UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**	
	)	
LAWRENCE JOHN CRESCIO, III,	**)**	**Docket No. 5–CWA-98-004**
(also known as John Crescio)	**)**	
	)	
Respondent.	**)**	

INITIAL DECISION

Respondent is found to have discharged pollutants into navigable waters without a permit, in violation of Section 301(a) of the Clean Water Act (33 U.S.C. §1311(a)), by the: (1) removal and redeposit of dredged material into a wetland using a Hoes Trenching Machine; and (2) removal and redeposit of dredged material into a wetland without meeting the requirements for a "farm road" exemption from a permit in Section 404(f)(1)(E) of the Clean Water Act. The wetlands on Respondent's site, being adjacent to a tributary which eventually flows into an interstate river, are "navigable waters." A civil administrative penalty in the amount of $31,500 is imposed on the Respondent for these violations.

Before: Susan L. Biro
Chief Administrative Law Judge

Issued: May 17, 2001

Appearances:

For Complainant: Eva Hahn, Esq.
Assistant Regional Counsel
Office of Regional Counsel
United States Environmental Protection Agency, Region 5
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For Respondent: Gary R. Leistico, Esq.
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I. PROCEDURAL HISTORY

On August 21, 1998, this action was commenced by the United States Environmental Protection Agency, Region 5, ("Complainant" or "EPA") by the filing of a Complaint under the authority of Section 309(g)(1)(A) of the Federal Water Pollution Control Act and Section 22.1 of the Consolidated Rules of Practice, 40 C.F.R. part 22. The Complaint alleges that Lawrence John Crescio, III [1] ("Respondent" or "Mr. Crescio") violated the Federal Water Pollution Control Act in his farming operation in Randolph, Wisconsin, by discharging dredged materials into a wetland in the process of tiling thirteen acres of his property and reconstructing and extending a drainage ditch. Respondent, through counsel, filed an Answer to the Complaint on September 18, 1998. In his Answer, Respondent raised thirteen affirmative defenses and requested a hearing.

A hearing was held in the instant matter in Madison, Wisconsin on April 4th and 5th, 2000, during which each party put forward and cross-examined witnesses and introduced documentary evidence. Complainant and Respondent each presented three witnesses. Complainant's witnesses were: Gregory Thomas Carlson, Lynn Andrew Hanson and Mark Sesing. Respondent's witnesses were: himself, Leonard R. Massie, Ph.D., and Steve Slinger. During the hearing, twenty-one joint exhibits were admitted into evidence (Jt. Exs.1-21). Additionally, Complainant submitted twenty-two exhibits of its own, labeled alphabetically, all of which were received into evidence (C's Exs. A, B, E, G-I, K-M, P, W-Z, AA-FF, KK, LL). Nine exhibits, also labeled alphabetically, were received into evidence from the Respondent (R' s Exs. A, E, H-K, L, M, N, O). Further admitted into the record were two Judge's Exhibits (ALJ's Exs. 1 & 2), both of which are computer printouts of maps of the property which were created and used by witnesses to identify specific areas of Respondent's property during the hearing.[2]

The transcript of the hearing was received in two parts, with the first part (pages 1-302) received by the undersigned on April 24, 2000 and the second part (pages 303-466) received on

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[1] The Complaint, as originally filed in this case, identified Respondent as "John Crescio." On May 5, 2000, Complainant filed a Motion to Amend Caption wherein Complainant moved to change the name of Respondent to "Lawrence John Crescio, III" on the basis that that is, in fact, Respondent's full legal name. Respondent filed a response to the Motion, stating that he had no objection to amending the caption, although Respondent objected to such Motion being orally placed on the record at the hearing on April 5, 2000. Complainant's Motion to Amend Caption is hereby GRANTED, as unopposed, and the caption is therefore changed from "John Crescio" to "Lawrence John Crescio, III."

[2] On June 9, 2000, Complainant filed a Motion to Complete Record. This Motion seeks to add into the record certain color photographs (ALJ Exs. 1 & 2, R's Exs. I, J, K, M, N and C's Ex. FF) which had been produced at the hearing and to substitute a color photograph of Jt. Ex. 6 for a black and white photocopy which had been entered into the record at the hearing. This Motion is unopposed and is hereby GRANTED.

May 11, 2000.[3] Respondent and Complainant each filed an Initial Post Hearing Brief and a Reply Brief. The record closed on July 5, 2000 with the receipt of Complainant's Reply Brief.

II. VIOLATIONS ALLEGED

The Complaint contains two counts, both of which charge Respondent with violating section 301(a) of the Federal Water Pollution Control Act, also known as the "Clean Water Act" ("CWA"). *See,* 33 U.S.C. § 1251, notes. CWA section 301(a) prohibits discharges of pollutants except for those discharges that comply with that section and/or with CWA sections 302, 306, 318, 402 and 404. 33 U.S.C. § 1311(a). Count I of the Complaint alleges a violation arising from Respondent's hiring of Slinger Drainage, Inc. ("Slinger") to install drainage tiles on Respondent's property ("site"). In the process of carrying out this project, the Complaint alleges, Slinger used a Hoes Trenching Machine which resulted in the discharge of approximately 2,810 cubic yards of dredged material (soils and organic material) into wetlands located on the site. The Complaint alleges that Respondent undertook this project without obtaining a permit in accordance with CWA section 404, which authorizes the issuance of permits, after notice and opportunity for public hearing, for the discharge of dredged or fill material into the navigable waters of the United States at specified disposal sites. 33 U.S.C. §1344. Count II alleges that Respondent further violated section 301(a) of the Act when, using a backhoe in the Fall of 1995 to reconstruct and extend a drainage ditch, he discharged dredged material into wetland areas at the site without a permit. Complainant seeks the imposition of a total combined penalty in the amount of $60,000 for these two alleged violations of the Clean Water Act.

III. FACTUAL BACKGROUND

Respondent is a self-employed "muck farmer."[4] Tr. 312. He owns three farm sites, together totaling approximately 275 acres of farm land. On these sites, Respondent grows onions, carrots, peppermint, spearmint and corn. Tr. 312. Respondent's farms are part of a larger family farm corporation, established in 1951, called "Jack's Pride Farms, Inc.," which farms a total of 800 acres. Tr. 313, 380. Respondent is part owner and vice president of the family farm corporation. Tr. 379; C's Ex. A.

The property at issue in this action consists of an approximately 85 acre site in Randolph, Wisconsin which Respondent purchased for $16,500 in late 1988 from Steve Slinger for the specific purpose of farming it. Jt. Ex. 20, Stip. 1; Tr. 321-323, 353, 363. At the time Respondent acquired the property, it had been fallow for at least 20 years. Ex. M, p.4. The portions of the

[3] Citations to the transcript will be in the following form: "Tr. __."

[4] Respondent testified that this term denotes the type of soil in which he grows his crops. Tr. 313. Muck soil is also called hydric soil. *Id.*

site at issue here are "wetlands," *i.e.*, soil saturated by water, some or all of the time. Jt. Ex. 21, Stip. 1; C's Ex. I.

In anticipation of purchasing the property, on August 16, 1988, Mr. Crescio contacted the Wisconsin Department of Natural Resources (WDNR) and inquired into the legality of draining a portion of the property in order to use it for agriculture. In response, WDNR advised Respondent that *state law* provides a permit exemption for draining land with ditches into navigable waters for agricultural purposes and that installation of drainage tiles is not prohibited by state statutes. However, WDNR further advised Respondent that more restrictive Federal and county wetland protection laws would also apply to such a project and recommended that Respondent contact those governmental authorities. C's Ex. I.

The following day, Respondent submitted a joint permit application to WDNR and the United States Army Corps of Engineers ("Army Corps of Engineers"), requesting permission to tile the site with plastic drain tile; to dig a new ditch on the north and west boundaries of the property with a consequent adjacent spoil bank to catch runoff from surrounding hills and roadside ditches;[5] to construct a new steel culvert in the northeast corner of the property; and to construct a new roadway on part of the eastern boundary of the property.[6] C.'s Ex. H; Tr. 26. Respondent stated in the application that his goal was to "improve the land so as to increase its reliability in crop production" and that he intended to use the land for growing mint. C's Ex. H at 2.[7]

As soon as he purchased the property, Respondent removed the fences on the property

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[5] At the time Respondent acquired the property, there was already a main drainage ditch or channel in existence along the eastern boundary of the site. Tr. 186-87, 321, 444. At the time the property also bore the remnants of two or three abandoned ditch configurations which crossed the property. Tr. 188-90, 213, 353; ALJ Ex. 1.

[6] The original access to the site was off of Old Highway 33 and was located along the northwest boundary of the property. Tr. 325. Respondent testified that "there was no existing field road or any type of pull-off from the highway at the time" he purchased the property. *Id. See also*, Tr. 188. However, he accessed the property by driving down its northwest boundary. Tr. 324. On April 11, 1989, Respondent had obtained a one year permit from the Columbia County Highway Department to construct a driveway *entrance* on his property off of Old Highway 33. *Id.*; R's Ex. A.

[7] The first page of C's Ex. H suggests that the application was initially submitted to WDNR, which forwarded it to the Army Corps of Engineers on September 6, 1998. Page 4 of that exhibit indicates that the Army Corps of Engineers received the application on September 8, 1988, reviewed it on October 4, 1988, and found that additional information was needed. In addition, the reviewer appears to note that "[t]his project is 5 or six miles south of Ed Crescio [Respondent's brother] (ditch where we went Denial Without Restoration)."

and began tillage operations. Tr. 323-324. Specifically, Respondent began to till the land on the southern 44 acres of the site. Tr. 197, 324; ALJ's Ex. 2. This tilling involved the discing of the grass, followed by the plowing of land. *Id.*

In November 1988, while the application was still pending, the Army Corps of Engineers received a complaint alleging that Mr. Crescio had already begun the work that he had proposed in his pending permit application. Tr. 27. As a result, in December 1988, the Army Corps of Engineers conducted an inspection of Respondent's site. *Id.;* C's Ex. L. The inspection revealed that Mr. Crescio had, in fact, used a bulldozer to excavate a 1,050 foot "test ditch" where he had proposed in his permit application to build a new permanent ditch. C's Ex. L. *See also,* Tr. 198 and ALJ Ex. 2. In addition, he was found to have graded an existing spoil bank on the eastern boundary for a farm road. C's Ex. L. The investigator opined that these actions constituted a "[CWA section] 404 violation" on the basis that Respondent had sidecasted dredged material into wetlands. *Id.* Despite these discoveries, the Army Corps of Engineers continued processing Respondent's application, considering it as an application for a "partial after-the-fact permit." *Id.*; Tr. 27. Letters opposing and supporting the project were received in connection with the application from numerous individuals and governmental entities including counsel for Mr. Crescio, the WDNR, and the United States Department of the Interior, Fish and Wildlife Service (FWS). C's Ex. W, X, Y, Z, AA, BB, CC, and K; R's Ex. L. The WDNR recommended that the permit be denied on the basis that the draining of the wetlands would adversely affect water quality and wildlife habitats. R's Ex. L. The FWS recommended in its letter that the permit requested by Respondent not be issued and that restoration of the property take place because, *inter alia*, the proposed actions would result in the loss of "78+ acres of high quality wildlife wetland habitat," and receiving waters downstream could be denigrated. C's Ex. K. The EPA did not file comments on the proposed permit. R's Ex. L, p. 2.

On October 23, 1989, the Army Corps of Engineers denied Respondent's application for the permit finding that issuance of the permit would be contrary to the public interest and that Respondent had not clearly demonstrated that there were no practicable alternatives to his project. Jt. Ex. 2; R's Ex. L. However, the denial letter also advised Respondent that a permit was not required for his proposed construction of a farm road since farm roads are exempt from regulation under Section 404 of the Clean Water Act. *Id.* Finally, the letter advised Respondent that restoration work, involving the placement of dredged materials back into the excavated shallow ditch, would be required by December 31, 1989 to avoid "further remedies" in connection with his violation. *Id.* The record indicates that Mr. Crescio complied with the restoration request and did not appeal the permit denial. C's Ex. M, p.5, Tr. 385.

Nevertheless, despite the fact that his permit had been denied by the Army Corps of Engineers, in late November, early December, 1989, Respondent went ahead and installed drainage tiles in the soil on the southern 44 acres of his property to put it into agricultural production. Tr. 31, 86, 201; ALJ Ex. 2; C's Ex. M. *However, Respondent's tiling of those 44*

acres is not at issue in this action.[8] At issue in this action is what Respondent did approximately 2 years later, in or about October 1991, which was to install drainage tiles on an *additional* 13 acres of his property located "immediately north and adjacent to the previously tiled 44 acres on the site." C's Ex. LL; Tr. 201-02; 329-30. This tiling, performed on Respondent's behalf by Slinger Drainage, Inc., involved the laying of approximately 20,900 feet of tile under the soil using a Hoes Trenching Machine, which operates by lifting the soil up as it goes along, laying the tile in place in the trench then created, and then replacing the previously removed soil back in the trench on top of the tile.[9] Jt. Ex. 20, Stip. 2, 3; Jt. Ex. 21, Stip. 2; Tr. 31-32, 330; C's Ex. LL.

