

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219

BEFORE THE ADMINISTRATOR

In the matter of:

C&S ENTERPRISE, L.L.C.,

Respondent

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) DOCKET NO. CWA-07-2018-0095
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COMPLAINANT'S POST-HEARING
BRIEF

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INTRODUCTION

Pursuant to 40 C.F.R. § 22.26 and the Presiding Officer's October 26, 2018 Post-Hearing Scheduling Order, the U.S. Environmental Protection Agency Region 7 ("EPA") submits the following Post-Hearing Brief. For the reasons set out below, Respondent should be held liable for its unauthorized placement of fill material into waters of the United States. EPA proposes that a \$40,500 penalty be assessed.

SUMMARY OF ARGUMENT

Respondent C&S Enterprise, L.L.C. is owned and operated by Mr. Scott Morrow and his wife, Carol. Respondent owns approximately 200 acres of farmland in Deep River, Iowa. Running through Respondent's property is a stream¹ that discharges into Deep Creek, a perennial tributary. Deep Creek flows for approximately one third of a mile before discharging into the North English River; and the North English River flows approximately 25 miles where it discharges into the English River, a traditional navigable water. The following facts are uncontroverted: In 2015, Respondent cleared vegetation growing within and adjacent to the stream and installed drainage tiles to divert the surface flow of the stream that discharges into Deep Creek. After placement of the tiles, Respondent filled in the former stream channel with dirt. Later, Respondent conducted farming operations over the former stream and forested areas. Respondent completed this work without obtaining a Clean Water Act ("CWA" or "the Act") Section 404 permit from the U.S. Army Corps of Engineers ("the Corps").

¹ The term "stream" is used here to generally describe a flowing body of water, which Mr. Morrow, testifying on behalf of Respondent, acknowledges existed on his property from the time he purchased the property to the time of the tile work described herein in 2015. *See, e.g.*, TR447: 16-17 ("There would be water in it at times, not all the time."). Mr. Morrow calls the water body a "waterway," "grassed waterway," and "drainageway" throughout its testimony. Complainant generally refers to the water body as an "unnamed tributary."

At issue is whether the affected stream and forested areas were, in fact and law, jurisdictional water bodies under the CWA. Evidence collected at Respondent's property and analysis of aerial imagery dating back to the 1930s support EPA's position that prior to Respondent's 2015 fill activity: (1) the stream had a defined channel forming a geographic feature that connected to Deep Creek; (2) the stream had water flowing in it for several months of the year, spanning many years; (3) the stream had a physical, biological, and chemical connection to Deep Creek and the English River; and (4) the vegetation cleared and filled by the Respondent contained hydrophytic wetland vegetation and was, in fact, a jurisdictional wetland that abutted the jurisdictional intermittent stream. The EPA will show that such stream and wetland characteristics are precisely the characteristics that the Corps and EPA routinely identify to assert CWA jurisdiction and evidence a clear finding of "waters of the United States."

The \$40,500 proposed penalty is reasonable and justified. Applying the CWA statutory factors for determining a penalty, EPA will demonstrate that Respondent harmed the watershed by eliminating the stream's and wetland's chemical, physical, and biological functions. EPA will show that Respondent was particularly culpable in performing the fill action as Respondent was motivated to do so for financial reward. Finally, EPA will show that Respondent's accrued economic benefit by completing the unauthorized work surpasses EPA's proposed penalty.

STATEMENT OF CASE

A. Statutory and Regulatory Framework

The CWA is a comprehensive statute designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve that goal, the CWA prohibits the discharge of pollutants from point sources to the navigable waters of the United States, unless authorized in accordance with the Act, 33 U.S.C. § 1311(a) generally

through compliance with a permit issued under CWA Section 402 or Section 404. 33 U.S.C. §§ 1311, 1342 & 1344. Section 404 of the Act prohibits the discharge of dredged and/or fill material into navigable waters without a permit issued by the Corps. 33 U.S.C. § 1344.

Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines “pollutant” to include, *inter alia*, “solid waste” and “biological materials.” 40 C.F.R. § 232.2 defines “[d]ischarge of fill material” as “the addition of fill material into waters of the United States.” 40 C.F.R. § 232.2 defines “fill material” as “material” that has the effect of “replacing any portion of a water of the United States with dry land” or “changing the bottom elevation of any portion of a water of the United States.” Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines “point source” as “any discernable, confined and discrete conveyance ... from which pollutants are or may be discharged.” Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines navigable waters, in part, as the “waters of the United States,” which is further defined at 40 C.F.R. § 112.2 (1993) to include tributaries to, and wetlands adjacent to, waters of the United States.

B. Procedural Background

On January 3, 2018, EPA filed an administrative Complaint against Respondent alleging unpermitted discharges of pollutants to a water of the United States. On May 31, 2018, EPA filed its Prehearing Exchange. Respondent filed its Prehearing Exchange on July 13, 2018. EPA filed its Supplemental Prehearing Exchange on August 24, 2018 and filed an Unopposed Motion to Supplement its Prehearing Exchange on September 13, 2018, which was granted by the Presiding Officer. Respondent did not file a Supplemental Prehearing Exchange.

The hearing in this matter was held in Des Moines, Iowa between October 2 and 5, 2018. Following the hearing, the Presiding Officer established a schedule for the parties to submit their

initial and reply briefs, beginning with Complainant's Post-Hearing Brief to be submitted by December 14, 2018.

C. Burden of Proof

Under the Rules of Practice, EPA has the burden of establishing that the violation occurred as set forth in the complaint and that the relief sought is appropriate. Courts have held that EPA has the burden of showing that the violation occurred. *In re City of Marshall*, 10 E.A.D. 173, 180 (EAB 2001). Once EPA establishes a *prima facie* case, the burden shifts to respondent to present affirmative defenses or additional evidence with respect to the appropriate relief. *Id.* Under the Rules of Practice, 40 C.F.R. § 22.24(b), each relevant fact must be decided by the Presiding Officer based upon a preponderance of the evidence. Under a preponderance of the evidence standard, the evidence is evaluated to determine its weight and persuasiveness. The proponent must show that, considering the evidence as a whole, the fact sought to be proven is more probable than not.

Courts have held that for the Government to establish a *prima facie* case for CWA violations it must prove: (1) a person (2) discharged a pollutant (3) into navigable waters (4) from a point source (5) without a permit. *See United States v. Hubenka*, 438 F.3d 1026, 1035 (10th Cir. 2006).

Based upon the evidence provided, EPA has established the *prima facie* elements of Respondent's failure to apply for a CWA Section 404 permit prior to the discharge of pollutants into waters of the United States.

ARGUMENT

I. RESPONDENT IS A PERSON WHO DISCHARGED POLLUTANTS FROM A POINT SOURCE INTO WATERS OF THE UNITED STATES WITHOUT A PERMIT

The Presiding Officer should hold Respondent liable for unauthorized discharges of fill material into waters of the United States in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a). EPA has met its burden of proof on all the necessary elements of liability in this case.

A. Respondent is a “Person” Under the CWA

Pursuant to Section 502(5), a “person” is defined as “an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a state, or any interstate body.” 33 U.S.C. § 1362(5). In its answer, Respondent admitted that it is a “person” as defined by Section 502(5) of the CWA.. Respondent’s Answer and Request for Hearing ¶ 13.

B. Respondent Discharged Pollutants

Respondent denies in its Answer that it or anyone acting on its behalf directed the placement of fill material into the unnamed tributary. Respondent’s Answer ¶ 15. Respondent also denies in its Answer that its placement of fill material constitutes the discharge of a “pollutant,” as defined in Section 502(6) of the CWA, 33 U.S.C. § 1362(6). *Id.* ¶ 19. Further, Respondent denies that the materials placed in the unnamed tributary constitute “fill material”; or that its placement of material into the tributary constitute a “discharge of fill material,” as those terms are defined in 40 C.F.R. § 232.2. *Id.* ¶ 18.

Section 404 of the CWA prohibits the discharge of “fill material,” except in compliance with a permit issued by the Corps. 33 U.S.C. § 1344. “Fill material” is defined at 40 C.F.R. § 232.2 as “material placed in waters of the United States” that has the effect of “[r]eplacing any

portion of water ... with dry land; or ... changing the bottom elevation of any portion of a water ...,” and includes “rock, sand, and soil.” “Discharge of fill material” includes “the addition of fill material into waters of the United States” and includes “the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction.” *Id.* Courts have recognized that “fill material” is a “pollutant” under the CWA, *see, e.g., Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 272 (2009), and that “(r)ock, sand, and ... other fill material are each a ‘pollutant’ when discharged into navigable waters,” *United States v. Akers*, 785 F.2d 814, 818 (9th Cir. 1986).

