

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of )  
 )  
Smith Farm Enterprises, L.L.C., ) Docket No. CWA-3-2001-0022  
 )  
Respondent )

INITIAL DECISION

By: Carl C. Charneski  
Administrative Law Judge

Issued: May 4, 2005  
Washington, D.C.

Appearances

For Complainant: Stefania D. Shamet, Esq.  
Pamela J. Lazos, Esq.  
Region III  
U.S. Environmental Protection Agency  
Philadelphia, Pennsylvania

For Respondent: Hunter W. Sims, Jr., Esq.  
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Norfolk, Virginia

**I. Statement of the Case**

This is a civil penalty enforcement proceeding brought by the United States Environmental Protection Agency (“EPA”) against Smith Farm Enterprises, L.L.C. (“Smith Farm”), for two violations of the Clean Water Act (“CWA” or “the Act”). 33 U.S.C. § 1251 et seq.<sup>1</sup>

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<sup>1</sup> EPA had also named Vico Construction Corporation (“Vico Construction”) as a co-respondent. Prior to the start of the hearing in this matter, however, EPA and Vico Construction settled the case. A Consent Agreement and Final Order was entered into between these parties and was subsequently signed by the EPA Regional Administrator on October 29, 2004. Accordingly, Vico Construction no longer is a party to this action.

In Count I of its First Amended Complaint, EPA charges that Smith Farm violated Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), by discharging dredged and/or fill material into “wetlands” that are “waters of the United States,” without a permit from the United States Army Corps of Engineers (“the Corps”), issued pursuant to Section 404 of the Act.

33 U.S.C. § 1344. Alternatively, EPA alleges that respondent committed this Section 301(a) violation by discharging pollutants into “wetlands” that are “waters of the United States” without a National Pollutant Discharge Elimination System (“NPDES”) permit, issued pursuant to Section 402 of the Act. 33 U.S.C. § 1342. In Count II, EPA charges that respondent discharged storm water associated with construction activity without a Section 402 NPDES permit in violation of Section 301(a) of the Act. *Id.* EPA seeks civil penalties of \$84,500 for Count I and \$21,000 for Count II, for a total penalty of \$105,500. 33 U.S.C. § 1319(g)(2)(B). *See* Compl. Br. at 108.<sup>2</sup>

Respondent Smith Farm disputes these charges of violation. A hearing was held in this matter on October 6-9, 2003, and October 28-29, 2003, in Virginia Beach, Virginia.<sup>3</sup> For the reasons that follow, it is held that respondent violated Section 301(a) of the Clean Water Act as alleged in Counts I and II. A civil penalty of \$94,000 is assessed for these violations -- *i.e.*, \$80,000 is assessed for the violation in Count I and \$14,000 is assessed for the violation in Count II.

## **II. Findings of Fact**

### **A. The Smith Farm Site**

1. Smith Farm consists of approximately 300 acres, situated in both the City of Chesapeake and the City of Suffolk, Virginia. Tr. 172 (Vol. I), 219-220 (Vol. III). This property is located north of Portsmouth Boulevard (Rt. 237), east of Shoulders Hill Road, and south of Route 17. Stipulation No. 3 (June 13, 2002).<sup>4</sup>

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<sup>2</sup> In the complaint, EPA had sought the maximum statutory civil penalty of \$137,500. The reduced penalty amount presumably reflects, at least in part, EPA’s settlement with Vico Construction. EPA states that its settlement agreement with Vico Construction “involves both the payment of a cash penalty and the performance of certain actions,” to which complainant has assigned a cash value of \$32,000. Compl. Br. at 87. EPA now seeks “the balance” of the penalty amount from Smith Farm. *Id.* Following the submission of complainant’s brief in this case, a “Consent Agreement And Final Order As To Vico Construction Corporation” was signed by the EPA Regional Administrator. This Consent Agreement requires that Vico Construction pay a \$2,000 civil penalty.

<sup>3</sup> EPA’s post-hearing Motion to Conform the Transcript is granted.

<sup>4</sup> The Smith Farm property also includes an 11-acre parcel separate from the 300 acres mentioned above. Tr. 228 (Vol. I). This 11-acre parcel is not involved in this case.

2. At the time of the events in this case, approximately 95.7 acres of the site were under cultivation as cropland, with the remaining acreage being forested. Tr. 171-172 (Vol. V); RX 42.

