UNITED STATES OF AMERICA
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
Donald Cutler,	)	
	)	Docket No. CWA-10-2000-0188
Respondent	)	
	)	

Clean Water Act-Wetlands-Jurisdiction of EPA and Corps of Engineers-Adjacent to Navigable Waters or Their Tributaries-Placement of Fill

Where Respondent admitted, and evidence established, that there were wetlands on portions of his property and these wetlands were adjacent to creeks which flow into a tributary of the Salmon River which, through the Snake and Columbia Rivers, ultimately flow into the Pacific Ocean, wetlands were adjacent to navigable waters or their tributaries and thus waters of the United States within the meaning of Sections 502(7), 402 and 404 of the Act and applicable Corps of Engineers and EPA regulations (33 C.F.R. § 328.3(a); 40 C.F.R. §§ 122.2, 230.3(s) and 232.2). Therefore, Respondent violated Section 301 of the Act to the extent he discharged a pollutant from a point source by placing fill into wetlands on his property without a permit from the Corps of Engineers pursuant to Section 404 and EPA has jurisdiction to institute an administrative civil penalty proceeding for this violation pursuant to CWA § 309(g).

Clean Water Act-Wetlands-Discharge of a Pollutant Without a Permit-Resolution of Prior Violations-Determination of Penalty -Statute of Limitations-Agency Policy

Where evidence established that Respondent violated the Act by placing fill into wetlands on his property without a permit from the Corps of Engineers, the statute of limitations (28 U.S.C. § 2462) precluded the assessment of a penalty for violations which were discovered and resolved to the satisfaction of the Corps by Respondent's removal of the unauthorized fill more than five years prior to the issuance of the complaint. Principle that statute of limitations is an affirmative defense which is waived unless raised in answer did not apply where complaint as initially written gave Respondent no reason to believe violations occurring more than five years prior to issuance of complaint were in issue. Moreover, such violations were not for consideration in determining Respondent's history of prior violations in any event, because of general Agency policy to the effect that violations occurring more than five years prior to the instant violation are too remote in time to be considered for penalty enhancement purposes. Although the complaint was amended at the hearing to include an additional area of alleged illegal fill, the upland/wetland demarcation in that area was uncertain and Complainant did not carry its burden of demonstrating with sufficient clarity fill placed in wetlands. Under these

circumstances, Complainant's contention that the illegal fill tolled the running of the statute of limitations was rejected.

Clean Water Act-Wetlands-Placement of Fill Without a Permit-Determination of Penalty-Extent and Gravity of Violations- Culpability- Ability to Pay

Where evidence established that Respondent violated the Act by placing fill into wetlands on his property without a permit from the Corps of Engineers pursuant to CWA § 404, Respondent was liable for a penalty for the violation calculated in accordance with Section 309(g)(3), but Complainant exaggerated extent and gravity of violation and Respondent removed unauthorized fill and restored one area in accordance with Complainant's directions and upland/wetland demarcation in a another area of alleged unauthorized fill was uncertain, penalty as calculated by Complainant was excessive. Moreover, Respondent produced specific facts demonstrating that he did not have the ability to pay the penalty sought by Complainant. Therefore, penalty sought by Complainant was rejected and penalty was re-computed.

Appearances:

For Complainant:

Mark A Ryan, Esq.
Assistant Regional Counsel
U.S. EPA, Region 10
Boise, Idaho
Clifford Villa, Esq.
Assistant Regional Counsel
U.S. EPA, Region 10
Seattle, Washington

For Respondent:

Jim Jones, Esq.
Jim Jones & Associates
Boise, Idaho

Initial Decision

This proceeding under Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g), was commenced on August 24, 2000, by the issuance of a complaint by the Director, Office of Ecosystems and Communities, U.S. EPA, Region 10, Seattle, Washington, charging Respondent, Donald Cutler, with the unlawful discharge of dredged and/or fill material into waters of the United States without a permit from the U.S. Army Corps of Engineers ("COE") in violation of Section 301(a) of the Act. Specifically, the complaint alleged that Respondent was the owner of

property located in Sec. 4, T.10N, R 19E, B.M., Custer County, near Stanley, Idaho, and that from at least 1995 to the present, Respondent and/or persons acting on his behalf discharged dredged and/or fill materials into wetlands north and south of his house, covering approximately 0.1 acres.[1] For this alleged violation, it was proposed to assess Respondent a penalty of $25,000.

On August 15, 2000, Complainant issued a Compliance Order to Respondent, which, in part, directed the removal of unauthorized fill as shown on a diagram enclosed with an attached Restoration Plan and, inter alia, the completion of the activities in the Restoration Plan in accordance with a schedule in the Compliance Order.[2]

Respondent through counsel answered under date of September 7, 2000, admitting that there were wetlands on portions of his property, but denying that Respondent had discharged dredged and/or fill materials into any of the same, denying that certain areas shown on Complainant's diagram [attached to the Compliance Order] were properly characterized as wetlands and asserting that, as to other alleged wetland areas any fill placed was authorized by COE permits. Respondent denied that any penalty was appropriate or authorized, denied receiving any economic benefit from the alleged violation, denied the ability to pay a penalty of $25,000 and requested a hearing. Respondent asserted that he was answering the allegations in the Compliance Order in the same manner as he was answering the complaint.

Prehearing proceedings included the exchange of witness lists and proposed exhibits in accordance with an order of the ALJ and, despite the extensive information concerning his finances provided by Respondent, a motion for additional discovery in that respect was filed by Complainant. This motion was denied by an order, dated March 6, 2001. A hearing on this matter was held in Boise, Idaho on March 20 and 21, 2001.[3] On July 19, 2001, Complainant

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[1] The term "wetlands" is neither defined, nor mentioned in the Clean Water Act. Regulations issued by the Corps of Engineers (33 C.F.R. § 328.3(b)) and EPA (40 C.F.R. §§ 230.3(t) and 232.2) however, provide that: *wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

[2] Notwithstanding the fact that the Compliance Order was issued in close proximity to the complaint, concerns the same violation as alleged in the complaint and contains language indicating that violations of, or failure to comply with, the Order may result in administrative penalties of up to $11,000 per day for each violation pursuant to Section 309(g) of the Act, Complainant insists that this proceeding is not an action for enforcement of the Compliance Order and that the ALJ has no jurisdiction in that regard.

[3] The hearing was originally scheduled for February 13 and 14, 2001, but was rescheduled in part to allow counsel to assess the affect of Solid Waste Authority of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 139, 148 L.Ed.2d. 576, 121

(continued...)

moved to reopen the hearing, which motion was supported by Respondent. A reopened hearing, including a site visit, was held in Stanley, Idaho, on October 11, 2001.

Based upon the entire record, including the proposed findings and briefs of the parties, I make the following:

FINDINGS OF FACT

1. Respondent, Donald Cutler, and his wife, Sharon Cutler, own approximately 2.554 acres of property located in Sec.4, T.10N, R. 19E, B.M., Custer County, near Stanley, Idaho. The property is partly within and partly without the Stanley City limits (Joint Prehearing Stipulations).
2. An aerial photograph taken in 1984, prior to the time the Cutler's present residence was constructed, shows a large whitish area in the approximate center having several buildings on it, referred to as the "building pad"; Highway 21 which runs in roughly an east- west direction to the south of the building pad; Meadow Creek which flows under Highway 21 in a northerly direction on the left-hand side of the photo and a white rectangular area having a red stripe in the middle which extends from the Access Road off of Highway 21 across Meadow Creek in a westerly direction almost to the building pad (C's Exhibit 1). This Access Road is marked "private road" on a drawing or diagram of the area. [4]. The rectangular area resulted from a tape being placed across the original

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[3](...continued)
S.Ct. 675 (2001) (SWANCC) on EPA's jurisdiction herein. Respondent has admitted and evidence establishes that wetlands exist on portions of his property and it is concluded that these wetlands are adjacent to navigable waters or their tributaries within the meaning of Sections 502(7), 402 and 404 of the Act and regulations issued by the Corps and EPA (33 C.F.R.§ 328.3(a); 40 C.F.R. §§ 122.2, 230.3(s) and 232.2) and thus, "waters of the United States". Therefore, EPA and the Corps have jurisdiction under the CWA. See finding 5 infra. Cf. United States v. Newdunn Associates, 195 F. Supp. 2d 751 (E.D. Va. 2002) (where wetlands on defendant's property were found not to be adjacent to navigable waters and the Corps argued that I-64 drainage ditches and a culvert under I-64 qualified as tributaries, but these alleged tributaries were not adjacent to navigable waters, the Court held that the Corps lacked jurisdiction over wetlands on defendant's property.) The Court agreed with the sweep of SWANCC as explained in Justice Stevens' dissent, i.e., the decision "excluded wetlands and tributaries that are not contiguous to navigable waters from the scope of the Corps' jurisdiction". 531 U.S. at 188, note 14. See, however, United States v. Interstate General Company, 152 F. Supp. 2d 843 (D. Md. 2002), affirmed 39 Fed. Appx. 870 (4th Cir. 2002), limiting SWANCC to the exclusion from the CWA of isolated wetlands based on the presence of migratory birds.

[4] R's Exhibit A. Exhibit A is dated 12/28/94 and is Sheet 2 of 9 attached to the permit modification issued to Mr. Cutler on April 13, 1995 (R's Exhibit E). This sheet varies only slightly from Sheet 2 of 9 attached to the permit issued to Mr. Cutler on July 7, 1993, which as (continued...)

photo as additional copies were being made for the purpose of marking the location of a connecting road and bridge across Meadow Creek which were subsequently constructed for the purpose of enabling the Cutlers to have access to their property from the east.[5] An aerial photo (C's Exhibit 2) of the area, reportedly taken in 1992, appears to show a tent-like structure in the northeast corner of the building pad where the Cutler residence was subsequently constructed and more water in the "new channel" than in a photo of the area taken at a later date (C's Exhibit 10). This channel, which flows off of the main channel of Meadow Creek and divides or separates from Meadow Creek north of Highway 21, is to the south and immediately to the east of the present Cutler residence (i, was allegedly constructed by Mr Cutler.

3. An aerial photograph taken in 1998 shows two buildings in the northeast corner of the building pad, one of which apparently is the Cutler residence and the other Mr. Cutler's shop (C's Exhibit 10). This photo also shows a road, sometimes referred to as a secondary access or feeder road, and bridge across Meadow Creek connecting to the Access Road to Highway 21. Little, if any, water is shown in the west channel of Meadow Creek.

4. Mr. Gregory Martinez, office leader for the Boise regulatory office of the Corps, testified that in December, 1991, "we"[the Corps] had a report of un-permitted activity at the Cutler site (Tr. 31). Although not specifically offered as an expert in wetland determinations, delineations, Mr. Martinez clearly qualified as such having worked on thousands of permits and having made hundreds of such determinations (Tr. 26). He visited the Cutler property in mid-December and found it covered with snow. After obtaining permission from Mrs. Cutler, he walked the property and observed that a "new channel" had been excavated for Meadow Creek and that "fill" had been placed in the east channel to block its flow.[6] He marked this channel, which is to the west of the main channel of Meadow Creek, "new channel" on a 1998 aerial photo of the area (C's Exhibit 10, Martinez). He noticed several other small fills had been placed in other graded lower sections of Meadow Creek and that a large steel culvert had been placed in the new

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[4](...continued)
will be seen, *infra* findings 5, 6, and 7, is based in part upon a site investigation by Mr. Gregory Martinez of the COE conducted in April 1992.

[5] (Tr. 43, 44). It appears that at one time the Cutlers owned substantially more of the building pad than at present, including the area south of their present residence fronting on Highway 21 where a motel is presently located (Tr. 462). The necessity for an eastern entrance apparently arose when the present owner of the frontage informed Mr. Cutler that he did not want him [Cutler] driving [his trucks] through the owner's property.

[6] The term *fill material* means any "pollutant" which replaces any portion of the "waters of the United States" with dry land or which changes the bottom elevation of a water body for any purpose (40 C.F.R. § 232.3).

channel with dirt fill placed on the west side and partially on the east side (Id.) Mr. Cutler testified that the culvert was being placed "straight across Meadow Creek"[apparently west of where the present bridge is located] in 1992 and then he got stopped [by the Corps] (Tr. 377-78). Although the 1984 aerial photo (C's Exhibit 1) does not appear to show a channel off of Meadow Creek north of Highway 21, Mr. Cutler denied excavating a "new channel" [in that area], maintaining that he had merely cleaned out an old channel (Tr. 388-89). Under cross-examination, he acknowledged removing some dirt in addition to rubbish [from the channel] (Tr. 451-52).

5. Testifying with reference to a 1998 aerial photo of the Cutler site and surrounding area (C's Exhibit 10), Mr. Martinez explained that Highway 21 was at the top, that Meadow Creek was the channel to the east of the Cutler's property which appeared to have water in it (Tr. 34). He marked with an arrow the "new channel" closest to the Cutler property which [in common with Meadow Creek] flows in a northerly direction and which was allegedly constructed by Mr. Cutler. He noted that the [connecting] road [and bridge across Meadow Creek to the Cutler property] shown in the photo were not there at the time [of his 1991 and 1992 site visits] (Tr. 36). He testified that Meadow Creek flows into Goat Creek which extends along the north side of the building pad, that Goat Creek flows into Valley Creek which is a much larger channel and which flows in an easterly direction until its confluence with the Salmon River (Tr. 35). Mr. David Arthaud, National Marine Fisheries Service, testified that the Salmon River is approximately one-half mile from the point where Goat Creek flows into Valley Creek (Tr. 252). Mr .Martinez added that the Salmon River flows in a northerly direction until its confluence with the Snake River, and that the Snake River flows into the Columbia River, which in turn flows into the Pacific Ocean. Accord, Arthaud, National Marine Fisheries Service (finding 69, infra). Mr. Martinez left the property, stating that " we" wanted to visit the site when it was free of snow and they could be absolutely certain of what had been done and that we had jurisdiction (Tr. 35, 36).

6. Mr. Martinez again visited the Cutler site in April of 1992. He explored the area to the east of Mr. Cutler's property to the Access Road. He testified that there was additional "side cast" material adjacent to the new channel in some areas and that he walked the area from the Access Road westward to the present fill [apparently the fill around the Cutler residence or where it was subsequently constructed] (Tr. 37). Using the 1987 Corps Wetlands Delineation Manual as a guide, he examined the hydrology, soils and vegetation of the area (his examination included the digging of holes), and determined that there was a narrow band of upland paralleling the Access Road which jets [juts] out [in a westerly direction where the Access Road joins Highway 21]. He noted that part of that upland is now occupied by the [eastern portion of the] connecting or feeder road [to the Cutler property] which was not there at the time.

7. The upland and wetland areas referred to in the previous finding appear to be shown on the diagram of the Cutler residence and surrounding area referred to previously (R's

Exhibit A, finding 2). Mr. Martinez testified that everything to the west of that to the existing fill as it existed at the time was wetlands. He explained that there were springs coming out of the fill and that it was very marshy, swampy and extremely wet along the edge of the fill (Tr. 38). He described the soils as organic, very dark and clearly hydrophytic; he stated that [the soils] were saturated, proving that hydrology was present and that the vegetation was typical of a very wet site. He asserted that most of the plants were [of the kind] that reside in an area which is saturated more than 99 percent of the time and named the plants as Nebraska sedge, water sedge, beaked sedge, willow, scrubby cinquefoil and white sedge (Tr. 38, 39). He stated that these plants were considered hydrophytic vegetation and were on the National as well as the Idaho list of wetland plants.

8. On cross-examination, Mr. Martinez acknowledged that there were areas on Sheet 2 of 9 below and to the east of the rectangle designated "motel" and to the south and east of the Cutler residence which were uplands (Tr. 74, 75). These uplands are represented by irregular lines on the diagram below (east) of the motel, designated "Hillslope", which extend to and curve below (east) of the Cutler residence and then curve upward to the west past the residence. These upland areas are labeled "Revegetate". Mr. Martinez pointed out, however, that the diagram represented fill as it existed in 1992, while the photo (C's Exhibit.10) represented fill in 1998.

9. Mr. Martinez returned to his office and apparently drafted a Notice of Violation which was sent to Mr. Cutler by the District Engineer on May 12, 1992 (C's Exhibit 3). The Notice referred to the unauthorized placement of a 64-inch diameter by 30-foot long culvert and associated fill into Meadow Creek and adjacent wetlands and other miscellaneous fill placed into wetlands. The notice also referred to an on-site meeting with Mr. Martinez on April 24, 1992. Mr. Cutler was ordered to remove the culvert and associated fill material adjacent to and over the culvert and to remove all dredged material side cast into wetlands adjacent to Meadow Creek and within the cross- channels by May 31, 1992. In order to minimize turbidity impacts, Mr. Cutler was informed that prior to removal of the dredged and fill material, he needed [was required] to place a temporary canvas or plastic tarp across Meadow Creek upstream of the restoration area and to divert all flow into the eastern most side- channel as discussed during the on-site meeting. After completion of the restoration work, Mr. Cutler was requested to call Mr. Martinez to arrange for an inspection. He (Cutler) was informed that upon satisfactory completion of the work, the matter would be considered resolved as far as the Corps was concerned. Mr. Martinez testified that the restoration work was completed in August of 1992 (Tr. 42).

10. As indicated (finding 2), an aerial photo taken in 1984 of the area where the Cutler residence was subsequently constructed is in evidence (C's Exhibit 1). Significant here is that this photo shows two entrance ways to the building pad area from Highway 21. A duplicate of this photo, which Mr. Martinez has altered by enclosing in black ink Areas A and B which extend in a westerly direction along a fence line which appears to mark the

northern boundary of the Cutler property and the building pad, is also in evidence (C's Exhibit 1-Martinez). Area A is immediately north and extends west of the building which Ms. Fromm marked as Building B 2 (apparently Reese House) on the 1998 aerial photo (infra, finding 35). This area appears to be heavily vegetated. Area B, which adjoins Area A and extends further west than the eastern entrance way to the building pad from Highway 21 on the south side of the building pad, appears to be largely barren of vegetation. Based upon his general familiarity with other property in the area, having viewed the Cutler site in the summer of 2000, and having walked the area immediately to the east albeit some eight years previously, and his general experience interpreting aerial photographs, Mr. Martinez opined that Area A was likely wetlands, but that Area B, the westerly area, was not (Tr. 52, 54).

11. In July of 1993, Mr. Cutler was granted a permit by the District Engineer authorizing the discharge of fill material and concrete into wetlands adjacent to Meadow Creek and Valley Creek to construct an access road and bridge on described property said to be located in Stanley, Custer County, Idaho (R's Exhibit D). The work is described as "Discharge approximately 300 cubic yards of fill material (road fill and riprap) and approximately 16 cubic yards of concrete (bridge abutments and center pier) into wetlands adjacent to Meadow Creek to construct an access road and bridge....The project shall be constructed according to the enclosed plans and drawings (Sheets 1 through 9)".

12. Mr. Martinez described the process in issuing the permit (Tr. 58, 59). He testified that, after confirming that Mr. Cutler had completed the restoration work called for in the 1992 Notice of Violation, "we accepted an after-the-fact permit [application] from him". He explained that, while minor road crossings are typically approved under what he referred to as a "Nationwide Permit", in this instance responses to the preconstruction notification (PCN) from state and other federal agencies were to the effect that, because of the sensitivity of the area, the project would have more than a minimal impact and that the project should not be approved under the Nationwide Permit.[7] In fact, he stated that the Idaho DEQ initially denied CWA § 401 certification, without which the project could not have been approved (Tr. 59, 60). The DEQ's concerns were eventually satisfied and on February 22, 1993, DEQ issued the certification subject to special conditions (Field Investigation Report, C's Exhibit 12).