Also at issue in this case is Respondent's engagement in another construction project, along the western boundary of his property. This project was begun prior to Respondent's tiling of the 13 acres, was suspended for a number of years, and then was resumed in 1993, 1994, and again in the Fall of 1995, after the completion of the tiling project. Tr. 337. According to Respondent, this project was undertaken to construct a farm road. *Id.* According to Complainant, the project involved the reconstruction and extension of a drainage ditch with incidental sidecasting of dredged soil into the wetland. Tr. 202-03, 341; ALJ Ex. 2. The project was started with an Ashland scraper, which is a small earth mover that is pulled behind a farm tractor, which scooped out soil, creating a ditch along the western perimeter of the property, and

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[8] The record shows that Respondent was advised in March 1990 by an Army Corps of Engineers' inspector that the installation of the tiles over the 44 acres constituted a violation of CWA section 404, that he could expect to receive a formal notice of violation in the future, and there could be possible legal action. Tr. 387; C's Ex. M, p.5. In addition, the inspector opined that the violation met the criteria for referring the matter to EPA under a Memorandum of Understanding between the two agencies because the unpermitted activity was a repeat violation and/or flagrant violation. C's Ex. M, p.6. In April of 1990, the Army Corps of Engineers sent a letter to Respondent regarding the tiling noting that it constituted a CWA violation, ordering Respondent to cease draining water via the tiling system, and advising him that no further work should be undertaken without authorization. Jt. Ex. 1; Tr. 30-31. The letter further indicated that the matter would be evaluated to "determine the appropriate legal or administrative remedy to be sought." Jt. Ex. 1. However, Respondent testified at the hearing that no action was ever actually instituted against him regarding his tiling of the 44 acres by *any* governmental entity. Tr. 387. *See also,* Tr. 86.

[9] Respondent testified that, in 1989, after the initial tiling of the southern 44 acres was completed, but before the subsequent tiling of the 13 additional acres at issue here, he and Slinger Drainage Corp. obtained a lawyer's opinion that the initial tiling, which was also apparently performed using the Hoes Trenching Machine, did not discharge dredged materials into a wetland and so no permit was required by law. Tr. 385-88. That opinion was conveyed on their behalf in letter to the Army Corps of Engineers on May 15, 1990, offering the Corps the opportunity to discuss this matter further. R's Ex. O. Respondent testified that no response was received to his lawyer's letter, and thereafter he initiated the tiling project on the 13 acre area at issue. Tr. 386-388.

placed it to the side. Tr. 337-338. The project was completed in 1995 with a backhoe, and the excavated soil was then leveled with a bulldozer. Tr. 338.

Respondent has stipulated that at no time since 1991 did he receive from either the EPA or the Army Corps of Engineers a permit to fill wetlands on his property, under section 404 of the Clean Water Act, 33 U.S.C. § 1344. Jt. Ex. 20, Stip 5.

In June 1998, EPA notified Respondent that it was prepared to bring a civil administrative action against him for his discharge of dredged material into a wetland without a permit, in violation of the CWA. Jt. Ex. 19. In August 1998, Respondent disabled the tile drainage system. Jt. Ex. 20, Stip. 4; Tr. 140. Further, at the EPA's direction, Respondent has installed a plug in the western boundary ditch. Tr. 104, 207, 422.

IV. DISCUSSION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

The stated objective of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). In order to achieve this objective, section 301(a) of the Clean Water Act prohibits the "*discharge of any pollutant* by any person" except with a permit issued under section 404 or in connection with activities exempted from the Act. EPA is authorized to assess administrative penalties against violators of the Act. 33 U.S.C. § 1319 (g). The central issues in the instant case are whether Respondent's activities described in the Complaint constitute the "*discharge of any pollutant*" within the meaning of section 301 of the Act, and, if so, given that Respondent did not have a section 404 permit, whether his activities fall within any permit exemption under section 404 of the Act.

The phrase "*discharge of a pollutant*" is defined by Section 502(12) of the Act, in pertinent part, as: "any *addition* of any *pollutant* to *navigable waters* from any *point source* . . ." 33 U.S.C. §1362(12) (italics added). Each of the four key terms of this definition are discussed below.

"Pollutant"

"*Pollutant*" is defined in the Act as including "dredged spoil . . . discharged into water." CWA § 502(6), 33 U.S.C. §1362(6). The term "dredged spoil" includes material that is excavated or dredged from a wetland. *Slinger Drainage, Inc.*, CWA Appeal No. 98-10, slip op. at 7 (EAB, September 29, 1999); *United States v. Wilson*, 133 F.3d 251, 259 (4th Cir. 1997); *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000). It is uncontested that the material at issue in the instant case is soil which was excavated or dredged from Respondent's property. Tr. 52-53, 123-127, 354; Jt. Ex. 21, Stips. 3, 4. The parties have stipulated that the portions of Respondent's property which are at issue in this proceeding have been wetlands at all times

relevant hereto. Jt. Ex. 21, Stip. 1. Therefore, the material dredged from Respondent's property falls under the definition of a "pollutant" set forth in section 502(6) of the Clean Water Act.

"Point source"

The Complaint categorizes the Hoes Trenching Machine and backhoe used by Respondent in undertaking the projects on his property as "point sources" as defined by the Clean Water Act. A "*point source*" is defined in the CWA as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. §1362(14). Bulldozers, backhoes, dump trucks, and other earth moving equipment have all been held to be "point sources." *See e.g., United States v, Tull*, 615 F.Supp. 619, 622 (E.D. Va. 1983), *aff'd*, 769 F.2d 182 (4th Cir. 1985), *rev'd on other grounds*, 481 U.S. 412 (1987)(bulldozer and dump truck); *Avoyelles Sportsman's League v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983)(bulldozer and backhoe); *United States v. Lambert*, 915 F.Supp. 797 (S.D. W. Va. 1996)(crane, earthmoving equipment). Thus, the earth moving equipment at issue in this case, being the same or similar types of equipment, are "point sources" under the CWA. *Slinger Drainage, Inc.*, CWA Appeal 98-10, 1999 WL 778576 (EAB, September 29, 1999)(*see*, note 8 noting the parties in that case had stipulated that a Hoes Trenching Machine is a "point source").

"Navigable waters"

The Complaint alleges that Respondent's property, "the site," is a "wetland, and is among the 'waters of the United States' and 'navigable water.'" Complaint ¶ 13. The Complaint further alleges that the site "is adjacent to a historic, unnamed navigable stream, now channelized, that flows into Fox Lake which flows into Beaver Dam Lake which is part of the Beaver Dam River which flows into the Rock River which is an interstate stream." Complaint ¶ 14. Respondent in its Answer denied these allegations, and in his Eighth Affirmative Defense asserted that the site "is not in part or in whole 'waters of the United States.'" The parties subsequently stipulated, however, that "[t]he portions of the site which are at issue in this proceeding have been, since at least 1991, "wetlands" as that term is defined in 40 C.F.R. § 230.3(t). Jt. Ex. 21, Stip. 1.[10] The

[10] This stipulation is buttressed by the testimony of Gregory Thomas Carlson, Environmental Protection Specialist of the Watershed and Non-point Programs Branch, wetlands regulatory team, Water Division of EPA Region 5, who inspected Respondent's property on three occasions: in June 1997, May 1998 and September 1998. Tr. 16, 43. During these inspections Mr. Carlson dug sample points and documented the dominant vegetation, hydrology and soil present at the site so that he could ultimately determine whether the site was indeed a wetland. Tr. 44. Mr. Carlson testified that "there was evidence of surface saturation and pockets of standing water," and he noted that the soil was composed of organic soils (these are by definition hydric soils), which are all indications of long-term saturation of the site. *Id.* He said (continued...)

question then becomes whether the "wetlands" on the Crescio site were at relevant times "navigable waters."

"Navigable waters" is defined in Section 502(7) of the CWA as ". . . the waters of the United States." 33 U.S.C. 1362(7). In turn, the phrase "waters of the United States" is defined by EPA's regulations at 40 C.F.R. §§ 230.3(s) and 232.2 (CWA 404 Program Definitions), and in the Army Corps of Engineers' regulations at 33 C.F.R. 328.3(a), as including: "[w]etlands *adjacent to*:"

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate commerce, including all waters which are subject to the ebb and flow of the tide;
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> (2) All interstate waters including interstate wetlands;
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> (3) All other 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 including any such waters:
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> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (iii) Which are used or could be used for industrial purposes by industries in interstate commerce;
>
> (4) All impoundments of waters otherwise defined as waters of the United States under this definition;
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> (5) Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;
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> (6) The territorial sea;

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[10](...continued)
that the sites he sampled on the property were dominated by "hydrophytic" plants, *i.e.*, water loving plants. Tr. 45. He observed three white-tailed deer as well as redwing blackbirds and sandhill cranes. *Id.* The categorization of Mr. Crescio's property as a wetland habitat for animals and vegetation was also confirmed by the hearing testimony of Lynn Andrew Hanson.

40 C.F.R. § 230.3(s)(emphasis added).[11] The term "*adjacent to*" is defined in 40 C.F.R. § 230.3(b) and 33 C.F.R. § 328.3(c) as "bordering, contiguous, or neighboring," and includes "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like."

At the hearing, the undersigned specifically invited the parties to address the issue of the connection between the wetlands on the site and "navigable waters." Tr. 10. The undisputed testimony shows that the Respondent's property is within the broader watershed of the Rock River, and within the smaller watershed of the Beaver Dam River. Tr. 51, 233, 239-240. Mark Sesing, water resource manager at the WDNR, who is familiar with the Beaver Dam River Watershed and the location of Respondent's property, testified that the water on Respondent's property drains into Cambria Creek. Tr. 268. Gregory Thomas Carlson, an Environmental Protection Specialist of the Watershed and Non-point Programs Branch, wetlands regulatory team, Water Division of EPA Region 5, testified more specifically that an unnamed channelized stream forms the eastern border of Respondent's property[12] and that this stream flows northeast into Cambria Creek. Tr. 183-184, 186. The stream at the eastern border of Respondent's property was channelized in the mid 1970's. Tr. 186-187, 321, 359, 443-444, 446; C's Ex. H, CC. A Wisconsin Wetlands Inventory aerial photograph from 1975 shows the stream, marked as a "stream or drainage ditch." Jt. Ex.14. Respondent testified that there are two marshes between his property and Fox Lake, which "probably have a little open water in them." Tr. 351. From a 58.1 square mile agricultural watershed, three principle tributaries, one of which is Cambria Creek, drain into to Fox Lake. C's Ex. DD p. 3; Tr. 184-185. Respondent's property is approximately five miles from Fox Lake. Jt. Ex.13; Tr. 351. Nevertheless, the undisputed testimony and evidence establish that Cambria Creek, and the unnamed channelized stream flowing from Respondent's property into Cambria Creek, are tributaries to Fox Lake.

The undisputed testimony and evidence also establish that Fox Lake, Beaver Dam Lake, and Beaver Dam River are tributaries to Rock River, an interstate river. More specifically, Fox Lake outlets, through a dam, into Mill Creek, which is the primary tributary to Beaver Dam Lake,

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[11] The definition of "waters of the United States" at 40 C.F.R. § 232.3 is identical, except that the subparts of the definition are not numbered. For clarity, Section 230.3(s) (located in the Guidelines for Specification of Disposal Sites for Dredged or Fill Material), with its numbered subparts, is quoted and referenced herein.

[12] Mr. Carlson stated at the hearing that an intermittent stream on the northwest corner of Respondent's property is considered navigable by the WDNR. Tr. 102, 171. However, the Federal definition of "navigable waters" is different from the State definition of "navigable waterway," which is one that is "capable of floating any boat , skiff or canoe, of the shallowest draft used for recreational purposes," including those which have only "periods of navigable capacity which ordinarily recur from year to year." *City of Oak Creek v. WDNR*, 518 N.W.2d 276 (Ct. App. Wisc. 1994), quoting *Muench v. Public Service Comm'n*. 53 N.W.2d 514 (Wisc. 1952) and *DeGayner v. WDNR*, 236 N.W.2d 217, 222 (Wisc. 1975).

and Beaver Dam Lake, the dammed section of the intrastate Beaver Dam River, flows into Rock River.[13] Tr. 184-185, 268; C's Ex. DD. Thus, the unnamed channelized stream on the eastern border of Respondent's property is ultimately a tributary to the Rock River.