3. At all relevant times, the portion of the Smith Farm located in the City of Chesapeake has been zoned for agricultural use. The current Land Use Plan for the City of Chesapeake proposes Light Industrial use for this portion of the property. Prior to September, 1999, the portion of Smith Farm located in Suffolk was zoned as R-1 (Low-Medium Density Residential) and M-2 (Heavy Manufacturing). Since September, 1999, the Suffolk portion has been zoned as M-1 (Light Industrial). Stipulations 30, 31, & 32 (September 8, 2003).

4. The Smith Farm site is owned by respondent Smith Farm Enterprises, L.L.C., a family-owned, Virginia limited liability company that was created to oversee the property. Robert Boyd and his son, James Boyd, were managers of Smith Farm Enterprises, L.L.C., when the violations at issue here took place. Stipulations 2, 4, & 5 (June 13, 2002); Tr. 207, 246-247 (Vol. III).

5. Some time after respondent obtained ownership of Smith Farm, the rural character of the surrounding region began to change. Indeed, for a time, it was the fastest growing area in the City of Chesapeake. First, Interstate 664 was constructed nearby. Second, a large residential community by the name of "New Boone Farm" had been proposed for development adjacent to Smith Farm. Tr. 49 (Vol. I), 207, 248-254 (Vol. III).

6. Respondent and New Boone Farm reached an agreement whereby New Boone Farm was to provide Smith Farm with direct access to Portsmouth Boulevard, a main east-west thoroughfare. New Boone Farm, however, subsequently entered into bankruptcy and the deal was never consummated. Tr. 249-251 (Vol. III).

7. Also, in anticipation of the New Boone Farm development, a master road plan for the City of Chesapeake showed a road running through the New Boone Farm and Smith Farm sites and ultimately connecting to Portsmouth Boulevard. Tr. 45-46, 51-53 (Vol. I); CX 92 (Smith Farm is marked in red).

8. Given the construction of Interstate 664 and the planned development of New Boone Farm, James Boyd explained, "We got to the point where even though we were not proactively doing things, we were finding that we had to react to situations that were happening around us." Tr. 248 (Vol. III).

9. Consistent with this sentiment, after learning that nearby property owners were planning to dig "Tulloch" ditches in order to remove wetlands from their properties, respondent engaged the services of Robert Needham, an environmental consultant. Respondent sought to explore this possibility for itself. Tr. 222-223 (Vol. III). In that regard, James Boyd acknowledged the presence of wetlands on the property, remarking: "Apparently, it was an opportunity that, you know, admittedly people realized that if you were working in a wetland,

that this opportunity may not be around forever.” Tr. 256 (Vol. III).

### **B. Tulloch Ditches**

10. Tulloch ditches are ditches that are dug in wetland areas in order to remove the wetland hydrology from the site. In other words, their purpose is to drain the wetlands. By removing the wetland hydrology the landowner may change the character of the property from wetland to upland. If the Tulloch ditches are successful in removing the wetland hydrology, then land disturbing activities can take place on the former wetland, now an upland, without the necessity of obtaining a Section 404 permit from the U.S. Army Corps of Engineers. Tr. 267-286 (Vol. I), 21-22 (Vol. II), 168, 170-171 (Vol. V) & 41-42 (Vol. VI).

11. Pursuant to the landmark decision in *National Mining Ass’n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1404 (D.C. Cir. 1998), Tulloch ditches may be constructed in wetlands that are subject to the jurisdiction of the Clean Water Act, without a Section 404 permit from the Corps, so long as only “incidental fallback” of the dredged material is discharged or redeposited into “waters of the United States” during the excavation.

12. As noted, some time in 1998, following the decision in *National Mining Ass’n v. U.S. Army Corps of Engineers*, *supra*, respondent Smith Farm contacted Needham, the environmental consultant, to discuss the prospect of digging Tulloch ditches on its property. Tr. 256 (Vol. III), 172 (Vol. V).

13. Smith Farm sought the services of Needham because its property contains wetlands. These wetlands are discussed, *infra*.