13. Paragraph 11 of the Special Conditions of the permit referred to in finding 11 provides

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[7] Section 404 (e)(1) of the CWA, 33 U.S.C.§ 1344(e)(1), authorizes the issuance of general permits for the discharge of dredged or fill material, if, inter alia, the Secretary determines that such activities will cause only minimal adverse environmental effects when performed separately. The conditions under which Nationwide Permits are issued and the terms of such permits are set forth in the Corps regulation (33 C.F.R. Part 330). It appears that the decision to authorize dredge and fill activities under a Nationwide Permit is discretionary, notwithstanding that prima facie the activities comply with the regulatory criteria therefor.

that "[t]he plug in the altered channel must be done in the dry. Should the channel be flowing at the time construction starts, the channel must be temporarily blocked with a plastic or some type of non-fill dam until the plug is placed. Sediment filters such as hay bales or silt fencing must be placed in the channel immediately downstream of the plug and immediately downstream of the road crossing prior to reopening the channel to flow." Although this language was apparently intended to mean that sediment filters were to be placed in the main or east channel and were to be permanent, the juxtaposition of this requirement with the provision that, if the channel be flowing at the time construction starts, the channel must be temporarily blocked until the plug is placed, could readily lead to the conclusion that "reopening the channel to flow "refers to removal of the temporary non-fill dam after the plug is placed, rather than after construction is completed. It is noted, however, that Sheet 8 of the drawings shows the embedding detail of a hay bale across the channel perpendicular to the direction of flow and also depicts "wire or nylon bound bales placed on the contour", which arguably supports the view that the placement was to be along or across the fill and thus permanent. The "plug" was to be constructed of a riprap berm and willow root balls in the west channel approximately 10' to 12' downstream of the divide between the east and west channels (Sheets 3 and 9).

14. Mr. Robert Flowers is a regulatory project manager for the Corps employed by the Walla Walla District (Tr. 95, 96). He described his duties as processing applications for permits to do work in waters of the United States, doing wetland delineations, jurisdictional determinations, enforcement actions and coordination with other agencies. He has a Bachelor of Landscape Architecture degree from the University of Arkansas and has attended courses on wetland identification sponsored by the Corps. He has worked on over a thousand CWA § 404 permits and has made hundreds of wetlands determinations and delineations (Tr. 97).

15. Although Mr. Flowers testified that his first visit to the Cutler site was in the fall of 1997 to check on an alleged violation of the permit for the construction of what he referred to as the "fill for Mr. Cutler's bridge and driveway" (Tr. 99), a memorandum for the file, dated June 23, 1994 , indicates that he was in the Stanley area for another reason on June 22 of that year and observed what appeared to be "new fill" in wetlands at the Donald Cutler residence (C's Exhibit 4). The memo describes the new fill as on the upstream (south) side of the bridge abutment and occupying a triangular area approximately 30' to 40' on the wide end by 60' to 80' long. The memo recites a conversation with Mrs. Cutler who, in response to a question, stated that they would not remove the fill, and a later conversation on that day with Mr. Cutler, who was asked why he did not get a permit before filling in the area described as "adjacent to his house and the new bridge". Mr. Cutler is reported to have replied that he did not need a permit, since the western stream channel had been blocked and that the area was now dry. Mr. Cutler is also reported to have referred to the area filled as a "mosquito hole." When asked to remove the fill, Mr. Cutler allegedly refused, saying he was going to have a lawn there and nobody was going to make him remove the fill. The reference to a lawn indicates that Mr. Cutler was

not referring to the triangular area adjacent to the bridge abutment, which is northeast of his house, but to an area immediately southeast of his residence.

16. Summarizing Respondent's violations, Mr. Flowers described the first violation as the driveway fill, excavation and side casting of the new channel adjacent to Meadow Creek (Tr. 124). He encircled the number 1 in black ink to mark this violation on the 1998 aerial photo (C's Exhibit 10-Flowers). He described the second violation as not meeting permit conditions for erosion control (Tr. 125). He marked this as No. 2 , on the eastern end and to the south of the bridge, on the mentioned photo. He indicated Violation No. 3 was the triangular area upstream of the bridge abutment, otherwise referred to as a "mosquito pond", which was also identified as a 1994 violation. Mr. Flowers described Violation No. 4 as an area between the Cutler residence and Meadow Creek upstream of the bridge. He drew a line black ink around this area on the photo and marked it with with number 4. This encircled area extends very nearly to the southeast corner of the Cutlers' residence (C's Exhibit 10-Flowers). This appears to include at least a portion of the lawn referred to by Mr. Cutler in his conversation with Mr. Flowers (finding 15). He (Flowers) testified that through aerial photography, "we" identified an area to the north of the compound, that is north of Mr. Cutler's garage or shop and south of Goat Creek, which appeared to be filled (Tr. 125, 130). He explained that this was a desk determination based on aerial photography (Tr. 149). He enclosed this elliptical area with black ink on the photo and also identified it as Violation No. 4. He explained that this was an approximation of where the wetlands are "... because obviously my line overlaps. It's not to scale and I honestly don't know how to draw it to scale at this point." (Tr. 150).

17. Under date of June 27, 1994, the District Engineer issued a Cease and Desist Order to Mr. and Mrs. Cutler notifying them that they had been identified as being responsible for work in waters of the United States without the required Department of the Army permit, i.e., discharge of dirt and rock fill material into wetlands adjacent to Meadow Creek located in Sec.4, T 10N, R.19E, Boise Meridian, near Stanley, in Custer County, Idaho (C's Exhibit 5). The Cutlers were ordered to immediately cease and desist from all such unauthorized work in waters of the United States and to remove all fill material discharged into the wetland area to the original ground surface and to dispose of it in an upland area by July 18, 1994. This order was sent to the Cutlers by certified mail, return receipt requested, but was returned as unclaimed. Mr. Flowers described this Cease and Desist Order as for the "fill adjacent to the bridge abutment" (Tr. 109).

18. A Conversation Record, dated 7/22/94, handwritten by Mr. Flowers and described as an "appeal visit", recounts a visit he and Mr. Martinez made to the Cutler residence on that date to determine if the fill in violation had been removed (Tr.106; C's Exhibit 6). They spoke with Mrs. Cutler, who in response to a question as to whether they had received the Corps letter [dated June 27, 1994], reportedly replied that she had refused to accept it and that the letter had been returned. Mrs. Cutler is also reported to have stated that they would not remove the fill nor ask permission to do further work on "their property" and that the Corps "could either buy their property or get off their backs". Prior to leaving

the area, Mr. Flowers took the four pages of photographs attached to the Conversation Record. These chiefly show the Cutler residence, what appears to be reddish soil and gravel fill immediately to the east and north of the residence, portions of Meadow Creek, riprap fill and surrounding vegetation.

19. On August 2, 1994, the COE sent a letter to the Custer County Sheriff requesting that he serve the Cease and Desist Order on the Cutlers (C's Exhibit 7). This Order, which was served by the Sheriff on August 8, 1994 (Field Investigation Report), required removal of the unauthorized fill material by August 26, 1994. By a letter from the District Engineer, dated September 16, 1994, the Cutlers were reminded of the Cease and Desist Order and informed that an inspection from the road on September 1, 1994, revealed that the required removal of fill material had not yet been accomplished (C's Exhibit 8). The Cutlers were informed that, if the material was not removed as required by the Cease and Desist Order, by October 1, 1994, the matter would be referred for legal action. Mr. Flowers inspected the Cutler site on September 7, 1994, and determined that the restoration requirements had been satisfactorily met (Field Investigation Report, dated January 7, 2000, at 3, C's Exhibit 12). The Cutlers were so informed and that no further action would be taken by the Corps in a letter from the District Engineer, dated October 14, 1994 (C's Exhibit 8).

20. Mr. Flowers stated that the permit condition he was investigating at the time of his 1997 visit to the Cutler site was Condition No. 11 (finding 13), which he described as requiring erosion control upstream of the bridge such as hay bales and [or] silt fencing along the fills that were in the wetland and adjacent to Meadow Creek to prevent erosion and sedimentation from reaching into the wetlands from that fill (Tr. 100). He testified that this work had not been done and that a Notice of Violation had been issued to Mr. Cutler therefor. He explained that through discussions with Mr. Cutler and with other agencies having an interest in the permit, it was agreed that Mr. Cutler would be allowed to put in filter fabric and crushed rock (riprap) in lieu of hay bales and silt fencing to which Mr. Cutler had objected. He (Flowers) asserted that the permit was so modified and the Notice of Violation withdrawn (Tr.101). Although neither of the mentioned documents is in the record, the Field Investigation Report (C's Exhibit 12), states that on September 29, 1993, the Corps issued a second Notice of Violation to Mr Cutler for non-compliance with the permit, specifically failure to install sediment control devices as required by Special Condition No 1 [11] and " as directed by Corps personnel." (emphasis added). Mr. Martinez testified that Mr. Cutler was not in compliance with Special Condition No. 11 (Tr. 63). The mentioned report further states that the permit was subsequently modified by substitution of filter fabric and rock riprap over the "exposed fill face" where erosion could occur. The absence of documents supporting these assertions may be attributable to the fact that this alleged violation is encompassed within the phrase "as directed by Corps personnel" rather than specific permit provisions (finding 21 infra).

21. Mr. Cutler testified that he had placed hay bales [across the channel], but that he did not understand how long the bales were to remain in place and so removed the bales once the

work was completed (Tr. 379-80). As we have seen (finding 13), the requirement of Paragraph 11 of the Special Conditions that sediment filters such as hay bales or silt fencing be placed in the channel prior to reopening the channel to flow is subject to the interpretation that the reopening referred to is to occur after the plug is placed rather than after construction is completed. This implies that the placement of sediment filters is to be temporary rather than permanent and arguably supports Mr. Cutler's understanding of the permit. Moreover, and more telling, is the fact that Sheet 9, which apparently was intended to depict the project as completed, shows the west channel re-vegetated with willows and willows extending along the east channel to the fill and past the bridge, but does not show bales or silt fencing in the channel. It is recognized that Sheet 8 of the drawings providing for the placement of wire or nylon bound bales "on the contour" tends to support the view that one of the options for erosion control contemplated by the permit was the use of hay bales along, if not in, the channel. It is, however, concluded that the permit is ambiguous as to whether the placement of hay bales or silt fencing in the channel contemplated by Paragraph 11 was to be a temporary measure or permanent and it is not clear that Mr. Cutler violated the permit when he removed the bales. He testified that the matter was resolved when he was allowed to place filter fabric and riprap "down the sides" (Tr. 380).

22. On April 13, 1995, the District Engineer granted the Cutlers' request to modify the permit issued on July 7, 1993 (finding 11), by the discharge of fill material into approximately 0.009 acres of wetland immediately adjacent to the south side of the west abutment of their driveway bridge (R's Exhibit E). The area authorized to be filled was described by Mr. Flowers as a wetland adjacent to [Mr. Cutler's] home consisting of a low area which had become a pond and held water most of the year (Field Investigation Report, Exhibit 12). The modification also authorized the discharge of fill material into 156 linear feet of open trench in wetlands on the west side of Meadow Creek, as shown in drawing, Sheet 2 of 9, dated December 28, 1994.[8] The mentioned drawing indicates that the "new

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[8] R's Exhibit A. This drawing, which is marked "not to scale", labels as "motel" the building immediately south of the Cutler residence and between the residence and Highway 21. Mr. Cutler testified that this drawing was wrong as this was not the motel (Tr. 428, 432). In a drawing on the reverse of a U.S.G.S. map of the Stanley Quadrangle (Sheet 1 of 9), which contains a note indicating that the drawing was based on an "Inspection Diagram of 4/14/93 by Rob Brachu [COE]" and another note indicating "Field Investigation Drawing of January 2000 (C's Exhibit 12), the building between the Cutler residence and Highway 21 is labeled "Reese House" and the motel is shown as an intermediate distance to the south and west of the Cutler residence and between the Cutler shop and Highway 21. A possible explanation for the confusion as to the location of the motel is provided by the Report of Financial Analyst Beatrice M. Carpenter (infra finding 79), which states, inter alia, that the Meadow Creek Motel was sold in 1999, that Donald and Sharon Cutler helped their son and daughter-in-law purchase the property upon which was located a manufactured home and that the old motel which had been

(continued...)

fill" authorized by the permit modification is immediately adjacent to the south side of the west bridge abutment and is a triangular area measuring 19' by 39'. Thus, the permitted area is less than half of the size of the area Mr. Cutler had filled and then been ordered to remove (finding 19). The open trench on the west side of Meadow Creek, which is the channel allegedly constructed by Mr. Cutler, is labeled "abandoned channel to be filled" on the drawing. The channel to be filled is marked with horizontal lines, which extend from just below the "plug" (finding 13) downstream to the beginning of the triangular area cross-hatched on the drawing to indicate the new fill. This leaves an apparent wetlands area, which includes part of the abandoned channel, west of the bridge, west of the triangular new fill area and south of the continuation of the Cutlers' driveway marked "old fill" on the drawing. In questioning Mr. Flowers as to the status of this area, the Cutler's attorney, Mr. Jones described it as the area surrounding the point of the arrow on the drawing (Exhibit A). The arrow is actually intended to identify the triangular "new fill" area. Mr. Flowers testified that the abandoned channel continued to the road marked "old fill" on the drawing and came down the other [north] side [of the road or driveway] (Tr. 141). He pointed out that the area marked old fill, which extends west of the bridge, filled that part of the channel and was authorized by the 1993 permit (Tr.142-43). It is noted that the 1993 permit (Sheet 2 of 9) designated the west channel as "channel to be abandoned and planted with wetland and riparian vegetation." Mr. Flowers explained that the purpose of the fill was to return the area to a wetlands condition.

23. A letter from the National Oceanic and Atmospheric Administration, National Marine Fisheries Service (NMFS) to the District Engineer, dated December 23, 1999, states that on November 30, 1999, an employee of NFMS witnessed the filling of wetlands adjacent to Highway 21 on Mr. Cutler's property (C's Exhibit 11). The letter describes the activity as the placing of fill material from a nearby stockpile into wetlands adjacent to the existing parking lot by use of a dump truck and backhoe. The letter states that Valley Creek is the primary water body affected by this project and that Valley Creek is designated as critical habitat for Snake River spring/summer chinook salmon, and proposed critical habitat for Snake River steelhead, both of which species are listed as threatened under the ESA. Additionally, the letter recites that Valley Creek provides important spawning and

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[8](...continued)
sold to Philip Reese was purchased and moved to the property in 1995. An irregularly shaped area on the drawing to the west of the "abandoned dug channel" and to the east and south of the Cutler residence, extends from the apparent boundary of the Cutler property on the south 171' in a northerly direction to the fill for the Cutler driveway west of the bridge. This area, which measures 53' at its widest and 27' at its narrowest point close to the fill for the Cutler driveway, is marked with horizontal lines and indicated to be an "area of suspected new fill." The western edge of this irregularly shaped area is marked "old upland/wetland line" and indicates that there is an unspecified distance between the Cutler residence and wetlands. The drawing, however, is labeled "Not to Scale [-] For illustration purposes only" and also states "Area Covered w/approx 30'' of snow and that " Measurements are Estimates".

rearing habitat for Snake River steelhead and spring/summer chinook salmon and that Snake River spring/summer chinook salmon and steelhead juveniles rear in Valley Creek adjacent to and downstream of the subject action. Three photographs are attached, which show what appears to be a white Ford pickup parked adjacent to an unidentified building apparently to the rear of the Cutler residence and to the left in the first photo, a dump truck with its body in the uplifted position, a backhoe, a larger excavator behind the backhoe, a stockpile of material and what appears to be Mr. Cutler's shop in the background. The second photo shows the Cutler residence looking in a westerly direction with the front of the white pickup, which presumably has not been moved since the first photo was taken, visible at the extreme left, while the third photo is identical or almost so to the first.[9]

24. The NMFS letter referred to in the preceding finding states that discussions with Corps' personnel at the Boise office revealed that the activities described in the letter were not authorized by a CWA § 404 permit. Describing adverse impacts from this activity, the letter states that it resulted in the unauthorized placement of soil into wetlands adjacent to Valley Creek, and that it likely degraded water quality and impacted riparian functions.[10] Wetlands are said to maintain water quality by filtering water flow, thus reducing the amount of chemical pollutants and sediment that enter stream channels. Wetlands also enhance the retention of surface and groundwater, thus moderating summer and winter temperatures and stream flows. In addition, wetlands provide habitat for aquatic and terrestrial insects used as food by juvenile salmon and steelhead. The letter states that the measures outlined below are necessary to reduce adverse effects associated with the unauthorized activity:

> 1. Remove unauthorized fill material and return affected land to pre-action elevations. Remove fill closest to the stream channel first; and
>
> 2. Restore or maintain all pre-action wetlands and riparian vegetation throughout the affected area.

25. On January 7, 2000, Mr. Flowers, accompanied by Ms. Carla Fromm, an EPA environmental scientist, met with the Cutlers at their property in Stanley (Tr. 117-18, 176-

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[9] These photos are substitutes for the originals which are of poor quality and which counsel represented had been reversed (Tr. 69).

[10] It is noteworthy that NMFS does not rely on the fact that wetlands on the Cutler property are adjacent to Meadow and Goat Creeks, the latter a tributary of Valley Creek. Regulations, 33 C.F.R. § 328.3(c) and 40 C.F.R. § 230.3(b), define "adjacent" as "bordering, contiguous or neighboring." Wetlands on the Cutler property do not border on and are not contiguous to Valley Creek and are thus adjacent to Valley Creek within the meaning of the cited definition only if within the indefinite and elastic term "neighboring".

77, Field Investigation Report, C's Exh. 12, Conversation Record, C's Exh.13). After obtaining Mr. Cutler's permission, they examined the area between the Cutler residence and the west channel, sometimes referred to as the abandoned channel, of Meadow Creek. The area was covered with 30" to 36" of snow and, after removing some snow, they dug through what Mr. Flowers referred to as fresh fill and found wetlands vegetation (Tr. 118). He described the vegetation as "undecomposed" which indicated new fill rather than old fill. This is the area marked No. 4 and 2000 Violation on the photo (C's Exhibit 10-Flowers). Further describing the area, he testified that there was an obvious break in elevation from the flat wetland stream channel area, a step-up and then [another] fairly obvious change in elevation to the level of the Cutler residence (Tr. 118-19). He stated that we went to the edge of that change, starting at the bridge and moving upstream toward the highway, making periodic investigations of the fill, finding different colors of fill [soils] some red, some brownish, some darker, some cobble and some gravel. He testified that the soils indicated hydric, that is, wetland conditions, and that in all cases where he was able to dig through the fill, he found wetland vegetation, essentially sedges, underneath.

26. Although the testimony of Mr. Flowers referred to in the preceding finding implies that more than one hole was dug, a Conversation Record, dated January 7, 2000, which, inter alia, summarizes conversations with Mr. Cutler on that date, describes the actions of Mr .Flowers and Ms. Fromm in exploring conditions beneath the snow in an area southeast of the Cutler residence and indicates that only one hole was dug through the fill (C's Exhibit. 13). Mr. Cutler is quoted as stating that he intended to have a lawn adjacent to his house and that he had placed fill over an old sewer line. He, however, denied placing fill in wetlands. The conversation memo recites that "we" (Flowers and Fromm) removed snow from an area where the elevation changed abruptly from a steep slope to the flat area below and states that several layers of fill were encountered on top of an area that was vegetated. Some of the vegetation is described as still green under the snow and identified as grasses, Juncus and Reed canary-grass.[11] These grasses appear to have been on top of the fill rather than underneath and are apparently not the wetland sedges under the fill identified by Mr .Flowers. Be that as it may, the memo states that the ground under the snow was not frozen and we were able to dig a soil sample hole on the south side of the toe of the fill. The hole reportedly showed fill had been discharged in the area previously and typed out as "2.5YR/2.5/2".[12] The memo states that further holes were not dug since [because] excavation of the fill layer revealed wetland vegetation under the fill .