Clearly, the Rock River, being interstate, is a "water of the United States" under 40 C.F.R. § 230.3(s)(2). The tributaries to Rock River, namely Beaver Dam River, Beaver Dam Lake, Mill Creek, Fox Lake,[14] Cambria Creek, and the unnamed channelized stream along the eastern border of Respondent's property, are also "waters of the United States," under 40 C.F.R. § 230.3(s)(5)("All interstate waters . . . [and] [t]ributaries of [such] waters"). In *United States v. Ashland Oil and Transportation Co.,* it was held that, a tributary which flows into several other bodies of water before flowing into one which is navigable-in-fact is still a "water of the United States," consistent with the U.S. Constitution's commerce clause (U.S. Const. Art 1, § 8, cl. 3). *United States v. Ashland Oil and Transportation Co.,* 504 F.2d 1317 (6th Cir. 1974)(discharge of oil into a small tributary to a creek which itself is a tributary to another creek, which flows into a river, which in turn is a tributary to another river which is navigable in fact, is a discharge into "navigable waters of the United States;" Congress has authority under interstate commerce powers to prohibit such discharge). Man-made ditches and canals that are tributaries to interstate waters or waters that are in fact navigable, have also been held to be "waters of the United States." *United States v. Eidson,* 108 F.3d 1336 (11th Cir. 1997), *cert. denied,* 522 U.S. 899 (1997)(discharge into a storm sewer that drains into a storm drainage ditch, which flows into a drainage canal that empties into a creek which is a tributary to Tampa Bay is a discharge into a "water of the United States"); *United States v. TGR Corp.*, 171 F.3d 762 (2nd Cir. 1999)(discharge into drain that flows into a storm water discharge system which flows into a

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[13] At the hearing, Mr. Carlson pointed out the Crescio wetland, the surface water tributary and Cambria Creek on a 1980 topographical map, but the map does not label Cambria Creek, and Fox Lake and the waterways into which it flows are beyond the edge of the map. Jt. Ex. 13; Tr. 183-184.

[14] Fox Lake and Beaver Dam Lake may also constitute "waters of the United States" under 230.3(s)(3)(i), on the basis that their "use, degradation or destruction . . . could affect interstate or foreign commerce" and that they are "or could be used by interstate or foreign travelers for recreational or other purposes." Fox Lake is a 2640 acre lake described in a "Beaver Dam River Watershed Lakes Appraisal," dated May 1992, as being "very popular" for fishing, boating, and hunting, and as used also for waterskiing and swimming. C's Ex. DD; Tr. 273. Because of the water quality problems of the lake, the activities are "not at their best potential." *Id.* The recreational uses and water quality problems of Beaver Dam Lake, which covers 5600 acres, are similar to Fox Lake. C's Ex. DD; Tr. 272. While Mr. Carlson testified generally that Fox Lake and Beaver Dam Lake are "navigable" (Tr. 184-185), there is no testimony or evidence specifically as to persons from outside Wisconsin using Fox Lake or Beaver Dam Lake for recreational purposes. *See, State of Utah v. Marsh,* 740 F.2d 799 (10th Cir. 1984)(intrastate Utah Lake is "navigable" based upon, *inter alia,* evidence of use by recreational visitors, two percent of which were from out-of state).

waterway that is channeled in some places and that flows into a navigable creek, is a discharge into a "water of the United States"). Intermittent tributaries have been held to be "waters of the United States." *Quivira Mining Company v. U.S. EPA*, 765 F.2d 126 (10th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986)(creek and arroyo are "waters of the United States" despite fact that they have surface water connection with navigable waters only at times of heavy rainfall); *United States v. The Texas Pipe Line Company*, 611 F.2d 345 (10th Cir. 1979)(small unnamed tributary of a creek which itself is a tributary of another creek, which is a tributary of a navigable river, is "navigable water" although there was no evidence that the creeks were flowing at the time of discharge).

In *Ashland*, the Sixth Circuit explained, in part, the rationale for its holding as follows:

> It would, of course, make a mockery of those [interstate commerce] powers if [Congress'] authority to control pollution was limited to the bed of the navigable stream itself. The tributaries which join to form the river could then be used as open sewers as far as the federal regulation was concerned. The navigable part of the river could become a mere conduit for upstream waste. Such a situation would have a vast impact on interstate commerce. . . . Pollution control of navigable streams can only be exercised by controlling pollution of their tributaries.

504 F.2d at 1326, 1327. As recognized by Congress and quoted by the Supreme Court, "water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." S. Rep. No. 92-414 at 77 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742-43, (quoted in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985)).

Such a source includes wetlands adjacent to navigable or interstate waters or their tributaries, and therefore, the regulatory definition of "waters of the United States" includes such wetlands. *Riverside Bayview Homes*, 474 U.S. at 129; 40 C.F.R. § 230.3(s)(7). In *Riverside*, the Supreme Court quoted with approval the language in the preamble to the regulation, that Federal jurisdiction under the CWA includes "any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system." 42 Fed. Reg. 37128 (1977), 38 Fed. Reg. 10834 (1973)(quoted in *Riverside Bayview Homes*, 474 U.S. at 134). In that case, the Supreme Court held that an area of wetland that is part of a larger wetland that actually abuts waters that are in fact navigable, is a "water of the United States," whether or not the wetland is actually inundated by the adjacent waterway. 474 U.S. at 134-135. As long as the wetland is "adjacent" to a water used or formerly used in interstate commerce or a tributary thereof, the interstate commerce nexus is established. *United States v. Pozsgai*, 999 F.2d 719, 733 (3rd Cir. 1993), *cert. denied*, 114 S.Ct. 1052 (1994); *Slagle v. United States*, 809 F. Supp. 704, 709 (D. Minn. 1992)(wetland on shore of lake hydrologically connected to a river which feeds into another lake which connects to an interstate river). A wetland is "contiguous" and thus "adjacent" to another water of the United States if there is a direct surface water connection to it. *United States v. Lee Wood Contracting, Inc.*, 529 F.Supp.

119, 121 (E.D. Mich. 1981). A wetland has been held to be "adjacent to" navigable waters where a hydrological connection existed primarily through groundwater, but through surface water during storms. *United States v. Banks*, 115 F.3d 916, 921 (11th Cir. 1997), *cert. denied*, 522 U.S. 1075 (1998). However, it has also been held that wetlands without a direct or indirect surface water connection to interstate waters, navigable waters or interstate commerce, are not "adjacent to" other waters of the United States. *United States v. Wilson*, 133 F.3d 251, 258 (4th Cir. 1997).

Because the channelized ditch that borders Respondent's property is a "water of the United States" under 40 C.F.R. § 230.3(5), the question is whether, under the case law cited above, the wetland on Respondent's property is "adjacent to" the channelized ditch and thus "waters of the United States." This question is easily answered in the affirmative, as undisputed testimony and evidence shows that the channelized ditch directly borders the wetland on Respondent's property.

Mr. Carlson stated that his determination that a wetland is "adjacent to" a navigable water, as opposed to an isolated wetland, is based upon a surface water connection. Tr. 182. The uncontroverted evidence and testimony establishes that the wetland on Respondent's property drains into and is immediately adjacent to a surface water tributary to Fox Lake. Tr. 183-184. In its natural state, the wetland on Respondent's property would operate as a sponge and a filter, cleansing and slowing the flow of waters running off of the adjacent farming areas to the west. Tr. 55-58. Water from the wetland would drain into the channelized ditch at the eastern border of the property.[15] Tr. 180, 375, 429. Since installation of the drainage tiles, the water from the wetland on Respondent's property drains from the tiling system eastward into a subsurface storage tank, from which the water is pumped into the channelized ditch at the eastern border of the property. Tr. 32, 57, 155, 199, 339-340, 361-362; C's Ex. M, p. 4. According to Mr. Carlson's testimony, the wetland on the Crescio site is "directly adjacent to a surface water tributary," namely the stream at the eastern border, which flows northeast to Fox Lake through Cambria Creek. Tr. 181, 183.

In addition, several documents in evidence refer to the wetland on Respondent's property as "adjacent" to other "waters of the United States." C's Ex. L, M. *See also*, tr. 64-65 (two reports of investigations of Respondent's property, conducted on December 15, 1988 and March 13, 1990, by U.S. Army Corps of Engineers investigator Dale Pfeiffle, describing the wetlands as

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[15] Testimony and evidence was presented as to the effects on Fox Lake and Beaver Dam Lake of the conversion of wetlands in the surrounding area. It is perhaps not possible to prove specifically that the drainage of Respondent's wetland affected those lakes. *See, Ashland Oil*, 504 F.2d at 1329 (recognizing the impossibility of proof that a particular discharge reached a navigable river, as "[d]rops of oil carry no fingerprints . . . water analysis which might show oil pollution could not possibly prove which polluter discharged it, in what proportion, or on what occasion"). Such testimony and evidence is considered, therefore, only in the assessment of the penalty in this case.

"adjacent" rather than "isolated," and referring to an unnamed stream in the tributary system of Fox Lake and Rock River, and a five-square mile drainage basin); C's Ex. K (letter dated March 27, 1989 from the U.S. Department of Interior Fish and Wildlife Service to the U.S. Army Corps of Engineers, based on a field investigation on March 9, 1989, recommending that a permit to fill Mr. Crescio's wetlands be denied, describing the wetlands on the Crescio site as "adjacent to a ditched tributary to the Rock River"); and R's Ex. L (Army Corps of Engineers' 1989 evaluation and decision denying Respondent's application for a permit to drain wetlands and construct a ditch and road, and describing the project as involving "wetlands adjacent to an unnamed tributary to Fox Lake").

Thus, it appears clear from the record that based upon its "adjacency" to "waters of the United States," the wetland on Respondent's property is a "navigable water" within the meaning of CWA section 502(7).[16]

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[16] In establishing Federal jurisdiction over the site in accordance with the commerce clause, Complainant appears to rely not only on the *adjacency* of Crescio's wetland to other "waters of the United States," but also on the use of Respondent's wetland by *migratory birds*. In its post-hearing brief (at 18), Complainant proposes a conclusion of law that the site is not an isolated wetland, on the basis that the site is "ultimately connected to interstate waters and is used by interstate and international migratory wildlife for nesting grounds." Lynn Hanson testified that the Crescio site lies within a mile of WDNR's Glacial Habitat Restoration Project, in which is located the "primary core" of the state's migratory duck habitat. Tr. 237-238. He testified that the ducks tend to mate and nest within a mile of wetland or deep water areas, and that he might expect to find some ducks on the Crescio property, depending on how the water level had been maintained. Tr. 243, 244-245, 252.

As to the issue of navigable waters, Respondent's counsel stated at the hearing that he would address the issue in his post-hearing brief. Tr. 462. However, in post-hearing briefs, Respondent appears to concede that the site contained "waters of the United States: "The maintenance of farm roads on the Site by Respondent during the relevant periods as set out under Count II of the Administrative Complaint, was completed in accordance with best management practices, to assure that the flow and circulation patterns and chemical and biological characteristics of *the navigable waters on the Site* were not impaired, and that the reach of any navigable waters on the Site was not reduced . . . " Respondent's Initial Brief at 10 (italics added). In the Reply to Complainant's Initial Brief, Respondent does not address the issue of whether the site contained "waters of the United States."

One may speculate that Respondent failed to follow through with its challenge on the issue of whether the Respondent's wetland was a "water of the United States," on the basis of testimony that the Crescio site was used by migratory birds, and the Federal court decisions issued previously which had held that even isolated wetlands are "waters of the United States," under the Migratory Bird Rule. *See e.g., Solid Waste Agency of Northern Cook County v. United*

(continued...)

"<u>Addition/Discharge</u>"

Having concluded that the dredged material from Respondent's activities is a "pollutant," that the earth moving equipment used in the projects are "point sources," and that the wetlands on Respondent's site are "navigable waters," the next question is whether the activities referenced in the Complaint resulted in "any addition" and thus a "discharge" of a pollutant to navigable water within the meaning of Section 502(12) of the CWA.

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[16](...continued)
States Army Corps of Engineers, 191 F.3d 845 (7th Cir. 1999)(regulation of isolated ponds, which were historically dug as gravel pits, based on use by migratory birds, is within Congress' power under Commerce Clause); *Leslie Salt Co. v. United States,* 896 F.2d 354, 360 (9th Cir. 1990), *on reconsideration,* 55 F.3d 1388 (9th Cir. 1995)(as to isolated, seasonally dry pits dug historically for salt manufacturing, the presence of migratory birds created sufficient connection to interstate commerce), *cert. denied,* sub nom *Cargill, Inc. v. United States,* 516 U.S. 955 (1995); *Hoffman Homes, Inc. v. EPA,* 999 F.2d 256, 261 (7th Cir. 1993)(potential use of isolated wetland by migratory birds is sufficient connection to interstate commerce).