Respondent’s denial that it discharged fill material clearly contradicts Mr. Morrow’s own testimony.² Throughout his testimony, he repeatedly acknowledged that he hired a contractor to excavate the stream channel and place drainage tiles in 2015. *See, e.g.*, TR478: 14-21. Morrow also acknowledges that he cleared trees and brush around this time. TR513: 1. He also admits that the channel had water in it at times. *See, e.g.* TR447: 16-17. After the tile drains were placed, he admits it filled in the channel. TR 511: 3-4 (“Q What did you push into the channel? A Dirt.”). Morrow also admits that after he filled in the channel, he plowed through and farmed the area, including the area where trees and brush were cleared. TR 501: 22-25; TR 506: 14-22; *compare* AX10, p. 14 (before), *with* AX10, p. 21 (after). Respondent admitted that the tile work had the effect of changing wet land to dry. TR458: 7-9 (“[tiling] dries out areas so that when it does rain, the soil is dry”); *see* 40 C.F.R. § 232.2 (fill material if it has the effect of replacing water with dry land).

Morrow’s admissions that he placed dirt into formerly wet areas by filling the channel with dirt and cropping over the former tributary and wetlands undoubtedly demonstrate the

² Mr. Morrow testified on behalf of Respondent.

discharge of fill material, which qualifies as a pollutant. Thus, EPA has demonstrated by a preponderance of the evidence that Respondent discharged pollutants.

C. Respondent Discharged from a “Point Source”

In its Answer, Respondent denies that the equipment he used to discharge fill material into the stream and wetlands qualifies as a “point source.” Answer ¶ 20.

Section 502(14) of the CWA defines “point source” as “any discernable, confined and discrete conveyance ... from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). A “point source” includes bulldozers, backhoes and other heavy mechanized earthmoving equipment that “collect into piles material that may ultimately have found its way back into the waters.” *Avoyelles Sportsmen’s League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983) (citing cases).

In its testimony, Respondent admits that the entire length of the stream channel from the northern boundary of his property to Deep Creek was first excavated with a backhoe to place the tiles (TR 478: 18-24) and that Morrow used a “skid-loader” to push dirt into the former stream channel. TR 510: 24. These admissions establish by a preponderance of the evidence that Respondent discharged pollutants through a point source.

D. The Unnamed Tributary and Adjacent Wetlands are Waters of the United States

Respondent denies that the unnamed tributary and adjacent wetlands are jurisdictional under the Clean Water Act. Answer ¶ 22.

Jurisdictional waters under the CWA are defined in Section 502(7) of the CWA, 33 U.S.C. § 1362(7), as “navigable waters,” which includes the “waters of the United States.” “Waters of the United States” are defined at 40 C.F.R. § 112.2 (1993) to include tributaries to, and wetlands adjacent to, waters of the United States. 40 C.F.R. §230.2(iv) defines wetlands as

“those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.”³

The limits of a jurisdictional “tributary” and “wetland” have been defined and redefined by the courts. The prevailing Supreme Court case, *Rapanos v. United States*, 547 U.S. 715 (2006), provides two distinct yet interrelated tests to determine whether a tributary or wetland meet the definition of a “water of the United States.” In 2009, the Eighth Circuit held that water bodies are jurisdictional if they meet either of these tests. *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009).

Justice Scalia’s test holds that a tributary must be a “...relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ ...” and have continuous flow. 547 U.S. 715 at 733. The “Scalia Test” specifically excludes “ephemeral flows of water” which only respond to rain events, *id.* at 733, but includes “seasonal” waters that may dry up during parts of the year, *id.* at 732 n.5. To be a jurisdictional wetland, Scalia asserts that the wetland must have a “continuous surface connection” to a jurisdictional tributary. *Id.* at 742.

Justice Kennedy’s test requires that tributaries and wetlands have a “significant” physical, biological, or chemical effect – a “significant nexus” – on a “traditionally navigable water” to be a jurisdictional water under the CWA. *Id.* at 759 (citing *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001)). Factors that may be relevant in determining significant nexus include the adjacency of the water, the ability of water to maintain runoff, the “regularity of flow” in tributaries, and a wetland’s role in filtering pollutants and

³ “Tributaries” are not defined in the regulations. In 2015, EPA promulgated a new definition of “waters of the United States” which includes a new regulatory definition for “tributary.” However, Respondent’s violations occurred prior to the 2015 Rule’s promulgation. Further, the 2015 Rule is currently stayed as part of ongoing litigation involving the State of Iowa. As a result, the 2015 Rule has no application to the present case.

controlling flooding. *Id.* at 785, 786. In *United States v. Cundiff*, the Sixth Circuit concluded that establishing a significant nexus does not require qualitative tests, such as soil samples or “laboratory analysis.” 555 F.3d 200, 211 (6th Cir. 2009). Instead, the court found that the testimony and observations of the government’s “credible” expert witness was sufficient to establish nexus and to conclude that Defendant’s actions harmed the watershed. *Id.* In that case, the expert demonstrated through its on-site observations that filling of a wetland and channelizing of tributaries could impact aquatic life. *Id.*

EPA will demonstrate herein that the tributary and wetland in the present case meet both the Scalia and Kennedy tests without difficulty.

i. The unnamed tributary had “relatively permanent” flow that formed a “geographic feature,” fulfilling the Scalia test

Building upon Justice Scalia’s test, courts have been clear that “intermittent streams,” as opposed to “ephemeral streams,”⁴ are “relatively permanent waters.” For example, the Ninth Circuit concluded that a tributary containing water for two months out of the year was a water of the United States. *United States v. Moses*, 496 F.3d 984, 989-91 (9th Cir. 2007). The District Court of Idaho found a stream jurisdictional where the tributary held water seasonally for six to eight months out of the year. *United States v. Vierstra*, 803 F. Supp. 2d 1166, 1170 (D. Idaho 2011). And a district court in California found a tributary to be jurisdictional where the “record makes clear that Fay Creek is a stream that flows throughout certain seasons of the year, even in its lower stretches, drying up in the summer months.” *Sequoia Forestkeeper v. U.S. Forest Serv.*,

⁴ “An ephemeral stream is primarily a stream that just flows right after a rainfall event.” Dr. Delia Garcia testimony, TR177: 16-17. “An intermittent stream would be a stream that derives its water not only from rainfall, but ... also has a high-water table where it’s also influenced by groundwater ... you have to look at bed and bank and also, intermittent stream usually has a meandering channel ... and an ordinary high-water mark ...,” Garcia Testimony, TR 176; TR177: 19-22, 2-4. “Intermittent streams also respond to rainfall events but they have a groundwater component to it, at least for some parts of the year, so they would flow longer” Pete Stokely Testimony, TR 289: 15-18.

Civ. No. 09-392, 2011 U.S. Dist. LEXIS 26447, at *14, 2011 WL 902120 (E.D. Cal. Mar. 15, 2011).

The evidence clearly supports EPA's conclusions that, prior to Respondent's 2015 fill activity, the unnamed tributary contained at least seasonal flow and formed a continuous channel with bed and bank from Respondent's northern property boundary to Deep Creek, easily fulfilling Justice Scalia's "relatively permanent water" test under *Rapanos*.

For starters, during each of the site visits conducted by EPA and the Corps at Respondent's property in July 2015, March 2017, and May 2018, the Agencies identified flowing water in the tributary above the impacted stream channel and also entering into Respondent's tile drain system.⁵ *E.g.*, Marlyn Schafer Testimony at TR 38: 22-23 ("there was water flowing in the channel at the time"); Joey Shoemaker Testimony at TR 148: 2-3 ("you can see what appears to be water flowing with rippling"); Delia Garcia Testimony at TR 211: 1-3 ("water was flowing – the water from the upstream tributary, undisturbed tributary – was flowing into the tile intakes"). During EPA's May 2018 site visit, Dr. Delia Garcia observed water flowing through the tile system.⁶ *E.g.*, TR19-22 ("the water was going up from the undisturbed portion of the unnamed tributary upstream and flowing into the tile intakes and you can see it flowing directly through the tiles"). And during the July 2015 Corps site visit and the May 2018 EPA site visit, personnel identified water flowing out of the tile drains directly into Deep Creek.⁷ *E.g.*, Garcia Testimony at TR 226: 5-6 ("you can see water flowing from the tile outlets directly into Deep Creek"). Mr. Morrow also repeatedly acknowledged his own on-site observations of

⁵ Marlyn Schafer Testimony, referencing photos AX4, pp. 2, 5, 6, 11; TR39: 20-22; TR40: 15-16; TR41: 13-17; Joey Shoemaker Testimony, referencing photos AX2, pp. 4, 5, 6, 7; TR149:13-16; TR21-23; TR150:3-5, 13; Garcia Testimony, referencing photos AX1, pp. 13, 15, 19, 23, 24, 28, 30, 31; TR212:9-13; TR213:1-3; TR220:7-8; TR221:24-25.

