 C.F.R. 232.2. In addition, the Clean Water Act defines the phrase "discharge of a pollutant" to mean in part, "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12).

The term "navigable waters" is defined in the Clean Water Act as "the waters of the United States, including territorial seas." 33 U.S.C. § 1362(7). Providing a more detailed explanation, EPA regulations state that "navigable waters" include "waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use degradation or destruction of which could affect interstate or foreign commerce." 40 C.F.R. 230.3(s)(3). Wetlands adjacent to such waters are also considered "waters of the United States." 40 C.F.R. 230.3(s)(7).[1]

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[1] In *United States v. Riverside Bayview Homes*, 474 U.S. 121, 133 (1985), the Supreme Court held that the Corps had Section 404(a) jurisdiction over wetlands that actually abutted on a navigable waterway. In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, et al.*, 531 U.S. 159, 2001 U.S. Lexis 640 (2001), the Court recently declined to extend that jurisdiction of the Corps to ponds that are not adjacent to open water. The facts of the present case, however, involve wetlands adjacent to open water and

This case is about the discharge of dredged and fill material, both pollutants, into a slough and wetlands, both of which fall within the definition of "navigable waters of the United States." As provided in Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), this discharge is unlawful unless it is performed pursuant to a permit obtained under Section 404 of the Act. 33 U.S.C. § 1344.

III. Findings of Fact

The Clean Water Act violation involved here occurred in November, 1998. While the events surrounding that violation are the centerpiece of this case, certain events occurred on respondent C.L. "Butch" Otter's property in 1992, and in 1995, which are relevant to the 1998 violation. The Findings of Fact are as follows:

1. C.L. "Butch" Otter owns property located at 1009 S. Star Road, Star, Idaho. CX 10. (The property is actually located near Star, Idaho.)

2. Otter's property lies adjacent to the Boise River. His home is situated approximately 1/4 to 1/3 mile from the river. The Boise River flows year-round into the Snake River, which flows year-round into the Columbia River. The Columbia River flows into the Pacific Ocean. Jt. Ex. 1, ¶ 2.

The 1992 Incident

3. In 1992, Otter performed work in a slough which was located on his property in Star, Idaho. The slough ran alongside and under a road near Otter's residence. Tr. 45; CX 32.[2]

4. Gregory Martinez of the U.S. Army Corps of Engineers conducted an inspection of this slough in 1992.[3] During this 1992 inspection of Otter's property, Martinez determined that the construction activity in the slough was occurring in the "waters of the United States," and that side-casted material was being placed in forested wetlands on the site. Tr. 46-48.

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not the isolated ponds involved in the *Solid Waste Agency* case.

[2] In this case, a slough has essentially been described as a river channel. Tr. 145. As noted, the term "slough" is included in the EPA's definition of "waters of the United States." 40 C.F.R. 230.3(s)(3).

[3] Martinez has 22 years experience with the Corps of Engineers and he is the office leader of its Boise Field Office, Walla Walla District. In fact, Martinez has conducted close to 1,000 wetland verifications while with the Corps. Tr. 27. A wetland "verification" is where the Corps verifies the accuracy of a Wetland Delineation which was performed by the property owner. The purpose of a Wetland Delineation is to determine the wetland-upland line. Tr. 25.

5. As a result of the Martinez inspection, in October, 1992, Otter was issued a Cease and Desist Order by the Corps. Tr. 49. This Order in part read:

> You are hereby notified that you have been identified as being responsible for conducting the following work in waters of the United States prior to obtaining the required Department of the Army permit.
>
> > Cleaning out of approximately 1,000 linear feet of two side channels of the Boise River and side casting of the dredged material below the ordinary high water elevation of the Boise River and into adjacent forested wetlands in Sec. 18, T.4N, R.1W., near Star, Ada County, Idaho.
>
> Pursuant to the authority and provisions of Section 404 of the Clean Water Act (33 U.S.C. 1344), and Department of the Army regulations (33 CFR 320, *et seq*.) published in accordance with this Act, you are hereby ORDERED to immediately CEASE AND DESIST any and all such unauthorized work in the waters of the United States….

CX 1.

6. Otter responded to this Cease and Desist Order by informing the Corps that the work that was done in the slough was "an effort to clean-out and re-establish an existing relief channel of the Boise River, and rehabilitate an existing access" to his property. CX 2.

7. In January of 1993, as a follow-up to the Cease and Desist Order, the Corps issued a Restoration Order to Otter. The Restoration Order directed Otter to "[r]emove all dredged material side cast below the ordinary high water mark of the Boise River and/or forested wetlands," to seed the disturbed area, to slope the side channels, and to remove and replace two existing inadequate culverts. CX 3.

8. The Restoration Order was not a Permit issued pursuant to Section 404 of the Clean Water Act.

The 1995 Incident

9. Martinez conducted another inspection of Otter's property in Star, Idaho, on February 17, 1995. During this inspection he observed that additional work had been done in the slough that was the subject of the 1992 Cease and Desist Order. This slough was located directly behind Otter's house. Tr. 61; CX 5.

10. Specifically, the work observed by Martinez on February 17, 1995, was the placement of 300 to 500-pound flat, slab rock around the perimeter of the slough. Also, there was fill material placed across one end of the slough resulting in the creation of a small pond, and form work was laid for the construction of a slough crossing. Finally, a second small pond was created downstream by the placement of large, cobble rock. Tr. 61- 63; CX 5 & CX 28.

11. In addition to this work, during the 1995 inspection, Martinez observed that work had been done in a second, small slough further south of Otter's house. Specifically, a roadway crossing was installed in this slough, as well as the installation of a culvert to pass water flows. This work resulted in the placement of fill material into wetlands, five-feet in width and 100 feet in length. *Id*.

12. Based upon his observations of February 17, 1995, Martinez determined that once again Otter was discharging fill material into the waters of the United States. This discharge was into both open waters, which was the slough, and wetlands in which sand and cobble stone were placed. Tr. 66-67.[4]

13. Accordingly, on March 6, 1995, the Corps issued a Notice of Violation to Otter. Tr. 69-70. The Notice of Violation in part stated:

> This is in regard to the discharge of fill material below the ordinary high water mark of the Boise River and adjacent wetlands associated with the construction of a pond and a culverted road crossing…. Section 404 of the Clean Water Act … requires that a Department of the Army Permit be issued for the discharge of dredged or fill material into waters of the United States, including wetlands. This includes excavation activities which result in the discharge of dredged material and destroy or degrade waters of the United States. You are hereby notified that because the required permit was not obtained prior to the start of construction, the work described above represents a violation of this Act.
>
> To assist in my evaluation of this unauthorized work, you are requested to provide the following information by March 20, 1995:

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[4] Martinez determined that wetlands were present by taking into account the plant species on adjacent wetlands that were not filled, and the fact that the soil was hydric. Martinez's determination was made in accordance with the Corps' 1987 Wetlands Delineation Manual. Tr. 66-68.

* * * *

> (e) *The reason why the work was done without obtaining a Department of the Army permit in light of the fact that you were previously cited for a violation of Section 404 of the Clean Water Act on October 27, 1992, in the same location as the current work.*

CX 6 *(emphasis added)*.