Any dependence by the parties on such rulings might suggest further briefing of the jurisdictional issue in light of the Supreme Court's recent ruling that the Migratory Bird Rule *exceeds* Federal authority under Section 404(a) of the CWA, reversing the Seventh Circuit's opinion, in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers,* 531 U.S. 159 (2001). However, neither party has referenced the Migratory Bird Rule in the course of this proceeding, and the Complaint does not reference migratory birds or in any way suggest reliance on the Migratory Bird Rule as a basis for jurisdiction. Moreover, even prior to the issuance of the Complaint in this matter, the Migratory Bird Rule, or the portion of the regulatory definition which it purported to interpret, was questioned or held invalid. *See, Cargill, Inc. v. United States,* 516 U.S. 955, 958 (1995) (Thomas, J., dissenting from denial of certiorari, stating that he has "serious doubts about the propriety of the Corps' assertion of jurisdiction" over isolated wetland based upon presence of migratory birds); *United States v. Wilson,* 133 F.3d 251, 257 (4th Cir. 1997)(33 C.F.R. § 328.3(a)(3), defining waters of the United States as "all other waters . . . the use or degradation of which could affect interstate or foreign commerce," exceeded the Corps authority under the CWA); *Tabb Lakes, Ltd. v. United States,* 715 F. Supp. 726, 729 (E.D. Va. 1988), *aff'd,* 885 F.2d 866 (4th Cir. 1989)(Army Corps of Engineers memorandum setting forth the terms of the Migratory Bird Rule held invalid as a substantive rule promulgated without notice and comment; court stated in dicta that it has "grave doubts" that use of property by migratory birds is a sufficient nexus to interstate commerce). Further, on May 22, 2000, prior to submittal of post-hearing briefs and a few weeks after the hearing in this proceeding, the Supreme Court granted certiorari of the Seventh Circuit's decision in *Solid Waste Agency of Northern Cook County.* 529 U.S. 1129 (2000). Still, neither party has raised this issue. Consequently, further briefing in light of the Supreme Court's decision is hereby deemed unnecessary.

Count I

The allegations in Count I stem from the installation by Slinger Drainage, Inc. of drainage tiles on 13 acres of Respondent's property, by use of a Hoes Trenching Machine. Complainant alleges that, in the process of this installation, approximately 2,810 cubic yards of dredged material was *added or discharged* into wetlands on the property.[17] In support of its characterization that the dredged material was an "addition," Complainant relies upon *Slinger Drainage,* CWA Appeal 98-10, 1999 WL 778576 (EAB, September 29, 1999). C's In. Br. at 29. *Slinger Drainage* involved the same kind of activity as that conducted by Respondent, *i.e.*, the use of a Hoes Trenching Machine to install drainage tile, and such activity was found by the Environmental Appeals Board in that case to result in the "addition" of pollutants.[18]

In contrast, Respondent argues that the tile installation, using a Hoes Trenching Machine, did not result in the "addition" of pollutants as defined by section 502(12) of the CWA and so

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[17] The fact that tiling activities referred to in Count I of the Complaint were performed by Slinger Drainage, Inc., does not affect Respondent's liability. Liability may be imposed on the person with responsibility over performance of the work, such as the property owner who contracts with another person to perform the work. *United States v. Lambert*, 915 F. Supp. 797 (S.D. W. Va.. 1996).

[18] EPA initiated the administrative action for penalty assessment against Slinger Drainage, Inc. on September 22, 1997, stemming from another project on another site involving the same type of tiling operation described in Count I of the instant case. *See, Slinger Drainage, Inc*., 5-CWA-97-022, (ALJ Initial Decision, September 14, 1998) and CWA Appeal 98-10, 1999 WL 778576 (EAB, September 29, 1999). That action administratively litigated, *inter alia*, the issue of whether Slinger's tiling activity with a Hoes Trenching Machine in a wetland, without a permit, constituted a "discharge of pollutants" in violation of section 404 of the Clean Water Act. Both levels of the EPA's administrative adjudication process - the Administrative Law Judge and the Environmental Appeals Board ("EAB"), found that such activity, without a permit, *did* create a discharge of pollutants in violation of the CWA. Slinger Drainage, Inc.'s appeal of the EAB's decision to the U.S. Court of Appeals for the District of Columbia Circuit was pending at the time of the hearing in this case. In light of that fact, the undersigned informed the parties at the start of the hearing held in this matter on April 4, 2000, that the EAB's decision in *Slinger Drainage* would be controlling on the legal issue in Count I of this matter regarding whether tiling with a Hoes Trenching Machine creates a "discharge of pollutants," unless and until the EAB's decision in *Slinger Drainage* is altered on appeal. Tr. 9. On January 30, 2001, the Court of Appeals dismissed the Respondent's appeal of the EAB's decision in *Slinger Drainage* on the basis that the appeal was filed untimely. *Slinger Drainage Inc. v. EPA*, 237 F.3d 681 (D.C. Cir. 2001). On April 13, 2001, that Court denied a Petition for Rehearing En Banc. *Slinger Drainage Inc. v. EPA,* 244 F.3d 967, 968 (D.C. Cir. 2001). The issuance of this decision was delayed in part awaiting what turned out to be an aborted adjudication of the *Slinger Drainage* case by the Court of Appeals.

cannot be found to have caused a discharge of pollutants. R's In. Post Hrg. Br. at 3. Respondent asserts that nothing is added to the wetland when a Hoes Trenching Machine is used; he argues that the machine "brings nothing into the wetland and takes no part of the wetland and removes it to another part of the wetland." R's In. Post Hrg. Br. at 16-17.

Respondent further asserts that "the fact that the soil in a wetland constitutes a pollutant does not automatically hold that the movement of that pollutant automatically causes a discharge in that wetland." R's Post Hrg. Br. at 18. Respondent relies on *Dubois v. U.S. Department of Agriculture*, 102 F.3d 1273, 1296-1297 (1st. Cir. 1996), asserting that it stands for the proposition that "the movement of pollutants within the same body of water does not constitute an 'addition.'" *Id.* Additionally, Respondent asserts that the Court of Appeals for the D.C. Circuit, in *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998) *enjoined* EPA from regulating "fall back," and alleges that the Court defined that term as a redeposit which "'takes place in substantially the same spot as initial removal.'" R's Post Hrg. Br. at 20. The parties agree that in the process of installing drainage tile with the Hoes Trenching Machine, "soil is momentarily lifted by the chainsaw-type blade, the tile is placed in the resulting trench, and the soil is immediately redeposited in substantially the same place back in the trench" or "drop[ped] . . . directly back into the same location in the same wetland." *Id.* According to Respondent, because the Hoes Trenching Machine places the excavated material directly back into the same location in the same wetland, it constitutes "fall back" and therefore does not constitute an "addition" of a pollutant within the meaning of the Clean Water Act. *Id.* Respondent distinguishes this process from "sidecasting," which, he asserts, involves placing removed soil in the wetland but at some distance from the point of removal. *Id.*

Courts have long held that the "addition of any pollutant" includes the redeposit of materials excavated or dredged from a wetland or water body. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923-924 (5th Cir. 1983)(land clearing activities which included filling in sloughs and burying logs involved the redeposit of materials from a wetland, which constituted an "addition" and "discharge" of a pollutant within the meaning of the Act); *United States v. MCC of Florida, Inc.*, 772 F.2d 1501 (11th Cir. 1985), *vacated on other grounds*, 481 U.S. 1034 (1997), *"redeposit" analysis adopted on remand*, 848 F.2d 113 (11th Cir. 1988) (redeposit of sediment dredged by tugboat propellers, destroying adjacent sea grass beds, constitutes a "discharge" and "addition" of a pollutant); *Rybachek v. EPA*, 904 F.2d 1276, 1285-86 (9th Cir. 1990)(resuspension of material in a stream, by excavation of gravel from a streambed and discharging it back into the stream after extraction of gold, is an "addition" of a pollutant); *United States v. Sinclair Oil Co.*, 767 F.Supp. 200 (D. Mont. 1990)(redistribution of river cobble and other indigenous riverbed materials to maintain the river channel constitutes "addition" and "discharge"); *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000)("sidecasting," where soil was excavated from a wetland to build a ditch and piled on the sides, constitutes the "discharge" of a pollutant); *United States v. Bay-Houston Towing Co., Inc.*, 33 F.Supp. 2d 596, 606 (E.D. Mich 1999)(same). Courts have noted that such activities often result in a disturbance of the "physical and biological integrity of the Nation's waters," contrary to the objective of the CWA as stated in Section 101 of the Act, 33 U.S.C. §1251(a). *See e.g., Avoyelles*, 715 F.2d at 923 (interpreting

"addition" to include "redeposit" is consistent with such purposes of the CWA); *MCC of Florida*, 772 F.2d at 1506 (activity "clearly disturbs the 'physical and biological integrity' of the subject areas"); *Deaton*, 209 F.3d at 336 ("When a wetland is dredged . . . and the dredged spoil is redeposited in the water or wetland, pollutants that had been trapped may be suddenly released" and it "threatens to increase the amount of suspended sediment, harming aquatic life").

On the other hand, courts have been reluctant to include within the terms "addition" and "discharge" activities in which the redeposit is merely "*incidental fallback*," and activities which do not involve removal and redeposit of most or all of the material. *Dubois v. U.S. Department of Agriculture*, 102 F.3d 1273, 1296-1297 (1st. Cir. 1996)(distinguishing water being pumped from a creek to a pond - an "addition" of a pollutant - from water being merely pumped from the bottom to the surface of a pond); *Wilson*, 133 F.3d at 260 (Niemeyer, J.: "[w]ere we to adopt so expansive a definition of 'discharge' that any movement of soil within a wetland constitutes 'addition,' we would not only flaunt the given definition of 'discharge,' we would be criminalizing every artificial disturbance of the bottom of any polluted harbor because the disturbance moved polluted material about"); *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1769, 1404-1405 (D.C. Cir. 1998)(while some forms of redeposit may be legally regulated, "incidental fallback," where material is removed from water and "a small portion of it happens to fall back," does not constitute "addition" of a pollutant); *United States v. Hallmark Construction Company*, 30 F. Supp. 2d 1033, 1037 (N.D. Ill. 1998)(excavation in wetland to construct pond involved "incidental fallback" and was not subject to regulation as a "discharge").

The analysis of the term "discharge of a pollutant" applies also to the definition of the term "discharge of dredged material," which delineates circumstances in which a Section 404 permit is required, at 40 C.F.R. § 232.2 and 33 C.F.R. § 323(d). The definition in effect at the time the alleged discharge first occurred (1991) was "any addition of dredged material into waters of the United States," but excluding "*de minimus*, incidental soil movement during normal dredging operations." 51 Fed. Reg. 41206, 41232 (Nov. 13, 1986). In 1993, the *de minimus* exception was removed and the definition was expanded to include "[a]ny addition, including any redeposit, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation," with the exception of such activity "that does not have or would not have the effect of destroying or degrading an area of waters of the United States." 58 Fed. Reg. 45008, 45037 (Aug. 25, 1993). In 1997, the District Court of the District of Columbia invalidated the amended definition, called the "Tulloch Rule," and enjoined EPA and the Corps from enforcing it. *American Mining Congress v. U.S. Army Corps of Engineers*, 951 F.Supp. 267 (D.D.C. 1997), *aff'd, National Mining Congress v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998). Specifically, the courts concluded that Congress did not intend the definition to cover "incidental fallback." After the Complaint in this matter was filed, the definition of "discharge of dredged material" was amended to exclude "incidental fallback." 64 Fed. Reg. 25120 (May 10,

1999).[19]

Thus, the removal of dredged material and redeposit of a substantial amount of the material into waters of the United States is the key distinction of a regulated "discharge" involving dredged material. Respondent's argument that the material at Respondent's site was redeposited to virtually the same location and therefore cannot be an "addition" of a pollutant is not consistent with the reasoning of the courts, with the exception of Judge Niemeyer in *Wilson*. As Judge Payne pointed out in his opinion in *Wilson*, it is not the movement of wetland material to a different location that constitutes an "addition" or "discharge," but the excavation and redepositing of the material, which releases soils and whatever is in them into water -- which, he noted, would include a wetland which is in a periodic dry state. 133 F.3d at 273-274; *but see*, 133 F.3d at 259 (Niemeyer, J.: "sidecasting," described as "the movement of native soil a few feet within a wetland does not constitute the discharge of soil . . .'[a]ddition' requires the introduction of a new material into the area, or an increase in the amount of a type of material which is already present"). After its decision in *Wilson*, the Fourth Circuit again addressed the issue of "sidecasting," reasoning that once the material was excavated from the wetland, it became a statutory pollutant, and concluding that its redeposit in that same wetland is an "addition" of a pollutant. *Deaton*, 209 F.3d at 336. The D.C. Circuit in *National Mining Association* distinguished "activities like the one at issue in *Rybachek* (removal of dirt and gravel from a streambed and its subsequent redeposit in the waterway after segregation of gold)" from excavation or dredging accompanied by "incidental fallback." 145 F.3d at 1407. Judge Silberman more explicitly stated in his concurring opinion, "[i]f the material that would otherwise fall back were moved some distance away and then dropped, it very well might constitute an 'addition' [o]r if it were held for some time and then dropped back in the same spot, it might also constitute an 'addition.'" 145 F.3d at 1408. *See also, American Mining Congress v. U.S. Army Corps of Engineers*, 120 F. Supp. 2d 23, 30 (D.D.C. 2000)("incidental fallback," which is not a "discharge," may involve some displacement of material).