14. In fact, in 1991, the previous owners of Smith Farm had requested that the U.S. Army Corps of Engineers make a jurisdictional determination. (Smith Farm Enterprises, L.L.C., did not acquire this property until 1998. Robert Boyd was, however, one of these previous owners.) The 1991 property owners wanted the Corps to determine whether there were wetlands on the site that came under the jurisdiction of the Clean Water Act, and thus subject to the Section 404 permitting provisions. While the Corps determined that much of the forested portion of the site contained wetlands, the owners of Smith Farm withdrew their request for a jurisdictional determination before a wetlands delineation could be performed or confirmed by the Corps. Tr. 267 (Vol. I); CX 27. Robert Boyd explained that such an environmental study would have been too expensive. Tr. 228-229 (Vol. III).

### **C. The Corps’ Response to Tulloch Ditching in the Tidewater Area**

15. As noted above, in 1998, the issue of Tulloch ditching was a hot topic in southeastern Virginia (also known as the “Tidewater” area). Tr. 225 (Vol. I). During this time period, wetlands consultant Needham had sent a letter to John Evans, an environmental scientist with the U.S. Army Corps of Engineers, Norfolk District, concerning Tulloch ditching. Needham’s correspondence addressed the excavation of drainage ditches in wetlands on property known as

the “Southern Pines site.” Southern Pines is also located in Chesapeake, Virginia, near Smith Farm. At the time of this correspondence, Needham had not yet taken on Smith Farm as a client. RX 10.

16. In his “Southern Pines” letter, Needham informed the Corps that the owners of the Southern Pines site were “planning to excavate a series of ‘vee’ ditches in the wetland area of the tract.” Accordingly, Southern Pines was seeking clarification of the Corps’ position regarding Tulloch ditching in light of the Court’s decision in *National Mining Ass’n v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998). RX 10.

17. On September 11, 1998, William Poore, Branch Chief of the Corps’ Norfolk District, responded to Needham’s Southern Pines inquiry. In a letter to Needham, Poore replied:

This is in reference to your August 24, 1998, letter that discussed ditch excavation activities on the 100 acres of wetlands on the Southern Pines tract, in Chesapeake, Virginia. Specifically, you indicated that your ditch excavation activity would *not* include:

1. Sidecasting of excavated material.
2. Double handling of excavated material in wetlands.
3. Digging of stumps other than excavation with a single pull of the excavator.
4. Corduroy roads from any fill material, including woody vegetation.
5. Any other discharge of excavated material except for “incidental fallback” associated with the ditch excavation.

To insure that the excavation activity does not cause any discharge into wetlands, except for ‘incidental fallback,’ you have also stated that the contractor will use the following procedures for excavation activities in wetlands.

- A. Shrubs and saplings will be mowed along the length of the proposed excavation.
- B. There will be no bulldozers or root rakes in wetlands.
- C. Large tree stumps will be avoided.
- D. Trucks will remove excavated material directly from backhoe bucket.
- E. Any placement of removed material will be in upland.
- F. Wooden mats may be used in soft soil areas.

We have determined, based on Corps and EPA joint guidance dated April 11, 1997, that the proposed activity does not result in the movement of substantial amounts of dredged material

from one location to another in waters of the United States. *Therefore, as long as your project does not include a more substantial discharge that would trigger Section 404 regulation, a Corps permit will not be required for the excavation of ditches in wetlands on the Southern Pines site as you have proposed. This is a case specific determination and does not apply to any other site.*

RX 11 (emphasis added).

18. Thereafter, against this Southern Pines backdrop, Needham contacted the Corps regarding the excavation of Tulloch ditches on the Smith Farm site.<sup>5</sup> Needham contacted the Corps, after having discussed the Southern Pines situation with Robert and James Boyd, to advise it that Smith Farm similarly intended to construct Tulloch ditches. Tr. 173 (Vol. III).

19. On October 30, 1998, respondent Smith Farm and its environmental consultant, Needham, met with Nick Konchuba, a Section Chief with the Corps' Norfolk District, to discuss Tulloch ditching on the Smith Farm site. Tr. 177 (Vol. V); RX 14.

20. Following this meeting with Konchuba, Needham sent a letter to the Corps again advising the Corps of its intended Tulloch ditching activities and asking that the Corps provide any response by November 13, 1998. Tr. 179 (Vol. V); RX 13.

21. On November 12, 1998, Steve Martin, an environmental scientist with the Corps of Engineers, Norfolk District, placed a telephone call to Needham. Martin testified that the two discussed Smith Farm's "pre-application request and the work that Mr. Needham's clients were planning to conduct on the Smith Farm property." Tr. 226-227 (Vol. I); CX 70.