14. On March 30, 1995, Tim Fitzpatrick, a consultant retained by Otter, filed a response with the Corps. This response stated in part that "Mr. Otter believed that when he received the permit for the 1992 work he had fulfilled the requirements necessary to perform the recent work." CX 7.

15. The Corps disagreed with Fitzpatrick's statement that a Permit had been issued to Otter in 1992. Tr. 76. In a letter to Otter, dated May 16, 1995, the Corps' District Engineer explained that it was a Restoration Order, and not a Section 404 Permit, that had been issued in 1992. The Corps' letter in part stated:

> We received and have reviewed the March 30, 1995, response to our notice prepared by Mr. Tim Fitzpatrick of Pacific Resource Management. In this letter, Mr. Fitzpatrick indicates that you believed this work was authorized by a permit for work you performed in 1992. On October 27, 1992, you were cited for a violation of Section 404 of the Clean Water Act for the unauthorized excavation of two side channels of the Boise River and sidecasting of the excavated material below the ordinary high water mark of the Boise River and in adjacent wetlands. This violation was resolved by ordering you to complete restoration work specified in our January 14, 1993 Restoration Order. You were subsequently notified in our March 22, 1994 letter that the work had been satisfactorily completed and the violation was resolved. No permit was ever issued for this work, as Mr. Fitzpatrick indicated in his March 30, 1995 letter. In addition, the work you have recently completed was not required in our January 14, 1993 Restoration Order. Therefore, I do not understand how you considered that this recent work had been authorized by a Department of the Army permit.
>
> However, in this case, I have decided not to take legal action for this violation of the Clean Water Act. Instead, I have determined it appropriate to require you to submit an application

> for processing of after-the-fact authorization of the completed work by June 16, 1995 (copy enclosed) ….

CX 8.

16. Otter submitted an After-The-Fact permit application to the Corps on June 1, 1995, for work done in the slough. On August 8, 1995, the Corps informed Otter that he was authorized to perform the work on his property, below the ordinary high water mark of the Boise River and in the adjacent wetlands. CX 9. This resolved the 1995 violation. Tr. 78.

17. Martinez acknowledged that the 1995 violation was "relatively minor." Tr. 70.

The 1998 Violation

18. The next contact between the U.S. Army Corps of Engineers and Mr. Otter occurred in January of 1997. At that time, Martinez received a letter from Fitzpatrick, Otter's agent, asking the Corps for an on-site inspection of Otter's property near Star, Idaho. Tr. 78.[5]

19. Martinez complied with Fitzpatrick's request and met on-site with Otter, Fitzpatrick and representatives from the Idaho Department of Water Resources. Tr. 78.

20. At this meeting, Otter explained that he wanted to do work in the large slough immediately south of his house. *See* CX 32. Otter stated that this slough was choked with vegetation and that it is stagnant most of the summer. Accordingly, he wanted to clean this area out, beginning near his house and extending downstream for approximately 1,800 linear feet. Tr. 78-79. The area discussed in January, 1997, was not the same section of Otter's property that was involved in the 1992 and 1995 incidents. Tr. 81.

21. Otter was informed that in order to do this work in the slough, he would need a Permit from the Corps. Tr. 79.

22. On April 9, 1997, Otter submitted to the U.S. Army Corps of Engineers a Joint Application for Permit proposing excavation work on his property in Star, Idaho. Jt. Ex. 1, ¶ 5; CX 10.

23. The Joint Application for Permit listed Tim Fitzpatrick, Pacific Resource Management, as Otter's authorized agent. CX 10.

24. In this Joint Application for Permit, Otter sought permission to excavate an area

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[5] Fitzpatrick is the individual whom Otter had retained as a consultant to work with the Corps of Engineers regarding both the 1992 and 1995 violations. Tr. 72, 342, 352.

"along an old meander cut off of the Boise [R]iver," described as an area "approximately 1800 feet long, 150 feet wide, and 25 feet deep." CX 10; Tr. 82. The Corps characterized Otter's request to excavate as "dredging out an old river channel of the Boise River, which was filled in and reverted into a shallow water wetland." CX 11. Throughout this proceeding, the channel that Otter sought to excavate is referred to as a "slough."

25. Because of the magnitude of Otter's proposed project, the Corps determined that it did not qualify for any of the existing Nationwide Permits.[6] Rather, this project was to proceed through the Individual Permit process. The Individual Permit process requires a greater amount of information from the applicant, including the submission of drawings that may be reviewed by the general public. Tr. 18-19, 83-84; CX 11.

26. The Corps reviewed Otter's Permit application and determined that it was incomplete. The Corps found that the Permit application did not have adequate drawings, that it did not identify all of the temporary and permanent fills necessary to complete the project, and that it lacked the signatures of all of the involved landowners. Tr. 83.

27. In a letter to Otter, dated June 10, 1997, written by Regulatory Project Manager, Gregory Martinez, the Corps explained the deficiencies in the Permit application as follows:

> In order to continue processing the proposed work, the following additional information is required:
>
> 1. All lands within the project area that would be affected by either excavation activities or by temporary or permanent fills (cofferdams, stockpile areas, haul roads, etc.) need to be delineated for wetlands. The slough that is proposed for excavation is identified on the National Wetland Inventory map as a wetland.…
>
> 2. The location and size of the temporary fill that would be placed on the west end of the slough needs to be shown in a plan-view and an end-view drawing drawn to scale. Please include the volume (cubic yards) of material that would impact open water and/or wetlands.
>
> 3. Please specify the volume (cubic yards) of dredged material you plan to place back into wetlands and/or open water during the restoration part of the project.

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[6] Nationwide Permits are issued for activities that would result in only a minimal impact upon the environment. Tr. 18-19.

> 4. A cross-section drawing of existing slough conditions needs to be drawn above another cross-section drawing of the slough after excavation. Please show width and depth in both. Beneath these two drawings, a third cross-section drawing should show what both side slopes would look like after restoration.… I've enclosed a few sample drawings to give you a visual idea of what I need.
>
> 5. Describe how you plan to deal with the water pumped from the excavation area. Are you proposing to pump it directly onto the land or into a settling pond?
>
> 6. I have looked at the location of your proposed temporary stockpile area and can tell you that wetlands do exist at this location. Also, during normal high water, this area does sub water. Enclosed is a copy of an aerial photograph (2-29-96) that was taken during normal high water.…
>
> 7. Describe in more detail how the proposed work would increase wetland habitat by 35 percent. Since the proposed work would convert a portion of the wetland slough to deep open water, mitigation for wetland losses would be required.

CX 11.

28. Following the Corps' June 10, 1997, letter to Otter, Martinez and Fitzpatrick, Otter's agent, discussed the Permit application by telephone. During this conversation, Fitzpatrick informed Martinez that he had never done a Wetland Delineation. While Martinez told Fitzpatrick that he was too busy to help with such a delineation, he did inform Fitzpatrick as to how to obtain the Corps' 1987 Manual for Delineating Wetlands. Tr. 89.[7]

29. On December 18, 1997, Martinez sent a letter to Otter informing him that the Permit application information requested by the Corps on June 10, 1997, still hadn't been received. The letter concluded: "If the requested information is not received by January 7, 1997, your application will be considered withdrawn and we will close this file." CX 12.