⁶ Garcia Testimony, referencing photo AX1, p. 37 and video AX19; TR 224: 4-5.

⁷ Schafer Testimony, TR 45:17-18 ("I do believe there was water outletting from the tiles at that time"); Garcia testimony, referencing photos AX1, pp. 49, 53 and video AX19; TR227: 12-13.

water within the channel (“There would be water in it at times, not all the time ...”). TR447: 16-17. *See also* TR496:21-24; TR498: 10-11, 25; TR499: 18-21.

In each of the three site visits, the Agency staff also observed that the stream channel directly above the drainage tiles had a defined bed and bank and ordinary high-water mark.⁸ *E.g.*, Garcia Testimony at TR212: 23-24 (“... you can clearly see the bed and bank of the tributary ...”). The Corps’ Project Manager, Marlyn Schafer, also concluded that the tiled channel would have had the same defined channel characteristics had it not been filled in. Schafer Testimony, TR41: 1-9 (“I presume the area downstream would have had very similar characteristics since it is on the upstream end, then as you go downstream ... the drainage area becomes larger ...”).

In addition to the presence of flowing water at the time of inspection, Dr. Garcia identified indicators of groundwater as a source of flow in the unnamed tributary, including evidence of oxidization from iron deposits surrounding the tile drain inlets⁹ and an oily sheen within the tributary above the inlets.¹⁰ She also observed ephemeral channels that she concluded would discharge into the unnamed tributary during rain events, further supporting EPA’s conclusion that the unnamed tributary is a “relatively permanent,” not ephemeral, tributary.¹¹

⁸ Schafer Testimony, referencing photos AX4, pp. 5, 6, 11; TR38: 13-15; TR39: 1-19; AX2, pp. 5, 7, 8; Shoemaker Testimony, referencing photos AX2, pp. 4, 5, 7; TR 148: 3-4 (“... you can see defined channel, a bed and bank ...”); TR149: 7; TR150:12-13; Garcia testimony, referencing photos AX1, pp. 15, 16, 19, 24; TR216: 17.

⁹ Garcia Testimony, referencing photo AX1, p. 31; TR221: 15; TR222: 1-11 (“... we are looking at ... iron deposits going into ... one of the tile intakes and that, to me, confirms our suspicion that this tributary is groundwater influenced. The reason that you can see these – this bright-orange, you know, streak, I guess, going into the tributary is that, when our - from groundwater is – there is little or very – no oxygen at all. And when it emerges into – to the surface there’s bacteria. That’s what they do, they oxidize iron, and so that’s why you get that bright orange. So, to me, this was indicative that this tributary is groundwater influenced.”).

¹⁰ Garcia Testimony, referencing photo AX1, p. 26; TR270: 14-20 (“... an oily sheen within the tributary is, in these kinds of systems where’s their [sic] groundwater ... it’s actually caused by oxidizing – by iron oxidizing bacteria, those are actually their cells ... when they get decomposed basically ...”).

¹¹ Garcia Testimony, referencing photo AX1, p. 27; TR217: 2-25 (“it was an ephemeral tributary that was draining into the unnamed tributary ... It’s just another contributor of water during rainfall events to – to the unnamed tributary ... that would make this what is called a second-order stream ... it means that there’s other lower-ordered streams contributing flow to this tributary.”).

Supplementing the agencies' on-site observations, EPA experts reviewed dozens of historical satellite images of Respondent's property dating back to the 1930s to draw conclusions about the tributary prior to the 2015 tile-and-fill activity. Dr. Garcia and Peter Stokely, EPA's national expert on satellite image interpretation and a 30-year practitioner of aerial photograph analysis,¹² used Geographic Information Systems (GIS) technology to view and analyze digitized images of the property, allowing them to see the tributary at multiple angles, distances, and resolutions. They also utilized GIS to view other digitized images and information such as LiDAR ("Light Detection and Ranging") and infrared imagery to gauge elevation differences and the presence of hydrology and vegetation. Garcia and Stokely also relied on United States Geological Survey data, watershed and topographic maps, and United States Department of Agriculture hydric soil maps. Based on these observations, Garcia and Stokely concluded the unnamed tributary exhibited characteristics of a water of the United States.

First, Garcia and Stokely identified the presence of water in the unnamed tributary in different months over a span of years. In her testimony, Garcia identified water in the tributary in April 2009, March 2010, July 2010, and March 2015.¹³ Of the 35 digital images of Respondent's property on different dates reviewed by Stokely, he affirmatively identified water in the channel seven times (April 2019, March 2010 [on two days], June 2010, July 2010, July 2011, and March 2015) and saw "probable" or "possible" signs of water an additional seven times.¹⁴ Of the seven dates where Stokely affirmatively observed water in the tributary, four were during periods of

¹² See AX6, Peter Stokely Curriculum Vitae.

¹³ See Garcia testimony, referencing photos AX10, pp. 5a, 7a, 8a, 14, 19a, AX26, p. 2: TR186: 15-25; TR189: 1-6; TR192: 23-24; TR195: 3; TR198: 20-22 ("...you can see what appears to be water flowing from the tributary to Deep Creek").

¹⁴ See Stokely's Expert Report, AX31, pp. 22-26; TR313: 16. For dates that Stokely did not identify water, many were due to the vegetative canopy, low resolution, or "season limiting" factors.

normal or below-normal precipitation, AX31, pp. 22-26, further supporting EPA's position that the tributary was not an ephemeral channel.

Second, Garcia's and Stokely's assessment of the geographic features of the unnamed tributary observed in the satellite imagery supported a conclusion that the tributary was an intermittent, "relatively permanent" water. In fact, Mr. Stokely testified that a "relatively permanent" intermittent stream can be identified through observations of the stream's geographic features regardless of whether water can be readily identified in the channel: "Intermittent streams typically (have) ... pronounced geographic features. They express themselves in the topography of the land ... Q ... is the presence or lack thereof of you being able to see water in an aerial image definitive of what type of stream it would be? A No." TR290: 24-25; TR291: 1-8; TR292: 17-25; TR293: 1-3.

In each of the satellite images representing different months and years, Dr. Garcia testified that she observed a defined channel marked by bed and bank with a physical connection to Deep Creek. *E.g.*, Garcia Testimony at TR192: 20-24 ("...it is pretty clear to see that there is bed and bank all ... the way from the northern part of the tributary to the connection with the [Deep] creek.").¹⁵ Similarly, Mr. Stokely testified that in his review of images between the 1930s and 2015, he consistently identified a well-defined channel traversing Respondent's property from the northern property line and discharging into Deep Creek. *E.g.*, Stokely Testimony at TR323: 15-24 ("...you can see the tributary flowing from the northwest to the southeast ... you can see some of the channel characteristics ... you can see some of the meandering nature of the tributary. And then you can see the connection, follow the tributary down to Deep [Creek]

¹⁵ Referencing photos AX10, pp. 5, 7, 8, 9, 14, 19; AX26, p. 2: TR186: 3-8; TR188: 19-23; TR192: 20-23; TR194: 22-25; TR195: 15-16; TR197: 5-6; TR198: 17-22 ("...a pretty good view of the bed and banks of the lower half of this tributary ... And you can see what appears to be water flowing from the tributary into Deep Creek.")

...”).¹⁶ Of particular note are the satellite images from March 20, 2015, marked as AX10, pp. 17-20. These images show the tributary from multiple angles and were taken within weeks before Respondent began the fill work within the tributary. Garcia pointed out the “good view of the bed and banks of the lower half of this tributary,” TR198: 17-19, and Stokely identified “either ice or sunlight reflecting, and either way to me it’s indicating the presence of water pretty clearly,” TR423: 10-12. Of further note, the precipitation for the month of March 2015 was “way below” average (AX31, p. 25), supporting EPA’s position that the tributary was intermittent.

Indeed, even Mr. Morrow confirmed the presence of a geographic feature in the tributary from the north end of the property until topography changes prior to Deep Creek. TR499: 1 (“Yes, there was a bank.”). The defined channel was also confirmed by Respondent’s expert witness, Gerald Hentges. TR631: 20-21 (“...[the tributary’s upper reach] has channel characteristics”); TR632: 16-19 (“Q ... Are ... you here today to dispute that the upper reaches of the tributary don't have a defined bed and bank? A No, I'm not.”).