#### **D. The Tulloch Ditching on the Smith Farm Site**

##### **1. Respondent's Preparations**

22. Smith Farm retained Vico Construction Corporation to perform the Tulloch ditching. Stipulation 6 (June 13, 2002). Vico Construction, in turn, subcontracted the ditch excavation work to Paxton Contractors Corporation ("Paxton Contractors"). Tr. 219 (Vol. IV), 71 (Vol. VI).

23. The contract between Smith Farm and Vico Construction called for the construction of 12,350 linear feet of ditches and approximately 20,000 linear feet of "Kershaw Well Transect Lines." Tr. 78-80 (Vol. IV); RXs 12 & 13.<sup>6</sup>

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<sup>5</sup> Smith Farm is located approximately three to four miles from Southern Pines. Tr. 174 (Vol. III).

<sup>6</sup> The Well Transect Lines are to allow for the placement of monitoring wells. Monitoring wells are used to determine the effectiveness of the Tulloch ditches in removing

24. In anticipation of this project, Vico Construction obtained a land disturbing permit from the City of Chesapeake on December 16, 1998. This permit was sought for the purpose of “clearing, filling, excavating, grading or transporting or any combination thereof in accordance with approved plan of Robert F. Boyd and Raymond L. Harris.” Stipulation 11 (June 13, 2002); RX 17; CX 19.<sup>7</sup>

## **2. The Erosion and Sediment Control Plans**

25. In preparation for the construction of the Tulloch ditches, Erosion and Sediment Control Plans (“E&S Plans”) also were prepared for respondent. These E&S plans were drafted by Hoggard/Eure, an engineering firm. Separate E&S Plans were prepared for the Chesapeake and Suffolk portions of the Smith Farm site and were submitted to the City of Chesapeake and to the City of Suffolk, respectively. CX 44A (Chesapeake-side Plan) & CX 109 (Suffolk-side Plan).

26. Both E&S Plans contain diagrams setting forth the location and size of the proposed Tulloch ditches, as well as the location of “check dams.” *Id.* Check dams are intended to impede the flow of water and thereby reduce the risk of soil erosion. Tr. 42, 45 (Vol. II).

27. In addition, the E&S Plan for the Chesapeake-side identifies the location of two proposed stockpiles where the material excavated from the ditches would be deposited, as well as the location and specifications for a construction entrance to the site. No stockpiles or construction entrances were proposed for the Suffolk side. Tr. 214-215 (Vol. II), 165, 170 (Vol. IV); CXs 44A & 109.

28. The total proposed area to be disturbed on the Chesapeake portion of the property was 3.562 acres and the proposed area to be disturbed on the Suffolk portion was 7.147 acres. Tr. 206-209 (Vol. II); CXs 44A & 109.

29. The City of Chesapeake approved respondent’s Erosion and Sediment Control Plan on December 14, 1998. CX 17. The E&S Plan for the Suffolk portion of the property was approved by operation of law as the City of Suffolk did not act upon this proposed plan within the prescribed period of time. Tr. 272-273 (Vol. III); RX 19.

## **3. The Construction Phase**

30. In order for the ditch excavation equipment to access the Smith Farm site, corridors or pathways had to be cleared in the forested area. Tr. 268 (Vol. III).

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wetland hydrology. Tr. 248-249 (Vol. I).

<sup>7</sup> At one time, Raymond L. Harris was a co-owner of the Smith Farm property. In 1995, his interest in the property was transferred to Finvest, Inc., and subsequently to Smith Farm Enterprises, L.L.C. Stipulations 4 & 5 (June 13, 2002).

31. Accordingly, on December 9, 1998, Smith Farm Enterprises, L.L.C., entered into a Timber Harvest Agreement with Old Mill Land & Timber Company (“Old Mill”) for the removal of trees from the proposed corridors. RX 16. The Timber Harvest Agreement provided that Old Mill would take the marketable hardwood removed from the site as payment for its services, and that it would pay Smith Farm Enterprises, L.L.C., for any marketable pine that was removed. Tr. 85-86 (Vol IV). This agreement allowed Old Mill “to log approximately 11.34 acres in the forested areas on the Smith Farm.” Stipulation 8 (June 13, 2002).

32. The actual on-site work began sometime around mid-December of 1998. Tr. 202 (Vol. V).

33. In accordance with the timber agreement, Old Mill cleared the timber from the proposed corridors, or paths, to a width ranging from 35 to 50 feet. Tr. 156 (Vol. II). See Tr. 143-144 (Vol. VI) (Paxton Contractors estimating pathways to be 40 to 60 feet in width).