Respondent's attempt to categorize the redeposit of soil by the Hoes Trenching Machine as subject to the D.C. Circuit's injunction in *National Mining Association* is of no avail. Respondent describes the activity subject to the injunction as "fall back" which occurs "when redeposit takes place in substantially the same spot as the initial removal." R's Post-Hrg. Br. at

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[19] Another rule to amend the definition of "discharge of dredged material" was published in the Federal Register on January 17, 2001. This amendment states that "mechanized earth-moving equipment to conduct landclearing, ditching, channelization, in-stream mining or other earth-moving activity in waters of the United States as resulting in a discharge of dredged material" is regarded as a discharge of dredged material "unless project specific evidence shows that the activity only results in incidental fallback." 66 Fed. Reg. 4550, 4575. The term "incidental fallback" is defined as "the redeposit if small volumes of material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as initial removal." *Id.* However, the effective date of the rule was postponed to April 17, 2001. 66 Fed. Reg. 10367 (February 15, 2001).

19, 20. The D.C. Circuit acknowledged that the parties in *National Mining Association* referred to "fall back" defined as such, and that "fallback and other redeposits . . . occur during mechanized landclearing . . . as well as during ditching and channelization . . . ." 145 F.3d at 1401, 1403. However, the District Court of the District of Columbia and the D.C. Circuit made clear that it is "*incidental* fallback" which goes beyond the Government's authority to regulate the "discharge of a pollutant." 951 F. Supp. at 271-278; 145 F.3d at 1405. "Incidental fallback" was described by the district court as the "incidental soil movement from excavation, such as the soil that is disturbed when dirt is shoveled, or the back-spill that comes off a bucket and falls back into the same place from which it was removed." 951 F.Supp. at 270. The D.C. Circuit referred to incidental fallback as "incomplete removal," "imperfect extraction," "a net withdrawal . . . of material," and removal of material where "a small portion of it happens to fall back." 145 F.3d 1404, 1405, 1406. However, it did not attempt to draw the line between regulable redeposits and incidental fallback, noting that "a reasoned attempts by the agencies to draw such a line would merit considerable deference." 145 F.3d at 1405.

The facts of the present case do not meet either the regulatory exclusion of "*de minimus*, incidental soil movement during normal dredging operations" or the D.C. Circuit's exclusion of "incidental fallback" from the definition of "discharge of a pollutant." The parties stipulated as follows:

> A Hoes Trenching Machine places tile in the ground by using a "chainsaw-type blade" with a circulating chain to dig a trench into the soil. The circulating chain around the saw-type blade or arm creates a trench where tile is placed by lifting the dirt momentarily out of the ground in a continuous flow with 50% of the soil being immediately set back in the trench. The remaining 50% remains momentarily on the side of the trench. Concave type blades at the back of the trenching machine place the remaining soil immediately back into the trench. The movement of soil is incidental to the placement of the tile.

Jt. Ex. 20. The soil movement is not, however, incidental to *excavation*, where only a small portion happens to fall back, and does not result in a net withdrawal of material.

Slinger Drainage involved the same activity -- and the same company operating the Hoes Trenching Machine -- as that at issue here. The Environmental Appeals Board held in that case that the redeposit of soil which occurs during the process of installing drainage tile with a Hoes Trenching Machine is a "discharge." The Board stated that the Hoes Trenching Machine process involves "three readily discernible steps . . . excavation to make room for the drainage tile in the excavation site; placement of the drainage tile in the excavation site; and burial of the tile with the excavated material," although the Board noted that the three steps "occur nearly simultaneously." *Slinger Drainage*, slip op. at 26, 33. The Board distinguished that process, in which the entirety of the material is redeposited, from mere incidental fallback, which involves an excavation without any significant "addition" or redeposit. *Id.* at 25-26. The Board also agreed with the analysis of Judge Payne, rather than that of Judge Niemeyer, in *Wilson*. *Id.* at 30-

31. Specifically, the Board reasoned:

> Dredged material, by its very nature, is something that has been removed "from" a body of water by dredging or excavation; it does not exist as such until it is removed from a body of water. Once it comes into existence, it becomes a pollutant as defined in section 502(6) of the Act. If it is subsequently redeposited "into" the same body of water, but at another location, the case law uniformly treats the redeposition as an addition of a pollutant to waters of the United States. The result should be no different when, as here, the dredged material is not just redeposited into the same body of water, but is also redeposited into the same location from which it was originally removed. There is nothing in the Act or regulations to suggest that dredged material in those circumstances, having once attained pollutant status, somehow loses that status upon redeposition into its former location. Redeposition of dredged material into a body of water constitutes the discharge of dredged material and, hence, an addition of a pollutant to waters of the United States for which a permit is required under section 404 of the Act.

Slinger Drainage, slip op. at 33.

In light of the Board's decision in *Slinger Drainage*, and the above discussion of Federal case law, it is concluded that the use of the Hoes Trenching Machine on Respondent's site resulted in an "addition of a pollutant" and thus a "discharge of a pollutant," which was unlawful unless in compliance with a permit under Section 404 of the CWA. As it is uncontested that Respondent did not have such a permit, nor has Respondent claimed to fall within any exemption to the permit requirements in regard to his tiling activities, it is hereby found that Respondent violated Section 301(a) of the Clean Water Act in connection with such activity as alleged in Count I of the Complaint.

Count II

Count II of the Complaint alleges that Respondent further violated Section 301(a) of the Clean Water Act by discharging approximately 2,547 cubic yards of dredged material into navigable waters without a permit in connection with his use of a back hoe to reconstruct and extend a drainage ditch on his property in the Fall of 1995. The record suggests that Respondent does not dispute that he "discharged" a pollutant by removing and redepositing dredged materials into wetlands on his site using earthmoving equipment in 1995. Instead, he raises a two pronged defense first challenging Complainant's characterization of the discharge as "sidecasting" and then challenging Complainant's characterization of the activity's purpose, alleging that this activity, being that it was actually for the creation of a farm road, is exempted from section 404's permit requirements.

As to the first prong of the defense, Respondent attempts to characterize the discharge

resulting from his activities in the Fall of 1995 as "incidental fallback," arguing that "[a]ny incidental fallback from the excavation of soils on the Site for the purpose of using the soils in the construction or maintenance of roadways on the Site" is not a violation under *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998). R's In. Post Hrg. Br. at 10. While "incidental fallback" is exempt from regulation, "'sidecasting,' which involves placing removed soil into a wetland but at some distance from the point of removal (*e.g.*, by the side of an excavated ditch)" was not held to be exempt from regulation in *National Mining*, as the 1986 regulation covered sidecasting. 145 F.3d at 1402, 1406; *see also, American Mining Congress v. U.S Army Corps of Engineers*, 951 F.Supp. 267, 270 n. 4 (D.D.C. 1997)("'[s]idecasting' . . . ha[s] always been subject to § 404"). There is no question that Respondent's activities on the western perimeter of his property, removing of soil and placing it adjacent to the ditch from which it was removed (tr. 337-338), constitutes "sidecasting." As such, the activities constitute a "discharge" of pollutants. *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000).

Farm Road Exemption

As to the second prong of his defense on Count II, Respondent asserts that the activity he conducted in the Fall of 1995 was exempted as a non-prohibited discharge of dredged or fill material under Section 404(f)(1)(E) of the CWA, on the basis that he did not undertake the activity for the purpose of reconstructing and extending a drainage ditch, but for the purpose of construction and maintenance of a farm road. R's In. Post Hrg. Br. at 3. The statutory exemption provides that discharge of dredged material for the purpose of the construction and maintenance of a farm road is *not* prohibited *when* it is constructed in accordance with the "best management practices." 33 U.S.C. 133(f)(10(E). Respondent asserts that the construction was done in accordance with best management practices. *Id.* Thus, Respondent avers that his project did not require a Section 404 permit and as a result, he did not violate the Clean Water Act as alleged in Count II of the Complaint.

Complainant asserts that Respondent did not intend to build a road, and that Respondent's argument as to the farm road exemption constitutes a "disingenuous attempt to rationalize his illegal activity." C's Reply at 6-7. According to Complainant, the Respondent only asserted the idea that he was building the road after proceedings against him had already begun. *Id.* at 7. Complainant asserts that Respondent's history at the site demonstrates that he intended to construct and extend a drainage ditch on the western perimeter of the site rather than to build a road. C's Reply at 6. Complainant argues in the alternative that if Respondent did undertake this project for the purpose of constructing a road then he has not satisfied his burden of proving that he complied with the requirements for the road building exemption under the Clean Water Act including proving that the site was an established farming operation at the time of the activity and/or that the flow or circulation of navigable waters was not impaired as a result of the project. C's Reply at 7, 11-12.

Section 404(f)(1)(E) of the Clean Water Act sets forth the standards for the farm road exemption to the requirements that one secure a Section 404 permit as a prerequisite to discharge. Section 404(f)(1)(E) provides that the discharge of dredged or fill material is not prohibited:

> for the purpose of construction or maintenance of farm roads . . . where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized.

33 U.S.C. §1344(f)(1)(E). *See also*, 40 C.F.R. § 232.3(c)(6).

The exemption cited above is "recaptured" by section 404(f)(2) of the Clean Water Act which states:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into *a use to which it was not previously subject*, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

33 U.S.C. §1344(f)(2)(italics added).

As the Ninth Circuit stated in *United States v. Akers*, 785 F.2d 814, 819 (9th Cir. 1986), *cert. denied*, 479 U.S. 828, "[t]o be exempt from the [404] permit requirements, one must demonstrate that proposed activities both *satisfy* the requirements of §(f)(1) and *avoid* the exception to the exemptions (referred to as the 'recapture' provision) of §(f)(2)." The exemptions of Section 404(f) are to be narrowly construed. *Id.; United States v. Brace*, 41 F.3d 117 (3rd Cir. 1994), *cert. denied*, 515 U.S. 1158 (1995)(Section 404(f)(1) and (f)(2) "provide a narrow exemption for agricultural activities that have little or no adverse effect on waters of the United States"). Thus, Respondent has the burden of not only demonstrating that his project was permissible under the "farm road exemption" but also showing that the project was not encompassed by the recapture provision of subsection (f)(2).

In his 1988 application for a section 404 permit submitted to WDNR and the Army Corps of Engineers, Respondent stated that he proposed to build a "new ditch to catch runoff of surrounding hills and roadside ditches." C's Ex. H. The ditch was indicated on the application as being located along the *northern and western perimeter* of his property. *Id.* The ditch was proposed to be 4 to 5 feet deep, and the "spoil bank leveled" at one foot above grade, according to Respondent's application. *Id.* The application further indicates that he proposed to build a roadway on the *northeastern perimeter* of his property. *Id.* He testified that he applied for the

permit "to do some ditches on the property," advising the Corps of his intent to "build a road, do some tiling and some ditches." Tr. 330.

The record shows that in 1989, Respondent obtained a permit to construct a "field driveway" to enter his property off of Friesland Road. R's Ex. A.; Jt. Ex. 2; Tr. 196, 215-216, 325, 436. Respondent testified that thereafter he began to construct a roadway along the *northwestern* boundary of his property. Tr. 215, 325-329, 340, 344-345, 353; R's Ex. M. However, Respondent did not complete that roadway; instead, after less than a year, he leveled the area along the *eastern border* of his property and used that area as a roadway to enter the site, because it seemed shorter. Tr. 336, 368-369, 375. Respondent testified that he resumed the road building project on the *western border* of his property in 1993 or 1994 and again in 1995, excavating dirt from the area along the western perimeter of his property, to obtain soil with which to construct the road. Tr. 337, 340-341, 354. This excavation formed the western perimeter ditch. Tr. 337, 341. He started by using a small earth mover called an Ashland scraper, and then in 1995 he used a backhoe to excavate and place the soil, and then used a bulldozer to level the soil. Tr. 35, 338. Respondent testified that some of the material was disposed of on upland ground "way over on the east side" of his property, as it was not needed for the roadway. Tr. 338-339, 354. Respondent still does not use the area for a roadway, because he "didn't know where [he] stood" after performing restoration work for the WDNR. Tr. 346. He testified that he would finish the road in the very northern part of the property "up to the highway" if things get straightened out. Tr. 355. Where he has done the work, Respondent testified, he can "pretty much drive on [the road] today." Tr. 355. It is generally 15 to 20 feet wide, elevated about one and a half to two feet from ground level. Tr. 347, 348, 414. Although he was able to farm the property using the roadway on the eastern side of the property, having a roadway on both sides of the property facilitates the harvesting of crops and minimizes driving on the field, which damages the roots and makes a mess, Respondent testified. Tr. 368, 376.