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[11] It is noted that "Juncus spp.", listed as having a common name "Rush", is included in Table C1, "Partial List of Species with Known Morphological Adaptations for Occurrence in Wetlands", of the 1987 COE Wetlands Delineation Manual. Although "reed" seemingly connotes a plant commonly found in water or extremely wet areas, no similar listing appears for "Reed canary-grass."

[12] No explanation for the type of soil signified by this symbol has been located.

27. The penultimate paragraph of the memo referred in the preceding finding, written by Mr. Flowers, states that Ms. Fromm and I measured out the fills from the Cutler residence and shoveled snow away from the toe of the fill to confirm that it did enter the wetland along the perimeter of the fill and concludes that it had. The memo acknowledges, however, that some of this fill was not regulated or a permit was not required for it and some was permitted under previous permit and enforcement actions. Ms. Fromm was unable to identify areas where such unregulated or authorized fill was placed. The Investigation Report (C's Exhibit.12) states that, while EPA and the Corps can determine the extent of the fill in the spring once the snow has melted, it acknowledges that this determination will be more difficult because of the lack of measured limits to the fill allowed under the 1993 permit. Photo No. 2 attached to the Investigation Report depicts footprints in the snow enclosing a roughly semicircular area south and east of the Cutler residence and an explanatory note underneath states that " [f]ootprints denote limits of the fill around the house". Photo No. 4 shows part of Mr. Flowers' legs and boots, a portion of the spade he used for digging and what is described as "[c]lose-up of fill toe and wetland." Mr. Flowers said that the photo depicted wetland vegetation from which we had dug the fill (Tr. 120). Replying to a question as to how they determined the area to measure, he stated that because of the snow cover, we used the differences in elevation, the bench, if you will, from the very low wetland area, to the very top fill where the Cutler residence was located and concentrated on the intermediate elevation [bench], which was clearly a new addition to the landscape that he had not remembered from previous visits (Tr.120-21).

28. By a letter from the District Engineer, dated February 1, 2000, Mr. Cutler was informed that the discharge of dirt and rock fill material into wetlands adjacent to Meadow Creek required a permit from the Corps and because a permit was not obtained, the work was in violation of Section 404 of the Clean Water Act as indicated in the enclosed Notice of Violation and Cease and Desist Order (C's Exhibit 14). The enclosed document is labeled a Notice of Violation, a Cease and Desist Order and a Request for Information. The Notice of Violation describes the violation as the discharge of dirt and rock fill material into wetlands adjacent to Meadow Creek in Sec.4, T. 10N, Range 19E, B.M. near Stanley, Custer County, Idaho, and the Cease and Desist Order ordered Mr. Cutler to Cease and Desist [from] any additional discharges of fill material into waters of the United States. Additionally, certain information was requested, e.g., the names, addresses, and telephone numbers of the persons performing the work, the dates the work was done, purpose of the work and the reason the work was done without a permit, so that the violation could be evaluated and an [appropriate] course of action determined. Mr. Flowers testified that, to his knowledge, Mr. Cutler never responded to this request (Tr.124).

29. A memorandum, dated July 26, 2000, summarizes a visit made to the Cutler site on July 7, 2000, by Ms. Carla Fromm and Greg Martinez (C's Exhibit.15). The purpose of the visit was to ascertain the extent of fill placed in the wetlands by Mr. Cutler. After obtaining permission from Mr. Cutler, they took soil samples and measurements of the fill. Results of soil samples are detailed in the memorandum and the testimony of Ms. Fromm, infra

finding 31. An attached map purportedly shows the measurements taken. Although no map is attached to the memorandum, the map referred to is apparently that on the reverse of the map of the Stanley Quadrangle (supra, note 8). Among other things, this map shows the Cutler shop directly north of the motel and 144' from Highway 21. An irregularly shaped area to the south and east of the Cutler residence, extending from the apparent boundary of the Cutler property on the south to the fill for the Cutler driveway on the north, is marked with horizontal lines and labeled "area of suspected new fill". This map was apparently used by Ms. Fromm at least in part to develop the map or sketch of "fill to be removed" (infra, finding 32).

30. Mr. Flowers testified that he assisted Ms. Fromm in creating this map or sketch (R's Exhibit. B) by superimposing the measurements we took on aerial photos of the area and taking characteristic vegetation which we knew to be wetlands and comparing texture, color and type (Tr. 129-30). He explained that we were able to determine that some vegetation of the same type had been filled on the north. He acknowledged that it was difficult to determine wetlands, if the area had been filled and that in this case they relied on the wetland delineation of the original violation made by Mr. Martinez and on aerial photography. Mr. Martinez, of course, had walked the area east of the Cutler residence, rather than the area to the north (finding 6). In further testimony, he (Flowers) opined that we were very generous in our estimation of where the upland/wetland boundaries actually were and that there was more fill placed in wetland than we staked out in the field (Tr. 131). He pointed out that, if the photos in Exhibit 6, taken on 07/22/94, were compared with those in Exhibit 16, taken on 10/31/00, it can readily be seen that there is considerably more lawn on the right hand side [east and north] of the residence than in the original photo[s] (Tr. 132). Asked whether the slope below the Cutler residence shown in Exhibit 6 could have been constructed in 1994 without filling wetlands, Mr. Flowers replied that he had no way of knowing, because we did not test it (Tr. 167). He emphasized, however, that the toe or edges of this fill, were up to the edge of the wetlands at that time.

31. Ms. Carla Fromm visited the Cutler site on three occasions in 2000 (Tr. 176, 219). The first occasion was on January 7, 2000, with Mr. Flowers, which has been described above, the second occasion was on July 7, 2000, with Mr. Martinez and the third occasion was on October 31, 2000. The visit on July 7, 2000, was for the purpose of verifying the measurements and determinations as to the extent of the fill made in the snow in January and to ascertain whether any new fill had been placed in the interim (Tr. 179-80; Memorandum, Cutler 404 Site Investigation, dated July 26, 2000, C's Exhibit. 15). She testified and the memorandum reflects that they took soil samples with Mr. Cutler's permission, the first boring being three and half feet in from the edge of the fill and the second about ten feet from the edge of the fill using a tool she referred to as a " patio pole". Both of these samples were taken 45 degrees from the patio revealing what Mr. Martinez

identified as wetlands vegetation (sedges) in hydric soils.[13] The third and fourth boring attempts were unsuccessful because they hit rock. They discussed their findings with the Cutlers and in doing so discovered what appeared to be "new fill" to the north and east of the Cutler residence otherwise described as a driveway constructed on fill in wetlands up to the fence line on the north property line (Tr. 181; memorandum, Exhibit 15). Mr. Martinez took two photos during this visit, the first, taken from the west end of the bridge looking south, shows rock riprap along the edge of the fill and is misleadingly entitled "Rock riprap from bridge west along edge of fill". The second photo taken by Mr. Martinez during this visit is labeled "Cutler driveway expansion to the north fence line" and shows riprap extending along the edge of the driveway, steel fence posts to the right and below the fill for the driveway and Ms. Fromm standing to the right of a vehicle and at the edge of the driveway.

32. As indicated at the outset of this opinion, EPA issued a Compliance Order, sometimes referred to as an Administrative Order, to Mr. Cutler under date of August 15, 2000 (R's Exhibit.E). Among other things, the Compliance Order directed the removal of unauthorized fill from approximately 0.1 acres in accordance with an attached Restoration Plan and the completion of activities in the Restoration Plan in accordance with a schedule in the Compliance Order. Attached to the Restoration Plan is a diagram or map designating as "fill to be removed" areas marked with horizontal lines south and east of the house and north and west of the house (Exhibit B). The diagram does not identify an upland/wetland boundary. The Restoration Plan attached to the Compliance Order, however, requires the removal of all unauthorized fill in the wetland up to the Cutler residence and along the ridge to the south of the residence, as shown in the attached diagram (Id. ¶ 1).

33. On the north side of the residence, the Restoration Plan does not refer to the diagram, but simply requires removal of fill placed in wetlands on the north side of the driveway. Presumably, the area marked with horizontal lines along the fence line to the north and west of the Cutler residence and designated "fill to be removed" on the map or diagram attached to the Restoration Plan is intended to represent fill placed in wetlands. This conclusion, however, is based on an inference rather than any express finding in the Compliance Order, Restoration Plan., or the attached diagram. According to the schedule, removal of the unauthorized fill was to be completed by September 15, 2000, and replanting of the disturbed area was to be completed by October 1, 2000. The diagram of "fill to be removed", which was prepared by Ms. Fromm with the assistance of Mr. Flowers (finding 22), indicates that the first such area is an irregularly shaped area south

[13] While there appears to be patio furniture visible in a photo (Exhibit 6, 1st page, upper right hand corner), this photo appears to have been taken from the northeast of the house. It is noted, however, that the drawing annotated by Mr. Lium (finding 43, infra) identifies a porch adjacent to the lawn to the southeast of the house. This photo (Exhibit 6) is, however, exceedingly difficult to interpret, because it shows stakes and the sewer pipe to the right of the bridge leading to the Cutler residence.

and east of the Cutler residence, which extends from the apparent south boundary of the Cutler property north to the south end of the triangular shaped area Mr. Cutler was allowed to fill under the 1995 permit modification. The second area marked "fill to be removed" on the diagram extends north and west of the Cutler residence along a fence line which apparently marks the north boundary of the Cutler property.

34. Ms. Fromm testified that she used two pieces of information in preparing the diagram of fill to be removed, one was the measurements of the fill she took at the Cutler's in July and the other was the aerial photos (Exhibits 1 and 10) (Tr. 184). Curiously, she did not specifically refer to the drawing on the reverse of Sheet 1 (supra, note 8), even though this is the drawing containing measurements and presumably the map referred in her memorandum (finding 22). She explained that she projected the 1984 aerial photo (Exhibit. 1) as a slide onto a wall and drew an outline of the building pad area and of these landmarks on a piece of paper, i.e., Meadow Creek to the east, Goat Creek to the north, the building-apparently the Cutler residence which had not yet been constructed when the 1984 photo was taken, and a fence line which runs in roughly a west, southwesterly direction along the toe of the slope on the north. She repeated the process for the 1998 photo (Exhibit 10), drawing an outline of the boundary of the building area and projecting it as a slide onto the same figure (Exhibit 1). Comparing the building pad or area in the 1984 photograph (Exhibit 1) with the 1998 photo (Exhibit 10) and adding the measurements taken in July to reflect changes since 1998, she was able to develop a rough idea of the area of fill which she considered needed to be removed from wetlands (Tr. 185-86). She did not have any measurements for the north side so she could only compare the 1984 and 1998 photographs in conjunction with Mr. Flowers to determine differences.

35. Ms. Fromm determined that fill had been placed [into wetlands] in four areas surrounding the Cutler residence which she proceeded to mark on a copy of the 1998 aerial photo.[14] It is noted that this photo shows only the easternmost entrance to the building pad from Highway 21. The first area to the south and east of the Cutler residence she encircled with black ink and marked with the letter A (Tr. 186-87) An area she described as "adjacent to the driveway " and "just to the north of the house" she marked in a similar fashion with the letter B. She marked as Area C, an area to the northwest of Building 2 between the fence line and the building pad as identified in the 1984 photograph (Tr. 189). She testified that this showed wetlands that had been filled sometime between 1984 when Exhibit 1 was taken and [1998] when Exhibit 10 was taken. While this testimony may be literally accurate, it should be noted that the heavily vegetated area immediately to the north of

[14] Exhibit 10, Fromm. She marked as B1, the building to the south of the Cutler residence and closest to Highway 21, which apparently is the motel; she marked as B2, the building an intermediate distance to the south and west of the Cutler residence, which may be the Reese House; as B3, a building south and further to the west and adjacent to what appears to be a fence line or dividing wall on the building pad; and as B4, the Cutler residence.

Building B 2, marked as Area A by Mr. Martinez on the 1984 photograph and which he opined was wetland , is shown as cleared or filled in the 1992 photograph of the area (Exhibit. 2) (Tr. 214-15).

36. Ms. Fromm identified as Area D, an area adjacent to and west of Area C and north of Building 3 (Tr. 190). Area D extends to the west only slightly beyond the fence line or barrier which extends across the building pad almost to the western edge of the eastern entrance way from Highway 21 and which separates the eastern from the western building pad area. She noted that Area D as shown in Exhibit 10 was [included] within a brown area identified as Area B by Mr. Martinez on Exhibit 1 and that based upon the fact it was in close proximity to the green area identified as Area C and in close proximity to the stream (Goat Creek) and associated wetlands, "we" believe that it is highly likely that this area was also wetlands. This belief is not supported by Mr. Martinez who opined that Area B was not wetland (finding 10). It will be recalled that Mr. Flowers testified that the conclusion the fill to the north of the Cutler residence was placed in wetlands was a "desk determination" based on aerial photography and an approximation of the location of wetlands (finding 16). In any event, it is clear that, if the brown in Area D referred to by Ms. Fromm (Area B referred to by Mr. Martinez) represents fill, it was placed prior to the time the 1984 photo was taken. Complainant has made no claim that any fill placed prior to 1984 should be removed. Mr. Cutler testified that he owned the property between the fence line and the first buildings shown on the photo (Exhibit 1) and he acknowledged that he had filled that area.[15] He indicated that this was probably shortly after the 1984 photo (Exhibit 1) was taken. Asked whether he had checked to see if the area were wetlands, he replied that we never heard of wetlands in those days (Tr. 439).

37. Ms. Fromm explained that we used Areas A and B [Exh.10-Fromm] together to identify areas [we] felt [fill needed] to be removed and included in the Administrative Order. She stated that these areas totaled approximately 1/10th of an acre, but that later she realized she had made a mistake and should have used a photo in Exhibit 6 to mark the wetland/upland boundary (Tr. 88). At the re-opened hearing, she emphasized that the photos in Exhibit 6 were taken from the ground and showed the fill dropping off immediately at [extending to] the edge of the house, while the aerial photos were more difficult to interpret with respect to the distance from the house to the edge or beginning of the wetlands (R. 52). She explained that we underestimated the amount of the fill next to the house and pointed out that there was a tree at the southeast corner of the house which appeared to have been planted in fill.[16] In other testimony, she stated that the fill had been

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[15] (Tr. 437-39). This is consistent with the admission he reportedly made when he answered affirmatively to a question from Ms. Fromm as to whether he had filled the area [north of his house] for a driveway (Memorandum, dated July 26, 2000 (Exhibit. 15)).

[16] R. 50. Mr. Cutler testified that this tree was planted in 1995 or 1996 after he had (continued...)

pulled back substantially to the southeast of the house (Area A), but referring to soil samples taken in two spots at the time of the site visit on April 30, 2001, she observed that wetland soil was below a thin layer of fill (R's 10, 11). She described this area as about two feet back from the toe of the slope and asserted that "we" decided that he (Mr. Cutler) had fulfilled the intent of the Administrative Order sufficiently to allow him to keep a couple of feet of soil over wetlands.

38. Photos in Exhibit 6 were taken on July 22, 1994, and stakes are visible in the photo (1st page, upper right hand corner) in front of the fill at the Cutler residence and which extend into the vegetated area. However, as indicated (supra, note 13) this photo was almost certainly taken looking at the residence from the northeast and Mr. Flowers described the stakes he observed at the time of his 1994 visit as on the southeast (Conversation Record, Exhibit 6). Ms. Fromm noted that she had placed stakes at the approximate delineation of the upland/wetland boundary [southeast of the house] for the purpose of the Administrative Order. Comparing the photos (Exhibits. 1 and 10), she pointed out that there was a green area north/northwest of Building B2 in the former photo, which Mr. Flowers had identified as wetlands and which occupied approximately 2/10ths of an acre, while in the latter photo vehicles were parked. in that area which she identified as Area C (Tr. 189). She estimated that, if areas A, B, C and D were added, the total acreage [of wetlands] lost could be as high as half an acre. She stated, however, that she had never broached with Mr. Lium, the Cutlers' consultant, the question of whether the Administrative Order would be modified to include areas C and D, because no decision in that regard had been made (Tr. 217-18).

39. Ms. Fromm acknowledged raising the question of removing fill from Areas C and D, which were not covered by the Compliance Order, at the April 30, 2001, on-site meeting (R. 47). She described the additional fill as to the north of the Cutler property [residence] and extending approximately 100 feet to the west of the fill area [to be removed] shown on the map (Exhibit. B).[17] At the reopened hearing, she estimated that only a fraction,

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[16](...continued)
received the 1995 permit modification (Tr. 391). Mr. Flowers opined that it would not be possible to plant the tree shown in Exhibit 16 at the southeast corner of the Cutler house without filling wetlands (Tr.166-67). Inexplicably, however, he stated that the tree would have to be much lower on the slope in order to have been planted in upland.

[17] R. 60. Ms. Fromm was aware that Mr. Cutler had been advised by his attorney, Mr. Jones, that he did not need to remove fill from Areas C and D, because those areas were not covered by the Administrative [Compliance] Order (R. 47). The complaint is not specific as to areas where unauthorized fill was placed, merely alleging in paragraph 6 that dredged and/or fill material was placed in 0.1 acres of wetlands. Complainant moved at the hearing to conform the complaint to the evidence so that paragraph 6 would allege that dredged and/or fill material was placed in 0.3 to 0.5 acres of wetlands. The amendment was based on indications that
(continued...)

probably a quarter, of Area B as depicted on Exhibit 10 [Exhibit 1]-Martinez was included in the [Compliance Order] as "fill to be removed" (R. 55). She explained that most of Area B was Mr. Reese's property.[18] She justified not requiring Mr. Reese (supra, note 18) to remove fill 20 to 25 feet from the fence as Mr. Cutler was ordered to do, by the claim that Mr. Reese's fill was further back from the fence than Mr. Cutler's. Ms. Fromm acknowledged, however, that she had not measured the distance between the fill on the Reese property and the fence and there is no support in the record for this claim. In other testimony, she explained that as a matter of enforcement discretion "we" could have asked Mr. Cutler to remove fill that he had placed on Mr. Reese's property [before the sale], but that she had decided, at this point, not to "harp on Mr. Cutler about that" (R's 49, 50).

40. Ms. Fromm returned to the Cutler site on October 31, 2000, for the purpose of checking on Mr. Cutler's compliance with the Administrative Order (Tr. 191). She took four pages of photos to demonstrate Mr. Cutler's progress in removing fill, annotating the photos in her handwriting (Exhibit 16). The first page, top half, shows a portion of what is apparently the motel adjacent to Highway 21, Mr. Cutler's equipment, including a backhoe, a front-end loader and a low boy tractor- trailer to the right of the motel on what is referred as the "parking area above the wetlands", Mr. Cutler's shop in the background and stakes extending along a disturbed area at the top of the slope. The photos also depict a vertical piece of black pipe on the slope beneath the equipment referred to as a "sewer pipe". The handwritten note states " Stakes and sewer pipe show up/wl boundary per figure in AO.". The three photos on the second page of Exhibit 16 depict stakes marking what are stated to be the "wetland/upland edge per the figure in the AO". Nothing in the Administrative Order, however, specifically designates a wetland/upland edge. The center photo, taken looking south from the western bridge abutment, shows what is stated to be "foreground-fill [riprap] permitted by the 1995 modification." Ms. Fromm testified that the lower half of that rock was adjacent to the area Mr. Cutler was permitted to fill in 1995, while the upper half [most southern] shows riprap in excess of that [allowed by the] permit (Tr. 192). While she denied requiring Mr. Cutler to remove this excess riprap, the Compliance Order states that [removal of unauthorized fill] includes removing the fill and rock riprap that exceeds the permitted fill by 25 feet to the south" (Id. Restoration activities, ¶ 1). The lower photo on page 2 shows an excavated area described as "area of removed fill", with

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[17](...continued)
unauthorized fill had been placed in Areas A, B, C, and D (Tr. 221-22). This motion was granted (Tr. 223).