34. In order to cut down the trees, Old Mill used a piece of equipment known as a “Fellerbuncher.” Needham described the operation of the Fellerbuncher as follows:

There’s a tract [*sic*] much like a backhoe, yet there’s, I guess, a hydraulic drive shaft hooked up to it. There is a horizontal circular blade that can be raised and lowered parallel to the ground surface. This blade, again, is a very industrialized version of the blade you would have on your skill saw or table saw at home. The blade that I saw on this machine was approximately one inch thick with large carbide tip teeth on it.

So that machine, it has a clamp-tight device that operates as if it was your hand that can grab the tree. Then this blade is slowly inserted into it, cuts it down, and the tree is laid over on the side.

Tr. 195-196 (Vol. V).

35. Needham added that the wood chips created by the cutting teeth of the Fellerbuncher would be larger than the wood chips created by the use of a large chain saw. The chips created by the Fellerbuncher are approximately one-half to three-quarter inch square, and perhaps one-quarter inch thick. Tr. 196-197 (Vol. V).

36. After the trees were cut, they were hauled out of the forest on a timber skidder, described as “a four-wheel, rubber-tired machine.” The skidder “will gather up several tree trunks at the same time, grab the butt end of the tree, the large part that got cut off the stump,” and drag the logs out of the wooded area. In this process, the skidder will create “tire ruts” and the trees being dragged will “bump and skid into the ground.” Tr. 192-193 (Vol. V).

37. Clearing the timber was only the first step in preparing the paths for the excavation of



the Tulloch ditches. The second step was to clear the saplings and other woody debris (also known as “slash”) left behind in the paths by Old Mill. This second phase was done by both Vico Construction and its subcontractor, Paxton Contractors. The purpose of this second phase clearing operation was to allow Paxton Contractors to get its ditch digging equipment (*i.e.*, the excavator and haul trucks) into the pathways. This second phase was known as “prepping” the paths. Tr. 157 (Vol. I), 73-75 (Vol. VI).

38. In preparing the paths, Vico Construction and Paxton Contractors used a grinding machine known as a “Kershaw.” A Kershaw is a four wheel, rubber-tired piece of equipment which has a rotary drum. It is situated on a “timber skidder” which prevents the head from coming into contact with the ground. The Kershaw grinds up the woody vegetation into chips. These wood chips are then randomly distributed to the rear of the Kershaw. Tr. 229-230 (Vol. I), 190-192 (Vol. V), 73, 105 (Vol. VI). It is the disposition of these chips into wetlands that forms part of EPA’s claim (and by far the most persuasive) that respondent discharged fill material in violation of Section 301(a) of the Clean Water Act.

39. After the timbering by Old Mill, and after the Kershaw reduced the remaining woody debris to wood chips, it was time to excavate the Tulloch ditches. To dig these ditches, Paxton Contractors used an excavator, weighing 60,000 pounds, and track-trucks weighing between 30,000 and 35,000 pounds. Track-machinery was used because it has “a very high flotation rate per square foot” and causes less damage to the land than rubber-tired equipment. Tr. 75-76 (Vol. VI).

40. After a path was “prepped,” an excavator was used to dig the Tulloch ditches. The dredged material was placed in a track-truck and hauled to an upland area on the Smith Farm site. Tr. 76-78, 87-89 (Vol. VI); CX 26 (Photographs 1- 6).

41. The land clearing and ditch excavating procedures at the Smith Farm site were the same procedures that had been employed by Vico Construction and Paxton Construction on the Southern Pines site. Tr. 99, 140 (Vol. VI).

42. Also, during construction of the Tulloch ditches, there was “no side casting” and “no double handling.” Tr. 77-78 (Vol. VI). There also was no digging of tree stumps with more than one pull of the excavator and no building of corduroy roads. Tr. 85-86 (Vol. VI).<sup>8</sup>

43. The Tulloch ditches constructed on Smith Farm were described as “vee” ditches, with a “one-to-one side slope.” They were four-foot deep, with a two-foot flat bottom, and were no greater than 12 feet wide from “rim-to-rim.” Tr. 76 (Vol. VI).