30. Toward the end of December, 1997, Otter telephoned Martinez and informed him that he had the requested Permit application information. Tr. 92.

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[7] Martinez explained that the 1987 Manual is used to determine the wetland-upland line. "It's a way to establish uplands versus wetlands." Tr. 245; *see* Tr. 269.

31. On January 6, 1998, Otter hand-delivered to the Corps a revised Permit application. The project identified in the revised application was on a smaller scale than that identified in Otter's original Permit application. As noted, the original application proposed widening the channel to 150 feet and deepening it to 25 feet, for a length of 1,800 feet. The revised application proposed widening the channel to 50 feet, at a depth not to exceed 15 feet. The excavation referred to in both applications involved the same slough, or channel. Tr. 93; CX 13.

32. In addition to the revised Permit application, on January 6, 1998, Otter hand-delivered to the Corps a Wetlands Delineation. CX 14. This Wetlands Delineation involved the slough that Otter wanted to excavate.

33. The Corps determined that both Otter's revised Permit application and Wetlands Delineation were incomplete.

34. With respect to the revised Permit application, the Corps found that it failed to include certain necessary drawings. Tr. 97-98. With respect to the Wetlands Delineation, the Corps found it deficient because it did not have a map showing the position of the field data points. In the Corps' view, this Wetlands Delineation did not show what area was "wetland" and what area was "upland." Tr. 103-104.

35. Accordingly, in an effort to aid Otter in preparing an acceptable Permit application, Martinez set about collecting diagrams that had been filed previously with the Corps and which would serve as good examples as to the kind of information that the Corps needed. (The Corps needed to know the width of the banks from the top, the side slopes of the banks, the width of the channel from the bottom, the high water mark, and the area to be excavated.) The diagrams sent to Otter included examples of cross-sections and plan views. These diagrams were sent by facsimile to Fitzpatrick. Tr. 106-107; CX 15.

36. Martinez also collected information which he believed would help Otter remedy the shortcomings in his Wetlands Delineation. That collection included an informational sheet which set forth the minimum amount of information needed to make a Wetlands Delineation, as well as a wetland delineation map which showed a wetland-upland line. This information also was sent to Fitzpatrick by facsimile. Tr. 109.

37. On January 21, 1998, Fitzpatrick submitted additional wetlands delineation information to the Corps regarding the proposed work on Otter's Star, Idaho, property. CX 16.

38. Once again, Martinez found Fitzpatrick's wetlands delineation submission to be incomplete. Martinez testified that this delineation still did not include a map showing the wetland-upland line. Instead, Fitzpatrick submitted a photograph with arrows showing where the survey lines were located. In Martinez's view, Fitzpatrick simply sent back to the Corps

the same diagrams that the Corps had provided him as examples of the type of information necessary for a Wetlands Delineation. In fact, page 3 of Complainant's Exhibit 15, a hand-drawn wetlands delineation example sent by the Corps to Fitzpatrick, is "almost exactly the same drawing" submitted by Fitzpatrick to the Corps. Tr. 111-113; *see* CX 16. In sum, the Corps determined that Fitzpatrick's submission of January 21, 1998, was merely an estimation of the wetlands area, based upon a tracing of an aerial photograph. This is not a proper Wetlands Delineation. Tr. 110-111, 113-115.

39. On January 29, 1998, Martinez informed Fitzpatrick during a telephone conversation that his Wetlands Delineation still failed to show the wetland-upland line. Tr. 118; CX 18.

40. Thereafter, on February 5, 1998, Martinez and Fitzpatrick met at the Otter site. At this meeting, Martinez told Fitzpatrick that he agreed with his wetland line on the north bank of the slough, since there basically was a water line with vegetation which in most cases didn't extend more than one foot above the water line. (Otter's residence is located on the north side of the slough.) Martinez also told Fitzpatrick that because the proposed project generally did not affect the south bank of the slough, a Wetlands Delineation was necessary at that site only to the extent that access roads would be necessary for the movement of material stockpiled on the south side. Tr. 120-121, 126-127; CX 19.

41. As a result of a February 5, 1998, meeting, Martinez and Fitzpatrick agreed that a 10-foot buffer would be left between the slough excavation and the wetlands on the south bank. If that situation were to change, then a wetland-upland line on the south side would have to be established. Tr. 130-131.

42. As Martinez observed during this February 5, 1998, on-site visit, the proposed excavation would not only affect open water, but also vegetation – *i.e.*, cattails, which "choked" a portion of the channel. Martinez referred to this area of vegetation as "in-channel wetlands." Tr. 122-123.

43. Based upon this meeting with Fitzpatrick, Martinez determined that if the proposed project were done with conventional equipment such as a bulldozer, then it would involve a discharge to wetlands. Tr. 130.

44. The ordinary high water in the adjacent Boise River is 6,500 cubic feet per second ("cfs"). The ordinary high water mark of the Boise River at the location of the Otter property is shown in an aerial photograph identified as Complainant's Exhibit 32. Tr. 33, 276.

45. Complainant's Exhibit 32 shows over bank flooding of the Boise River at 6,500 cfs at points very near Otter's property. The over bank flooding flows into existing high-flow channels that in turn flow through portions of Otter's property, converging at the large slough immediately adjacent to his house and eventually entering the Boise River downstream.

Martinez testified that over bank flooding begins around 6,200 cfs to 6,300 cfs. Tr. 35, 42.

46. In fact, these overflow channels activate even before the Boise River reaches 6,500 cfs. When the river gets above 5,500 cfs, these channels start flowing due to the rising groundwater. As the river rises, it pushes water laterally into the banks, thus raising the water table in these adjacent channels. At approximately 6,300 cfs, the side channels on, or near, Otter's property begin to carry water. When these sloughs begin carrying water, they flow back into the Boise River downstream of Otter's property. Tr. 33-35, 42-44.

47. The slough next to Otter's property fluctuates with the level of the Boise River. Martinez has observed this fluctuation between high and low flows. Tr. 44.

48. In a letter to Otter, dated February 10, 1998, Martinez summarized his February 5, 1998, meeting with Fitzpatrick. The letter read:

> This is in regard to the wetland delineation report you submitted to us on January 6, 1998, for your property located … near Star, Ada County, Idaho. Your report included a map delineating wetlands on the property.
>
> On February 5, 1998, I met on-site with your consultant, Mr. Tim Fitzpatrick, who prepared the delineation report and map on your behalf. We walked the north side of the slough and I agreed with this wetland-upland line as shown on Mr. Fitzpatrick's delineation. We also inspected the proposed temporary stockpile area and I have verified that it is uplands and not subject to our jurisdiction. Mr. Fitzpatrick said he did not delineate the wetland-upland line along the south side of the slough because the work you propose would not extend that far south. Therefore, I agree with Mr. Fitzpatrick, that it is unnecessary to establish this wetland-upland line. Should your project be changed and the work area extend further to the south, the wetland-upland line will have to be established and verified.
>
> Based on our review of the submitted wetland delineation and on-site inspection, I have determined that the enclosed map accurately delineates the extent of wetlands subject to our jurisdiction under Section 404 of the Clean Water Act….
>
> *In accordance with Section 404 of the Clean Water Act, a Department of the Army permit is required for the discharge of dredged or fill material in waters of the United States, including wetlands. This includes excavation activities which result in the*

> *discharge of dredged material and destroy or degrade waters of the United States. If your proposed project involves such discharges into wetland areas identified on the map, a permit is required and must be obtained prior to the start [sic] degrade waters of the United States. If your proposed project involves such discharges into wetland areas identified on the map, a permit is required and must be obtained prior to the start of construction….*

CX 20 *(emphasis added)*.