Based on their respective analyses, Garcia and Stokely, as well as the Corps’ Marlyn Schafer, made the following conclusions concerning the tributary as a “relatively permanent” water forming “geographic features”:

... the site visit substantiated or supported what I had seen on the resource maps, that we have a jurisdictional stream channel. And the aerial photography and again, the (United States Geological Survey) topographic map (AX20), the updated National Wetland Inventory map, all support that there was a defined channel all the way down to Deep Creek. There was some of that aerial photography that also showed where the portion of the intermittent stream channel that flowed through the bottom land of Deep Creek, where it had a

¹⁶ Referencing photos AX10, pp. 1, 2, 3, 4, 5, 5b, 7, 7b, 8, 8b, 9, 9a, 12, 12a, 14, 14a, 15, 15a, 17, 18, 18a, 19, 19b, 20, 20a; AX26, pp. 2, 2a: TR318: 1-5; TR319: 10-13, 22-25; TR320: 1-11; TR321: 6-8; TR322: 1-4, 11-18; TR323: 15-22, 23-25; TR324: 7-14; TR330: 24-25; TR331: 3-8; TR334: 8-11, 17-25; TR336: 11-23; TR338: 3-18; TR339: 22-25; TR340: 2-14; TR341: 7-20; TR342: 13-17 (“...the channel characteristics are very clear ... before it flows into Deep Creek ... you can see the defined channel.”); TR344: 22-25; TR345: 1-11; TR347: 1-25; TR348: 24-25; TR349: 1-23; TR350: 1-5; TR351: 18-23.

history of having been altered. But yet, it always returned to a defined channel, and -- which is the condition that it was in the more recent years. Marlyn Schafer testimony, TR46: 17-25; TR47: 1-3.

... this tributary has all the characteristics of an intermittent tributary that would have relatively permanent flow, where it would flow seasonally ... a bed and bank were present, and an ordinary high-water mark were present on the upstream portion ... there was a direct physical connection [to Deep Creek] ... Delia Garcia testimony, TR227: 18-22; TR228: 2-4, 11-12.

I'm concluding [the tributary is a] ... relatively permanent based on time feature. I also observed the topography, the geomorphic characteristics of it, and the watershed size, the precipitation, and the amount of precipitation, the averaging of precipitation, and then the way the U.S. Geological Survey mapped it, along with my own experience looking at tributaries like this in size, that I concluded that it's a relatively permanent geographic feature. I agree with the U.S. Geological Survey's interpretation that it's intermittent, and as you can see in my report, I further concluded that it is likely a seasonal flow, relatively continuous seasonal flow. Peter Stokely testimony, TR368: 4-17.

ii. The unnamed tributary had wetlands adjacent to it with a continuous surface connection, fulfilling the Scalia test

Per *Rapanos*, wetlands must have a “continuous surface connection” to jurisdictional waters to be jurisdictional. 547 U.S. 715 at 742.

Based on information provided by the USDA’s Natural Resources Conservation Service (“NRCS”), analysis of USDA hydric soil maps and aerial imagery, and on-site observations, EPA and the Corps determined that Respondent cleared approximately 1.3 acres of jurisdictional wetlands that had a “continuous surface connection” to the tributary without obtaining a CWA Section 404 permit.

According to Don Carrington, a Resource Conservationist with the NRCS in Des Moines, Iowa, the NRCS determined that Respondent cleared 1.3 acres of wetlands in and around the unnamed tributary. AX11, pp. 6, 8; TR80: 1, 22-24, 81: 10-12. According to the “Highly Erodible Land and Wetland Conservation Determination” submitted to Respondent by NRCS, the determination was made on October 29, 2015, approximately six months after Respondent

completed the tile-and-fill work on his property.¹⁷ AX11, p. 6. A map accompanying the notification marks the “converted wetland” area within and surrounding a portion of the unnamed tributary in the northern, upstream portion of the tributary. AX11, p. 8. In testimony, Mr. Carrington confirmed that his read of the map indicates the wetlands directly abutted the tributary. AX11, p. 6a; TR85: 2-4 (“Q ... there is no separation between the wetland and the tributary, correct? A To the best of my knowledge, there is not.”).

Mr. Carrington also testified that NRCS makes wetland determinations pursuant to the USDA’s Food Security Act and that the agency does not have CWA jurisdiction. TR91: 10. However, when making wetland determinations, Mr. Carrington testified the agency looks “... at the soil. We are looking at vegetation and we are looking for indicators of hydrology.” TR73: 6-8. According to Marlyn Schafer of the Corps and Delia Garcia of EPA, these are the same indicators that the Corps and EPA look for in making their own wetland determinations. TR20: 1-5 (Schafer Testimony: “...similar to the NRCS’ requirements, hydrophytic vegetation, wetland vegetation and it has to be – there’s a hydric soil so that it supports wetland conditions or wet conditions and saturation to the surface ...”); TR171: 5-8 (Garcia Testimony: “we’re looking at whether there is a presence of hydric soils, the source of hydrology, and whether there is hydrophytic vegetation ...”) In fact, Mr. Carrington testified that the NRCS uses the same wetland determination methods as the Corps and utilizes the Corps’ wetland determination manual to make its wetland determinations. TR74: 10-13; TR75: 1-2. Finally, both the Corps and EPA testified that it commonly relies on NRCS wetlands determinations in making its own wetland determinations. TR21: 19-24; TR204: 19-22.

¹⁷ According to documents provided by the NRCS and Mr. Carrington’s testimony, Respondent challenged the wetland determination in 2016 but lost his appeal after failing to provide additional supporting evidence. AX11, pp. 11, 12; TR88: 15-20. According to Carrington, the NRCS determination that Respondent converted wetlands remains to date. TR89: 15-16.

To confirm the NRCS's wetland determination, Corps and EPA personnel conducted ground truthing at Respondent's property during their respective site visits in 2015 and 2018. Observing conditions upstream of the filled tributary, Marlyn Schafer identified "wet conditions ... very saturated ... vegetation in there that is ... definitely is hydrophytic vegetation ... And so, we have some fringe wetland areas in there very likely." TR40: 16-22. Schafer concluded that "the area downstream would have had very similar characteristics since this is on the upstream end, then as you go downstream ... the drainage area becomes larger and so you start collecting more drainage ..." TR41: 1-7. During her 2018 site visit, Dr. Garcia identified sedge and willow species, "hydrophytic vegetations that are present within wetlands," indicating the presence of hydric soils and "enough surface and groundwater to be able to sustain this kind of vegetation." TR219: 11-15; TR223: 6-13. Garcia also concluded that "we would expect, given the ... conditions of this tributary, to be very similar ... downstream." TR219: 22-24.

Concerning the EPA's determinations about impacted jurisdictional wetlands on Respondent's property, Garcia concluded, "my analysis, and given my review of the NRCS wetland determination, and ... looking at aerial images, hydrology and hydric soil maps, there was definitely wetlands prior to impact. And these were within stream wetlands." TR228: 20-23. *See also* AX27, USDA Hydric Soils Map.

iii. The unnamed tributary had a physical, biological, and chemical significant nexus to the English River, fulfilling the Kennedy test

Even if EPA were unable to meet its burden in establishing that the unnamed tributary was a "relatively permanent water" forming "geographic features" per Justice Scalia's test in *Rapanos*, the Agency asserts the evidence in the present case easily satisfies Justice Kennedy's "significant nexus" test by demonstrating the tributary's significant physical, biological, and chemical nexus to Deep Creek and the English River.

The science concerning the integral physical, biological, and chemical relationships between smaller tributaries and downstream, navigable waters is well-documented. For example, “Where Rivers are Born: The Scientific Imperative for Defending Small Streams and Wetlands,” a compendium of stream and wetland data authored by 11 scientists says:

Scientific research shows that healthy headwater systems are critical to the healthy functioning of downstream streams, rivers, lakes, and estuaries ... (C)hanges that degrade these headwater systems affect streams, lakes, and rivers downstream ... the total elimination of some small streams reduces the amount of rain-water, runoff, and snowmelt the stream network can absorb before flooding. The increased volume of water in small streams scours stream channels, changing them in a way that promotes further flooding. Such altered channels have bigger and more frequent floods. The altered channels are also less effective at recharging groundwater, trapping sediment, and recycling nutrients. As a result, downstream lakes and rivers have poorer water quality, less reliable water flows, and less diverse aquatic life. AX15, p. 4. *See also* “Ecology: Achievement and Challenge.” AX15, pp. 29-52.

“Where Rivers are Born” also discusses the importance of smaller streams to aquatic species. The article states that a recent review of scientific literature “found that small headwater streams that do not appear on most maps can support over 290 taxa, some of which are unique to headwaters, thus emphasizing the significant contribution of small streams to biodiversity of entire river networks.” AX15, p. 17.