The purpose of the western perimeter ditch, according to Respondent, was to obtain material for the roadway. Tr. 354. However, he admitted that "a byproduct" of the ditch "would be that it intercepts water after you get a storm and facilitates its entry into the tile system," and he referred to water in the area running down a grassy slope after a rain. *Id.* Respondent's testimony indicated that before he conducted the restoration work required by the government, the ditch "flowed a little bit" and that the ditch was dug deeper on the northern end. Tr. 342, 346. Since the restoration work, the ditch "just holds the water until it seeps away." Tr. 355. Although Respondent answered "no" when questioned as to whether the perimeter ditch was needed (Tr. 341), his testimony essentially supports Mr. Carlson's testimony that the ditch intercepts water flowing easterly from uplands to the west of Respondent's property and the purpose of the ditch was to prevent water from flowing into and being retained in the wetland on the site. Tr. 40, 56, 58, 77, 155-156.

Leonard Massie, Ph.D., a part-time instructor-teacher at the University of Wisconsin-Madison Department of Biological Systems Engineering, testified on behalf of Respondent regarding the "farm road" issue. Dr. Massie is retired from his position as a specialist in the

Engineering Phases of Soil and Water Management with the University. Tr. 398. He was qualified as an expert during the hearing on agricultural practices related to farm roads and drainage. Tr. 402-412. Dr. Massie visited Mr. Crescio's property on March 7, 2000, and observed the conditions which were in existence on the site. Tr. 412. He characterized the area at issue in Count II of the Complaint, along the western boundary, as a "farm road, a field road on which one would travel with equipment" and stated that the ditch next to it looked like it was where the material used in its construction had been taken. Tr. 415-416. Dr. Massie characterized the material used on the roadway as mineral soil consisting of "mineral soil, sand, gravel, clay, [and] small stones." Tr. 415. As to the purpose of Respondent's construction activities, he testified:

> My sense was that [Respondent] first needed the road, and if he happened to get something besides that, okay . . . He first excavated the material to create the roadway. He then had a trench, and if there's enough slope so that water can pile up and make its way out, it would do so . . . . Tr. 423.

Photographs of the area of Respondent's property at issue in Count II depict a dirt covered path on which were wheel tracks. Jt. Ex. 6; Tr. 433. Mr. Carlson described the area as generally leveled out on the north segment of the ditch, but the southern part of it was "sort of a mounded and vegetated area," and some of it was planted with the crops. Tr. 124-126.

Dr. Massie testified that the ditch along the road was three to four feet deep, and approximately 15 feet wide at the surface. Tr. 417, 437. He testified that the ditch had water in it, but the ditch was plugged, and therefore the water was not flowing. Tr. 417, 418, 422-423. He admitted, consistent with Mr. Carlson's and Respondent's testimony, that the ditch would intercept water flowing from the hill near Respondent's property. Tr. 426. However, he testified that the velocity of the flow would be quite low because there was not much, if any, slope. Tr. 438.

The testimony and evidence of record indicate that Respondent had a dual purpose for his construction project: to reconstruct and extend a drainage ditch as well as construct a farm road. It is appropriate to "look[] beyond the stated or subjective intentions and determine[] the effect or 'objective' purpose of the activity conducted" in construing the exemptions under Section 404(f) of the CWA. *United States v. Sargent County Water Resource District*, 876 F. Supp 1090, 1101 (D. N. D. 1994). The 1988 CWA Section 404 permit application, coupled with the fact that Respondent did not need some of the soil excavated from the ditch for the roadway and therefore disposed of it elsewhere, strongly suggests that the primary purpose of Respondent's construction activity on the western perimeter of the site in 1995 was to reconstruct and extend a ditch to prevent water from flowing into the wetland.

Nevertheless, assuming *arguendo* that the project passes muster as discharge of dredged material "for the purpose of construction or maintenance of [a] farm road[]" within the meaning of Section 404(f)(1)(E) of the CWA, Respondent has not shown that he followed the best

management practices "to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized." 33 U.S.C. § 1344(f)(1)(E). The EPA and Corps of Engineers promulgated such practices in their rules, at 40 C.F.R. § 232.3(c)(6) and 33 C.F.R. §323.4 respectively.

As to the question of whether the construction and maintenance of the road complied with the best management practices, Dr. Massie testified as follows:

> [The roadway is] constructed in the same manner and to the same quality as most field roads where one is not dealing with exceptionally wet conditions or unique character. It's not built to the standard that one would make a highway to because you don't have the speeds involved and the safety features. It was up to the quality needed to accomplish the task desired; that is, he can move down it without getting stuck and so on and so it appears to be just fine.

Tr. 416. In addition, he stated that the road "wasn't any wider than it really should be" and that it "had enough material in terms of depth so that he had developed a firm base on which to support his equipment." *Id*. As to whether the road impaired the flow or circulation patterns of water on the property, he testified that "you might have a little bit of holding water back against the road bed," but the water could "flee either north or south along it," so it did not significantly affect the flow of water on the property. Tr. 418. As to any adverse effect on the environment, he testified that "you have a little chance for some dust to blow." *Id.*

Respondent testified that the roadway did not cross any navigable waterways, that generally there was no movement of water across the roadway, and that the roadway was as much out of the production/wetland area as possible. Tr. 347-348, 359.

The record does not establish that Respondent complied with all of the best management practices. The first listed "best management practice" is that roads in waters of the United States "shall be held to the minimum feasible number, width, and total length consistent with the purpose of specific farming, silvicultural or mining operations, and local topographic and climactic conditions." 40 C.F.R. § 232.3(c)(6)(i); 33 C.F.R. § 323.4(a)(6)(i). Respondent has not established that a roadway on the western side of his property was necessary, where he used the roadway on the eastern side of his property to access and farm the property. Respondent did not provide any testimony or evidence that he complied with the best management practice that the "borrow material shall be taken from upland sources whenever feasible." 40 C.F.R. § 232.3(c)(6)(viii). The record shows that Respondent owned non-wetland property, but that the material was excavated from wetland soil. Tr. 338-339, 348, 354, 378-379.

Furthermore, Mr. Hanson, a Private Lands Wildlife Specialist for the Upper Rock Basin at the WDNR testified that the Rock River Valley, the location of the Respondent's farm, is home to several different kinds of species of birds and animals. He said that some of these

include deer, muskrat, otter, moles, mice, raccoons, skunks, ducks, sandhill cranes, sedge wrens and redwing blackbirds. Tr. 234. Mr. Hanson further testified that the birds are attracted to wetlands because their overhead covers, cattails and willow brush provide protection from predators. *Id.* Respondent did not provide any evidence to support a finding that "[d]ischarges into breeding and nesting areas for migratory waterfowl . . . and wetlands shall be avoided if practical alternatives exist," as provided by 40 C.F.R. § 232.3(c)(6)(x). Although Respondent indicated that the western perimeter roadway facilitates harvesting his crops (Tr. 376), Respondent did not discuss any lack of practical alternatives.

Dr. Massie's testimony was made in general terms and did not specifically address whether Respondent's project was consistent with or followed the best management practices delineated in the regulations. As it stands, the record does not support a finding that Respondent complied with the best management practices.

Finally, Respondent has not established by a preponderance of the evidence that his activities in excavating the western perimeter ditch and depositing the dredged material onto the wetland were not "incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced." 33 U.S.C. 1344(f)(2). The excavation and redeposit of dredged material on the western perimeter of the site were incidental to drainage of the site, which had as its purpose bringing the natural wetland into agricultural use for growing mint. C's Ex. H; R's Ex. L. The record establishes that the flow or circulation of the waters in the wetland on the site was impaired due to these activities. Tr. 40, 56-58, 77, 155-156, 354, 426. Dr. Massie's testimony that the roadway itself did not significantly affect the flow of water on the property (Tr. 418) does not contradict this conclusion.

Respondent has not met its burden of proof with regard to a farm road exemption and therefore has not established that his project was exempt from the permit requirement under Section 404 of the Clean Water Act.

It is concluded that, for discharging dredged material into the wetland on the western side of his property using earthmoving equipment, Respondent is liable for discharging a pollutant into navigable waters without a permit, in violation of Section 301(a) of the CWA.

V. PENALTY

The assessment of civil administrative penalties for violations of the Clean Water Act is authorized by Section 309(g) of the Act. 33 U.S.C. § 1319(g). Under that section, penalties for class II type violations, such as those alleged in this case, cannot exceed $10,000 for each day the violation continues, and the total penalty cannot exceed $125,000. 33 U.S.C. §1319(g)(2)(B). The Clean Water Act provides that in determining the amount of any penalty, the nature,

circumstances, extent and gravity of the violations must be taken into account. 33 U.S.C. 1319(g)(3). In addition, consideration must also be given to the violator's ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violations and such other matters as justice may require. *Id.*

The Rules of Practice state that "the complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and the relief sought is appropriate." 40 C.F.R. §22.24(a). The standard of proof under the Rules of Practice is a preponderance of the evidence. 40 C.F.R. § 22.24(b). Complainant, therefore, has the burden of demonstrating the appropriateness of its proposed penalty.

The Complaint proposes that Respondent be assessed a combined Class II penalty of $60,000 for his violations of the Clean Water Act. At the hearing, Mr. Carlson, who calculated the penalty for Complainant, testified that Count I accounts for approximately 65 percent of that penalty, or $39,000, and Count II accounts for 35 percent of the penalty, or $21,000, based on the fact that the activities as to Count I converted a larger area of wetland than the activities involved in Count II. Tr. 205. Respondent disputes the proposed penalty, contending that it is vastly inappropriate and that there is not sufficient evidence to justify the proposed penalty.

There are no civil penalty guidelines issued under the CWA to provide a methodology for calculating a penalty, so the penalty must be determined by some method on the basis of the evidence of record and the penalty criteria set forth in Section 309(g) the CWA. 40 C.F.R. §22.27(b). Federal courts, calculating penalties under the penalty criteria of Section 309(d) of the CWA, generally use one of two methods. One method, known as the "bottom up" method, starts with the economic benefit of noncompliance, and then that amount is adjusted to reflect the other statutory factors. *United States v. Municipal Authority of Union Township*, 929 F. Supp. 800, 806 (M.D. Pa. 1996), *aff'd*, 150 F.3d 259 (3rd Cir. 1998)(calculating "wrongful profits" - earnings the defendant made by not cutting back production volume to come into compliance, multiplied by two for deterrent effect). Other courts apply the "top down" method, starting with the statutory maximum and reducing that amount for any statutory factors in mitigation of the penalty. *Atlantic States Legal Foundation v. Tyson Foods*, 897 F.2d 1128, 1142 (11th Cir. 1990). Some Administrative Law Judges have calculated penalties under Section 309(g) of the CWA following the framework of EPA's general civil penalty policies, known as "GM-21" (Policy on Civil Penalties) and "GM-22" (A Framework for Statute- Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties), 41 Env't Rep. (BNA) 2991, dated February 16, 1984. *See e.g., Urban Drainage and Flood Control District*, EPA Docket No. CWA-VIII-94-20, 1998 ALJ LEXIS 42 (ALJ, June 24, 1998); *Industrial Chemicals Corp.*, EPA Docket No. CWA-02-99-3402, 2000 ALJ LEXIS 58 (ALJ, June 16, 2000). These policies provide that a preliminary deterrence figure should first be calculated, based upon the economic benefit of noncompliance and the gravity of the violation, and then that figure is increased or decreased based upon the other statutory factors. The Federal courts as well as the Environmental Appeals Board has emphasized the importance of the economic benefit factor, even where the exact or full amount cannot be calculated, and provided that a partial amount or

reasonable approximation is sufficient to include in a penalty assessment. *United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 529 (4th Cir. 1999), *cert. denied*, 121 S. Ct. 46 (2000); *B.J. Carney*, CWA App. No. 96-2, slip op. at 62-64 (EAB, June 9, 1997), *on remand*, EPA Docket No. CWA-1090-09-13-309(g), 1998 ALJ LEXIS 112 (ALJ, January 5, 1998), *appeal dismissed*, 192 F.3d 917 (9th Cir. 1999). In this case, it is possible to calculate at least a partial or reasonable approximation of Respondent's economic benefit of noncompliance, so the penalty calculation will begin with that factor.

Economic Benefit (or savings) resulting from the violation

Complainant initially calculated an economic benefit of $5,000 representing Respondent's delayed costs of restoring the site, that is, his savings in not monitoring and restoring the site for seven years, from October 1991, when he installed the tiles, until August 1998, when he plugged the ditch system and disabled the tiling system. C's In. Post Hrg. Brief at 27; Tr. 72. However, after the hearing, Complainant added that Respondent obtained an additional economic benefit of approximately $27,000 to $29,700 minus costs for the years 1993 through 1998 from his violations of the Clean Water Act. C's In. Post Hrg. Br. at 28. This benefit reflects Respondent's wrongful income from the sale of mint oil which was grown on the nine productive acres of the thirteen acres tiled in 1991. Tr. 373. The income is based on the price of mint oil ($10-$11/pound) (tr. 372), and on the fact that one acre of mint yields approximately 50 pounds of mint oil (tr. 373), resulting in an estimated yield of mint oil of approximately 450 pounds per year. C's In. Post Hrg. Br. at 27-28.