49. Thereafter, on April 1, 1998, Martinez telephoned Fitzpatrick inquiring as to the information that Fitzpatrick had promised during their on-site inspection of the Otter property on February 5, 1998. Fitzpatrick informed Martinez that he would be proceeding with the project through conventional construction rather than by hydraulic dredging. Fitzpatrick also told Martinez that he would provide him with this information shortly. Despite this representation, Martinez never again heard from Fitzpatrick. Tr. 131-132; CX 21.

50. Martinez called Fitzpatrick by telephone on September 28, 1998, but was unable to reach him. Martinez left a message to the effect that they needed either to finalize the project, or to withdraw the application and resubmit it when they had all their plans. Martinez received no response to this telephone call. Tr. 133; CX 21.

51. On November 17, 1998, Martinez received a telephone call from Erv Ballou, the State Coordinator for the Stream Protection Program, Idaho Department of Water Resources. Ballou was already at the Otter property in Star, Idaho, and he asked Martinez if he would meet him there immediately because work had been done on-site. Tr. 133.

52. Martinez proceeded to Otter's property on November 17, 1998, where he met with Ballou and another individual, Charles Robnett. Robnett is a contractor who was hired by Otter to perform certain excavation work on his property. It is this excavation work which triggered the present enforcement action. Along with Otter, Robnett is a respondent in this case. Jt. Ex. 1, ¶ 4; Tr. 134.[8]

53. The Martinez visit to the Otter property on November 17, 1998, constituted an inspection. This inspection involved the work that was done in the slough and wetlands immediately to the south of Otter's residence. This is the area where Martinez met with Otter and Fitzpatrick in January, 1997. This, however, was not the specific area where the 1992 and

[8] Mr. Otter and Mr. Robnett are represented by the same counsel. At the outset of the hearing, their counsel informed the court that the subject of conflict of interest was discussed with respondents. Tr. 3-4.

1995 violations took place. Tr. 79, 81.

54. Upon arriving on-site, Martinez observed that a portion of the slough that was proposed to be worked was dewatered. There were large piles of stockpile material in the bottom of the slough. A cofferdam had been placed across the channel and water was being pumped out of the coffered area and directly into the slough immediately downstream. Because the water being pumped downstream was heavily laden with silt, the slough on the opposite side of the cofferdam was very turbid. Tr. 80, 134, 138.

55. It was necessary to dewater this site so that the slough could be worked with construction equipment. In this case, a bulldozer and front-end loader were used in the dewatered slough. Tr. 139; Jt. Ex. 1, ¶ 4.

56. Martinez observed that dredged material had been discharged for a distance of 525 feet on the north bank of the slough. On average, this material was 10 to 12 feet wide. In addition, some of the material had been pushed into wetlands on the south side of the slough. Tr. 80.

57. According to Martinez, Robnett explained that he was constructing a two-acre pond at the direction of Otter. When Robnett finished constructing the pond, he was to excavate the remainder of the channel. Tr. 134-135.

58. Robnett told Martinez that he did not know that Otter had a Section 404 Permit application pending with the Corps. Martinez was of the view that Otter's pending application was "very different" from the excavation that was taking place on November 17, 1998. Tr. 134.

59. Robnett told Martinez that he began this excavation work on the Otter property on November 9, 1998. Jt. Ex. 1, ¶ 4.

60. The area on Otter's property that was excavated in November, 1998, contains wetlands and a slough. Based upon Martinez's rough estimate, this area measured 525 feet by 225 feet, or approximately 2.7 acres. Jt. Ex. 1, ¶ 3; CX 22.

61. During the time that this work was being done by Robnett, Otter was on a trip to China. Otter did not return from this trip until November 24, 1998. Tr. 357-358, 363.

62. Martinez and Fitzpatrick had a phone conversation on November 18, 1998, one day after the Corps' inspection of the Otter property. During this conversation, Fitzpatrick told Martinez that he thought that a Permit had been issued to Otter. Martinez informed him that all that had been issued was a verification for the delineation line on the north side and an agreement that a delineation was not needed for the south side if they were not going to encroach into that area. Tr. 157, 177.

63. On November 19, 1998, the Corps' District Engineer sent a Cease and Desist Order to both Otter and Robnett. The Cease and Desist Order stated that Otter and Robnett violated Section 404 of the Clean Water Act by discharging dredged material into waters of the United States and adjacent wetlands without obtaining a permit from the Corps. The Order described the violation as follows:

> The discharge of dredged material below the ordinary high water mark of a high flow channel of the Boise River and adjacent wetlands. Channel clearing is being done using a bulldozer to push up river bed materials into larger stock piles and then removing the material using a front end loader. Additionally, some of the pushed material has been used to fill adjacent wetlands and construct a cofferdam and equipment access road.…

CX 25.

64. Subsequently, EPA filed a complaint against Otter and Robnett pursuant to Section 309(g) of the Clean Water Act. 33 U.S.C. § 1319(g). That complaint led to the present enforcement proceeding. The complaint charges that the respondents violated Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), by discharging dredged and fill material into navigable waters of the United States, without having obtained a permit from the U.S. Army Corps of Engineers pursuant to Section 404 of the Act. 33 U.S.C. § 1344.[9]

65. The Corps never did issue a Section 404 permit to either Otter or Robnett for the excavation work that was performed in the slough and adjacent wetlands in November of 1998. Jt. Ex. 1, ¶ 5.

66. Some time after the events of November 17, 1998, Otter replaced Fitzpatrick as his consultant with the engineering firm of Toothman-Orton. Tr. 184. Toothman-Orton represented Otter before the Corps in the restoration work phase of this case. Tr. 185.

67. On June 3, 1999, the U.S. Army Corps of Engineers transferred this matter to the U.S. Environmental Protection Agency for enforcement. CX B-1; Tr. 189.

68. Thereafter, Otter performed restoration work on the involved excavation area pursuant to a Compliance Order issued by EPA under Section 309(a) of the Clean Water Act.