As discussed above, the evidence is replete with photographs and on-site observations that there existed a physical connection between the unnamed tributary and Deep Creek. Indeed, the configuration of Respondent’s drainage tile system itself evidences a connection between the tributary and Deep Creek. EPA and Corps staff repeatedly testified to that physical connection through their respective analyses of historical aerial imagery and through their on-site observations where they observed water discharging through the drainage tiles into Deep

Creek.¹⁸ Also, as testified by Dr. Garcia and Mr. Stokely, photograph AX10, p. 19 acutely demonstrates the connection of the tributary to Deep Creek, and the photograph was taken weeks prior to Respondent's fill activity. When presented AX10, pp. 19 and 20, even Respondent's expert witness acknowledged he saw the physical connection between the tributary and Deep Creek. TR661: 7-8 ("I do not see a lack of connection."); TR661: 19-21 ("Q ... Can you mark on the map where you see a lack of physical connection between the water body and Deep Creek? A ... in this photo there is abundance. The water's running off, and it's running from the upland to the creek.")

The Corps and EPA also testified to observations made on-site supporting evidence of a biological and chemical connections between the tributary and Deep Creek. During his July 2015 site visit, Marlyn Schafer observed that the stream channel above the tile inlets "is carrying some ... the flow is a little cloudy and so, it is carrying some fine sediments with it ... we are seeing that rippling effect there where you have the sediment sorting occurring on the streambed." TR41: 15-19, referring to AX4, p. 11. In her testimony concerning her May 2018 site visit, Dr. Garcia described how she observed transport of vegetation in the channel above the tile inlets and explained "there's microorganisms and other aquatic fauna in these smaller streams that would break down vegetation like this to make nutrients, such as carbon, available to other organisms that rely on that ..." TR213: 13-23, referring to AX1, p. 19. Dr. Garcia also photographed further evidence of chemical and biological activities taking place in the channel: This included decomposing walnuts in the channel "to show the type of processes that take place

¹⁸ Referencing photos AX10, pp. 1, 2, 3, 4, 5, 5b, 7, 7b, 8, 8b, 9, 9a, 12, 12a, 14, 14a, 15, 15a, 17, 18, 18a, 19, 19b, 20, 20a; AX26, pp. 2, 2a; TR 45: 17-18; TR46: 17-25; TR47: 1-3; TR186: 3-8; TR188: 19-23; TR192: 20-23; TR194: 22-25; TR195: 15-16; TR197: 5-6; TR198: 17-22; TR318: 1-5; TR319: 10-13, 22-25; TR320: 1-11; TR321: 6-8; TR322: 1-4, 11-18; TR323: 15-22, 23-25; TR324: 7-14; TR330: 24-25; TR331: 3-8; TR334: 8-11, 17-25; TR336: 11-23; TR338: 3-18; TR339: 22-25; TR340: 2-14; TR341: 7-20; TR342: 13-17; TR344: 22-25; TR345: 1-11; TR347: 1-25; TR348: 24-25; TR349: 1-23; TR350: 1-5; TR351: 18-23.

in these kinds of tributaries. Where ... these walnuts ... will sometimes take years to decompose ... there's obviously organic matter that goes into ... larger tributaries ... but it's -- it doesn't have as much of a chance to decompose because of higher flows as it does on these smaller tributaries ...” (AX1, p. 23; TR216: 18-25; TR217: 1-8). Finally, as discussed above, she observed conditions in the channel evidencing oxidization, a chemical process. AX1, pp. 26, 31; TR221: 15; TR222: 1-11; TR270: 14-20.

Concerning the transport of biological materials from the tributary to Deep Creek, Mr. Morrow also testified that “I have seen with my own eyes on big rains coming off ... my property, corn stalks, bean stubble, and grasses that flow directly into Deep Creek.” TR499: 18-21. And Respondent’s expert acknowledged that, prior to the 2015 fill activity, the tributary would have carried nutrients and sediment downstream. TR653: 22-25; TR654: 7-9.

Regarding the tributary’s connection to a “traditionally navigable water,” Dr. Garcia and Mr. Morrow both testified that Deep Creek has continuous flow (except during periods of extreme drought) and that the Creek flows into the North English River. TR234: 25; TR235: 1-3; TR530: 2-5; TR531: 3-6. The USGS Topographic Map marked as AX20 shows the North English River as a perennially-flowing channel. In Peter Stokely’s Expert Report (AX31), Mr. Stokely identified that “(m)oving downstream from Deep Creek, the North English River is joined by the Middle and South English Rivers and becomes the English River at the English River Wildlife Area ... approximately 25 miles downstream from the Site.” At 5. AX22 demonstrates that the Iowa Department of Natural Resources considers the English River a fishing resource and identifies a boat launch on the River, confirming the English River’s designation as a “traditionally navigable water.”

Based on the foregoing information, EPA has established by a preponderance of the evidence that the unnamed tributary had a “significant nexus” to Deep Creek and to the English River.

iv. The wetlands had a physical, biological, and chemical connection to the tributary, fulfilling the Kennedy test

According to “Where Rivers are Born: The Scientific Imperative for Defending Small Streams and Wetlands:” “Like headwater streams, wetlands are also key components of the nation’s network of rivers and streams ... There are strong biological connections also; many aquatic and semi-aquatic animals, ranging in size from aquatic insects to raccoons, routinely move between land-locked wetlands, streamside wetlands, and stream channels.” AX15, p. 9. The article also discusses wetlands’ abilities to trap sediment, contain and transform organic matter and nutrients, which affect downstream water quality; and feed habitat downstream and promote ecological diversity. *See generally Id.* Dr. Garcia also testified extensively concerning the general ecological functions of wetlands, including flood attenuation, nutrient breakdown, and species habitat. TR179: 5-15.

As discussed above, based on the NRCS wetland determination and on-site observations by the Corps and EPA, the agencies determined that Respondent cleared and filled approximately 1.3 acres of jurisdictional wetlands that existed within and abutting the unnamed tributary. *See* TR228: 20-23. Further, EPA and Corps personnel identified the presence of wetland hydrology, vegetation, and soil surrounding the tributary directly above the tile inlets during on-site inspections and concluded the same conditions would have existed downstream prior to Respondent’s clearing and filling. TR40: 16-22; TR41: 1-7; 219: 11-15; TR223: 6-13; TR219: 22-24.

During her site visit in 2018, Dr. Garcia identified the presence of wetland vegetation growing in the area where the tributary existed prior to 2015: “What we are looking at ... is a willow species, which ... is one of those species of trees that are usually water dependent. So, to me, it indicates that, you know, there are still hydric soils despite the disturbances ... There’s still enough surface and groundwater to be able to sustain this kind of vegetation.” TR223: 6-13, referring to photo AX1, p. 35. Respondent’s expert corroborated this finding during his site visit: “I saw what appeared to be wetland vegetation (along the tile line) ... I believe as long as that area's not farmed it will eventually show characteristics of a wetland.” TR622: 17-25; TR623: 1, 13-15.

While EPA and the Corps were not present to analyze wetland functions on Respondent’s property prior to the 2015 drain and fill work, both agencies agree on the following: wetlands performing ecological functions currently exist above the tiled tributary; that, in conjunction with NRCS findings, over an acre of wetlands were present prior to the activity; and that the wetlands were within and adjacent to the tributary. Moreover, the agencies and Respondent’s expert agree that wetland conditions continue to exist over the fill site.

Based on these findings and what we know about the significance of wetlands to the health of a watershed, EPA establishes by a preponderance of the evidence that the cleared and filled wetlands were physically, biologically, and chemically connected to the unnamed tributary, and thus, to the English River.

v. Manipulation of the tributary’s lower reaches did not sever jurisdiction

Courts have found that human-caused manipulation of a stream channel does not sever the jurisdiction of a stream. For example, in *In re J. Phillip Adams*, 2006 EPA ALJ LEXIS 33 (October 18, 2006), a case with similar facts to the present case, Administrative Law Judge

William B. Moran concluded that, contrary to Respondent's assertions that the tributary's flow dissipated into a field and therefore lost its "nexus" to its receiving stream, the tributary was still jurisdictional because it contributed flow to the receiving stream and, eventually, a traditionally navigable water. The Ninth Circuit held in *United States v. Moses* that the human-made severance of a tributary which caused the channel to go dry for portions of the year did not sever the tributary's jurisdiction. 496 F.3d 984, 990 (2007). In *Leslie Salt Co. v. Froelke*, the Ninth Circuit found a salt water evaporation pond was jurisdictional despite the fact that the pond was humanmade and that it came in between two jurisdictional waters. 578 F.2d 742, 755 (9th Cir. 1978) The Court emphasized that that the term "navigable waters" is "to be given the broadest possible constitutional interpretation." *Id.* In *United States v. Adam Bros. Farming*, the Central District of California held that a gravity pump that discharged water from a channelized stream into a navigable water did not sever jurisdiction: "a majority of courts that have addressed the issue have concluded that the existence of a hydrological connection does not turn on a distinction between the 'natural' flow of water and the 'artificial' flow of water." 369 F. Supp. 2d 1166, 1177 (C.D. Cal. 2003).