Respondent asserts that the possible benefit was actually a net loss, pointing out his testimony that the cost of mint production would range from $250 to $400 per acre, so that the total cost for the site would be between $16,250 and $26,000 (for 13 acres). Tr. 377-378; R's Reply Br. at 3. Respondent cites his testimony that he did not sell mint oil for two of the years from 1993 or 1994 to 1998, and only a limited amount the three previous years. Tr. 372. Therefore, Respondent contends, there was no economic benefit from the use of the site for mint production. R's Reply Br. at 3. Respondent suggests that the site could have been farmed without placing drain tiles on the property, citing to Dale Pfeiffle's investigation report, dated February 13, 1990. C's Ex. M p. 5.

It is undisputed that Respondent harvested mint from at least eight of the 13 acres tiled in 1991 for at least three years, between 1993 and 1998. Tr. 372-373. It is also undisputed that Respondent harvested up to 50 pounds of mint oil per acre, which was sold at $10 or $11 per pound. Tr. 373. This yields a gross profit of $12,000. Using Respondent's estimate that his costs per acre were $250 to $400 per acre, the total costs for eight acres over three years at $400 per acre are $9,600. According to these figures, Respondent would have made a net profit in those three years of $2,400 from the 13 acres at issue.

Respondent's argument that he could have farmed the land without the drainage tiles is unpersuasive, as he admitted that he could have done so only in drier years on portions of his

land. Tr. 360. Moreover, Dale Pfeiffle's investigation report merely notes from his interview with Respondent that Respondent could "probably" farm the land without drain tiles, "but he would have difficulty in seeding and harvesting activities." C's Ex. M p. 5. Respondent's testimony that he sold only a limited amount of the mint oil in the three years is vague, unsupported by any business records, and is equitably balanced by calculating according to his maximum estimate of his costs per acre, and minimum estimate of acres harvested and dollars per pound of mint oil.

As to any monetary savings to Respondent resulting from his delay in restoring the site, Mr. Carlson testified that he used the Agency's models, namely the "BEN" model, to calculate the return Respondent would otherwise have made on an investment of the money not spent immediately on restoring and monitoring the site during the relevant years. Tr. 72, 137-138. He testified that he estimated costs consisting of eight hours to restore the ditch and tiling system at $80 per hour in 1991, totaling $640, plus a mobilization fee of $500, plus $750 per year for three years to monitor the site. Tr. 142-143. The BEN model then calculates the amount that the money not spent on those restoration costs would have earned in the relevant years if it was invested at a standard variable discount rate. Tr. 138, 143-145. Based upon those calculations, Mr. Carlson came up with a total figure of approximately $5,000 in economic benefit from delayed restoration. Tr. 145. Respondent did not dispute the figures, but merely argued that such calculation was "a nonsensical use of a factor that obviously has to do with economic gain, not simply the EPA's allegations of what could have been a hypothetical return on money EPA claims would have been needed to restore the property." R's Reply Br. at 2.

Respondent is mistaken. The statutory factor "economic benefit (or savings) resulting from the violation" may represent "wrongful profits"as well as "costs avoided," *i.e.*, savings realized from not bringing the site into compliance or delaying compliance with the CWA. *Municipal Authority of Union Township*, 150 F.3d 259 (3rd Cir. 1998). The "cost-avoided" method is calculated using "the weighted average cost of capital as a discount/interest rate," on the rationale that "the company is able to use those funds for other income-producing activities, such as investing that money in their own company." *United States v. Smithfield Foods, Inc.*, 191 F.3d at 530. This method "is not in conflict with the CWA or basic economic principles" and "represents a logical method by which a violator . . . can be disgorged of any profits it obtained through its noncompliance." *Id.*

The penalty representing the economic benefit to Respondent of his violations of the CWA, is at least $2,400 in "wrongful profits," plus $5,000 in savings from delayed restoration of the site, or a total economic benefit of $7,400. While this amount may represent restitution, a penalty must also serve to deter future violations and to account for retribution. *Tull v. United States*, 481 U.S. 412, 422 (1977)(citing 123 Cong. Rec. 39191 (1977)). Thus, the $7,400 penalty will be adjusted in consideration of the nature, circumstances, extent and gravity of the violations, the degree of Respondent's culpability, and any other matters as justice may require. Because there are two Counts of violation which both contributed to the economic benefit, half

of the $7,400 penalty, or $3,700, will be allocated to Count I and the other half to Count II.[20]

Multi-day penalties

Before considering the individual penalty determination criteria, the issue of the number of days of violation must be addressed. The Complaint alleges that each discharge by Respondent without a permit constitutes a day of violation of Section 301(a) of the CWA, and that "each day the discharged material remains in the wetland without the required permit . . . constitutes a day of violation of section 301(a) of the CWA." Complaint ¶¶ 23, 24, 33, 34. Section 309(g)(2)(B) of the CWA provides a maximum penalty of $10,000 per day for each day during which the violation continues.

In *Slinger Drainage*, the Environmental Appeals Board (EAB) upheld the presiding Administrative Law Judge's imposition of the $90,000 penalty proposed by the complainant for one count of discharging dredged material during installation of drainage tiles. The EAB found that there were no "obvious errors" in the penalty assessment. *Slinger Drainage*, CWA Appeal No. 98-10, slip op. at 35. In that case, the Presiding Judge had found that the Hoes Trenching Machine removed soils "and redeposited them in a location *other than* the location from which they were removed." *Slinger Drainage*, EPA Docket No. 5-CWA-97-022, 1998 WL 743892 *3 (emphasis added). The Administrative Law Judge then reasoned that since the drainage tile system operated for approximately 15 months, during which time the discharged material remained undisturbed in its new location, the period of violation encompassed 15 months, yielding a multi-day penalty. *Slinger Drainage,* EPA Docket No. 5-CWA-97-022, 1998 WL 743892 *6 (ALJ, September 14, 1998). However, that reasoning does not appear to be consistent with the EAB's finding on appeal in that case that the dredged material is "redeposited into the *same* location from which it was originally removed." CWA Appeal 98-10, slip op. at 33 (emphasis added). Where dredged material is redeposited to another location in the wetland, or fill material is placed in a wetland, it is reasonable to assume that removing and/or replacing the material to its original location may restore the wetland to some extent. Thus, it is logical to conclude that, until that time, the discharged material remains in the wetland, continually impairing its function, and thus in continuing violation of the CWA. *See, United States v. Reaves,* 923 F.Supp. 1530, 1534 (M.D. Fla. 1996)(unpermitted discharge of dredged material to fill wetlands was a continuing violation for as long as the fill remained); *Sasser v. Administrator,* 990 F.2d 127, 129 (4th Cir. 1994)(each day the dredged and fill material remains in the wetlands without a permit constitutes an additional day of violation); *United States v. Cumberland Farms*

[20] Under the heading of economic benefit it can also be mentioned that the record reflects that the site at issue is currently worth about $800-$900 per acre, or about $70,000, which is over four times what Respondent paid for the property twelve years ago in 1988. Tr. 353. One can surmise from Respondent's testimony to the effect that he was able to purchase the site in 1988 for about 1/4 the cost per acre of already developed farm land, that the current value of the site is largely attributable to its transformation from fallow land into property suitable for and actively engaged in agricultural production. Tr. 381.

of Conn., Inc., 647 F. Supp. 1166, 1183-84 (D. Mass. 1986), *aff'd*, 826 F.2d 1151 91st Cir. 1987)("a day of violation constitutes . . . every day [defendant] allowed illegal fill material to remain" in the wetland); *United States v. Tull*, 615 F. Supp. 610, 626 (E.D. Va. 1983), *aff'd*, 769 F.2d 182 (4th Cir. 1885), *rev'd on other grounds*, 481 U.S. 412 (1987); *United States v. Ciampitti*, 669 F. Supp. 684, 700 (D. N.J. 1987)($1,000 fine for each day defendant allowed illegal fill material to remain in wetland).[21] However, where the soil is redeposited to the *same* location, this reasoning does not seem to apply, as there is no soil to move or remove for restoration of the site. *See, Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 1999 U.S. Dist. LEXIS 21389 (E.D. Cal. 1999)(rejecting per-day penalty assessment for each day defendant failed to remove soil from a wetland, where the discharge consisted of discing and "deep ripping" the wetland, plowing wetland five to seven feet deep so that standing water would percolate into the soil, causing soil to move horizontally and vertically).

In the present case, after the installation of the drainage tiles and reconstruction/extension of the ditch, the wetland's functions, *i.e.*, to improve water quality (filtering and slowing the flow of water entering the site) and provide wildlife habitat, continued to be impaired by, *inter alia*, the absence of natural wetland vegetation, diversion of water from the site, and lowering of the water table. Tr. 55-59, 206-09. The continuing impairments resulted from the displaced dredged material, operation of the drainage ditch and tile system, and Respondent's agricultural activities. *Id.* This harm continued at least until the drainage ditch and tile system were disabled in 1998. Tr. 207. However, the *operation* of the drainage ditch and tile system and the agricultural activities were *not* alleged to be violations of the CWA in this proceeding. It is only the discharges of dredged material, which occurred in the installation of the tiling system and in the 1995 reconstruction and extension of the western perimeter ditch, which are the alleged violations, and which must be the basis for any multi-day penalty assessment.

In regard to Count I, where the dredged material was redeposited to the same location, the allegation that "each day the discharged material remains in the wetland without the required permit" is meaningless. There is no evidence in the record to support a finding that the wetland function and water quality were *continually* impaired by the redeposit of the *dredged material* alone, or that restoration of the site would be achieved by removing the *discharged material*.[22]

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[21] The EAB has noted that "cases involving 'continuing harm' to human health or the environment may be appropriate for the assessment of the full base penalty for every day that the violation continues." *Mobil Oil Corp.* 5 E.A.D. 490, n. 38 (EAB Sept. 29, 1994).

[22] It must be noted that while the violation relates to the installation of the drainage tiles, the drainage tiles themselves are not alleged to be the "pollutant" that was discharged, rather it is the dredged soil that is the "pollutant." Even from a holistic perspective, seeing the violation as consisting of both discharge of dredged material and installation of the drainage tiles, the record does not show that removal of the drainage tiles would be an appropriate remedial act for restoring the wetland. It may be the case that removing the drainage tiles at this point is, in fact,

(continued...)

One can only speculate that the disturbance to the wetland and water quality caused by the redeposit of the soil lingered for some indefinite time after the installation of tiles. In these circumstances, there is no basis for penalizing Respondent for each day the discharged material remained in the wetland as a separate day of violation. Therefore, for purposes of per day penalty assessment, the violation in Count I cannot be considered to have continued for each day that the discharged material remained in the wetland.

The penalty for Count I could be assessed per day that the discharging activity occurred, that is, the days during which the Hoes Trenching Machine was operating to install the tiles. However, the record does not show any such number of days. Respondent merely testified that the tiles were installed sometime in the Fall of 1991 (Tr. 229-230), and Mr. Slinger did not provide any testimony on the subject. Therefore, the maximum penalty for Count I is a one-day penalty of $10,000.

For the violation in Count II, the dredged material was removed from the ditch and deposited alongside the ditch, *i.e.*, to a different location in the wetland, and that discharge remained in place from 1995 until at least 1998. This violation continued to impair the flow of water into the wetland during that time. Tr. 56, 58, 104-105, 165. The statutory maximum penalty of $10,000 may be assessed for each day the dredged material remained in place, from some time in the Fall of 1995 until at least 1998. *Sasser*, 990 F.2d at 129; *Ciampitti*, 669 F.Supp. at 700; *Cumberland Farms*, 647 F.Supp. at 1183-84. Because the statutory penalty ceiling of $125,000 is reached after only 125 days at a penalty of only $1,000 per day, it is unnecessary to determine the exact number of days the violation continued. Accordingly, the violation in Count II is a multi-day violation, with a maximum penalty of $125,000.

Nature

The nature of the violations are the discharge of pollutants into waters of the United States without a permit; in Count I, during installation of tiles to drain the wetland, and in Count II, during the construction of a drainage ditch.

Extent

Complainant describes Respondent's violations as "far reaching" in extent. C's In. Post Hrg. Br. at 22. It is undisputed that the 1991 tiling project involved the discharge of at least 2,800 cubic yards of material into 0.3 acres of wetland, converting approximately 13 acres of wetland to agriculture, and the 1995 project involved the discharge of at least 2,547 cubic yards of material into approximately 2 acres of wetland. Tr. 52-53; R's Post-Hrg. Br. at 8, 12. The ditch extended approximately 2800 feet along the western side of the property, diverting water away from the wetland on Respondent's property. Tr. 53; R's Ex. J.

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[22](...continued)
more detrimental to the wetland than allowing them to remain undisturbed.