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[9] "Dredged material" is defined as "material that is excavated or dredged from waters of the United States." 40 C.F.R. 232.2. "Fill material" is defined as "any 'pollutant' which replaces portions of the 'waters of the United States' with dry land or which changes the bottom elevation of a water body for any purpose." *Id.*

33 U.S.C. § 1319(a). This restoration work was approved by EPA. Tr. 424.

69. The restoration plan included the removal of material along the north bank, with the area being seeded and planted with what were referred to as "required species." Tr. 267. Also, wetland plants, including "woody" species, were planted in the area where cattails had been growing. In addition, the cofferdam was substantially removed. *Id;* 317-318; *see* RX E-1.

70. The restoration work began in the Fall of 1999, and was completed on, or about, November 19, 1999. Otter has completed all the work required to date under the Compliance Order. Jt. Ex. 1, ¶ 6.

IV. Discussion

A. Liability

Section 301(a) of the Clean Water Act provides that the "discharge of any pollutant by any person" is unlawful unless in compliance with the Act's permitting provisions. 33 U.S.C. § 1311(a). The Act's permitting provisions are found in Sections 402 and 404. 33 U.S.C. §§ 1312 & 1344. Section 402 authorizes EPA to issue National Pollutant Discharge Elimination System permits to control the discharge of wastewater into navigable waters. Section 404 authorizes the United States Army Corps of Engineers, with EPA oversight, to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." This case is about the permitting provisions of Section 404.

Specifically, in the complaint, EPA alleges that respondent Otter's property contains riparian wetland habitat and a stream channel, both of which constitute "navigable waters" within the meaning of Section 502(7) of the Clean Water Act. 33 U.S.C. § 1362(7). ¶ 5.[10] EPA further charges that respondents Otter and Robnett used heavy equipment, a "point source" within the meaning of Section 502(14), 33 U.S.C. § 1362(14), from which dredged or fill material, a "pollutant" within the meaning of Section 502(6), 33 U.S.C. § 1362(6), and 40 C.F.R. 232.2, was discharged into the wetlands and stream channel. ¶¶ 6-9. Because this discharge into navigable waters was not authorized pursuant to a permit issued under Section 404, EPA submits that respondents Otter and Robnett have violated Section 301(a) of the Act.

[10] In addition to Section 502(7) of the Act, EPA also cites 40 C.F.R. 122.2. Part 122 of 40 C.F.R., however, involves EPA's National Pollutant Discharge Elimination System program. Section 122.2 contains definitions relative to that program. It is Part 232 of 40 C.F.R. which contains Section 404 Program definitions. Section 232.2 contains the definition of the phrase, "Waters of the United States."

Although respondents initially denied this allegation, whether a violation of the Clean Water Act occurred is no longer an issue. In that regard, Otter and Robnett concede in their post-hearing brief that EPA has proven a Section 301(a) Clean Water Act violation in this case. They state:

> Mr. Otter, by his own testimony in this case, acknowledged that work was undertaken on his property which resulted in a discharge of a pollutant to the waters of the United States without a § 404 permit…. It would be frivolous for the Respondents in this action – C.L. "Butch" Otter and Charles Robnett – to argue that there has been no discharge whatsoever of a pollutant into the waters of the United States without a § 404 permit as a result of the construction activity which took place on the Otter property in November 1998.

Resp. Br. at 5. *See* Resp. Proposed Concl. Of Law, No. 1 ("The slough and related wetlands on the Otter property are waters of the United States."), No. 2 ("The excavation undertaken by Respondent, Charles Robnett, in November 1998, resulted in the discharge of pollutant[s] to the waters of the United States."), & No. 4 ("Otter has admitted liability to the extent charged by the September 1999 Complaint for discharges to the north back *[sic]* of the slough located adjacent to his home.")[11]

Respondents' admission that they unlawfully discharged pollutants into waters of the United States is in accord with the record evidence. First, as set forth in the Findings of Fact section, *supra*, respondents used a bulldozer and front-end loader to discharge dredged and fill material onto 2.4 acres. The bulldozer and front-end loader are "point sources" within the meaning of Section 502(14) of the Clean Water Act. 33 U.S.C. § 1362(14). Second, these 2.4 acres constitute "navigable waters of the United States." In that regard, the property involved in this case lies adjacent to the Boise River, which is connected to the Pacific Ocean by way of the Snake and Columbia Rivers. Jt. Ex. 1, ¶ 2. Moreover, there is substantial testimony establishing the hydrologic connection between the involved sloughs on Otter's property and the adjacent Boise River. *See* Tr. 32-34, 41-44; CXs 32 & 33.

In addition, using the 1987 Corps Wetlands Manual, Martinez identified portions of the

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[11] Despite the fact that the respondents admit that EPA has established a violation of Section 301(a), they nonetheless maintain that the scope, *i.e.*, extent of the violation is substantially less than alleged by EPA. In that regard, respondents' admission of liability seems to be limited solely to the north bank of the slough. Resp. Br. at 5. While this admission appears to be inconsistent with their own proposed Findings of Fact Nos. 1, 2, and 4, *see* above, it is certainly inconsistent with the record evidence in this case. As discussed, *infra*, the area involved in this violation includes the slough, as well as the north and south banks.

area adjacent to the slough and involved in respondents' 1998 excavation work as wetlands.[12] Martinez explained that it was determined as far back as 1992, that this area of Otter's property contained jurisdictional "waters of the United States." Tr. 145. In that regard, he stated that the slough is a former channel of the Boise River and that the slough is activated with surface water when the river attains its ordinary high water mark. *Id*. Furthermore, this area has the hydric soils and hydrophytic vegetation necessary to qualify as waters of the United States. Tr. 93-96, 277.

In sum, respondents' admission that the discharge of pollutants in this case took place in waters of the United States, and that a Section 404 permit had not been issued, is well-taken. There is no question that the evidence supports a finding that respondents violated Section 301(a) of the Clean Water Act.

B. Civil Penalty

While respondents admit to a Section 301(a) violation, they strenuously object to the $80,000 civil penalty sought by EPA. Indeed, it is the size of this proposed penalty which is the battleground of this case. *See* Resp. Br. at 2.

Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g), provides for the assessment of a civil penalty whenever a Section 301(a) violation is established. Section 309(g)(3) offers the road map in this assessment process. It sets forth penalty criteria which addresses both the circumstances of the violation and the actions and status of the violator. Section 309(g)(3) 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….

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[12] 40 C.F.R. 232.3 provides:

> *Wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

33 U.S.C. § 1319(g)(3). These statutory penalty factors are examined below.[13]

Before beginning this penalty criteria examination, however, a threshold argument raised by respondents must first be addressed. In that regard, respondents argue that they are essentially entitled to a directed verdict on this penalty issue because EPA did not call any witnesses who were involved in the Agency's decision to seek an $80,000 penalty, nor did the Agency provide a penalty calculation worksheet. Resp. Br. at 7-11; Resp. R.Br. at 3. In making this argument, respondents misconstrue the manner in which penalties are assessed for violations of the Clean Water Act.