In reviewing historical aerial imagery of Respondent's property and the tributary, EPA and Corps staff identified that many of the images showed that the lower reach of the tributary just before entering Deep Creek had been manipulated over the years, including channelization, clearing of vegetation, and conversion to a "grassed waterway." *See, e.g.*, AX18, Corps Cease and Desist letter written by Marlyn Schaefer ("In the 1960s, a channel/swale was present in the bottomland which appears to have been mechanically excavated and graded ... In 2000 to 2010, the riparian wooded cover was removed from the bottomland channel, and the channel appeared to have been graded as a grass waterway again.")

Respondent has confirmed he is responsible for such manipulation. In response to EPA's August 15, 2018 CWA Section 308 Request for Information, Respondent admitted that its "... activities within the drainageway and Respondent's property prior to July 2015, were to conduct normal crop farming operations, such as tillage, planting and harvesting." AX30, p. 6. In testimony, Mr. Morrow admitted that he cropped over the lower portion of the tributary "at various points" and that when he conducted farming operations over the tributary, that portion of the tributary would not have a defined channel. TR501: 22-25; TR506: 16-22; TR507: 9-13.

In an apparent case of having one's cake and eating it, too, Respondent here both admits that he farmed over a portion of the tributary's defined channel and then asserts that such lack of a defined channel caused by his activities results in loss of jurisdiction for the entire tributary. In his expert report, Mr. Hentges asserts that "the lower reach of the unnamed intermittent tributary of Deep Creek does not show all the characteristics necessary to be defined as a (water of the United States) under the CWA," arguing that the reach is, in fact, a "grassed drainageway than does not have a defined channel bed and defined channel bank." RX1, p. 1. Thus, according to Mr. Hentges, there is no "significant nexus" to Deep Creek and, thus, the tributary is not jurisdictional. *Id.*

Mr. Hentges's position appears to be that, once a portion of tributary is manipulated, it severs the jurisdiction of the entire reach of a tributary in perpetuity. Respondent does not proffer any case law or EPA/Corps guidance to support such a conclusion. In fact, Hentges maintained this position in his testimony despite admissions by Morrow and Hentges that the upper portion of the tributary had a defined channel (TR499: 1; TR631: 20-21; TR632: 16-19) and the lower portion discharged water through a physical connection to Deep Creek. TR499: 18-21; TR661: 19-21.

The assertion that manipulation of a tributary necessarily removes the tributary's CWA jurisdiction does not comport with case law or with EPA/Corps practices. Both Dr. Garcia and Mr. Schafer testified that, even if a portion of the channel were manipulated to remove a defined bed and bank, the tributary itself would still be jurisdictional under the law. TR48: 21-25; TR252: 3-10 (“... there would still be flow within the grass waterway and so ... it would still remain a tributary ... Because there is flow going from the upstream portions of the tributary into the ... other tributary, in this case, Deep Creek.” TR253: 13-18).

Moreover, assuming *arguendo* that manipulation of the lower reach of the tributary made that portion of the stream non-jurisdictional, the facts show that, since the 1930s, after the tributary had been altered in some form, the unnamed tributary continued to cut a well-defined path to Deep Creek. Mr. Schafer, Dr. Garcia, and Mr. Stokely all testified that their review of historical images showed the tributary's continued and consistent reversion to a defined channel after manipulation. *See* Schafer's testimony at TR52: 2-6; Garcia's testimony at TR254: 22-25, and; Stokely's testimony at TR359: 6-10. This “re-channelization” is especially obvious in the photographs marked as AX10, pp. 17-20. These images were taken just weeks before Respondent filled in the tributary. Dr. Garcia, Mr. Stokely, and Mr. Hentges all testified to the photos' clear indication that a defined bed and bank was present and that the channel was flowing and discharging into Deep Creek at the time. TR198: 17-19; TR423: 10-12; TR499: 1; TR631: 20-21; TR632: 16-19.

Despite evidence that the lower reach of the tributary was recurrently manipulated for decades, EPA has demonstrated, and Respondent has admitted, that the tributary continued to form a geographic feature with relatively permanent flow that physically connected to Deep Creek, again fulfilling both jurisdictional tests under *Rapanos*. Importantly, photographic

evidence of the tributary mere weeks before the fill activity indisputably shows these jurisdictional characteristics. AX10, pp. 16-20. Such evidence renders Respondent's assertions of loss of jurisdiction meaningless.

vi. Respondent's expert is not qualified to make jurisdictional determinations

In his testimony, Gerald Hentges testified that he is not qualified to make legal determinations concerning whether a water body is or is not jurisdictional under the CWA, that he has never been retained as an expert to testify to a legal conclusion concerning CWA jurisdiction, and that he would never advise a client to fill in a stream or wetland without first consulting with the appropriate permitting agency. TR606: 12-19; TR607: 2-6. ("I pronounce my opinion on whether an aquatic feature is a Water of the U.S. all the time ... And I tell my clients it doesn't mean anything, what I think." TR637: 20-25; TR638: 1).

Mr. Hentges acknowledged he has not received any specialized training in aerial photo interpretation (TR584: 1-3; TR608: 1-21), that he had never been called as an expert to testify about aerial imagery (TR610: 22-25), that he did not independently apply GIS or other digital tools to review aerial images in this case and instead relied only on copies of images previously submitted by Complainant (TR612: 21-25; TR613: 1-25), and that his report did not contain any analysis of aerial imagery after 2009 (even though the fill activity occurred in 2015). TR648: 17-25. Hentges admitted he has never read the *Rapanos* case, could not identify the two tests described in *Rapanos* (TR616: 17-25; TR617: 1-9), and did not refer to *Rapanos* in analyzing the facts of this case. TR618: 16-20. These acknowledgments clearly make Mr. Hentges unqualified to volunteer opinions that are central to the factual and legal issues in the present case.

E. Respondent Did Not Obtain a CWA Section 404 Permit

Respondent did not have a CWA Section 404 permit authorizing its discharge of fill material. Morrow admitted in his testimony at hearing that it never consulted the Corps prior to completing any of the tile work, filling of the channel, and/or removal and fill of the vegetated areas adjacent to the tributary (“Q ... you don't have anything in writing to authorize the tiling work and the fill work from ... the Corps of Engineers ..., correct? A That's correct.” TR 513; TR514: 24-25, 1-3).

Thus, based on the foregoing, Complainant has established beyond a preponderance of the evidence that Respondent is a person who discharged pollutants through a point source into waters of the United States without a CWA Section 404 permit.

II. THE PRESIDING OFFICER SHOULD ASSESS THE FULL PROPOSED PENALTY OF \$40,500

Once liability is established, the Presiding Officer is obligated to assess a penalty for the unauthorized activity. *See Atlantic States Legal Foundation v. Tyson Foods*, 897 F.2d 1128, 1142 (11th Cir. 1990); *Chesapeake Bay Foundation v. Gwaltney of Smithfield*, 890 F.2d 690, 697 (4th Cir. 1989). As discussed above, liability for unauthorized discharges has been established. Therefore, for the reasons set out below, the Presiding Officer should assess, at a minimum, the full proposed penalty of \$40,500.

Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), authorizes the administrative assessment of civil penalties in an amount not to exceed \$10,000 per day for each day during which the violation continues, up to a maximum total penalty of \$125,000.¹⁹ Pursuant

¹⁹ *Chesapeake Bay Foundation v. Gwaltney*, 791 F.2d 304, 314-15 (4th Cir.1986), vacated on other grounds, 484 U.S. 49, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987). The court reasoned that the Clean Water Act “speak[s] in terms of

to the Civil Monetary Penalty Inflation Adjustment Rule of 2015, civil administrative penalties of up to \$21,393 per day for each day during which a violation continues, up to a maximum of \$267,415, may be assessed for violations of CWA Sections 301 and 404, 33 U.S.C. §§ 1311 and 1344, that occur after January 15, 2015.