[18] The Report of Beatrice M. Carpenter, Financial Analyst (C's Exhibit 23) states that Mr. Cutler sold the front property (property fronting on Highway 21), which contained a house and motel, to Philip Reese in 1990. Asked whether Mr. Reese had been requested to remove fill as it extended into Area D, Ms. Fromm replied that she and Mr. Flowers had approached Mr. Reese about removing fill, root wads, rocks, etc. which he had deposited below his slope and she understood that he had done so (R. 48).

the sewer pipe on the slope beyond the excavated area, while "fill remaining" is up the slope and to the stakes at the right.

41. The third page of photos in Exhibit 16 depicts a dump truck and a portion of another vehicle on what Ms. Fromm referred to as the "truck parking area " [to the north and west of the Cutler residence]. She pointed out that this area was included within "Area B" on the photo (Exhibit 10, Fromm) and that the photo (Exhibit 16) shows fill going down to the fence line (Tr. 193). These photos were, of course, taken before Pat Cutler began to pull back fill on November 7, 2000, as described in Mr. Lium's notes (infra finding 45). She testified that based on discussions with Robert Flowers and Greg Martinez these photos show wetlands on the other side of the fence and that "... it's believed that wetlands are below the fill and the fence based upon the photographs taken in '84, Exhibit 1" (Tr. 193). At the reopened hearing, Ms. Fromm asserted that Mr. Cutler could look at the scale (one inch equals 40 feet) to determine the number of linear feet of fill to be removed in Area 1 and that she had always considered that Exhibit B was to scale (R. 42). Use of this scale indicates that the fill to be removed is approximately 160 feet in length, which generally accords with a scale of one inch equals 40 feet. Ms. Fromm's assumption does not appear to be accurate, however, because she prepared the map or diagram of areas of fill to removed with the assistance of Mr. Flowers and he testified that his determination of wetlands on the north side of the Cutler property was an approximation based upon aerial photography and that he did not know how to draw it to scale at this point (finding 16). Moreover, the map or diagram on the reverse of the Stanley Quadrangle (note 8, supra), which appears to have been used at least in part to prepare Exhibit B, the map attached to the Restoration Plan, is not to scale and, while Mr. Flowers was aware that there was a scale on the drawing, he did not know whether it was to scale (Tr. 129).

42. Referring to the last page of Exhibit 16, Ms. Fromm testified that it consisted of three photos taped together, showing a broad view of wetlands, of fill removed and remaining to be removed with the Cutler house on the left (Tr. 194). The sewer pipe is shown in the photo in the right hand corner, which was apparently taken from the Cutler property looking northeast. She explained that the stakes delineated the inside line, closest to the house of the figure (Exhibit B), which was attached to the Administrative Order. Although she noted that the sewer pipe was not shown on Exhibit B, she stated that at the time of the inspection, we used the sewer pipe as a marker of fill which needed to be removed [south and east of the Cutler residence] (Tr. 195). She indicated that at the time she believed that the pipe was the approximate wetland/upland boundary for the fill and that the stakes [if placed] would have been on top of the sewer line. Under cross-examination, she explained that Mr. Flowers used his interpretation of aerial photos and his recollection of the permitting process between 1993 and 1995, i.e., the areas permitted to be filled, to determine that [placement of] the stakes and [the location of] the sewer pipe marked the upland/wetland boundary (Tr. 206). In other testimony, however, she referred to a faint line in the green between Building B1 and Meadow Creek on Exhibit 10, an area which Robert [Flowers] had identified as wetlands, and which line extended from the highway

[north] toward the [Cutler] house and then fades [out]. (Tr. 197). She opined that this faint line was a sewer line and that she now believed that the vertical sewer pipe shown in Exhibit 16 was in wetlands. She also expressed the belief that the stakes should have been further to the west, but denied requiring that this additional fill be removed (Tr. 206-07).

43. Mr. Cutler has retained the services of American Water Resources Company to perform remedial [restoration] work on the property (Joint Prehearing Stipulations). Notes, entitled "Cutler's Restoration Project", by Mr. Bruce Lium of American Water Resources Company, referring to a meeting with the Cutlers at the site on November 7, 2000, are in evidence (R's Exhibit C). Mr. Lium described the notes as a Restoration Plan which he prepared for Mr. Cutler on November 7, 2000 (R. 63, 64). He testified and the notes recite the removal of fill from the wetlands as discussed with Carla Fromm and Robert Flowers during the last on-site meeting and refers to an attached drawing for further details. The "last on-site meeting" referred to by Mr. Lium occurred on October 31, 2000, at the time Ms. Fromm took the photos in Exhibit 16.[19] Although the notes were admitted into evidence, the drawing, which is basically a copy of the drawing attached to the Compliance Order, annotated by Mr. Lium, was not admitted into evidence at the initial hearing, because Mr. Lium did not appear as a witness. Mr. Lium was a witness at the reopened hearing, however, and Exhibit C is admitted into evidence.[20] The mentioned drawing designates as Area 1 the fill to be removed north and west of the Cutler residence and as Area 2, the area east and south of the residence where the fill has been removed.

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[19] Although a letter from Carla Fromm to Bruce Lium, dated September 12, 2001 (C's Exhibit 30), refers to an on-site meeting held on April 30, 2000 [2001], attended by Mr. Lium, the letter also refers to an on-site meeting on October 31, 2000, and on this record, the latter can only be the meeting referred to by Mr. Lium in his notes. It is noted that in testifying at the reopened hearing his understanding that fill in the area on the north was to be pulled back four to six feet [from the fence line], Mr. Cutler referred to a meeting "last fall" (R. 107). Mr.Lium testified that he was trying to depict in Exhibit 29 what we agreed on at our first meeting [on October 31] with Fromm, Flowers, Cutler and himself (R. 90). Moreover, his notes refer to color photographs from photo points established by EPA and it is likely that the photos referred to are those taken by Ms. Fromm on October 31, 2000 (Exhibit 16).

[20] In its Supplemental Post-Hearing Brief, dated November 28, 2001, Complainant points out that Mr. Lium's annotated drawing, the second page of Exhibit C, was not expressly offered or admitted into evidence (Id. 7, 8). While it does appear that Respondent mistakenly assumed that Exhibit C including the drawing was in evidence, Complainant objected to the drawing at the initial hearing solely upon the ground Mr. Lium was not present to testify as to its preparation. Mr Lium, however, did appear at the reopened hearing and the drawing was treated as if it were in evidence. Under these circumstances, Complainant is not prejudiced by admission of the drawing and Exhibit C is in evidence in its entirety.

44. Mr. Lium testified that the Restoration Plan was written when the fill in Area 2 had been removed (R. 65). Consistent with this testimony, the drawing annotated by Mr. Lium (Exhibit C) shows a cross-hatched area, designated as Area 2, and labeled "Fill has been Removed." With respect to Area 1, Mr. Lium has marked in black as the wetland/upland line a narrow area along the east and north of the area designated by Ms. Fromm on Exhibit B and labeled it as "Fill being Removed" (Exhibit C). This area extends approximately 60% of the length of the designated area and almost to the area marked "(l)arge rocks and cement [concrete] will be removed from this area" along the north.[21]

45. Mr. Lium's notes (finding 43 supra) state that:"(t)oday [November 7] in Area 1 Pat Cutler [the Cutlers' son] was beginning to pull the fill well back from the upland/wetland line and that he would continue to address this area (as discussed in our on-site meeting) until completed. It will then be re-seeded and the seed covered with straw. Additionally, some large boulders and some blocks of cement [concrete] near the fence and in the wetland will be removed. Next spring re-vegetation of the bank and the wetland in Area 1 will be treated similarly to Area 2." From the foregoing, it is found that the upland/wetland boundaries subsequently drawn by Mr. Lium on Exhibit C were discussed at the on-site meeting on October 31, 2000. Ms. Fromm acknowledged that Mr. Lium faxed her a copy of Exhibit C on November 7, 2000, and that she discussed it with him on the phone (Tr. 213). She answered affirmatively the question of whether she had "worked it out" with Mr. Lium, i.e., reached an understanding as to what was going to be done, and that he was happy and so was she. In her letter to Dr. Lium, dated September 12, 2001 (note 24, infra), she stated, inter alia, that she had always regarded [his] correspondence as a report describing the progress made by the Cutlers toward restoring the area according to the EPA AO. Although this appears to have been intended as a partial response to Mr. Lium's handwritten memorandum and photographs forwarded on August 13, 2001 (finding 58, infra), it is not a reasonable interpretation of Exhibit C prepared by Mr. Lium and, indeed, is contrary to her own testimony noted above. Ms. Fromm testified that she was informed

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[21] Exhibit C. A letter from Ms. Fromm to Mr. Cutler, dated November 6, 2000, thanks him for participating last week in EPA's review of your efforts to restore wetlands on your property as specified in the Administrative Compliance Order (Exhibit 26). The letter states that the stakes that you have placed in the remaining fill will guide you as you remove fill from the wetlands adjacent to your house and parking area above the wetlands [Area 2]. As we discussed, fill removal on the north boundary (the newer parking area) [Area 1] should be conducted in the same manner, removing fill (including rocks) to the upland/wetland edge. It should be emphasized, however, that neither the Restoration Plan nor the diagram attached thereto specified or purported to specify an upland/wetland boundary on the north side and that this omission was most likely because both Ms. Fromm and Corps' representatives were uncertain as to the location of that demarcation line. Ms. Fromm's letter suggests that Mr. Cutler proceed with fill removal as soon as possible, complete the planting and erosion control measures no later than November 17, 2000, and grants an extension to that date for both removal of unauthorized fill and completion of planting in the disturbed area.

by Dr. Lium that the ground had frozen in November and that they would not be able to remove anymore fill until the spring thaw (R. 8). She reportedly agreed that was reasonable.

46. Mr. Lium's notes (Exhibit C) state that in Area 2 all of the fill has been removed back to the upland/wetland line and even further into upland in several pockets. The notes further state that in the very south end of Area 2, minor fill was pulled back and that this material, plus all the fill was taken to an upland area. The notes state that Area 2 was re-seeded and covered with straw. This statement is not supported by the drawing annotated by Mr. Lium, however, which for the far largest portion of the cross-hatched area is simply marked "Fill has been Removed" (Exhibit C). A small area south of the sewer pipe is marked as "Area of Fill Pulled Back and Reseeded". A darkened line extends along the west of the cross-hatched area and across and to the east of that area at the sewer pipe and is labeled "Wetland/Upland Line and New TOE of Bank." It was observed that upon inspection a majority of wetland plants in the area appeared to be still viable, but there were other areas that should be planted with nearby wetland plants in the spring (R. 65).

47. Referring to the next on-site meeting on April 30, 2001, Ms. Fromm testified that the purpose of the meeting was to ascertain whether he (Mr. Cutler) had fully complied with the Administrative Order and to answer any questions he might have pertaining to compliance with the Order (R.10). This seems unlikely as she appears to have previously agreed at least telephonically with Mr Lium's annotations Exhibit C, which located the upland/wetland line in Area 1 and made it clear that far less fill than indicated on Exhibit B was to be removed in that area (finding 43). Ms. Fromm testified that she and Robert [Flowers] walked the length of the north side all the way past Area B into Areas C and D and observed fill on Mr. Reese's property (R. 12). With respect to Area B (Exhibit 10-Fromm), they discussed with Dr. Lium and Mr. Cutler the need to pull back fill in that area as it had not yet been completely pulled back according to the map attached to the Administrative Order. As noted previously (finding 33), however, the Restoration Plan, which is attached to and incorporated into the Compliance Order, does not require removal of fill to the north of the residence (Area B, Exhibit 10-Fromm) in accordance with the attached diagram or map, but simply requires removing fill placed in wetlands on the north side of the driveway. The failure to clearly specify fill to be removed in the area north of the driveway is confirmation of uncertainty as to the location of the upland/wetland boundary (supra, note 21) and logically contemplated discussions and/or negotiations in that regard. Ms Fromm explained that Mr. Cutler was not expected to create the same conditions as aerial photography showed in 1984,[22] but that "we" expected him to pull back any fill that had been placed since the inspections in 1992 and resolution of the bridge issue (R. 13). The inspections in December 1991 and April 1992 were conducted to the

[22] The Restoration Plan, however, provides that fill shall be removed to prior ground condition, while not disturbing the underlying vegetation and original wetland soils and grade (Id. ¶1).

east/southeast of the Cutler residence (findings 4, 6 and 7), and neither the Restoration Plan nor the map attached to the Compliance Order mention or refer in any way to fill placed since 1992.

48. Although Mr. Lium had made a determination of the wetland/upland boundary in Area 1 the previous November (finding 44), which the Compliance Order did not purport to make, and although Ms. Fromm acknowledged that Mr. Cutler was now being requested to remove fill in addition to that shown on the map or diagram attached to the Compliance Order and indeed, all the way to his west boundary (R. 20, 23), his response, according to her, was simply that he needed more time to remove that much fill. Ms. Fromm wrote a letter to Mr. Cutler, dated May 2, 2001 (Exhibit 27), which she testified confirmed discussions at the April 30th meeting.[23] Although he may have confused the on-site meeting of October 31, 2000, with that of April 30, 2001, Mr. Lium testified that [with respect to Area 1] he simply did not believe that the letter represented what was discussed at the April 30th on-site meeting (R. 87). Moreover, see finding 57, infra, for Mr. Lium's testimony as to his understanding of the line to which the fill should be pulled back and finding 45 supra where upon receipt of Exhibit C from Mr. Lium, Ms. Fromm appears to have agreed with it. It is concluded that Ms. Fromm simply changed her mind as to the area from which fill should be removed after walking the north side with Mr. Flowers on April 30, 2001 (findings 39 and 47)..

49. Mr. Cutler was informed by Ms. Fromm in the May 2 letter that after inspecting the "south-southeast yard" of your house, I concluded that you have partially met the intent of the Administrative Order issued to you by removing fill as indicted on the map attached to the Order. Additional work to be completed early in the growing season in this area includes the planting of container stock or plugs carefully taken from the adjacent wetland in bare spots in the recovering area. Mr. Cutler was also informed that the north side of your property will need additional work to achieve compliance with our Order. The letter states that as we discussed, fill removal should be conducted to the extent shown in the map attached to the Order, and extending to your property boundary with Mr. Reese, which boundary is not specified (emphasis added). The letter continues "(a)s we discussed on-site, fill placed since 1992 should be removed from wetlands on your property". Nothing in the record specifically describes "fill placed since 1992". Additionally, the letter described monitoring requirements for the re-vegetation efforts and extends the deadlines for both removal of unauthorized fill and completion of planting in the disturbed area to November 15, 2001. Counsel for Respondent pointed out that this date had not passed at

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[23] R.13. There are two exhibits marked Complainant's Exhibit 27 in the record. The second, which is designated Exhibit 27-A, is a letter from Mr. Jones to Complainant's counsel, dated January 8, 2000, which explains and encloses documents relating to the sale of the Meadow Creek Motel. The record reveals that the Cutlers had guaranteed the loan so that their son and daughter-in-law could purchase the Motel and that upon the couple's divorce, it was sold in 1998 at no gain to the Cutlers.

the time of the reopened hearing on October 11, 2001. These completion dates had previously been extended to October 15, 2000, for removal of unauthorized fill and to November 1, 2000, for completing planting of the disturbed area by a letter from Complainant's counsel, dated September 14, 2000. As indicated, the completion dates had been extended to November 17, 2000, by a letter, dated November 6, 2000.

50. Ms Fromm testified that after the May 2nd letter was mailed, she received a call from Dr. Lium on or about May 8, stating, apparently for the first time, that the Cutlers could not remove additional fill as requested in the Administrative Order, because they needed the area as a parking and turn-around area for vehicles.[24] Ms. Fromm discussed Mr. Cutler's request to leave the fill in place as a parking and turn-around area with Mr. Flowers and it was determined that it was highly unlikely that an after-the-fact permit for this additional fill could be issued, because of the close proximity to the creek having endangered species occurrence and the wetlands associated with that creek. Although it is not clear that she was referring to Valley Creek, Valley Creek is the only creek designated critical habitat for salmon species (infra, finding 70). She informed Dr. Lium that she did not think that the Administrative Order could be changed to leave the additional fill in place as she considered [the Cutlers] had other alternatives at the house and work pad to park vehicles (R. 31).

51. In her Second Declaration (infra, finding 55), Ms. Fromm claims that Mr. Cutler had agreed to remove that fill and that Mr. Lium was requesting a change to that agreement. It should be noted that on brief, Complainant insists that there was no agreement of any kind. Although Ms. Fromm spoke with Mr. Lium on June 25, 2001, concerning the Cutler's progress or lack thereof in complying with the Compliance Order, she called the Cutlers and visited the site on July 13, 2001.[25] With respect to the southeast side (Area 2), she

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[24] R. 30. A fax from Mr. Cutler to Jim Jones, dated August 8, 2001, forwarded a copy of a letter from Ms. Fromm, purportedly dated November 6, 2000, which, inter alia, quotes Mr. Cutler as telling her that the fill had been on the north end of the property when he purchased it. In his fax, Mr. Cutler denies telling her that, asserting that he told her the fill had been there for at least 20 years (Exhibit B to Respondent's Response to Complainant's Memorandum, dated August 9, 2001). There are indications that at least part of the brown in Area B marked by Mr. Martinez on the 1984 photo (Exhibit 1-Martinez, finding 10) represents fill, and if so, this fill had been there for at least 17 years at the time of the on-site meeting on April 30, 2001, which lends support to Mr. Cutler's position [that the fill had been there for a long time]. Ms Fromm attributed the erroneous date on the letter, which should have been dated 8/01/01, to the fact the letter was a "cut and paste job," and it does appear that the letter borrows extensively from the letter, dated May 2, 2001.

[25] R.21-23. In her Declaration in Support of Motion to Reopen Hearing, Ms. Fromm states that in a telephone conversation on June 25, 2001, Mr. Lium informed her that Mr. Cutler

(continued...)

testified that Mr. Cutler indicated that he had re-seeded the area by the sewer pipe, but that he intended to allow the slope beneath his house to "come back on its own " (R. 22). Although Mr. Lium testified that the southeast slope was re-seeded last year (R. 80) and his notes state that "Area 2 was reseeded and covered with straw", his annotated diagram indicates that only an area south of the sewer pipe was re- seeded (finding 45). This small area is apparently the area referred to by Mr Lium in his notes which state "(t)he new bank (as shown on color photographs from photo points established by EPA), looked very good once seeded and covered." They (Ms. Fromm and Mr. Cutler) walked the length of the area on the north side and, although she reminded Mr. Cutler that the Administrative Order required removal of more fill than he had accomplished, and that in April they had discussed removing fill 20- to- 25 feet from the fence all the way to Mr. Reese's property, he indicated he considered that the work was complete and that he wasn't required to do any more (R. 23). This is apparently because he had been advised by Mr. Lium of the wetland/upland demarcation and that he wasn't required to remove fill in uplands (finding 57, infra).

52. Under date of July 19, 2001, Complainant filed a motion to Reopen Hearing, the ostensible purpose of which was to demonstrate that, contrary to his testimony at the hearing and arguments on Post-Hearing Briefs, Respondent was in substantial non-compliance with the Compliance Order and that he had told Ms. Fromm that he had no intention of completing the work. These assertions are supported by the Declaration of Carla Fromm and seemingly refute Complainant's assertion that it does not seek enforcement of the Compliance Order in this proceeding (infra, note 28). Respondent submitted a Response to Motion to Reopen Hearing, under date of July 31, 2001, strongly supporting the motion. Respondent alleged that the parties had reached an agreement prior to the hearing as to, inter alia, the amount of fill to be removed on the north side of the Cutler property and that Complainant was now demanding that Mr. Cutler remove substantially more soil than was agreed upon by the parties. According to Respondent, the matter of the agreement for the site to be remedied as well as Mr. Lium's determination of wetlands in Area 1 were among matters to be explored at a reopened hearing.