The key to understanding this penalty assessment phase is that the $80,000 sought by EPA is a penalty "proposal" only. In effect, it is the Agency's way of saying that it has reviewed the facts associated with the violation and that it believes that the evidence will support the assessment of a penalty in the amount that it proposes. Whether the evidence does so or not is the function of this court. Any penalty assessed for a violation of the Clean Water Act is the product of a consideration of the record evidence in light of the penalty factors that Congress has supplied. As Section 309(g)(3) illustrates, civil penalties are assessed on the basis of the evidence as it relates to the violation itself and to the actions of the violator. As explained below, the penalty assessed against respondents is based upon a consideration of this statutory penalty criteria. How Agency employees who propose an $80,000 penalty view the strength of their case is of no more a concern to this court than how a respondent views the strength of its case. What it boils down to is the evidence that each side introduces into the record and how that evidence fits within the statutorily prescribed civil penalty scheme. Accordingly, respondents' argument that EPA failed to carry its burden of proof on the penalty issue because complainant did not call as witnesses those employees who calculated the Agency's proposed penalty amount is rejected.

Respondents' argument that they were somehow denied due process of law because of EPA's alleged failure to call these employees to the witness stand is likewise rejected. *See* Resp. Br. at 25. Given the fact that Section 309(g)(3) of the Clean Water Act enumerates the factors to be considered in the assessment of a civil penalty for a violation of the Act, given the fact that respondents were afforded the opportunity to cross-examine all of EPA's witnesses who testified regarding these civil penalty factors, and given the fact that respondents were afforded the opportunity to put on their own case as it related to the Section 309(g)(3) criteria, this court can find no evidence to support respondents' argument that they were deprived of property without due process of the law.

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[13] The penalty criterion "such other factors as justice may require" falls into neither the "violation," nor the "violator" category. Inasmuch as there has been no showing that the evidence in this case would justify a penalty adjustment under this criterion, it will not be specifically addressed.

In addition, respondents argue that the $80,000 penalty that was proposed by EPA constitutes an "excessive fine" and is in violation of the Eighth Amendment of the United States Constitution. Resp. Br. at 27. Respondents' argument is rejected. First, the penalty proposed here (and in fact, the penalty actually assessed) is less than that permitted by the statute. This fact alone defeats respondents' argument that the penalty constitutes an excessive fine. *See Newell Recycling Co., Inc. v. EPA*, 231 F.3d 204 (5th Cir. 2000). Second, as discussed, *supra*, the assessed penalty is supported by the record evidence as evaluated under the penalty criteria of Section 309(g)(3) of the Act. 33 U.S.C. § 1319(g)(3).

Penalty Factors Relating to the Violation

a. Extent

The "extent" of the violation in this case offers a logical starting point for evaluating the evidence as it relates to the violation. EPA submits that respondents dredged or filled 2.7 acres of waters of the United States in committing the Section 301(a) violation. This area includes both open waters and wetlands. Compl. R.Br. at 9. Respondents, however, submit that the violation in this case was limited to a wetland area along the north bank of the slough, one foot in width and 525 feet in length. Resp. Br. at 13, 15. As set forth below, it is held that the violation encompassed an area of 2.4 acres. Of this amount, three-quaters of an acre was open water and the remainder was wetlands. Tr. 240-241.[14] In addition, the unpermitted dredging and fill operation began on November 9, 1998, and continued until November 18, 1998. Tr. 171; *see* Resp. Proposed Findings of Fact, No. 17.

This holding regarding the extent of the violation is based primarily upon the testimony of Martinez, the Corps of Engineers representative who inspected Otter's property on November 17, 1998. As noted, during this inspection, Martinez made the determination that fill material had been discharged into both open waters, *i.e.*, the slough, and adjacent wetlands. Tr. 66. When he arrived at the Otter site on November 17, Martinez observed that a "great quantity" of dredged material had been discharged along the north bank of the slough for a distance of approximately 525 feet. Martinez further determined that, on average, this material was 10 to 12 feet wide. Also, a cofferdam was in place allowing for the dewatering of the slough. Martinez observed that large piles of stockpile material had been placed in the bottom of the slough and that some of this material had been pushed into the wetlands on the south side of the slough. Tr. 80.

In addition, photographs taken by Martinez of Otter's property illustrate the extent of the violation at issue here. Complainant's Exhibit 29 consists of photographs taken on February 5, 1998, prior to any work being done on the slough and in the wetlands. *See*

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[14] The extent of the acreage found to be involved, particularly the .75 acres of open water is consistent with respondents' Proposed Finding of Fact No. 16.

Tr. 84-86. Complainant's Exhibit 30 consists of photographs of the same area taken on November 17, 1998, after Robnett began excavating and filling these areas. *See* Tr. 136-143. As Martinez testified, a comparison of the these photographs shows that a considerable amount of fill had been placed in the slough, that dredged material had been redeposited along the entire north bank, that material had been stockpiled in the slough itself, and that a cofferdam had been constructed across the channel. Tr. 137-140, 142-143. Moreover, aerial photograph No. 7 of Complainant's Exhibit 31, taken on November 18, 1998, shows that fill material was pushed into wetlands on the south side of the channel on Otter's property. Tr. 146, 151.

Not only was this work done without the requisite Section 404 permit, but it also exceeded the scope of the work for which Otter had sought approval in his Permit application. In that regard, when he arrived on-site on November 17, 1998, Martinez observed that the area being dredged and filled was "very different" from the area identified in Otter's Section 404 Permit application. Tr. 134. As explained by Martinez, Otter did not request permission to add fill to the north bank in any of his Permit applications. Nor was the subject of the north bank fill raised during any of the discussions that Martinez had with Otter and Fitzpatrick. Tr. 156. As far as the south bank was concerned, this too was an area which Fitzpatrick had represented to Martinez would not be impacted by the proposed project. Tr. 151. Because of this representation, Martinez had informed Fitzpatrick that a Wetlands Delineation was not needed on the south side of the slough, *i.e.*, as long as Otter respected the proposed 10-foot buffer separating the slough excavation from the south side wetlands. Tr. 120-121, 126-127, 130-131; CX 19.

As for the actual size of the area affected by this Section 301(a) violation, Martinez paced the slough and wetlands and determined that it measured 525 feet by 225 feet.[15] This equals an area of 2.7 acres. Martinez began his measurement at the downstream end of the cofferdam and paced along the north bank to where the fill ended. He then paced the width of the cofferdam that had been placed across the channel. Finally, Martinez looked down the edge of the south side where the fill had been placed into the wetlands and observed that it was in a relatively straight line. Martinez concluded that the affected work area on the Otter site "was close to being rectangular in shape." Accordingly, he multiplied the length by the width of this area and came up with 2.7 acres. Tr. 157- 159. *See* CXs 22 & 30. However, within this 2.7 acres, Martinez identified an upland area approximately .2 to .3 acres in size. Tr. 159-160; *see* CX 32 (upland area marked).[16] Accordingly, this reduces the area affected

[15] Martinez testified that the 525 foot measurement was "very close" to what the drawing submitted by Fitzpatrick showed. Tr. 167.

[16] The term "upland" refers to land which does not have the necessary characteristics to qualify as a wetland.

by the Section 301(a) violation to 2.4 acres.[17]

b. Nature and Circumstances

Next, the "nature" and "circumstances" penalty criteria are considered. As for the nature of the violation, the record shows that respondents discharged the pollutants dredged spoil and fill material into a wetland habitat and a stream channel. Both the wetland and the stream channel qualify as "navigable waters" within the meaning of Section 502(7) of the Clean Water Act. 33 U.S.C. § 1362(7). As already discussed, respondents conducted this dredging and filling operation without a Section 404 Permit issued from the U.S. Army Corps of Engineers.