44. Jeffrey Paxton of Paxton Contractors explained that there were “upstream” and “downstream” portions of the Tulloch ditches and that water was intended to flow through the

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<sup>8</sup> These were the ground rules agreed to by the U.S. Army Corps of Engineers and the owners of the Southern Pines site. RX 11.

ditches and eventually off the property. Tr. 125 (Vol. VI).

45. Four Tulloch ditches were dug on the Chesapeake-side of the property. These ditches tied into a main ditch which ran through the middle of the property. Tr. 241 (Vol. IV). The Tulloch ditches dug on the Suffolk-side also are tied into a main ditch. Tr. 80-81 (Vol. VI); RX 36.

#### **E. The Site Visit by the U.S. Army Corps of Engineers**

46. Environmental scientist Steve Martin of the U.S. Army Corps of Engineers, Norfolk District, first visited the Smith Farm property on January 6, 1999. By this time, the Tulloch ditching activity was under way. Martin's duties with the Corps include wetland determinations, confirmation of delineations, permitting, and investigating unauthorized activities in "waters of the United States." Tr. 215-216, 229 (Vol I).

47. Wetlands are characterized by the presence of three parameters: (i) hydric soils; (ii) a predominance of wetlands vegetation; and (iii) wetlands hydrology. Tr. 74 (Vol. I); CX 29 ("*1987 Corps of Engineers Wetlands Delineation Manual*") ("*1987 Manual*").

48. Martin had been assigned to Smith Farm following the respondent's submission of a "pre-application request" for the excavation of Tulloch ditches. This type of assignment entails an office review of the application by the Corps, as well as an on-site visit to discuss the project with the landowner. Tr. 226, 229 (Vol. I).

49. Martin reviewed the plan submitted by respondent and estimated that of the 300-acre portion of Smith Farm involved in this case, one-half was wooded and one-half was cropland.<sup>9</sup> Martin also discussed this pre-application request with Robert Needham, Smith Farm's environmental consultant. Tr. 227-228 (Vol. I). Respondent's plan called for a "logger" (here, Old Mill) to remove trees greater than 8 inches in diameter at breast height and for the use of a "Kershaw" to grind trees that were lesser than 8 inches in diameter. Tr. 228 (Vol. I).

50. On his January 6, 1999, visit, Martin was accompanied by Needham, respondent's environmental consultant, as well as by David Blevins, Vico Construction's supervisor for the Smith Farm Tulloch ditching project. Tr. 229 (Vol. I).

51. Needham and Blevins explained the ditching operation to Martin. Tr. 229-230 (Vol. I).<sup>10</sup> They then examined some of the paths that had been cleared and in which the ditches had been dug, as well as some paths that had been cleared of timber and slash, but in which the ditches had not yet been dug. Tr. 233-234 (Vol I).

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<sup>9</sup> As noted, Respondent's Exhibit 42 identifies 95.7 acres as being cropland.

<sup>10</sup> Martin had worked with Needham on other Tulloch ditching projects in the Corps' Norfolk District. Tr. 233 (Vol. I).

52. In addition to observing cleared corridors and excavated Tulloch ditches, Martin also observed what he termed as “finger ditches.” These were small lateral ditches excavated through wetlands to drain “little wet pockets.” Tr. 256 (Vol. I); CX 98. (“Most of them were no longer than maybe the length of the boom of some sort of excavation equipment. Maybe thirty, 35-foot tops.” *Id.*)

53. During this January 6 visit, Martin completed a wetland data sheet (containing information on wetland soil, wetland plants, and wetland hydrology) in a forested area on the site which he identified as “Plot ID 1.” Martin determined that Plot ID 1 was in a wetland. Tr. 235 (Vol. I); CX 26.

54. Martin did the same evaluation for an area that he identified as “Plot ID 3.” This area was located 75 feet west of the eastern-most drainage ditch in a forested section on the City of Chesapeake-side. He concluded that Plot ID 3 also was situated in a wetland. Tr. 237 (Vol. I); CX 26.

55. In addition, during this January 6, 1999, visit to Smith Farm, Martin observed a layer of wood chips, ranging from one-half inch to five inches, in the “cleared swath areas.” He determined the depth of the wood chips by using a soil auger. Tr. 237 (Vol. I).

56. The wood chips observed by Martin ranged in size from a “quarter” to a “half-dollar,” to shards of wood six to ten inches long and one-half to two inches wide. He stated that while sticks and twigs were mixed in with the wood chips, the wood chips were not like “forest duff.” Tr. 257 (Vol. I).