53. Following the meeting on July 13, Ms. Fromm sent Mr. Cutler a letter on August 1, 2001, which was erroneously dated November 6, 2000 (supra, note 24). The letter informs Mr. Cutler that, while he has partially complied with the Administrative Order by removing fill on the south-southeast yard of your house, he is out of compliance with the Order and subsequent letters from her amending the Order. It is pointed out that he has not completed the planting in bare spots in the recovering area, which was described in the May 2, 2001 letter as necessary additional work to be completed early in the growing season. The

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[25](...continued)
had not done the re-vegetation work that he was required to do and that he (Lium) did not know when, or if, Mr. Cutler would comply. Significantly, nothing appears to have been said concerning the seemingly more important fill removal on the north side.

necessary planting was also described in the Administrative Order, Attachment 1, Restoration Plan, paragraphs 3 and 4, and was to consist of container stock or per the May 2nd letter, plugs carefully taken from adjacent wetland. Referring to the July 13, 2001 on-site meeting, Mr. Cutler is reported to have said that he re-seeded the far southwest slope below the equipment storage area, but had not re-seeded the slope nearest (below) his home. The letter states that the apparent weeds that now denominate this slope will not provide the root mass provided by perennial plants appropriate to your locale and erosion will continue to occur. [26] Additionally, Mr. Cutler is informed that the north side of his property needs additional work to achieve compliance with the Administrative Order, the letter stating that "(a)s we discussed on April 30, 2001, fill removal should be conducted to the extent shown on the map attached to the order, and extending to your property boundary with Mr. Reese. The fill placed since 1992 should be removed from wetlands on your property."

54. Mr. Cutler testified that he placed fill in the area to the east and south of the east corner of his house to increase the size of his yard (Tr. 349, 439-40, 461). He did not believe that the area filled was wetlands, because he thought wetlands would have to be wet most of the year, while this area dried up in the summertime.[27] On cross-examination, he acknowledged that this was a "layman's" opinion rather than any expertise in identifying

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[26] R. 22. At the reopened hearing, Counsel for Complainant represented that Mr. Cutler's compliance with the Administrative Order in Area 2 was not in issue (R. 53).

[27] (Tr. 349-50, 404, 432). Some justification for this belief is provided by an incident that occurred when Mr. Cutler was doing excavation and fill work for a Mr. Jerry Warren who owns property described as "the third property to the east of the Cutler property" (Tr. 382-83). Mr. Cutler testified the Warren property was "right on" Valley Creek and that the work was stopped by Mr. Martinez who said that the area was very probably wetlands (Tr. 383-84). He (Cutler) stated that Mr. Warren was required to remove some of the fill, but that after an [on site] meeting with a County Commissioner, a member of the State Legislature and a representative from then U.S. Representative, now Senator, Crapo's office, it was determined that the area probably was not wetlands and that it was OK to fill it (Tr. 384-85,386, 387). Mr. Cutler testified that the area was wetter, i.e., had more moisture when walked upon, than the area he had filled to the east [of his house]. According to Mr. Martinez, this incident occurred about 1990 (Tr. 82). Martinez, however, denied that the Warren property was similar to the Cutler property, asserting the former property was much higher in elevation, had a completely different vegetative community and had a different soil type (Tr. 83). He acknowledged that Mr. Warren was initially told that the area was wetlands, and stated that he (Martinez) made the determination that the area being filled was not wetlands (Tr. 84). Although he acknowledged speaking to congressional members [or their representatives] about the wetland status of the area being filled on the Warren property, he denied that any pressure was brought to bear to change his wetland delineation (Tr. 89, 90). He testified that he used the Corps Wetlands Delineation Manual in making his determination.

wetlands (Tr. 426-27, 436). This fill was placed in 1999. (Tr. 370, 389). He also acknowledged placing fill on the property line at the north side of his house at an undetermined date or dates (Tr. 394-95). Testifying with reference to Sheet 2 of 9 of the Corps' drawings accompanying the 1993 permit modification (Exhibit A), however, he maintained that the fill he placed was on the upland rather than the wetland side. There is no doubt that there are upland areas south, east and north of the Cutler residence (finding 8). Mr. Cutler is quoted as having told Ms. Fromm on July 13 that he did not intend to remove additional fill on the north side, other than some large rocks, because the fill was there when he purchased the property in the 1970's. On the contrary, Ms. Fromm's letter states that aerial photographs of your property show that the area of fill has increased between 1984 and 1992 and again between 1992 and 1998. See, however, finding 36 to the effect that Areas C and D on the 1998 photo (Exhibit. 10-Fromm) were also shown as filled as Area B on the 1984 photo (Exhibit 1-Martinez). Mr. Cutler was warned that, until you remove the fill on the north side, EPA will consider you out of compliance with the Administrative Order and that failure to comply with the Order may subject you to penalties of up to $27,500 per day of violation or administrative penalties of up to $11,000 for each day of violation.[28]

55. On August 2, 2001, Carla Fromm executed a Second Declaration in Support of Motion to Reopen Hearing. This declaration was initially objected to by Respondent, but is now in evidence as an exhibit sponsored by Respondent (Exhibit M). Ms. Fromm emphasizes that the Compliance Order requires the removal of unauthorized fill only in the lawn area east of the Cutler residence and the driveway area to the north next to the bridge, Areas A and B, respectively, Exhibit 10-Fromm. She asserts that these areas are cross-hatched (actually marked with horizontal lines) and labeled "fill to be removed" on the attachment to the Compliance Order and that these areas have not changed since issuance of the Compliance Order. This conflicts with Mr. Lium's determination of the upland/wetland boundary in Area 1 as annotated on Exhibit C , which indicates that only a small portion of the fill designated to be removed on the diagram attached to the Compliance Order occupies wetlands (finding 45). Mr. Lium's notes and drawing were faxed to, among others, Ms.

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[28] Under date of July 27, 2001, the ALJ issued an order requiring Complainant to file a memorandum supporting its authority to require compliance with a Compliance Order where an answer denying liability and invoking the administrative process has been filed and no finding of liability in the resulting proceeding has been made. Complainant's response was that it does not seek compliance with the Compliance Order in the instant proceeding (Memorandum Re CWA Compliance Orders, dated August 3, 2001). This is an abuse of the enforcement process, because it allows Complainant to threaten and harass Respondent for alleged non-compliance with the Administrative Order, while at the same time denying that enforcement of the Order is at issue. Moreover, Complainant has used Respondent's alleged non-compliance with the Order to support the proposed penalty for, despite the above disclaimer, Complainant maintains that Respondent is in substantial noncompliance with the Order (Motion to Re-Open Hearing, finding 49).

Fromm on the day they were prepared, November 7, 2000. Moreover, Ms. Fromm's assertion ignores the attempted expansion of the Order to include removal of fill "to your property boundary with Mr. Reese" in her letter to Mr. Cutler, dated May 2, 2001 (finding 48). At the inspection on July 13, 2001, she observed that Mr. Cutler had not completed the removal of unauthorized fill from the two areas marked "fill to be removed" on the attachment to the Compliance Order. She notes that these observations are consistent with those she made at the time of the April 30, 2001 inspection and that, following that inspection, she wrote Mr. Cutler on May 2, 2001, informing him that he needed to complete removal of the unauthorized fill and extending the time for him to do so. Ms. Fromm asserts that at the time Mr. Cutler did not object and that he did not inform her that he did not intend to complete the work until July 13, 2001. This, of course, was after his request to leave some of the fill in place as a parking and turn-around area for his vehicles had been denied.

56. Although she has denied reaching any agreement relative to removal of fill and, indeed, denied that any such agreement was necessary (finding 63, infra), Ms. Fromm claims that "our" agreement was that Mr. Cutler would remove that fill (Second Declaration, ¶ 5). She further claims that Complainant never agreed with Mr. Lium's markup of the diagram attached to the Compliance Order or agreed that only the areas which he marked would be removed. See, however, finding 45 supra, wetland/upland boundary in Area 1, as subsequently annotated by Mr. Lium on the drawing or map of fill to be removed prepared by Ms. Fromm (Exhibit B), was discussed at the on-site meeting on October 31, 2000, and findings 58 through 61, infra, that an agreement or understanding as to the upland/wetland demarcation and the line to which the fill was to be removed was reached. Ms. Fromm's testimony that it was "our" understanding in the Fall of 2000 that as Mr Cutler began removing all of the areas marked as "fill to be removed" on the EPA diagram, that further removal would take place in 2001 is not inconsistent as the work was discontinued because the ground was frozen (finding 45).

57. Mr. Cutler was present at the on-site meeting on April 30, 2001 (R. 105). Asked whether there was any discussion as to a line of demarcation concerning the extent soil had to be pulled back on the north side, he replied that the soil was supposed to be come back four to six feet from the fence line [west] to a point where there were some rocks, which were also to be removed (R. 105-06). He testified that he had done that (R. 106). This testimony substantially accords with his affidavit, dated July 30, 2001, in support of his Response to Motion to Reopen Hearing. He states that a strip averaging between 4 and 8 feet along the north side of Area 1 was characterized by Mr. Lium as wetlands and that he has pulled back soil from a wider area than agreed upon. He further states that the area to be removed started on the west side of the cross- hatch where the large rocks and cement [concrete] were located and then proceeds eastward toward the bridge. Mr. Cutler was also present at the on-site meeting on October 31, 2000, attended by Ms. Fromm, Mr. Flowers and Mr. Lium and it is concluded that the understanding as to the distance from the fence line the fill was to be removed or pulled back referred to by Mr. Cutler more likely resulted from that meeting rather than the meeting on April 30, 2001 (finding 45). He (Cutler)

acknowledged that he may have been confused as to the dates (R.106). In his affidavit, he recites that, when Carla Fromm visited his property earlier this month [July 13, 2001], she told him that he was going to have to remove additional soil for a total of 20 to 25 feet along the east-west course of Area 1 and then all the way along the fence line to the west boundary of his property. He reportedly replied that this soil had been there for about 30 years and that he wasn't required to remove it. It does appear that at least some of this fill had been there for at least 17 years (note 24, supra). Mr. Cutler states that as he understood our agreement, there was never any request to remove soil located to the west of Area 1 and that he had been told by Mr. Lium that he should not have to remove any soil that was not properly characterized as wetlands. He emphasized that Mr. Lium's diagram indicates that [wetlands] constitute only a small fraction of Area 1.

58. By a handwritten memorandum, dated August 13, 2001, Mr. Lium forwarded to Carla Fromm four photographs which the memorandum states were taken after a visit with the Cutlers on August 11, 2001 (C's Exhibit. 29). The first of these photos shows a straight black line inside the fence line at the toe of the fill to the north and west of the Cutler residence. The other three photos show the slope to the south and east of the Cutler residence in various states of re-vegetation. A note on the back of the first photo by Mr. Lium asks "Does this line look OK?" Asked whether there was ever any agreement as to how much fill should be removed from Area 1, Mr. Lium replied that it was his understanding that from the rock outcropping near the bridge on the north side of the property looking down a line of sight toward Mr. Reese's property [to the west], there is a promontory that protrudes further towards the wetlands and acts as a point of reference (R. 66, 97, 100). He indicated his understanding that these two reference points were the line delineating the wetlands from the supposed uplands (R. 68).

59. Mr. Lium further testified that when Ms. Fromm, Mr. Flowers, Mr. Cutler and himself looked at that [area] it was his understanding that the line on Exhibit 29 was the line to which it [the fill] should be pulled back (R. 66, 67, 97, 100, 101-02). He testified further that it was his understanding that an agreement had been reached as to the amount of fill that had to be removed, that this amount [of fill] has been removed and even further back than what we discussed in some places (R. 67). Mr. Lium is a forthright and completely credible witness, his testimony is supported by his notes and annotated diagram (Exhibit C) and he did not create this understanding "out of whole cloth". His testimony in this regard is accepted as accurate. Although he was of the belief that the understanding referred to was reached at the on-site meeting at the Cutler property on April 30, 2001, it more likely was reached at the on-site meeting on October 31, 2000 (findings 43 and 44). After receipt of Ms. Fromm's letter, dated May 2, 2001, Mr. Lium understood that EPA did not agree with his delineation of [upland/wetland] on the north side. However, on cross-examination he reiterated that "...the darker line [on Exhibit C] is what I think we agreed to, to have removed" (R. 96).

60. Mr. Lium testified that he drew the black line on the photo (Exh. 29) and that this showed Mr. Cutler had removed fill beyond the agreed line (R. 68, 69). Comparing the photos

taken by Ms. Fromm on 10/31/00 (Exhibit 16) with the photo taken by Mr. Lium on 8/11/01 (Exhibit 29), it does appear that fill has been pulled back substantially from the fence line and beyond the black line drawn by Mr. Lium. Under cross-examination, Mr. Lium acknowledged that he had not confirmed in writing with Ms. Fromm his understanding as to the amount of fill to be removed or informed her orally that the Cutlers intended to remove less fill than required by the Compliance Order (R. 83, 84). Although this testimony appears to be literally accurate, the fact that on November 7, 2000, he faxed a copy of his notes and the annotated drawing prepared for the Cutlers to Ms. Fromm as a minimum put her on notice of where he considered the upland/wetland demarcation to be. Moreover, the matter discussed was the upland/wetland demarcation and not the amount of fill to be removed per se. Mr. Lium asserted that the question as to whether he had informed Ms. Fromm they intended to remove less fill than required by the Compliance Order confused him, because he understood that EPA was now requesting that more fill be removed than required by the Order (R. 84, 85).

61. Mr. Lium simply did not believe that Ms. Fromm's letter, dated May 2, 2001, represented what was discussed at the April 30th on-site meeting (R. 87). He explained that the line [on Exhibit 29] was based upon the difference between the truly wetland plants-the sedges-and the upland plants going up the slope (R. 92). While he acknowledged that [some] upland plants on the slope were in fill, he testified that the black line represented a reference line that we all discussed together (R. 93, 95). He emphasized that we did not know where the fill was and how much of the fill was covering wetland and that we were trying to find a delineation or reference line as to where the wetland and upland [division] was so as to begin pulling back the fill. He said it was clear that fill had been placed in wetlands, because where the fill had been pulled back, wetland plants were returning. Asked, however, whether he would expect to find more wetland plants, if an additional ten feet of fill were pulled back from the line he had drawn on Exhibit 29, he replied that he did not know (R. 95, 96). Moreover, he asserted that he did not know how anyone could be certain [whether there were additional wetlands under the fill] without performing additional boring or fill removal. This is consistent with Mr. Flowers' reply to the question of whether the fill on the slope at the Cutler residence had been placed in wetlands, which was that he did not know because we had not checked it (finding 30).

62. Asked whether she believed that Mr. Cutler was complying with the Administrative Order Ms. Fromm replied in the negative, stating that the seeding of the slope on the south side had not been completely successful and that re-vegetation of areas not coming back on their own was necessary (R. 11). Additionally, Mr. Cutler had not removed all of the fill on the north side as depicted in the map attached to the Order (R. 9). She also noted that this area would require re-vegetation. Mr. Lium pointed out, however, that there was little point in re- vegetation of the north side until there was a determination of the amount of fill to be removed (R. 69). Referring to the on-site meeting on April 30, 2001, the purpose of which she claimed was to ascertain whether Mr. Cutler had fully complied with the Compliance Order, Ms. Fromm testified we found on the southeast side that the fill had been pulled back substantially (R. 10). With respect to the north side, she denied that Dr.

Lium had ever told her that there was an agreement for pulling less fill than required by the Compliance Order and denied that she ever discussed or come to any such agreement (R.17, 18, 20, 21). This is contrary to her own testimony (finding 45). Other than a couple of feet of fill she allowed Mr. Cutler to keep on the south side [and extensions of time], she denied ever making any changes in the requirements of the Administrative Order (R. 29). This, of course, ignores her letters to Mr. Cutler, dated May 2 and August 2001, and her oral instructions to Mr. Cutler at the on-site meeting on July 13 that fill should be removed to his property boundary with Mr. Reese.

63. Ms. Fromm pointed out that an Administrative Order was an order and is not [nor does it require] an agreement of the parties. This assertion is accurate where the requirements of the order can readily be gleaned from the order and accompanying documents as for example in Area 2, the area to the south/southeast of the residence. The Compliance Order requires Respondent to complete all work pursuant to the attached Restoration Plan, which, inter alia, requires removal of all unauthorized fill up to the Cutler residence and along the ridge to the south of the residence, as shown in the attached diagram. No such clarity is evident as to the north side (Area 1) which does not require removal of fill in accordance with the attached diagram, but merely requires removal of fill placed in wetlands on the north side of the driveway. In her letters, dated May 2, and August 1, 2001, she described fill to be replaced as simply that placed in wetlands since 1992. (findings 49 and 53). However, her explanation of how she arrived at "Fill to be removed" on Exhibit B does not refer to fill placed since 1992 and she acknowledged that she had no measurements on the "north side" (findings 33-37). There is no basis in the Compliance Order for even an inference that "Fill to be removed" on Exhibit B represents fill placed since 1992. This is merely another indication that the upland/wetland demarcation in Area 1 was and is uncertain.

64. Mr. Flowers also attended the October 31, 2000 and the April 30, 2001 meetings at the Cutler site (R. 115). Asked his understanding of any agreement regarding fill on the north side, he did not specifically answer the question, but replied that we were generally discussing where the real upland and the fill ended, trying to find some common ground on where we might begin removal of the fill (Id.). He confirmed Dr. Lium's testimony concerning the presence of a rock outcropping and stated that we looked at this outcropping, trying to make a determination based on aerial photography where the wetland existed. He indicated that they discussed methods to determine if we were successful in removing the fill. Asked whether there was an agreement concerning the line (Dr. Lium had drawn) on Exhibit 29, he again evaded the question, stating that was the general area we were discussing, but that based upon aerial photography and conditions at the site, he did not think it [the dividing line between upland and wetland] would be a straight line (R.116). He explained that they had discussed at the meeting that the [only way] we would really be able to tell [the dividing line] was, if that material were excavated and hydric soil or wetland plants or remnants thereof were found underneath, we would know we needed to go further back in order to get to the true uplands. It bears repeating, however, that Mr. Lium's notes state that today (November 7) in Area 1 Pat Cutler was

beginning to pull the fill "well back from the upland/wetland line" (finding 44). As indicated previously, neither the Restoration Plan nor the attached diagram delineates an upland/wetland boundary on the north side. Moreover, when Ms. Fromm received the photo from Dr. Lium with the black line drawn between the fill and the fence and the query "Does this Line Look OK?" (Exhibit. 29), she did not reject it out of hand, but indicated to Dr. Lium that they needed to meet at the site to discuss the matter further (R.27, 28). At a minimum, this confirms Ms. Fromm's uncertainty as to the location of the upland/wetland boundary in Area 1. Although she discussed Dr. Lium's restoration plan telephonically (a copy was faxed to her on November 7), no such additional on-site meeting occurred.