As for the circumstances surrounding this violation, the dredging and filling activity occurred after Otter had been forewarned by the Corps that a Section 404 Permit was needed, and after he had been advised by the Corps on several occasions that his application for such a permit was deficient. The circumstances of this violation are addressed more fully below, in the discussion of the respondents' negligence.

c. Gravity

The final penalty criterion relating to the violation is the "gravity" factor. In other words, how serious was the environmental harm caused by the respondents in this case? The evidence shows that the environmental harm was substantial. First, a fairly large area, *i.e.*, 2.4 acres, was involved in the unlawful dredging and fill operation. Second, as shown in the aerial photographs taken of the excavation site on the Otter property, all of the wetland vegetation within this area was destroyed. *See* CX 31.

EPA employee John Olson, a Wetlands Ecologist with the Aquatic Resources Unit, became involved in this case during the restoration phase. Olson worked with the Toothman-Orton Engineering Company, the consulting firm retained by Otter to replace Fitzpatrick, to develop a restoration plan that would restore the wetland characteristics of that portion of the Otter property which was unlawfully dredged and filled. Tr. 249, 266.[18]

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[17] Another EPA witness, John Olson, agreed that the uplands area was approximately .3 to .4 acres. He based this determination upon a review of aerial photographs. Tr. 272-273, 275.

[18] Olson was qualified as an expert in wetlands ecology and aquatic resources. Tr. 262. His EPA responsibilities include the overall management of the Agency's program to protect wetland resources within the State of Idaho. Olson also reviews Permits issued by the Corps of Engineers pursuant to Section 404 of the Clean Water Act. Tr. 250-251.

Olson testified that the excavation conducted on the Otter property caused "substantial harm" to the aquatic environment because it eliminated the wetland community. This wetland community had consisted of a mix of emergent vegetation, which is herbaceous or grass-like vegetation, as well as shrubs and trees. Tr. 278-279. Olson further testified regarding the overall importance of the destroyed wetland:

> [W]etlands are a very important resource in Idaho. Idaho only has, even today, has less than one percent of its total land area as wetlands, and so just by that fact, they're a very scarce part of the landscape within the state of Idaho, unlike many other states or some other states, especially coastal states that can have large amounts of wetland areas.
>
> These wetlands are generally found along streams. They're the interface between the upland community and rivers and streams, and they also, because we're in a semiarid state where the rainfall is sparse, those trees and shrubs provide sometimes the only structural diversity that occurs in the natural landscape, and as a result, take on a much more important role than would normally be assumed by their small area on the landscape. The estimates are that 75 percent of the wildlife in Idaho depend for some point in their life cycle on using wetland areas, which are those – some of those areas found along streams and river[s]. So they – wetlands provide that wildlife habitat, and that was one of the functions that was completely eliminated by the work that was done.

Tr. 280-281.

Another important role of wetlands is their contribution to the integrity of aquatic ecosystems. For example, Olson testified that wetlands improve water quality because the wetland vegetation takes up nutrients, such as nitrogen and phosphorous, that exist in the water column. Excessive nutrients can result in the excessive growth of algae and adversely affect water quality. Indeed, Olson added that from Star, Idaho, downstream, the Boise River is listed as having an excessive level of nutrients. Tr. 281. In addition to promoting water quality, another important wetland function is the soil stability that wetlands provide. Tr. 281-282.

Finally, Olson testified that the restoration work performed by Otter may not succeed, and that even if it does, it will take 5 to 15 years for the woody vegetation to reestablish itself. In fact, Olson stated this type of restoration project has a low chance of complete success because it's very difficult to reestablish all of the wetland functions. Tr. 285-286, 315.

It is noteworthy that Olson only testified as to the environmental harm caused to the wetlands. He offered no testimony regarding any environmental harm inflicted upon the .75 acres of slough that was dredged. Indeed, EPA introduced no specific evidence showing the extent of the environmental damage caused by the respondents' dredging in the slough.

Penalty Factors Relating to the Violator

a. Ability To Pay

At the hearing, counsel for respondents stipulated that Otter has the ability to pay the penalty proposed by EPA. Counsel submitted that this rendered the ability-to-pay penalty factor moot. Tr. 487. While no such stipulation was offered as to Robnett's ability to pay, neither was any evidence submitted by either side as to his ability or inability to pay a penalty. In any event, given this stipulation regarding Otter, "ability to pay" is not an issue in this case.

b. History

Insofar as the penalty factors relate to respondents, what is at issue are Otter's "history of such violations," and his "degree of culpability," *i.e.*, negligence. These factors weigh heavily in the assessment of the penalty in this case.[19]

We look first at the "history" of violations. While the Section 301(a) violation took place in 1998, as set forth in the Findings of Fact section, *supra*, respondent Otter has had permit problems with the Corps of Engineers in both 1992 and 1995. Like the present case, these prior incidents took place at Otter's property near Star, Idaho, and both involved work which required a Section 404 permit. A closer examination of these two historical events is helpful to understanding the events of 1998.

In 1992, Otter was issued a Cease and Desist Order by the U.S. Army Corps of Engineers. CX 1. The Corps issued this order to Otter because he was excavating a slough on his property without having obtained a Section 404 permit. This matter was resolved upon Otter's compliance with a Restoration Order issued by the Corps. CX 3. As a follow-up to this matter, in a letter dated March 22, 1994, the Corps specifically informed Otter that a Department of the Army permit is required for discharges of dredged or fill material into the waters of the United States, including wetlands. The Corps added, "[t]his includes excavation activities which result in the discharge of dredged material and destroy or degrade waters of the United States." CX 4.

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[19] Again, insofar as these penalty factors are concerned, the parties paid no attention to respondent Robnett. One then wonders why EPA had opposed respondents' prehearing motion to dismiss him from this case.

Despite the Corps' warning, Otter again ran into problems when in 1995, he undertook construction activities in the same slough that was involved in the 1992 Cease and Desist Order. The activities that Otter undertook in 1995, resulted in the issuance by the Corps of a Notice of Violation. CX 6. In this notice, Otter was asked to explain to the Corps "why the work was done without obtaining a Department of the Army permit in light of the fact that you were previously cited for a violation of Section 404 of the Clean Water Act on October 27, 1992, in the same location as the current work." *Id*.

Subsequent to this 1995 Notice of Violation, the Corps explained to Otter that Fitzpatrick, his agent, was wrong in believing that he had a "permit" to do the work. The Corps specifically informed Otter that, "[n]o permit was ever issued for this work." The Corps added that it could not understand how Otter thought that he had a permit to perform the 1995 work. CX 8.