Circumstances and Gravity

The violations involve the conversion of a natural freshwater wetland to agriculture. Congress has determined that "the systematic destruction of the Nation's wetlands is causing serious, permanent ecological damage." Staff of Senate Comm. Of the Environment, 95th Cong. 2nd Sess., 4 Legislative History of the Clean Water Act of 1977, p. 869 (Comm. Print 1978)(remarks of Senator Muskie on S. 1952, Aug. 4, 1977). The Army Corps of Engineers has recognized that wetlands "play a key role in protecting and enhancing water quality." *Riverside Bayview Homes*, 474 U.S. at 133. "Freshwater wetlands are ecologically valuable for various reasons . . . [t]hey help supply fresh water to recharge groundwater supplies . . . serve as biological filters by purifying water as it flows through the wetlands . . . [and] provide seasonal and year-round habitat for both terrestrial and aquatic wildlife." *United States v. Cumberland Farms of Conn., Inc.*, 826 F.2d 1151, 1153 (1st Cir. 1987)(citing 33 C.F.R. 320.4(b)), *cert. denied*, 484 U.S. 1061 (1988).

Testimony in this proceeding established that the conversion of the Respondent's property from a wetland to an agricultural site compromised three critical functions of the wetland: (1) providing a wetland habitat for wildlife; (2) operating as a sponge to store water and slow the velocity of surface water flowing into the wetland; and (3) operating as a filter to remove sediments, excess nutrients, and contaminants from the water. Tr. 53-59; C's Ex. K. The western perimeter ditch, by routing water off of the wetland, prevents water from being stored and filtered in the wetland. Tr. 58. Water that enters the tiling system, while still percolating through organic soil, leaves the site much more quickly, with less time for contaminants to absorb. Tr. 59, 278.

The record shows that conversion of the site to agricultural use is likely to result in diminution of pheasant wintering habitat and breeding areas, reducing pheasant populations, and in reduction of feeding and mating areas for migratory ducks, reducing wild duck populations. Tr. 241-243, 244-245, 254. Wetlands in that area are crucial as feeding and reproduction areas for a variety of other bird and animal species, particularly where humans have converted over 50 percent of the historical wetlands in the area to agricultural use. Tr. 45, 234-235, 237, 239, 245, 252, 254, 365-366; C's Ex. G. Continuing reduction of wetlands will continue to reduce the numbers of these animals. Tr. 247.

The wetland on Respondent's property has been described as "high quality wildlife wetland habitat." D's Ex. K (Comments of the U.S. Department of the Interior, Fish and Wildlife Service, to Respondent's 1989 requested drainage activities). Mr. Hanson testified that the wetland had "good functional value." Tr. 249. When Respondent purchased the property, it had natural wetland vegetation, and was unaltered except for some fences, the eastern channelized ditch and remnants of previous ditches. Tr. 321, 323-324, 443-444; C's Ex. K.

The site is within a mile of the WDNR's Glacial Habitat Restoration Project to restore

wetlands and grasslands, improve the water quality of surface waters degraded by agriculture and other development, and to bring back wildlife species that have been declining in the area . Tr. 51-52, 61, 159, 235. The site is within a priority watershed, the Beaver Dam Priority Watershed Project, which focuses on wetland restoration to improve water quality. Tr. 240. Mr. Hanson, who worked on this Project, explained that wetlands play a primary role in the hydrology and water quality in the Beaver Dam River area, in natural filtering, prevention of erosion and sedimentation. Tr. 239-241.

Conversion of the site from wetland to agricultural use is likely to increase flows of sediments and nutrients from the site into receiving waters, destroying water quality and wildlife habitat. Tr. 58-59, 241. Conversion of wetlands in the watershed area increases nutrients in Fox Lake and Beaver Dam Lake, promoting dense algae growth and turbidity, destroying habitat and impairing aesthetic and recreational uses. Tr. 269-275; C's Ex. DD. The water quality of Fox Lake is largely affected by its tributaries and the loss of surrounding wetlands. Mr. Sesing's report states that the observed or potential sources of the water quality problems of Fox Lake and Beaver Dam Lake include "erosion of farmland exacerbated by wetland ditching" and "agricultural activities causing erosion, nutrient runoff and wetland degradation." C's Ex. DD p. 1. As noted above, it may be impossible to quantify the particular harm to a water body from the drainage of a particular adjacent wetland area.

The testimony and evidence support a finding that Respondent's violations would have a significant impact on water quality and wildlife in the area. The nature, extent, circumstances and gravity of the two violations are equivalent and/or applicable to both, and therefore the penalty for the one day violation in Count I and for one day of the violation in Count II, will be the same for each Count. A gravity component of $5,000 will be added to the $3,700 economic benefit component, for a total of $8,700 for Count I, considering the factors heretofore discussed. The gravity component of the penalty for Count II will be multiplied by three to account for multiple days of violation, as discussed above, and to represent an appropriate deterrence factor, so the penalty for Count II, considering the factors discussed above, is $15,000 plus $3700, or $18,700.

Ability to Pay

Complainant points out that Respondent has not raised the argument that he does not have the ability to pay the proposed penalty, and that a review of a Dun and Bradstreet report for Jack's Pride Farms, of which Respondent is an officer, did not indicate that Respondent is unable to pay the proposed penalty. Tr. 69-72, 379; C's Ex. A.

Respondent acknowledges that he did not raise the issue of inability to pay the proposed penalty, although he had been ordered to state in his prehearing exchange his position on that issue and to supply any supporting documents. Prehearing Order dated January 22, 1999; R's In. Post Hrg. Br. at 14. Complainant's submission of the Dun and Bradstreet Report for Jack's Pride

Farms is sufficient evidence that Complainant has considered Respondent's ability to pay the proposed penalty, as required by the Rules of Practice, 40 C.F.R. § 22.24(a). *New Waterbury*, 5 E.A.D. 529, 538 (EAB 1994). Therefore, the penalty will not be adjusted for this factor.

History of Violations

Respondent does not have a prior history of adjudicated Clean Water Act violations. Tr. 68.

Culpability

Complainant believes that Respondent has a high degree of culpability for the violations, because he was informed by the WDNR of the permit requirements of Section 404 of the CWA, applied for a permit and began drainage activities before it was denied, received a notice of violation in 1990 for tiling the 44 acres in the southern part of his property in 1988, and continued ditching and tiling activities nevertheless. Jt. Exs. 1, 2; C's Ex. L; Tr. 31, 64, 98, 196; C's In. Post-Hrg. Br. at 25-26.

With respect to culpability and "other matters as justice may require," Respondent argues that he sought legal advice and was given an opinion that the tiling was not a violation, and that the Government failed to take any action for his earlier tiling (in 1988) of the southern 44 acres of his property, all leading him to believe the tiling was not, in fact, a violation. Tr. 68, 385-386, 394-395; R's Ex. O.

Respondent is a farmer who personally performed the activities involved in Count II, and who contracted with Slinger Drainage, Inc. to perform the activities involved in Count I; thus he was in direct control of the activities at issue in both Counts. Tr. 68. The 15 acres of wetland at issue in this case are only a portion of the land Respondent farms. He also grows crops on 44 acres of wetland, installed with drainage tiles, to the south of the 13 acres at issue here, and on other lands, totaling 275 acres. Tr. 313, 371. Also as indicated above, Respondent is vice president of a family farm corporation, Jack's Pride farms, which farms a total of 800 acres. Tr. 313; C's Ex. A.

Respondent had knowledge that his conduct was in violation of the CWA, after having his permit denied in 1989 and receiving notice of violation and other correspondence from government authorities warning him of wetland protection laws. Tr. 30-31, 60, 85, 99, 383-384; C's Ex. I (WDNR letter, dated Aug. 17, 1988, stating "[t]iling is not prohibited by state statutes," and that Wisconsin statutes exempt ditching for agricultural purposes, but stating that "both federal and county wetland protection laws apply to many wetlands and are often more restrictive than state law," recommending Respondent contact the Army Corps of Engineers); C's Ex. H (Respondent's permit application to construct drainage ditch and install drainage tile); Jt. Ex. 2

(Army Corps of Engineers denial, dated October 23, 1989, of Respondent's application for permit); Jt. Ex. 1 (Army Corps of Engineers Notice of Violation, dated April 24, 1990, for discharging dredged material into a wetland in conjunction with the installation of drainage tiles in the southern 44 acres of the property). Moreover, Respondent read the rules and specifically knew that "digging a ditch and sidecasting the material beside it would require a permit." Tr. 384. With respect to tiling, Respondent believed that the installation of drainage tile did not involve placement of dredged or fill material. *Id.* Therefore, he consulted a lawyer who inquired of the Corps, in a letter dated May 15, 1990, as to whether his tiling activities were regulated, after he had installed the tiles in the southern 44 acres of the property. R's Ex. O; Tr. 385-389, 394-395. Receiving no response, Respondent initiated the tiling project on the 13 acre are at issue. Tr. 386-387.[23]

Considering all these culpability facts together, I find it is appropriate for the penalties to be increased by fifteen percent for each Count: $1,300 for Count I, and $2,800 for Count II.

Other factors as justice may require

As to "any such matters as justice may require," Respondent repeats the same argument as for "culpability," that the Government failed to take action on the tiling of the southern 44 acres of his property. This argument is best considered as to culpability, and has already been considered under that factor.

Federal courts and the EAB have considered, in assessing a penalty, EPA's delay in enforcing the particular violation at issue or conflicting or erroneous government agency representations. *B.J. Carney*, CWA App. No. 96-2 (EAB June 9, 1997)(EPA's 5 year delay in bringing enforcement action after learning of violations, and conflicting signals from EPA and city treatment works); *Buxton v. EPA*, 961 F.Supp. 6, 10 (D.D.C. 1997)(conflicting governmental orders regarding wetland restoration); *United States v. Marine Shale Processors*, 81 F.3d 1329, 1349 n. 11 (5th Cir. 1996)(erroneous state agency representation). However, EPA and the WDNR in the present case did not give Respondent conflicting signals as to whether the ditching and tiling activity on his site was in violation of the CWA. C's Ex. I (WDNR letter, dated Aug. 17, 1988, stating "[t]iling is not prohibited by state statutes," and that Wisconsin statutes exempt ditching for agricultural purposes, but stating that "both federal and county wetland protection laws apply to many wetlands and are often more restrictive than state law," recommending Respondent contact the Army Corps of Engineers); C's Ex. H (Respondent's permit application to construct drainage ditch and install drainage tile); Jt. Ex. 2 (Corps of Engineers' denial, dated October 23, 1989, of Respondent's application for permit); Jt. Ex. 1 (Corps of Engineers' Notice

[23] R's Ex. L, p.4, reflects that Mr. Crescio had also previously retained counsel, in connection with his denied permit application, who had submitted extensive comments in connection therewith regarding the Army Corps of Engineer's regulatory procedures and regulations.

of Violation, dated April 24, 1990, for discharging dredged material into a wetland in conjunction with the installation of drainage tiles in the southern 44 acres of the property). The Corps of Engineers acted reasonably promptly on the tiling violation of the southern 44 acres, and has prosecutorial discretion not to take further action in regard to that violation, and EPA did not unduly delay initiation of the Complaint in 1998 after Mr. Carlson inspected the site in June 1997, based upon a letter from the Corps in April 1996 concerning the ditching work conducted in 1995. Tr. 43; C's Ex. G.

There are no facts in the record to support any adjustment to the penalty for "other matters as justice may require."

Accordingly, the penalties assessed against Respondent are $10,000 for the violation alleged in Count I of the Complaint, and $21,500 for the violation alleged in Count II of the Complaint. The total penalty assessed against Respondent for his violations of Section 301(a) of the CWA found herein is $31,500.

ORDER

1. A civil penalty of $31,500 is assessed against Respondent Lawrence John Crescio, also known as John Crescio.

2. Payment of the full amount of this civil penalty shall be made within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c) , as provided below. Payment shall be made by submitting a certified or cashier's check in the amount of $31,500, payable to the Treasurer, United States of America, and mailed to:

The First National Bank of Chicago
EPA - Region 5
Regional Hearing Clerk
P.O. Box 70753
Chicago, Illinois 60673

3. A transmittal letter identifying the subject case and the EPA docket number, as well as Respondent's name and address must accompany the check.

4. If Respondent fails to pay the penalties within the prescribed statutory period after entry of this Order, interest on the penalty may be assessed. *See*, 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

5. Pursuant to 40 C.F.R. §22.27(c), this Initial Decision shall become a final order forty-five (45) days after its service upon the parties and without further proceedings unless (1) a party moves to reopen the hearing within twenty (20) days after service of this Initial Decision,

pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the Environmental Appeals Board is taken within thirty (30) days after this Initial Decision is served upon the parties; or (3) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision, pursuant to 40 C.F.R. §22.30(b).

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Susan L. Biro
Chief Administrative Law Judge

Date: May 17, 2001
Washington, D.C.