65. Mr. Lium whose background is in environmental biology and river ecology, testified that, among other things, his firm, American Water Resources, performs construction and enhancement of wetland areas, restoration of river banks, construction of fisheries ponds and that it deals with water rights issues concerning water resources (R. 62, 63). Although he acknowledged that he was not certified in wetland delineation, he stated that he worked with people who were so certified, including Trent Stumph, an employee of his firm, and Messrs. Martinez and Flowers [of the Corps], the latter over the last 14 years. He testified that he could certainly tell the difference between a wetland and an upland (R. 63, 72). Asked whether he could list the factors to be considered in determining wetlands, he replied that it was necessary to look at the types of vegetation, the hydrology and the soils (R. 71). He described the plants necessary for an area to be a wetland as "hydric" and asserted that he could recognize the great majority of such plants. He testified that for the most part plants associated with wetlands on the Cutler property were sedges and that these were identifiable by the fact that the plants had triangular stems as opposed to round stems (R. 71, 72). The fact that most of the wetland plants on the Cutler property were sedges appears to have been confirmed by Mr. Martinez and Mr. Flowers (findings 7, 25, and 31). See also Attachment 1 to the Compliance Order which lists sedges as among native herbaceous wetland vegetation and native emergent wetland plants. The ALJ ruled that Mr. Lium had sufficient experience with wetlands to give his opinion under the circumstances present here, and he answered the question as to how he made the determination as to the wetland/upland line in Area 1 shown on the drawing, page 2 of Exhibit C (R. 77). He testified that this is a case where he truly did understand that it was primarily sedges that we are dealing with in these wetland areas to the north and south of the Cutler home (Id.). He reiterated that sedges have triangular stems while upland plants, to the best of his knowledge, do not have such a stem. The dark, solid colored line on the north side of the drawing (Exhibit C) was the part that he determined were wetlands in Area 1 (R.78). He was of the belief that Mr. Cutler had removed the [fill] in that area

66. Mr. John Olson, a wetlands ecologist employed by EPA stationed in Boise, Idaho, was accepted as expert in that field (Tr. 223-25). He described his responsibilities as primarily the management of EPA's wetland protection program in the State of Idaho. He was familiar with the Cutler property, having been informed of unauthorized work on the property in early 1992 by the Corps and having visited the property in April, 1992 (Tr. 226). Since that time he has observed the site on an irregular basis from the roads. He

described wetland vegetation on the Cutler property as basically two different types of plant communities, one an emergent wetland community made up of wetland plants that are grasses or grass-like herbaceous species, and the other what he called "a scrub, shrub community", which in this case consisted mostly of willows (Tr. 227-28). He drew a line in black ink around the approximate area of wetlands adjacent to Meadow Creek north of Highway 21 and between Highway 21 and road over Meadow Creek leading to the Cutler [residence] on the 1998 photo of the area (Exhibit 10-Olson). He marked with the letter "S" an area to the east/southeast of the Cutler home between the east and west channels of Meadow Creek to designate the scrub/shrub community and with the letters "EM" an area south and east of the Cutler home between the west channel of Meadow Creek and the building pad, signifying an emergent wetland plant community (Exhibit 10-Olson). He testified that these wetland areas were adjacent to and hydrologically connected to Meadow Creek (Tr. 230).

67. Mr. Olson opined that the fill placed by Mr. Cutler in wetlands as shown in the EPA Administrative Order caused significant environmental harm (Tr. 231). Testifying as to the importance of wetlands, he stated that Idaho was a semiarid State and he estimated that wetlands occupy approximately 0.7 percent of the total land surface (Tr. 238-39). He pointed out that one of the most important functions of wetlands is to protect water quality and that [when] fill material is placed in wetlands it completely eliminates the wetland plant community and the functions that plant community provides (Tr. 231-32). He explained that wetlands protect water quality in a number of ways such as by acting as physical filters to remove sand, dirt, mud, and nutrients from the water before it reaches flowing streams (Tr. 232-33). He stated that in Idaho most of the precipitation occurs as snowfall and that wetlands perform the same filtering function as water returns to the streams after snow melt causes streams to overflow their banks. He also noted that, being heavily vegetated, wetlands prevent the ground from being eroded.

68. Another function of wetlands described by Mr. Olson is to provide habitat for wild life such as song birds, small animals, amphibians, and invertebrate insects, which are a food source for aquatic life (Tr. 234). With respect to restoration of disturbed areas (areas where fill had been removed), he pointed out that the Stanley area was a little over 6,000 feet above sea level in elevation, that this made for a very short growing season and that it was difficult for wetland plants to become established and to grow and repopulate the area (Tr. 235-36). He estimated that in the Stanley area, it would take a minimum of three years to know whether the effort to restore plants would be successful (Tr. 236-37). Under cross-examination, he acknowledged that there was a large acreage of wetlands along Valley [Meadow] Creek upstream of the Cutler property [south of Highway 21] (Tr. 240; Exhibit 2). He, nevertheless, maintained that the wetlands [on the Cutler property] were very important to the aquatic ecosystem of Meadow Creek.

69. Mr. David Arthaud, a fisheries biologist employed by the National Marine Fisheries Service, was accepted as an expert in fisheries biology (Tr. 250-51). He described himself as a "consultation biologist", meaning that he basically deals with Endangered Species Act

compliance and permitting. He is familiar with the Stanley, Idaho area through hunting, touring and managing the fish population in the area for the Shoshone Bannock Tribes by whom he was employed for six years. He is familiar with the location of the Cutler property having stayed in lodges in Stanley and having looked over habitat in the valley numerous times. He marked on a copy of the 1998 photo with a circle and a C the location of the culvert where Meadow Creek flows under Highway 21 northward, he marked the location where Meadow Creek flows into Goat Creek, which in turn flows into Valley Creek, which flows eastward toward the Salmon River (Tr. 253-54, 259; Exhibit 10-Arthaud). He continued that the Salmon River flows into the Snake River, that the Snake River flows into the Columbia River and the Columbia River flows into the Pacific Ocean.

70. Mr. Arthaud purported to identify the fish species of Meadow Creek as mostly white trout or white fish, cutthroat trout or bull trout (Tr. 254-55). He was not, however, referring to Meadow Creek for he continued :"There is also anadromous summer chinook salmon, summer steelhead and sockeye salmon [which] move past the mouth of Valley Creek in the main stem Salmon [River] and may come into Valley Creek."(Id.). It will be recalled that the NMFS letter to the District Engineer, dated December 23, 1999, reporting that an NMFS employee had witnessed the filling of wetlands adjacent to Highway 21 on Mr. Cutler's property, describes the wetlands filled as "adjacent to Valley Creek" and makes no mention of Meadow Creek (findings 23 and 24).[29] He explained that all of these fish are listed under the Endangered Species Act, the sockeye salmon being designated as endangered, while the other species were listed as threatened. He testified that Meadow Creek above, through, and downstream from the Cutler property was designated "critical habitat" for these fish under the Endangered Species Act as is Goat Creek, Valley Creek and, in fact, all the head waters of the upper Salmon [River]. However, this testimony is inaccurate because the critical habitat designation excludes tributaries of Valley Creek. The regulation, 58 Fed. Reg. 68543 (December 28, 1993), cited in the NMFS letter to the District Engineer, dated December 23, 1999 (findings 23 and 24), in referring to designated habitat for Snake River sockeye salmon specifically mentions that portion of Valley Creek between Stanley Lake Creek and the Salmon River, while in contrast, designated habitat for the spring/summer chinook salmon includes all tributaries of the Snake and Salmon Rivers with specified exceptions not applicable here.[30] The specific

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[29] Id. On cross-examination, Mr. Arthaud acknowledged that he has never personally seen a fish in Meadow Creek, but that, instead, he has relied on reports from the Idaho Fish and Game [Department] of anadromous fish having been observed in Meadow Creek within the last ten years (Tr. 266-67). While he noted that the number was "not a lot", he stated that it was more than a "handful" and that the number varied from year to year.

[30] (Tr. 257). The preamble to the cited regulation, after stating that NMFS is designating critical habitat for the Snake River sockeye salmon; Snake River spring/summer chinook salmon and Snake River fall chinook salmon, describes the habitat as follows: **The designated habitat**

(continued...)

reference to Valley Creek in the designation of critical habitat for sockeye salmon with no mention of tributaries by implication excludes from the designation tributaries of Valley Creek, because all tributaries of the Snake and Salmon Rivers are referenced in the designation of critical habitat for spring/summer chinook salmon, which would includes Valley Creek, but excludes tributaries thereof. This conclusion is supported by the NMFS letter (finding 23), which states, inter alia, that Valley Creek is designated as critical habitat for Snake River spring/summer chinook salmon and proposed critical habitat for Snake River steelhead. This may explain why NMFS asserts that wetlands on the Cutler property are adjacent to Valley Creek rather than tributaries thereof. Referring specifically to Meadow Creek, however, Mr. Arthaud indicated that it has roughly two miles of open habitat for anadromous fisheries and that the habitat is different below [north] of Highway 21, than it is above (Tr. 258). He attributed this difference to its close proximity to Valley Creek and Goat Creek and to the fact the stream becomes smaller south of the highway. There may, of course, be habitat for anadromous fisheries without that habitat being designated as critical. In any event, the area filled on the Cutler property-- one-half acre at the most, not all of which was adjacent to Meadow Creek-- pales in comparison to the two miles of open habitat referred to by Mr. Arthaud.

71. Mr. Arthaud was familiar with Exhibit B, the drawing which Complainant alleges shows fill placed in wetlands by Respondent (Tr. 259). Although he had not physically inspected, in the sense of walking, the Cutler property or Meadow Creek where it passes through the Cutler property, he had observed from Highway 21 the fill allegedly placed by Mr. Cutler (Tr. 260-62). He opined that the impact of the fill on the fisheries habitat of Meadow Creek was significant and that the fill caused significant harm. He explained that wetlands perform certain functions for the stream, e.g., stabilizing banks, helping to shade the water and providing cover and habitat for the fish (Tr. 263). He stated that placing fill in wetlands can affect a number of things including soil structure, vegetation and hydrology of the stream. He pointed out that the fill can destroy the vegetation which is used by invertebrates, insects which are forage for the fish. He added that sediment, if it reaches the stream, can cause harm to the fish, e.g, by covering incubating eggs with fine material.

72. Sharon K. Cutler is the wife of Donald Cutler, the Respondent in this proceeding (R. 110). Concerning the re-vegetation efforts in the Area 2, south and east of her residence, she testified that she did the watering [in the summer of 2001], watering the upper part of

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[30](...continued)
for Snake River sockeye salmon consists of river reaches of the Columbia, Snake and Salmon Rivers, Alturas Lake Creek, **and that portion of Valley Creek between Stanley Lake Creek and the Salmon River;** and Stanley, Redfish, Yellow Belly, Pettit, and Alturas Lakes (including their inlet and outlet creeks). The designated habitat for Snake River spring/summer chinook salmon consists of river reaches of the Columbia, Snake and Salmon Rivers and all tributaries of the Snake and Salmon Rivers with specified exceptions. 58 FR 68543 et seq. (December 28, 1993).

the slope almost every day when she was home (R. 111). She stated that the upper part had come out real well, but that the lower part had not. She asserted, however, that she had re-seeded parts of the lower area, put straw over parts of it and did her best. A schedule maintained by Mrs. Cutler is in evidence (R's Exhibit N). The schedule covers the period August 7, 2001, through October 7, 2001, and principally shows the number of hours spent watering on each day that watering occurred during that period, which was almost every day during August and a lesser number of days in September. The schedule reflects that no watering occurred on five days in September when it rained. The schedule also reflects that on August 7 parts of the "lower hill" were re-seeded and that bulbs were planted in wetlands on August 12. Mr. Cutler confirmed that they had re-seeded and planted some "plugs" on the slope to the southeast of his house (R. 103, 105). While he testified that the plugs had all grown as far as he knew, he noted that the summer of 2001 had been unusually cold, with the temperature [dipping] into the 20's every night, which did not allow much of a growing season (R. 104, 107). He testified that it was his understanding that they could wait and see how the vegetation was coming back on its own in the spring [before doing any extensive work] (R. 103, 109). He opined that, considering the cold weather, the vegetation was coming back real well. On cross-examination, however, he acknowledged, that they did not begin additional re-vegetation efforts [following Mr. Lium's suggestions] until EPA filed its Motion to Reopen the Hearing (R. 109).

73. Mr. Cutler was 69 years of age at the time of the initial hearing in March, 2001, and his wife, Sharon was 63 (Tr. 348). Mr. Cutler is and has been engaged in the excavation business for over 30 years (Joint Prehearing Stipulations). Because of weather conditions, the construction season is limited to approximately six months of the year in the Stanley area (Id). Normally, he plows snow with his equipment and maintains or is employed at a snowmobile repair shop in Stanley in the wintertime (Tr. 415). He testified, however, that there was no snow to plow or snowmobiles coming through the area during the [past] winter [i.e., the winter of 2000-01] (Tr. 462-63). Mr. Cutler stated that, although he had lived in that vicinity since 1973, he had never seen a fish in Meadow Creek. While it is not clear whether he had personally seen salmon in Valley Creek or merely been informed of their existence, he acknowledged that salmon appeared in Valley Creek about every year (Tr. 400-01, 458-59).

74. The Cutlers' federal income tax returns for the calendar years 1997, 1998, 1999 and 2000 are in evidence (R's Exhibits G, H, I; C's Exhibit 28). These returns show gross income from the excavation/construction business of $132, 915 in 1997, $140,638 in 1998, $63, 241 in 1999, and $142,550 in 2000. The returns show an operating loss of $5,675 and a negative adjusted gross income of $2,870 in 1997; and an operating loss of $27,254 and a negative adjusted gross income of $ 24,360 in 1999 (R's Exhibits G and I). The return for the year 1998 showed an operating profit of $12,097 and an adjusted gross income of $6,636; the return for 2000 showed an operating profit of $12,292 and an adjusted gross income of $12,682. Adjusted gross income for the year 2000 is as high as it is only because of a capital gain of $27,037 attributable to the sale of two trailers, representing the recapture of accelerated depreciation. This gain offset almost all of the operating loss

carryover of $27,254. Mr. Cutler testified that his [gross] income from the excavation business was down in 1999 because he thought he had sold the business to his son and daughter (Tr. 352-53; 365). He explained that the purchase price was $340,000, but that there was never a formal contract of sale and that he received payments of $4,000 a month for three or four months (Tr. 416-17). He further testified that he helped his son in doing the work, that his son did a good job, but that his son did not want the responsibility and so he (Cutler) took it back (Tr. 353-54, 416).

75. As indicated previously, the Cutler property is partially in the City of Stanley and partially in Custer County (the residence is in Custer County). The property is valued at approximately $150,000 and is free and clear of encumbrances (Joint Prehearing Stipulations; (Tr. 350-51)). The Cutlers also own a house and lot in Bellevue, Idaho [south of Sun Valley], upon which they owe $150,000 and which is valued at approximately $200,000 (Tr. 354). Mr. Cutler testified that he had purchased that lot close to 20 years ago, because he thought it was a good buy at the time, we [he and his wife] were from that area and they wanted a place to move back to when he retired (Tr. 352). He placed a manufactured house on the lot in 1999, incurring an encumbrance of $150,000, when he thought he had sold his business to his son and daughter (Tr. 353-54, 365, 368). The payments on the mortgage, which are $1,411.92 a month, were current at the time of the initial hearing. The Cutlers' Federal income tax return for 2000 shows a deduction of $12,068 for mortgage interest on Schedule C, Profit or Loss from Business or Profession (C's Exhibit 28). On cross-examination, Mr. Cutler affirmed that he had deducted $12,000 in interest on the Bellevue property as a business expense on his Federal income tax return for the year 2000 (Tr. 425). He asserted, however, that he had taken it [information as to interest paid] to the tax people (CPA firm), who prepared his tax returns. While it seems unlikely that the house would remain vacant, there is no evidence that the Bellevue property was rented or attempted to be rented so as to produce any income.

76. Mr. Cutler testified that he maintained two checking accounts which as of the date of the initial hearing had combined [balances] of less than $1,000 and that he had no saving accounts (Tr. 350-51). His only retirement program is social security. He indicated that when he retired he hoped to be able to sell his business and use that money for retirement. He testified that in 1999 he purchased a new John Deere loader (backhoe), because the other one rolled off a hillside and was totaled (Tr. 355). He explained that he could not operate his business without a loader. He stated that he was able to finance the purchase through John Deere, that the payments were $1,864 a month and that he owed 67 payments which total $124,888 (Tr. 356-57). Additionally, Mr. Cutler testified that he owed money on a Cat "skid steer", 13 payments of $524 a month or $6,812 (Tr. 357-58, 359). Asked where he was going to get the money to make these payments, he replied that he hoped to be able to borrow enough money from the bank (First Bank of Idaho) to make it for a month or two (Tr. 359-60).

77. It appears that mortgage and equipment payments were current at the time of the initial hearing, because Mr. Cutler had sold two trailers for a net gain of $27,037 in 2000 (Tr.

361). This sum is reflected on the Cutlers' 2000 Federal income tax return under sales of business property (Exhibit. 28). Mr. Cutler testified that the money was spent over the winter in making payments. Asked whether there was any other equipment he could sell, he replied in the negative except for possibly one truck which he estimated was worth $15,000. (Tr. 362-63). He explained that this truck was no longer licensed because the State of Idaho had raised the fees so high that he could not afford to license it (Tr.363-64). He testified that he needed all of his other equipment "to do the jobs up there", i.e., to operate his business (Id.).

78. In 2000, Sharon Cutler received over $27,000 as her share of the estate of her mother, Mollie Fender (Tr. 369). Although this money was Mrs. Cutler's separate property, it was put into the business and spent. The Cutlers' 2000 income tax return reflects over $5,700 in interest and dividends attributable to the Mollie Fender Estate. Mr. Cutler testified that he did not have the money to pay the penalty of $25,000 demanded by Complainant and that he could not pay the penalty and continue in business (Tr. 374). He denied obtaining any economic benefit from the fill he placed to the east of his house in 1999 (Tr. 370-71). He stated that, although he did not know what it cost to put the fill in, it cost him $5,200 to take it out. This figure is basically what he would have billed had he been doing work for someone else, in other words an estimate of his time and equipment cost (Tr. 371, 440-41). Although he acknowledged that this fill was removed near the end of the construction season, he maintained that he turned down other jobs in order to remove this fill.

79. Ms. Beatrice Carpenter, a financial analyst for EPA, who has a degree in accounting and whose experience includes 32 and a half years working with financial matters for the IRS, authored a report, dated March 2, 2001, concerning Donald Cutler's ability to pay the $25,000 penalty sought by Complainant (Tr. 279-80; C's Exhibit 25). She opined that based on the information received to date, it appeared that Mr. Cutler would be able to pay the penalty by obtaining a loan, withdrawal of savings, sale of assets or some combination of these sources (Exhibit 25). In the final paragraph of her report, she expanded on the sources of funds Mr. Cutler could use to pay the penalty, asserting that he could pay the penalty by current business earnings, obtaining a loan, withdrawing savings, sale of assets or payment of income over a couple of years. A review of the Cutlers' Federal tax returns in the record shows that the business is only modestly profitable at best (finding 69) and refutes the notion that the penalty could be paid from current business earnings. The returns make it evident that Mr. Cutler could not make substantial payments on a penalty and have any money left to operate his business or for personal living expenses.[31]

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[31] Idaho Code Title 11 is entitled "Enforcement of Judgments in Civil Actions" and Chapter 6 concerns "Exemption Of Property From Attachment or Levy". Section 11-604 is entitled "Property exempt to extent reasonably necessary for support" and provides in pertinent

(continued...)

80. Because Mr. Cutler had borrowed over $250,000 in the past year, which, according to Ms. Carpenter, he could not have done without substantial assurance of repayment, she concluded that he could borrow the money to pay the penalty. She acknowledged, however, that the principal security on the $100,000 borrowed in purchasing the John Deere loader was the equipment itself, i.e., the fact that it was purchased on a conditional sales contract and title had not passed (Tr. 343-44). The same conclusion applies to the Bellevue property where the $150,000 loan is secured by a mortgage on the property. This is not analogous to a dead expenditure like the payment of a penalty upon which no security is possible and which has no possibility of a return. Moreover, Complainant's contention that Mr. Cutler could borrow the money to pay the penalty is in effect an acknowledgment that he does not currently have the money to pay it and, the fact that Mr. Cutler has borrowed over $250,000 in the past year more likely means that his borrowing capacity is used up rather than that he has additional such capacity. The fact is that the Cutlers have no reliable or steady source of income other than the uncertain construction business and it is unlikely that any lending institution would lend the money to pay a $25,000 penalty, notwithstanding Mr. Cutler's good credit rating.