Finally, as noted earlier, the 1995 violation was resolved when Otter was issued an After-The-Fact permit by the Corps. CX 9. In issuing this permit, the Corps very clearly explained:

> Section 404 of the Clean Water Act (33 U.S.C. 1344) requires that a Department of the Army permit be issued for the discharge of dredged or fill material into waters of the United States, including wetlands. This includes excavation activities which result in the discharge of dredged material and destroy or degrade waters of the United States.

CX 9.

Thus, the evidence in the record as it relates to the respondent Otter's "history of violations" supports the assessment of a significant penalty. The enforcement actions taken by the Corps against Otter in both 1992 and 1995 involve basically the same type of unlawful activity that is at issue in this case. Yet, despite these previous violations, in 1998 once again there was a discharge of dredged spoil and fill material, without a Section 404 permit having been issued, on respondent Otter's property near Star, Idaho.

c. Negligence

The penalty criteria provisions of Section 309(g)(3) speak in terms of the respondents' "degree of culpability." In other words, how negligent were the respondents? As discussed below, the Section 301(a) violation in this case was the result of the respondents' considerable degree of negligence.

First, as the circumstances surrounding the 1992 and 1995 violations (discussed under the "History" criterion, *supra)* show, Otter was made well-aware of the legal requirement to obtain a permit from the Corps before discharging dredged spoil and fill material into navigable waters of the United States. On several occasions, the Corps of Engineers informed him in no uncertain terms as to the necessity of obtaining a Section 404 permit before discharging pollutants into the waters of the United States. *See, e.g.*, CXs 4, 8, & 9. Yet, it is undisputed that in November, 1998, excavation work took place on Otter's property, in jurisdictional waters of the United States, without a Section 404 permit having been issued by the Corps.

Second, the evidence shows that from the time that Otter filed his initial application for a Section 404 permit (*see* CX 10), he was repeatedly advised by the Corps as to its deficiencies. In a letter dated June 10, 1997, the Corps informed Fitzpatrick that Otter's application for a Section 404 permit did not qualify for approval under any of the general permits. Instead, the application would proceed through the individual permit process. Accordingly, the Corps listed certain information that the application lacked. Aside from the fact that Fitzpatrick, his agent at the time, received this notice from the Corps, Otter was also sent a copy of the Corps' June 10, 1997, letter. CX 11.

Not only were Otter and Fitzpatrick advised as to the permit application's shortcomings, but the Corps made a considerable effort in offering examples of properly prepared applications, including Wetlands Delineations, in an effort to help Otter submit a proper application. It is undisputed that such a proper Section 404 permit application was never submitted.

In addition, the fact that Otter submitted a permit application for the 1998 work in the first place shows that he understood the requirement that he obtain a Section 404 permit from the Corps of Engineers before beginning work. He had twice before attempted to do work in a slough next to his house, and on each occasion he ran into problems with the Corps. In each of these prior instances, the problem was identical -- *i.e.*, Otter needed a Section 404 permit to work in "waters of the United States" and he did not have one. The result was enforcement action against him by the Corps.

Yet, despite this history, both Fitzpatrick and Otter somehow believed that they had the Corps' permission, *i.e.*, a valid Section 404 permit in hand, to begin work on his Star, Idaho, property. While this court is of the view that Otter actually thought that he had a Section 404 permit before he left for China (and before Robnett began to work the area), respondents can point to no evidence to show that this belief, even though erroneous, was a reasonable one under the circumstances.

Third, Otter must bear the responsibility for any failure in communication between himself and Robnett which resulted in the Section 301(a) violation. In that regard, Martinez testified that during his November 17, 1998, inspection he was told by Robnett that Otter had directed him to construct a two-acre pond and also to do work in the channel. Otter, however,

testified that he only told Robnett to do preparatory work. While it is unfortunate that respondent Robnett was not called to testify, even Otter's version of events shows considerable negligence on his part. In other words, his failure to properly communicate to his co-respondent as to the scope of the work to be done resulted in 2.4 acres of waters of the United States being unlawfully worked.

Finally, Martinez testified that respondent Robnett was not even aware that a Section 404 permit application was pending when the Corps conducted its inspection on November 17, 1998. Regardless of the work instructions that Otter had given him prior to his beginning work, it is undisputed that Robnett used a bulldozer and front-end loader to discharge dredged and fill material in 2.4 acres of waters of the United States. Robnett was negligent in performing this excavation activity without a Section 404 permit.

d. Economic Benefit

There is no evidence that the Section 301(a) violation involved in this case resulted in an economic benefit to respondents.

Summary of the Penalty Analysis

EPA sought an $80,000 civil penalty against respondents Otter and Robnett. While a lesser penalty was assessed, it is still a substantial one. The basis for this $50,000 civil penalty has already been offered. The evidentiary foundation for this assessment has been detailed above in the application of the Section 309(g)(3) penalty criteria to the evidence in this case. That evidence reflects, among other things, the negligence of the respondents, Otter's history of involvement with the Corps of Engineers, and the environmental harm that occurred in the wetlands.

In seeking the proposed $80,000 civil penalty, EPA substantially relies upon the evidence relating to the negligence, history, and gravity penalty criteria. This reliance is well-taken, as shown by the fact that a $50,000 penalty has been assessed. Nonetheless, a key factor in not assessing a higher civil penalty was the demeanor of respondent Otter. In that regard, upon observing the demeanor of Mr. Otter, it is the opinion of this court that this respondent began the excavation work in November of 1998, because he believed that he had a Section 404 permit from the Corps. This belief does not excuse his negligence in proceeding with the project even though he really didn't have the permit that he thought he had; nor does it excuse his failure to properly communicate to Robnett the extent of the work that he wanted him to perform. Indeed, these are some of the reasons why a significant penalty was actually assessed against respondents here.

Rather, in the final analysis, EPA failed to show (as the Agency suggested was the case) that Otter intentionally sought to go forward with the project, regardless of the consequences. The argument that Otter wanted to finish his project at any cost is just not consistent with the

remedial work that he performed in 1992 and 1995, as well as to the restoration work that he performed in 1998, to help remedy the present violation. Nor is EPA's theory consistent with the fact that Otter was attempting to get a Section 404 permit and the fact that he knew that the Corps was "looking over his shoulder." EPA had the burden of proof on the penalty issue and it's proof simply didn't measure up to the size of the penalty that it requested. In that regard, EPA could have called Fitzpatrick, Robnett, or Ballou (the state representative present on November 17, 1998) to build a better case for its proposed penalty. While no one can say that those witnesses would have testified in favor of EPA and not Otter, the fact of the matter is that these individuals did not testify and that the testimony of those witnesses who did wasn't sufficient to support the penalty sought by the Agency.

V. Order

Respondents C.L. "Butch" Otter and Charles Robnett are held to have violated Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), for discharging dredged and fill material into navigable waters of the United States without a Section 404 permit. 33 U.S.C. § 1344. Pursuant to Section 309(g)(3) of the Clean Water Act, 33 U.S.C. § 1319(g)(3), respondents are ordered to pay a civil penalty of $50,000 within 60 days of the date of this order.[20]

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

[20] Payment is to be made to Mellon Bank, EPA Region 10 (Regional Hearing Clerk), P.O. Box 360903M, Pittsburgh, PA, 15251.