The amount of the proposed penalty is appropriate under the statutory penalty factors set forth in section 309(g)(2) of the CWA. 33 U.S.C. § 1319(g)(3). Specifically, section 309(g)(3) of the CWA provides, in pertinent part:

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 . . . , 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). One of the main intents of imposing civil penalties is “to punish culpable individuals and deter future violations, not just to extract compensation or restore the status quo.” *Kelly v. EPA*, 203 F.3d 519, 523 (7th Cir. 2000). In determining the appropriate penalty amount, the presiding officer must depend on the specific facts of the case. *See In re Pleasant Hills Authority* at § 4, Docket No. CWA-III-210 (ALJ McGuire Nov. 19, 1999). To deter future violations, a penalty must capture economic benefit “to ensure that the violator does not profit from its violation of the law” and a punitive component above the economic benefit “which accounts for the degree of seriousness and/or willfulness of the violations.” *Catskill*

penalties per day of violation, rather than penalties per violation.” *Id.* at 314 (emphasis in original). “This language strongly suggests that where a violation is defined in terms of a time period longer than a day, the maximum penalty assessable for that violation should be defined in terms of the number of days in that time period.” *Id.* An approach that would set a maximum penalty per violation, rather than per day of violation would create a result that is inconsistent with the language of § 1319(d). *See Id.* The Gwaltney Court recognized that to hold otherwise would create a situation where the courts would lack sufficient flexibility to assess penalties that suit the particular circumstances of each case. For example, a court would be limited to the same single day of penalty for the most egregious violations that extend over time as something that is barely a violation. Such an approach could impose a drastic limitation on the court's authority to assess “appropriate” civil penalties.

Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 244 F. Supp. 2d 41, 48 (N.D.N.Y. 2003).

Courts have held that each day in which pollutants remain in a wetland without a CWA permit “constitutes an additional day of violation.” *Sasser v. Administrator, United States EPA*, 990 F.2d 127, 129 (4th Cir. 1993). *See also United States v. Ciampitti*, 669 F. Supp. 684, 700 (D.N.J. 1987); *United States v. Cumberland Farms*, 647 F. Supp. 1166, 1183-84 (D. Mass. 1986), *aff’d* 826 F.2d 1151 (1st Cir. 1987).

Two of the statutory penalty factors do not apply here: EPA is unaware of any previous enforcement actions against Respondent that would make prior history of violations relevant, and Respondent made no claim nor proffered evidence in support of an inability to pay the proposed penalty. As a result, these statutory penalty factors are not at issue. The statutory penalty factors that remain at issue are: (1) the nature, circumstances, and extent of the violation; (2) the gravity of the violation; (3) Respondent’s degree of culpability; (4) the economic benefit that results from the violation; and (5) other matters that justice may require.

A. Respondent Enjoyed an Economic Benefit Resulting from His Unauthorized Fill Work²⁰

The recapture of a violator's economic benefit from noncompliance is the cornerstone of EPA’s civil penalty program. *See In re B.J. Carney Industries, Inc.*, 7 E.A.D. 171, 207 (EAB 1997), *appeal dismissed*, 192 F.3d 917 (9th Cir. 1999), *dismissal vacated*, 200 F.3d 1222 (9th

²⁰ Complainant’s Prehearing Exchange did not provide a specific amount for economic benefit. However, EPA asserted that “Respondent placed fill material into the tributary in conjunction with its sale of property to an animal feeding operation operator, thus conferring an economic benefit ...” Complainant’s Prehearing Exchange at 7. At hearing, Mr. Morrow’s testimony provided conclusive and specific evidence concerning the amount of economic benefit derived from the sale of his property in addition to other benefits derived from filling the tributary. Thus, based on the Court’s “highly discretionary” ability to calculate penalties under the CWA (*Tull v. United States*, 481 U.S. 412, 426-427 (1987)), Complainant respectfully requests the Court to consider such economic benefit evidence in the assessment of penalties or, in the alternative, consider the evidence as part of the “other matters as justice may require” statutory factor found at 33 U.S.C. § 1319(g)(3).

Cir. 2000). The purpose of assessing a penalty amount that reflects a violator's economic benefit of noncompliance is two-fold. First, it deters violations by taking away an incentive to violate the law. Second, it helps to create a level playing field by ensuring that violators do not obtain an economic advantage over their competitors. *Id.* at 208. EPA need only provide a reasonable approximation of economic benefit. *United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 529 (4th Cir. 1999), *cert. denied*, 531 U.S. 813 (2000), *In re B.J. Carney Industries, Inc.* at 218.

i. Respondent's unauthorized fill activity allowed him to sell a portion of his property

Morrow testified that he sold a portion of the C&S Enterprise, L.L.C. property to a company called MCM Pork so that MCM Pork could build a swine animal feedlot operation on the property. TR517: 7-8. Morrow also testified that he "sold the land for \$12,000 and \$28,000 was paid to Morrow Construction for cleaning up the site ..." TR518: 2-3. Further, Morrow testified that part of the sale arrangement with MCM Pork was that it would provide manure to Respondent for use as fertilizer at no cost for a period of ten years, and that the value of the manure was between \$10,000 and \$12,000 a year. TR518: 6-11; TR540: 8-12, 22-24; TR541: 5-6.

Bert Noll of the Iowa Department of Natural Resources testified that state law requires confined animal feedlots to maintain a distance of at least 500 feet from "waters of the state," which generally include streams with a bed and bank. TR104: 20-23; TR105: 1-3. In July 2015, Marlyn Schafer of the Corps created a "Telephone Conversation Record" recounting his conversation with Respondent from July 27, 2015 and wrote "[Morrow] installed large tiles and filled the channel because it was within the limits set by DNR for distance of the confinement channel." AX9, p. 1. On October 7, 2015, Mr. Schafer sent Respondent a letter that, in part, recalled that Morrow told Mr. Schafer that it had filled in the tributary "to meet State of Iowa

requirements for distance between a planned swine confinement facility and open water.” AX18, p. 1. At hearing, Mr. Shafer confirmed that he was told by Morrow that he tiled and filled the tributary because the tributary “... was within the limits set by the Iowa Department of Natural Resources.” TR32: 5-7.

According to documents submitted by the NRCS, on June 7, 2016, Morrow testified at a NRCS hearing concerning Respondent’s wetland determination appeal. AX11, p. 11. According to the summary of the hearing, Morrow “stated he asked NRCS previously if the gully could be closed *as the DNR required and limit it in order to put in the hog building ...*” *Id.* (emphasis added).

It is clear from the record that Respondent filled the tributary in order to sell a portion of its property to the swine feedlot operator to avoid the State’s regulations concerning distances between confinement feedlots and water bodies. In effect, Respondent violated federal law to ensure that the siting of an animal feedlot would not violate state law. It is further evident that Respondent received a substantial economic benefit for completing the tiling work, including the sale of the property (approximately \$40,000) and the free manure from the feedlot (\$10,000 to \$12,000 annually). Thus, without even factoring the remaining penalty statutory factors, EPA’s proposed \$40,500 penalty is justified.

ii. Respondent’s testimony concerning economic benefit is inconsistent with the evidence

Despite the litany of evidence demonstrating Respondent’s acknowledged motive for filling in the tributary was to skirt state law, Mr. Morrow testified unequivocally on direct examination at the hearing that he completed the tile-and-fill work in April 2015 prior to any consideration of selling its land. TR489: 20-25; TR490: 1-3 (“Q ... At the time you did the work that we’re talking about, had you planned to sell off any land for a hog building? A No, I had

not.”). However, when presented with the above-referenced evidence that Respondent informed representatives from two separate federal agencies in 2015 and 2016 that it had filled in the tributary to sell the land and avoid the State setback regulations, Mr. Morrow recanted, agreeing it was at least “a partial reason” for filling in the tributary. TR515: 23-25; TR516: 1.

Respondent’s timeline for completing the fill work also conflicts with the totality of the evidence: First, in EPA’s August 2018 Request for Information, EPA asked Respondent to describe the activities it performed in the tributary prior to the 2015 fill activity. AX30, p. 1. Morrow answered that his “... activities within the drainage way on Respondent’s property *prior to July 2015* were to ...,” indicating the work was completed in July 2015. *Id.* at 6 (emphasis added). Second, the timeline conflicts with the initial complaint by a neighboring property owner from July 20, 2015, indicating that Morrow was in the process of completing his fill work and photographs showing fresh grading and the above-ground presence of tile lines. AX5. Finally, AX14, p. 5 shows an aerial photograph of Respondent’s property listed as “Morrow 1 Site” submitted by a consultant for MCM Pork with a date of June 10, 2015 showing the tributary without any fill work. Even if the photograph was not taken on June 10, 2015, it begs the question: why would at least three parties, MCM Pork, its consultant, and IDNR go through the trouble of analyzing the distance between the proposed confinement building and the tributary in June 2015 if the fill work had already been done months prior?

Thus, Complainant has demonstrated by a preponderance of the evidence that Respondent completed the unauthorized fill work to avoid triggering state law and thereby receiving an economic benefit from the sale of his property.