81. The Cutlers have no savings. The interest and dividends shown on their Federal income tax return for the year 2000 are, with the possible exception of $200, attributable to the estate of Mollie Fender, Mrs. Cutler's mother, which is in no sense Mr. Cutler's. In any event, this money has been put into the business and spent (finding 78). With the possible exception of one truck, which is not licensed and which has an estimated value of $15,000, Mr. Cutler has no equipment he could sell to pay the penalty and continue in business (finding 77). If this truck were sold, the proceeds would of necessity, be used to make the substantial payments due for equipment let alone the mortgage on the Bellevue property. I find that Mr. Cutler does not have the ability to pay a $25,000 penalty.[32]

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[31](...continued)
part: (1) An individual is entitled to exemption of the following property to the extent reasonably necessary for the support of him and his dependents;...Section 11-604 (2) provides that the phrase 'property to the extent reasonably necessary for the support of him and his dependents' means property required to meet the present and anticipated needs of the individual and his dependents, as determined by the court after consideration of the individual's responsibilities and all the present and anticipated property and income of the individual including that which is exempt. Additionally, Idaho Code § 55-1003-is entitled "Homestead exemption limited" and provides that "A homestead consists of lands, as described in section 55-1001, Idaho Code, regardless of area, but the homestead exemption shall not exceed the lesser of (i) the total net value of the lands, mobile home, and improvements as described in section 55-1001, Idaho Code; or (ii) the sum of fifty thousand dollars ($50,000).

[32] Complainant alleges that the Cutlers' net income is larger than the tax returns show (Post-Hearing Brief at 21).Pointing to the "Cash Flow From Business Activity"tabulation
(continued...)

Conclusions

1. Respondent has admitted and the evidence establishes that there are wetlands on his property. These wetlands are adjacent to creeks which are tributaries of Valley Creek, which, in turn, is a tributary of the Salmon River and thus, the wetlands are "waters of the United States" within the meaning of CWA §§ 502(7), 402, and 404 and Corps and EPA regulations; 33 C.F.R. § 328.3 and 40 C.F.R. §§122.2, 230.2(s) and 232.2. Therefore, to the extent Respondent placed fill from a point source into wetlands on his property without a permit from the Corps of Engineers pursuant to Section 404 of the Act, he violated Section 301(a) of the Act, which makes unlawful the discharge of a pollutant into waters of the United States without such a permit.

2. The statute of limitations (28 U.S.C. § 2462), which is applicable to administrative as well as judicial actions or proceedings for the enforcement of civil penalties, clearly precludes the assessment of a penalty for violations by Respondent in placing fill into wetlands on his property without a permit from the Corps of Engineers which were discovered and resolved to the satisfaction of the Corps by removal of the illegal fill more than five years prior to the issuance of the complaint. [33] Moreover, such violations are not to be considered in determining Respondent's "prior history of such violations" for penalty calculation purposes pursuant to CWA § 309(g)(3),[34] because general Agency policy limits consideration of prior violations for

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[32](...continued)
prepared by Ms. Carpenter (Exhibit 25, Appendix), Complainant asserts that once depreciation on equipment is added back his net earnings jumped significantly. The mentioned tabulation, computed by adding Schedule C Business Income (Loss), Gains on Sales of Business Property and Depreciation [as reported] on Schedule C shows what is stated to be "Cash Flow from Business" of $59,967 in 1997, $60,464 in 1998, $35,463 in 1999 and $19,581 in 2000. Adjusting these figures to account for additional assets (equipment) purchased results in "Net Cash Flow from Business" of $12, 663 in 1997,$ 63,942 in 1998, $3,458 in 1999 and a negative ($52,706) in 2000. While "cash flow" is a recognized item in business financial statements and useful in evaluating the worth of a company, the picture of Mr. Cutler's financial condition Complainant is attempting to depict is inaccurate for at least two reasons. Firstly, the Internal Revenue Code specifically allows a reasonable deduction for depreciation and obsolescence (26 U.S.C. § 167) and there can be no doubt that depreciation is a legitimate expense of doing business. Secondly, "cash flow"is not the same as available cash. While depreciation may shield income from taxation, if that money is used for other purposes, it is not available for the payment of penalties, and, of course, the equipment which earned the depreciation will eventually need to be replaced.

[33] The statute of limitations, 28 U.S.C.§ 2462, provides in pertinent part: "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise shall not be entertained unless commenced within five years from the date when the claim first accrued . . ."

[34] Section 309(g)(3) of the CWA is entitled "Determining amount" and provides in
(continued...)

penalty enhancement purposes to those occurring within five years from the instant violation. Although the complaint was amended at the hearing to enlarge the area of alleged illegal fill placed by Respondent and Complainant now contends that fill placed in wetlands by Respondent along his north property line since 1992 should be removed, the location of the upland/wetland demarcation in that area is uncertain and Complainant has not carried its burden of demonstrating with sufficient clarity "fill placed since 1992". Under these circumstances, Complainant's contention that the alleged illegal fill constitutes a "continuing violation", tolling the running of the statute of limitations, is erroneous and is rejected.

3. Because the penalty proposed by Complainant pursuant to Section 309(g)(3) of the Act for Respondent's actions in placing fill into wetlands on his property without a permit from the Corps of Engineers, exaggerates the extent and gravity of the violations, improperly considered violations which were resolved more than five years previously, insufficiently accounted for Respondent's efforts in removing unauthorized fill and re-vegetation efforts and exceeded Respondent's ability to pay, the proposed penalty is excessive and is not accepted.

4. An appropriate penalty is the sum of $1,250.

Discussion

I. Jurisdiction

CWA § 402(a)(1) authorizes the issuance of permits for discharges of pollutants into navigable waters and § 404(a) authorizes the issuance of permits for discharge of dredged or fill material into navigable waters at specified disposal sites.[35] Section 502(7) of the Act provides: (t)he term "navigable waters" means waters of the United States, including the territorial seas. Regulations issued by the Corps of Engineers, 33 C.F.R.§ 328.3 (a), define "waters of the United States" as including:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

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

[35] CWA § 502 (6) provides in part: (t)he term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agriculture waste discharged into water....

(3) All other waters, such as interstate lakes, rivers, streams (including intermittant streams), mudflats, sandflats, **wetlands**, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could effect interstate or foreign commerce including any such waters:.....[36]

* * * *

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;

* * * *

(7) *Wetlands* adjacent to waters (other than waters that are themselves *wetlands)* identified in paragraphs (a)(1)-(6) of this section.

EPA regulations, 40 C.F.R. §§ 230.3(s) and 232.2, are identical with the exception of paragraph numbering. The term *adjacent* for the purpose of the definition of *wetlands* in 33 C.F.R.§ 328.3(a)(7) supra, and the corresponding EPA regulation, means "bordering, contiguous, or neighboring" (supra, note 10).

In his answer to the complaint, Respondent admitted that there were wetlands on unspecified portions of his property. Additionally, the record shows that there are wetlands to the south, east and north of the Cutler residence (findings 4, 7 and 16). Mr. Olson testified that wetlands [to the south and east of the Cutler residence] are adjacent to and hydrologically connected to Meadow Creek (finding 66). Because these wetlands border on, if they are not contiguous to, Meadow Creek, they are within the quoted definition of "adjacent"and Mr. Olson's testimony is accepted as accurate. This conclusion is significant only because Meadow Creek is a tributary of Goat Creek, which in turn is a tributary of Valley Creek. Wetlands to the north of the Cutler house border on, if they are not contiguous to, Goat Creek, which is to the north of the building pad and the Cutler property and thus the mentioned wetlands are "adjacent" to Goat Creek within the regulatory definition of that term. Meadow Creek flows through a portion of the Cutler property to the south and east of the present Cutler home and into Goat Creek. Goat Creek in turn flows into Valley Creek which flows into the Salmon River and through the Snake and Columbia Rivers ultimately into the Pacific Ocean.

According to the NMFS, wetlands on the Cutler property are adjacent to Valley Creek and Valley Creek is the primary water body affected by the fill placed into wetlands by Mr. Cutler (finding 23). Valley Creek does not border on and is not contiguous to the Cutler property or the wetlands thereon. The regulatory definition of "adjacent" includes "neighboring" and among the definitions of neighboring is "relatively near".[37] Because portions of Valley Creek are shown on aerial photos of the area (findings), it is arguable that the wetlands on the

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[36] Section 328.3(a)(3) is not applicable because that section has been determined to exceed the authority of the COE under the CWA and to be invalid in its entirety. United States v, Wilson, 133 F.3d 251 (4th Cir. 1997).

[37] Webster's Third New International Dictionary (1971).

Cutler property are "relatively near" Valley Creek, notwithstanding that there is no evidence in the record of the distance from the Cutler property or the wetlands thereon to Valley Creek. Jurisdiction, of course, does not depend on whether wetlands on the Cutler property are "relatively near" Valley Creek, because the wetlands are adjacent to Meadow and Goat Creeks, the former a tributary of Goat Creek, the latter a tributary of Valley Creek, which in turn is a tributary of the Salmon River. "Tributary" is not defined in the regulation. The long standing meaning of the term, however, is that a "tributary is any stream flowing directly or indirectly into a river."[38] Accordingly, wetlands on Respondent's property are adjacent to waters identified in paragraphs (a)(1)-(6) of this section (§ 328.3(a)(7)), which are tributaries of waters identified in paragraphs (a)(1)-(4) of this section (§ 328.3(a)(5)) and thus of "(a)ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce...(§ 328.3(a)(1), i.e., the Salmon River. Therefore, Respondent's action in placing fill into wetlands on his property without a permit from the Corps of Engineers pursuant to § 404 violated § 301(a), which makes unlawful the discharge of a pollutant into from a point source into [waters of the United States] without such a permit.[39] It follows that EPA has jurisdiction to institute this proceeding for a civil penalty pursuant to § 309(g)(1)(A) of the Act.

II. Determination of Penalty- Nature, Circumstances, Extent and Gravity of Violation

As noted at the outset of this decision, the complaint is not specific as to the wetlands allegedly filled by Respondent, merely alleging that from at least 1995 to the present Respondent, or someone acting on his behalf, discharged dredged and/or fill materials into wetlands north and south of his house covering approximately 0.1 acres. Based on indications that Mr. Cutler had placed fill into wetlands without a permit in Areas C and D to the north and west of where the his house was subsequently constructed, in addition to Areas A and B also north of the Cutler house, the complaint was amended at the hearing to allege that unauthorized fill had been placed in 0.3 to 0.5 acres of wetlands (note 14, supra). The record reveals that the initial fill to the east of the present Cutler residence was placed sometime in 1991 as part of Mr. Cutler's efforts to install a culvert in the west channel of Meadow Creek, the east channel having been blocked or partially blocked, to enable the Cutlers to cross Meadow Creek and access their property from the east. Although the dimensions of the steel culvert were 30' by 64'' in diameter, there is no evidence of the number of cubic yards of unauthorized fill placed by Mr Cutler in connection with this effort. Complainant points out that the necessity for the Cutlers to access their property from the east and to cross Meadow Creek arose because they sold the front half of their property [fronting on Highway 21] leaving them no access to their home and business (Response to Respondent's Post-Hearing Brief at 13). The implication, of course, being that the Cutlers were somehow blameworthy and that the predicament in which they found

[38] Black's Law Dictionary, Third Edition (1933).

[39] There is no dispute that Respondent's placement [discharges] of fill material into wetlands on his property were from loaders, backhoes, excavators or similar equipment which are point sources as any "discernible, confined and discrete conveyance" (§ 502(14)).

themselves is of their own making. However, Mr. Cutler should not be punished for failing to anticipate that the purchaser would deny the Cutlers permission to drive across his (the purchaser's) property. In any event, this violation was resolved to the satisfaction of the Corps when Mr. Cutler removed the culvert and the unauthorized fill and constructed an access road and bridge across Meadow Creek under a permit issued by the COE in July 1993. As noted infra, this violation is too remote in time and is not for consideration in determining Respondent's "prior history of such violations" for penalty computation purposes under CWA § 309(g)(3).

The next alleged violation is Mr. Cutler's failure to install permanent erosion control in the channel of Meadow Creek as purportedly required by Paragraph 11of the Special Conditions of the permit. The record shows that in constructing the driveway and bridge Mr. Cutler placed hay bales across the channel, an option permitted by the mentioned Special Condition, but he did not understand how long the bales were to remain in place and removed the bales once the work was completed (finding 21). As found supra, however, Paragraph 11 is ambiguous as to whether the bales were to be temporary or permanent and it is not clear that Mr. Cutler violated the permit when he removed the bales (findings 13, 20 and 21). The Corps appears to acknowledge some difficulty with the clarity of the requirement for permanent erosion control, because the Field Investigation Report, the only such document in the record written by the Corps describing this alleged violation, refers to the failure to install permanent erosion control as required by Special Condition No.11 and "as directed by Corps personnel" (finding 20). In any event, this alleged violation was resolved when the permit was modified to allow Mr. Cutler to place filter fabric and riprap "over the exposed fill face" (findings 20 and 21) and, for the reasons noted infra, will not be considered in determining a penalty.

The next violation is Mr. Cutler's placement of fill into a triangular area approximately 30' to 40' wide by 60' to 80' long on the upstream (south) side of the west bridge abutment (finding 15). This area was apparently filled sometime in 1994 and is sometimes referred to as a "mosquito" hole. This unauthorized fill was removed to the satisfaction of the Corps in late August or early September 1994 under a cease and desist order (finding 19). In April of 1995, the District Engineer granted the Cutlers' request to modify the 1995 permit by the discharge of fill material into 0.009 acres of wetlands immediately adjacent to the south side of the west abutment of their driveway bridge (finding 22). The area authorized to be filled by the modification is a triangular area measuring 19' by 39' and thus, is less than half the size of the area Mr. Cutler had filled and then been ordered to remove (finding 15). The seriousness of this violation is, however, tempered by the fact that, in addition to its small size, the area filled is immediately adjacent to, and may have included part of, the west channel of Meadow Creek which is labeled "channel to be abandoned and planted with wetland and riparian vegetation" on the drawing accompanying the initial permit issued in 1993. Moreover, this channel was expressly authorized to be filled by the 1995 permit modification (finding 22). Once more, however, this is a violation which was resolved to the satisfaction of the Corps more than five years prior to the issuance of the complaint and is too remote in time to be considered in determining the penalty.

The next violation alleged by Complainant occurred in November of 1999 when an employee of NMFS observed the placing of fill into wetlands adjacent to Highway 21 on the Cutler property (findings 23 and 24). The record shows that this fill was placed to the south and east of the Cutler home because Mr. Cutler intended to expand his yard so as to have a lawn next to his house (findings 26 and 54). Although nothing in the record indicates the depth or volume of this fill, it appears to cover an irregularly shaped area to the east and south of the Cutler house, extending from the south boundary of the Cutler property 171' in a northerly direction to the fill for the Cutler driveway west of the bridge (finding 22, note 8; finding 29). The area of fill measures 53' at its widest part and 27' at its narrowest point next to the fill for the Cutler driveway. The diagram of fill to be removed attached to the Compliance Order appears to extend into the west channel of Meadow Creek and stop at the south end of a triangular area which extends northerly to the fill for the driveway west of the bridge (finding 32). This triangular area is the area Mr. Cutler was allowed to fill under the 1995 permit modification. Ms. Fromm concluded that Mr. Cutler had sufficiently fulfilled the intent of the Order as to [removal of unauthorized fill] in Area 2 (finding 37). Moreover, while it does appear that the Cutlers' efforts to re-vegetate the slope intensified after Complainant filed its motion to reopen the hearing, Mr. Cutler's compliance with the Administrative Order in Area 2 is no longer in issue (finding 53, note 26).

Mr. Cutler is also alleged to have violated the Act when he placed an undetermined amount of fill into wetlands north and west of the area where his residence is presently located without a permit from the Corps. He acknowledged placing fill along the north side of his property probably in 1984 or shortly thereafter (findings 36, 54). Ms. Fromm testified that probably a quarter of Area B as depicted in Exhibit 1-Martinez was included in the Compliance Order as fill to be removed along the north side (finding 39). Moreover, even if the Compliance Order were amended to include removal of fill extending 100' to the Reese property line as Ms. Fromm attempted to do in her letters, dated May 2, and August 1, 2001, fill placed prior to the sale to Mr. Reese, which apparently occurred in 1990, would not be included in fill to be removed (findings 38, 39, and 49). According to Ms. Fromm, the Compliance Order contemplated removal of fill placed since 1992 (finding 49). In view thereof and in view of the fact that the complaint refers to fill placed since 1995, any fill placed prior to 1992 is not at issue herein.

It appears that an undetermined amount of fill north of Mr. Cutler's house was placed sometime after 1992 for the purpose of constructing a driveway and parking area for his vehicles. Notwithstanding Complainant's arguments to the contrary, it is not clear that all of the fill placed along the north side of the Cutler property was placed in wetlands (findings 33-36). Firstly, Ms. Fromm's testimony that photos taken on October 31, 2000, showed wetlands on the other side of the fence line, and that based upon a 1984 photograph, "it is believed" that wetlands are below the fill (finding 41) is hardly a ringing endorsement of the presence of wetlands in that area of the Cutler property. In this regard, Mr. Flowers explained that the determination fill was placed in wetlands north of the Cutler residence was "a desk determination" based on aerial photography (finding 16) and, although she was speaking of Area 2, the area to the south and east of the Cutler residence, Ms. Fromm testified that aerial photos were difficult to interpret

with respect to distance from the house to the beginning of wetlands (finding 37). Secondly, Mr. Martinez opined that Area B which he marked on the 1984 photo along the north property line was not wetlands (finding 36). Although Ms. Fromm estimated that only a quarter of Area B as depicted by Mr. Martinez was included in the Compliance Order as fill to be removed (finding 39), this estimate does not include 100' of additional fill to the property line with Mr. Reese. It will be recalled that the Compliance Order simply required removal of fill placed in wetlands on the north side of the driveway and that the accompanying drawing did not purport to identify an upland/wetland boundary. Such a boundary was marked by Mr. Lium on an annotated copy of Exhibit B (finding 44). The point of the foregoing being that, if the location of the upland/wetland boundary is unclear, the nature, circumstances and extent of the violation must necessarily mitigate the penalty as Mr. Cutler's need for a parking and turn around area for his vehicles is certainly reasonable.

The extent of the violation having been discussed above, it is necessary to address the gravity of the violation. Complainant's evidence in this respect was presented through the testimony of Mr. John Olson, a wetlands ecologist employed by EPA, and Mr. David Arthaud, a fisheries biologist, employed by NMFS. Mr. Olson testified that one of the most important functions of wetlands is to protect water quality and that when fill is placed in wetlands it completely eliminates the wetland plant community and the functions the plant community provides (finding 67). He testified that wetlands on the Cutler property were adjacent to and hydrologically connected to Meadow Creek. and he opined that the fill placed by Mr. Cutler in wetlands as shown in the EPA Administrative Order caused significant environmental harm.

Another important function of wetlands described by Mr. Olson is to provide a habitat for wildlife including invertebrate insects which are a food source for aquatic life (finding 68). Although he acknowledged that there was a large acreage of wetlands along Meadow Creek upstream of the Cutler property (south of Highway 21), he, nevertheless, maintained that the wetlands on the Cutler property were very important to the aquatic ecosystem of Meadow Creek (Id). This testimony can be accepted as accurate without altering the conclusion that Complainant's penalty determination exaggerates the gravity of the violation. This is so because the December 23, 1999 NMFS letter states that the primary water body affected by the unauthorized fill is Valley Creek and it is obvious that fill placed in wetlands adjacent to Meadow Creek has at most an indirect effect on Valley Creek, because Meadow Creek is a tributary of Goat Creek rather than of Valley Creek (finding 23).

Mr. Arthaud, in common with Mr. Cutler, has never personally seen a fish in Meadow Creek (finding 70; note 29). While he referred to reports from the Idaho Fish and Game Department which purportedly stated that anadromous fish had been observed in Meadow Creek within the past ten years, he was clearly referring to Valley Creek rather than Meadow Creek when he identified fish species (finding 70) and it is not clear that the observations reported by the Idaho Fish and Game Department are of Meadow Creek. Be that at it may, his most important testimony, as to the harm or possible harm caused by the unauthorized fill placed by Mr. Cutler, is that Meadow Creek above, through, and downstream from the Cutler property, and, in fact, all of the headwaters of the upper Salmon River, have been designated "critical habitat" for these [anadromous] fish under the ESA . This testimony is inaccurate, however,

because the designation of critical habitat for sockeye salmon and for spring/summer chinook salmon excludes tributaries of Valley Creek (finding 70). This may explain why NMFS found it necessary to assert that wetlands on the Cutler property were adjacent to Valley Creek rather than to Meadow and Goat Creeks (findings 23 and 24).

It is also significant that the mentioned NMFS letter states that Valley Creek is the primary water body effected by this project, i.e., Mr Cutler's unauthorized placement of fill into wetlands on his property. It is, of course, obvious that any such effect is indirect at most, because wetlands on the Cutler property, while they may be adjacent to Valley Creek as "neighboring" under the Corps' regulation (33 C.F.R. § 328.3(a)(7), border on, and are contiguous to Meadow and Goat Creeks rather than Valley Creek (supra, note 10). Mr Arthaud was clearly confused when he identified fish species in Meadow Creek and, even if his testimony that there were roughly two miles of open habitat for anadromous fisheries on Meadow Creek, most of which is south of Highway 21, is accepted, it is difficult to comprehend how fill placed in wetlands on the Cutler property downstream and north of Highway 21 could affect that habitat. In any event, the fill placed by Mr. Cutler, one-half acre at the most, not all of which was adjacent to Meadow Creek, pales in comparison. It is concluded that Complainant's calculation of the penalty exaggerates the gravity of the violation.

III Determination of Penalty-Respect To The Violator-Ability To Pay-Prior History of Such Violations-Degree of Culpability-Economic Benefit or Savings -Other Matters As Justice May Require

Complainant's contention that Mr. Cutler has the ability to pay a $25,000 penalty is based principally upon the report and testimony of financial analyst Beatrice Carpenter (findings 79 and 80). In substance, Ms. Carpenter opined that Mr. Cutler could pay the penalty by current business earnings, obtaining a loan, withdrawal of savings, sale of assets or installment payments over a couple of years. The fact is, however, that Mr. Cutler's business is only modestly profitable at best, his 1997 and 1999 income tax returns showing negative adjusted gross income, his 1998 return shows an adjusted gross income of $6,636 and the return for 2000 showing an adjusted gross income of $12,682. The latter figure is as high as it is only because of a capital gain of just over $27,000 on the sale of two trailers which represented the recapture of accelerated depreciation (finding 77). Mr. Cutler is obligated to make monthly payments totaling $2,388 on equipment, $1,864 on a loader and $524 on a Cat "skid steer", which is essential for the operation of his business (finding 76). Money from the sale of the trailers was used to keep the payments current over the winter. These figures make it evident that Mr. Cutler could not pay the penalty out of current income or make substantial payments thereon and have any money for personal living expenses. The foregoing recitation of monthly payments does not include the payments of over $1,400 a month on the mortgage on the Bellevue property. Moreover, as Respondent points out, Idaho is a community property state, meaning that one-half of the Cutler assets are owned by Mrs. Cutler, who is not a party to this proceeding.

The Cutlers have no savings and Mr. Cutler appears to be "leveraged to the hilt", making it unlikely that he could borrow the money to pay the penalty. While Mr. Cutler indicated that he had one truck, having an estimated value of $15,000, which could possibly be sold, all other equipment he owns or has on hand is essential for the operation of his business. Moreover, the

proceeds of this truck, if sold, would necessarily be used for personal living expenses or payments on equipment as were the proceeds from the sale of the trailers. Complainant emphasizes that while Mr. Cutler testified as to "his alleged penury" and has shown a low reported taxable income, he did not testify that his two homes and a business were his only assets (Response to Respondent's Post Hearing Brief at 5, 6). Additionally, Complainant asserts that because Respondent opposed the Complainant's discovery request, it is questionable whether he has fully disclosed his finances.[40] Complainant's ability to pay determination may not rest on speculation that Mr. Cutler has undisclosed assets and unreported sources of income. Complainant also points to the purported sale of his business to his son and daughter for $340,000 in 1999. While it may well be that the sale to his children was not an "arm's length transaction", there is no evidence of goodwill or work in progress, however, and seemingly the value of the business is the value of the equipment. Some of this equipment, the loader and the Cat "skid steer", is encumbered (finding 76). It is concluded that Mr. Cutler does not have the ability to pay a penalty of $25,000 and remain in business and that the foregoing recitation provides specific facts within the meaning of Robert Wallin, CWA Appeal No. 00-3, 2001 App. LEXIS 8 (EAB 2001), refuting Complainant's preliminary showing in that regard. It is concluded that Mr. Cutler could with great difficulty pay the penalty of $1,250 which is assessed herein.

Statute of Limitations-History of Prior Violations

Relying on the "continuing violation" doctrine, i.e., that the violation continues as long as the unauthorized fill remains in place, Complainant asserts that none of its claims herein are barred by the statute of limitations, 28 U.S.C. § 2462.[41] It is, of course, well settled that 28 U.S.C. § 2462 is inapplicable to actions or proceedings which are remedial in nature rather than penal.[42] It is therefore clear that, while the statute of limitations is no bar to an action by the United States for the removal of illegal fill, the accrual of penalties is penal and subject to the bar created by

[40] Id. Complainant's Motion for Additional Discovery was denied because Respondent had previously supplied a great deal of information concerning his finances and because details as to his living expenses sought by Complainant were regarded as obnoxious and burdensome (Memorandum, dated March 7, 2001).

[41] Supplemental Brief at 8. The record shows that the matter of the statute of limitations was raised sua sponte by the ALJ at the reopened hearing (R. 3). Complainant has not alleged, and the record would not support a finding, that it was prejudiced by this action. This is so, because the language of the complaint as initially written that "since at least 1995 Respondent or persons acting on his behalf have discharged dredged and/or fill material into wetlands..." gave Respondent no reason to believe that violations prior to 1995 were in issue.

[42] See, e.g., Johnson v. Securities and Exchange Commission, 87 F.3d 484 (D.C. Cir.1996) and United States v Telluride Company, 146 F.3d 1241 (10th Cir. 1998).

Section 2462.[43] Complainant also points out that the statute of limitations is an affirmative defense and argues that Respondent waived this defense, because it was not raised in its answer (Id. 9). That principle has no application here, however, because the language of the complaint that "since at least 1995 Respondent and/or persons acting on his behalf discharged dredged and/or fill material into wetlands", the complaint having been filed on August 24, 2000, indicates that violations occurring prior to five years from the filing of the complaint were not intended to be included and gave Respondent no reason to believe that violations occurring more than five years prior to filing the complaint were at issue. While the complaint was amended at the hearing to expand the area of wetlands allegedly filled from 0.1 acre to from 0.3 to 0.5 acres, and Ms. Fromm determined that Mr. Cutler should remove fill placed on the north side of his property since 1992, which presumably means that such fill is the basis in part of the penalty sought, the amendment to the complaint did not refer to fill placed since 1992 and did not refer to the continuing violation doctrine. The Compliance Order was not formally amended. Even if the continuing violation rule were to toll the running of the statute of limitations (28 U.S.C.§ 2462) so that a penalty for the unauthorized placement of fill into wetlands could be assessed as long as the unauthorized fill remained in place, the continuing violation doctrine has no application to violations which were discovered and resolved to the satisfaction of the Corps, i.e., by removal of the unauthorized fill, more than five years prior to the issuance of the complaint. It is therefore clear that no penalty may be assessed for fill placed in wetlands in 1991 in connection with Mr. Cutler's attempt to install a culvert in Meadow Creek, the alleged failure to install permanent erosion control, which has been determined not to be a violation, and his filling of the "mosquito hole" in 1994.

Apart from any question of the application of the statute of limitations to the violations alleged herein, it should be noted that Agency policy generally limits the use of prior violations for penalty enhancement purposes to those occurring within five years of the issuance of the complaint. Although there is no Agency penalty policy specifically applicable to determining penalties under CWA § 309(g), the EAB has indicated that it is, nevertheless, appropriate to refer to the general enforcement policy document- A Framework for Statute-Specific Approaches to Penalty Assessments; Implementing EPA's Policy on Civil Penalties (EPA General Enforcement Policy # GM-22 (February 16, 1984)- for guidance. See, e.g., Robert Wallin, supra. The cited policy document indicates that among points to be considered in determining history of

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[43] It is noteworthy that the United States did not appeal the District Court's holding in United States v, Telluride Co., 804 F. Supp. 404 (D. Colo. 1995), which dismissed the claim for civil penalties, because of the bar created by 28 U.S.C. § 2462. It is recognized that the court in Sasser v. Administrator, EPA, 990 F.2d 127 (4th Cir. 1990) applied the continuing violation doctrine, i.e., each day the pollutant remains in place in wetlands without a permit constitutes an additional day of violation, to refute petitioner's contention that an amendment of the CWA, authorizing the administrative assessment of civil penalties, was an unlawful retroactive application of the amendment. The court did so without analysis, however and, was careful to point out that the administrative complaint charged a continuing violation, which is not the case here.

noncompliance is how recent was the previous violation (Id. 21). The penalty provision in Section 16 of the Toxic Substances Control Act (15 U.S.C. § 2615(a)(2)(B)) is very similar to § 309(g)(3), the penalty provision in the CWA, as both provisions mandate that "with respect to the violator" that "any prior history of such violations" be considered. "Guidelines for the Assessment of Civil Penalties under Section 16 of the Toxic Substances Control Act", 45 Fed. Reg. 59770 et seq. (1980), published well before the D.C. Circuit's landmark decision, 3M Company v. Browner, 17 F.3d 1453 (D.C. Cir.1994), which held that the statute of limitations, 28 U.S.C. § 2462, applied to administrative as well as judicial proceedings, were to the effect that violations occurring more than five years prior to the instant violation were too remote in time to be considered for penalty enhancement purposes (Id. 59774). This policy has been adopted in other TSCA penalty guidelines. See, e.g., Polychlorinated Biphenyls (PCB) Penalty Policy (April 9, 1990) at 16. See also Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (July 2, 1990), Appendix B Footnotes, ¶ 4(b). To the same effect is the Final Penalty Policy For Sections 302, 303, 304, 311 and 312 of the Emergency Planning and Community Right-To-Know Act and Section 103 of the Comprehensive Response, Compensation and Liability Act (1990) at 24 (To be considered a prior violation, the final order, default judgment, or consent decree must have been entered within five (5) years of the present violation). Additionally, see the Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act (oil and hazardous substance pollution) which exclude from prior history adjustments any violations that occurred more than five years prior to the charged violation (Id. 10 and 14). Analogously, the Agency generally does not calculate economic benefit beginning more than five years prior to the time the complaint should have been filed. Interim Clean Water Act Settlement Policy (February 28, 1995) at 5. It is concluded that the same concept is applicable here and that this is an additional reason for disregarding violations which were discovered and resolved more than five years prior to the issuance of the complaint.

Moreover, the fact that violations were remedied, i.e., that the unauthorized fill was removed, operates to mitigate the seriousness of the violation in any event. See, e.g., Britton Construction Co. et al., CWA-Appeal Nos. 97-5 & 97-8, 8 E.A.D. 261 (EAB, 1999). In that case, EPA sought a penalty of $125,000 for the unauthorized placement of fill into approximately 31,000 sq. feet of wetlands, substantially more than involved here which is at most one-half acre. The ALJ, based partly on ability to pay grounds, but primarily on the fact that the removal of the unauthorized fill mitigated the seriousness of the violation, reduced the penalty to $2,000. The EAB upheld that decision.

The next factor which § 309(g)(3) requires be considered in determining a penalty is economic benefit or savings, if any, resulting from the violation. There is no evidence or allegation that Mr. Cutler obtained any savings from the violations, and while it may well be that placement of fill around the Cutler residence enhanced the value of the property, the evidence does not permit a determination of such value. Complainant says that it no longer asserts that Cutler enjoyed an economic benefit so long as he removes the illegal fill placed in wetlands (Response Brief at 2, note 4).This is in keeping with Complainant's contention that the areas of illegal fill are clearly set forth in the Compliance Order or otherwise. As found above and as discussed below, however, this is not the case.

There being no matters requiring consideration as "justice may require", the remaining matter requiring discussion is the "degree of culpability". While Complainant argues that the repeated violations demonstrate that Mr. Cutler is fully culpable and that the full amount of the proposed penalty should be assessed, some of these violations, as we have seen, were discovered and resolved by the removal of the unauthorized fill more than five years prior to the issuance of the complaint, and are thus not to be considered for penalty enhancement purposes. Even if the rule that violations occurring more than five years prior to the issuance of the complaint are too remote to be considered for penalty enhancement purposes is inapplicable, the fact that the violations were remedied by the removal of the unauthorized fill goes a long way to alleviate or mitigate the culpability. See Britton Construction Co., supra, which in several respects is quite similar to the instant case.

Accompanying Respondent's Reply Memorandum, dated July 6, 2001, is a plastic overlay which Respondent says was made by the use of tracing paper on Exhibits 10-Flowers, -Fromm and-Olson and Exhibit 1-Martinez. The overlay shows a large area enclosed in black as wetlands to the south and east of the Cutler residence as the wetlands designated by Mr. Olson. There is, however, no dispute that the area marked by Mr. Olson represents wetlands, except for a narrow band of upland paralleling the Access Road and extending southward to the intersection of the Access Road and Highway 21 and an additional narrow band of upland south, east, north and in close proximity to the Cutler residence (findings 6, 7 and 8). No contention has been made that all of the wetland area delineated by Mr. Olson has been filled. The overlay shows a much smaller area closer to the Cutler residence circled in red designated as wetlands by Ms. Fromm and an area of approximately the same size but whose boundaries do not coincide circled in yellow as wetlands designated by Mr. Flowers. These areas represent areas allegedly filled by Mr. Cutler. On the north side, the largest area, circled in blue, represents wetlands designated by Mr. Martinez; a smaller area, circled in red, represent wetlands designated by Ms. Fromm and a much smaller area, circled in yellow, represents wetlands designated by Mr. Flowers. These allegedly represent wetland areas filled by Mr. Cutler. Respondent argues that, if the experts can't agree on the extent of the wetlands filled, Mr Cutler is to be forgiven, if indeed, he did fill some wetlands (Memorandum at 5). Here, Respondent has removed unauthorized fill from Area 2, the area to the south and east of his residence. Additionally, that area has been re-vegetated and restoration of that area is no longer in issue (finding 53, note 26).

This leaves in contention Area 1, the area north of the Cutler residence and along the property/fence line. The Compliance Order, as we have seen (finding 33), does not require removal of fill in accordance with the attached diagram, but simply requires removal of fill placed in wetlands on the north side of the driveway. Reading the Compliance Order gives no indication that, as subsequently determined by Ms. Fromm, it requires removal of fill placed since 1992 (finding 63). The diagram labeled "fill to be removed" does not designate an upland/wetland line, leaving that matter for inference. Annotations on this drawing by Mr. Lium, however, do designate an upland/wetland boundary and indicate that it is a fraction of the area of fill to be removed as shown on Exhibit B (finding 44). While Complainant attacks Mr. Lium's qualifications to make this determination, pointing out that he is not certified to make wetlands delineations (Supplemental Brief at 6), the fact is that most of the wetlands vegetation on the Cutler property are sedges which are readily identifiable by triangular stems (finding 65). It was

on this basis and Mr. Lium's general familiarity with wetland criteria, that the ALJ ruled he had sufficient experience with wetland vegetation to be qualified to give his opinion under the circumstances present here. Complainant puts great store on Mr. Lium's acknowledgment that some upland plants he observed were in fill material and that he did not dig or bore into the fill to ascertain what was underneath (Id. 7). It should be emphasized, however, that Mr. Flower's initial determination that fill had been placed in wetlands on the north side was a "desk determination" based on aerial photography and an approximation of the wetland boundary (finding 16). Ms. Fromm acknowledged that aerial photographs were more difficult to interpret spect to the beginning of wetlands (finding 36). Moreover, for all that the record shows, however, neither Messrs. Martinez nor Flowers nor Ms. Fromm did any such boring or digging in Area 1 either and, although it is clear that some fill was placed in wetlands, the fact remains that the upland/wetland demarcation in Area 1 is uncertain (finding 61). Under these circumstances, Mr. Cutler's culpability, if any, may not be increased by his failure to remove fill from Area 1 as ordered by Ms. Fromm in her letters of May 2, and August 1, 2001, and orally at the on-site meeting with Mr. Cutler on July 13, 2001. Moreover, Mr. Cutler was advised by his attorney that he did not need to remove fill from areas C and D because these areas were not included in the Compliance Order and, he was advised by his consultant, Mr. Lium, that he should not have to remove any fill that was not properly characterized as wetlands (findings 39 and 57). Mr. Lium determined that wetlands occupied only a small portion of the area represented by "fill to be removed" on the diagram attached to the Compliance Order prepared by Ms. Fromm.

Although Mr. Cutler had some basis for his stated belief that the fill he was placing to the south and east of his residence in the Fall of 1999 was in upland areas rather than wetlands (findings 8 and 54) and a memorandum by Mr. Flowers acknowledges that some of this fill was not regulated (finding 27), his (Cutler's) previous experience with the Corps in obtaining a permit for a bridge and driveway across Meadow Creek and amendment of that permit, while not a basis for penalty enhancement because too remote in time, may not simply be ignored. Moreover, although Meadow Creek is not critical habitat for endangered species of salmon, it is, nevertheless, fisheries habitat and, although Mr. Cutler has mitigated the gravity of the violation by removing the fill and restoring that area, the illegal fill remained in place for approximately one year. The record is clear that some damage to wetlands occurs from any placement of fill therein (findings 67-71, inclusive). Therefore, Respondent's argument that no penalty should be assessed is not accepted and under all the circumstances, it is concluded that a penalty of $1,250 adequately considers the seriousness of the violation, the deterrent effect and Respondent's ability to pay. A penalty of $1,250 is appropriate and will be assessed.

Order

The violation alleged in the complaint having been established, a penalty of $1,250 is assessed against Respondent, Donald Cutler, pursuant to Section 309(g)(1)(A) of the Clean Water Act.[44] Payment of the full amount of the penalty shall be made by sending or delivering a

[44] Unless appealed to the Environmental Appeals Board in accordance with Rule 22.30 (continued...)

cashier's or certified check payable to the Treasurer of the United States to the following address within 60 days of the date of this order:

Regional Hearing Clerk
U.S. EPA,Region 10
P.O. Box 360863M
Pittsburgh, PA 15251-6859

Dated this 31st day of December 2002.

Spencer T. Nissen
Administrative Law Judge

[44](...continued)
(40 C.F.R. Part 22) or unless the EAB decides to review this decision *sua sponte* as therein provided, this decision will become the final order of the EAB and of the Agency in accordance with Rule 22.27(c).