B. Respondent's Unauthorized Fill Work Harmed and Continues to Harm the Environment

EPA's expert, Dr. Garcia, testified extensively concerning the ecological roles played by streams and wetlands. Garcia talked about how streams "convey water to downstream waters. They also provide habitat for aquatic-dependent or semi-aquatic dependent species ... they ... also have a chemical portion ... in terms of breaking down nutrients and sorting sediment ..."

TR175: 15-22. Of higher order, smaller streams, Garcia discussed how they "conduct chemical breakdown of nutrients and pesticides ... they make [nutrients] available to higher order organisms, so basically they are forming the base of the food chain." TR176: 8-15. Concerning wetlands, Garcia testified how they "attenuate floods downstream ... it kind of helps to sustain flow ... They also act as kidneys ... they have the ability to ... break down nutrients and they provide habitat ... they can serve as refuge for smaller fish and other aquatic animals." TR179: 4-15.

Respondent's expert, Mr. Hentges, also acknowledged the important roles of wetlands ("Q Dr. Garcia referred to them as the kidneys of the land. Would you agree with that? A Yes") and tributaries ("... they retain water in high runoff periods ... They also provide ground water recharge and wildlife habitat"). TR629: 9-11, 18-20.

The scientific literature bears out the importance of natural stream channels: "Natural streambeds are rough and bumpy in ways that slow the passage of water. Particularly in small narrow streams, friction produced by a stream's gravel bed, rocks, and dams of leaf litter and twigs slows water as it moves downstream ... Changed channels send water downstream more quickly, resulting in more flooding." AX15, p. 10.

Dr. Garcia testified that drainage of the tributary and fill of the channel causes significant environmental harm: "... you're losing habitat and you're losing the ability of microorganisms

and other ... lower order aquatic organisms to break down nutrients and make them available ... you're still having the flow obviously going into the lower ... watershed, but you're losing the ability of the microorganisms to be able to break down nutrients and make them available to the food web. You're also losing habitat for aquatic species.” TR178: 3-18. Garcia also testified that removal of the tributary’s banks removes its abilities to filter pollutants, break down nutrients, and increases the velocity of the channel, which results in increased erosion in downstream channels. TR229: 13-24; TR230: 16-25; TR231: 1-5.

Concerning the loss of wetland functions, Garcia said that the watershed “would have lost the ability for this water to be ... stored during higher water events and to be slowly released to maintain the flow with two downstream tributaries. You are also losing the ability of the functions of the wetland in terms of breaking down chemical components and ... You're losing the ability for [the wetlands] to be able to break down harmful nutrients.” TR231: 20-25; TR232: 1-5.

C. The Nature and Extent of Respondent’s Violation Justify the Proposed Penalty

The nature and extent of Respondent’s violation is significant. Respondent’s actions resulted in the functional loss of 1,871 linear feet of intermittent tributary and 1.3 acres of wetland. AX18, p. 1; AX11, p. 6, 8. In one of the most agriculture-heavy states in the country, such functional losses in terms of habitat loss, pollutant-filtering, and flood mitigation is indeed significant.

Despite Respondent’s awareness of government programs to limit wetland losses (see Culpability section below), Respondent chose to ignore regulations that have been in effect for decades. The fill material placed by Respondent in the tributary has been in place since July

2015. Further, to date, Respondent has not satisfied NRCS requirements to mitigate its wetland losses since it performed the work over three years ago. *See* TR89: 12-16.

D. Respondent's Actions make It Culpable for Violating the CWA

The CWA requires the Presiding Officer to look at a Respondent's degree of culpability in determining an appropriate penalty amount. 33 U.S.C. § 1319(g)(3); *see also In re C.W. Smith, Mr. Grady Smith & Smith's Lake Corporation*, Docket No. CWA-04-2001-1501, slip op. at 56 (ALJ Biro July 15, 2004); *In re C.L. "Butch" Otter & Charles Robnett*, Docket No. CWA-10-99-0202, slip op. at 25 (ALJ Charneski April 9, 2001). Here, the degree of culpability is high.

As detailed in the Economic Benefit section above, Respondent was financially motivated to complete the unauthorized fill work through the sale of his property to MCM Pork and to facilitate the free manure it receives from MCM. Indeed, Morrow explained pursuant to Judge Biro's questioning at hearing that removal of the tiles would result in economic loss because the animal feedlot would not be able to operate in Iowa (TR537: 21-25) and Respondent would thus lose the free manure from the feedlot. TR 540: 8-24. Further, Respondent would lose financially to pay for tile removal (TR543: 21-25) and to pay for mitigation for lost wetland functions, which Respondent estimates would cost him "forty to fifty thousand." TR537: 1-12.

Morrow testified that he is not culpable for the unauthorized fill work because he was not aware he needed to obtain a CWA Section 404 permit (TR 528: 9-12), that he had received verbal permission from a NRCS employee, Regina Leer, to complete the work (TR465: 13-25), that he had received documentation from the Farm Service Agency ("FSA") that wetlands were not present on its property prior to performing the fill work (RX4; TR480: 25; TR481: 1-5), and that he thought it was conferring environmental benefits by tiling and filling the tributary (*See*

e.g., TR458: 13-19). Under examination, each of these arguments fails.

First, the Clean Water Act is a strict liability statute and EPA need not prove knowledge of the law or intent to break the law to impune liability. *United States v. Bailey*, 571 F.3d 791, 805 (8th Cir. 2009).

Second, Morrow testified that he did not receive written permission from Regina Leer or anyone at NRCS to perform the fill work in the tributary and wetlands, even though he had received such permission for previous projects, and that “to the best of my knowledge,” Ms. Leer was not qualified to make wetland determinations. (TR512: 4-17). Further, Don Carrington from the NRCS testified that Ms. Leer’s role with the NRCS did not qualify her to make wetland determinations. TR90: 15-21.

Third, concerning the FSA document saying that wetlands were not present on Respondent’s property, Mr. Carrington testified that the FSA is not authorized to make wetland determinations for the NRCS (TR77: 6-8) and that the NRCS “strongly discourage(s) (landowners) from relying on that type of information because it’s not always 100 percent accurate ... NRCS has tried to communicate that as we work with producers to the best of our ability.” TR97: 20-22, TR98: 6-8. Also, Morrow testified that he had received NRCS wetland determinations in the past (TR509: 16-22), but in this situation, it did not consult the NRCS immediately prior to completing the fill work. TR513: 7-10.

Finally, though Morrow asserted he thought he was protecting the tributary by draining it and filling in the channel, he testified that he is not an expert in stream ecology or morphology (TR519: 18-22), nor did he consult with any experts in stream ecology or morphology before completing the tile-and-fill work. TR519: 17-20.

E. Other Matters as Justice May Require

The Supreme Court has cited the CWA's "other matters as justice may require" prong in authorizing trial judges "highly discretionary" calculations "necessary to award civil penalties after liability is found." *Tull v. United States*, 481 U.S. 412, 422 n. 8, 426-427 (1987). "[U]se of the justice factor should be far from routine, since application of the other adjustment factors normally produces a penalty that is fair and just." *In re Spang & Co.*, 6 E.A.D. 226, 250 (EAB 1995). Respondent proffered no evidence at hearing that would dictate a reduction in the proposed penalty based on the "such other matters as justice may require" factor. However, Complainant has proffered evidence of concrete economic benefits garnered by Respondent that were first raised at hearing plus Respondent's highly conflicting testimony concerning its economic benefit. Complainant asks the Court to take this evidence into account when assessing a penalty.

Considering the nature and extent of the violations, a \$40,500 penalty would be warranted even if Respondent had received no economic benefit from its violations. Respondent discharged pollutants without a CWA Section 404 permit, created significant harm within the watershed, and the unauthorized fill has been in place for over three years.

In terms of the statutory maximum for assessing penalties, even though the fill material has been in place for approximately 1,240 days, EPA's proposed penalty represents less than two days of the per-day statutory maximum or, alternatively, approximately 15% of the statutory maximum for administrative penalties. Taking into account Respondent's economic benefit, its culpability, and extent of harm to the environment, the proposed penalty is more than reasonable.

CONCLUSION

EPA proves herein by a preponderance of the evidence that Respondent is a person who discharged pollutants from a point source into waters of the United States without obtaining a CWA Section 404 permit. EPA also demonstrates that Respondent enjoyed a significant economic benefit from his violation and that the extent of harm to the environment is substantial. Respondent's failure to comply with the CWA warrants an assessment of a proposed penalty of \$40,500.

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of December 2018, I sent via the OALJ E-filing system the original and one copy of this Post-Hearing Brief to the EPA Headquarters Hearing Clerk and sent one true and correct copy via email to Mr. Eldon McAfee, Esq. at eldon.mcafee@brickgentrylaw.com.

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