57. Martin also visited the Smith Farm site on March 16, 1999, among other times. On March 16, he collected data points from the Suffolk-side of the property. CX 28. During this visit, Martin again identified the presence of wetland areas on the property. Tr. 250-251 (Vol. I).

58. Martin did not observe wood chips in the forested area of Smith Farm. Tr. 258 (Vol. I). This is an area undisturbed by respondent’s land clearing and ditch digging activities.

59. In undertaking his review of the path clearing and ditch digging on Smith Farm, Martin stated, “the big question was were activities being conducted, had activities been conducted that would require Corps authorization.” Tr. 269 (Vol. I).

60. While, based upon respondent’s November 6, 1998, letter to the Corps, Martin was expecting “a much smaller operation” -- *i.e.*, not as wide a corridor that was being cleared, and not the large sized equipment used to excavate the ditches -- he still had not as yet determined that Corps authorization was needed by Smith Farm. Tr. 269-270 (Vol. I). In that regard, Martin testified:

At the end of my site visit and at the time I wrote this particular memo [*i.e.*, CX 27, Martin’s Smith Farm inspection

report dated February 15, 1999], my questions were was the dispersal of wood chips through the cleared wetland area considered a deposit of fill material? And was the rutting, the soil compaction, the moving around of soil within the wetlands due to equipment operation, something that would be considered jurisdictional in light of previous court decisions? *And I needed answers to these questions in order to determine whether Corps authorization was required for any of the work.*

Tr. 270 (Vol. I) (emphasis added).

61. Martin testified that subsequently he and a number of his colleagues, at the request of Norfolk District Branch Chief William Poore, “compiled our questions, descriptive memos, photographs, into one package and then sent them to headquarters requesting guidance.” Tr. 271 (Vol. I). Among the questions raised were whether wood chips could be considered “fill,” and whether the material being moved by operation of the tracked vehicles was also “fill.” Included in this package was a summary of the drainage (*i.e.*, Tulloch ditch) activities that had +taken place on the Smith Farm site. Martin added that this request for guidance “was actually in response to a request from headquarters for any information about activities that might be conducted pursuant to the Tulloch decision.” *Id.*; Tr. 7 (Vol. II).

62. On April 21, 1999, the Norfolk District received written guidance from U.S. Army Corps Headquarters relative to the Tulloch ditching issues in the Tidewater area. In Martin’s view, this guidance did not answer his concerns about the activity that was taking place on Smith Farm. Tr. 12 (Vol. II).

63. The Corps Headquarters guidance of April 21, 1999, in part read as follows:

a. Wood Chips. As outlined in previous guidance, we do not regulate wood chips. There is consensus that wood chips are not dredged materials. It is possible that wood chips could be used as fill material. The regulatory definition of fill material requires that the material be placed for the primary purpose of replacing an aquatic area with dry land or changing the bottom elevation of a water body. The term does not include any pollutant discharged into the water primarily to dispose of waste. Such activity may be regulated under Section 402 of the Clean Water Act. As portrayed, the developer brought in a chipper to reduce slash material that resulted from a logging operation. The chips were subsequently blown over the area to eliminate them, as the developer was concerned that the materials may have been determined to be a violation. The fact that the equipment operators have found the chips to be good support for their equipment does not eliminate the fact that they were blown over the area simply as a means of disposing of the wood chips.

CX 81.

64. As noted, as of Martin's January 6, 1999, and March 16, 1999, visits to Smith Farm, the Corps had not made any determination as to whether a Section 404 permit was required for the Tulloch ditching activities. Moreover, Martin was not even authorized to make any such determinations while on site. In that regard, Norfolk District Branch Chief Poore instructed his staff that only he would make such permit decisions. Tr. 15, 68-69 (Vol. II); CX 91.

#### **F. The EPA Inspection**

65. EPA and the Corps have concurrent authority to carry out the provisions of Section 404 of the Clean Water Act. Tr. 81, 83 (Vol. I). Some time in late 1998, or early 1999, EPA learned of efforts at five sites in the Tidewater area of Virginia to drain wetlands without first obtaining a Section 404 permit. Smith Farm was one of these sites. EPA decided to take the enforcement lead in investigating the Tulloch ditching activities on each of these sites. Stipulation 1 (September 8, 2003); Tr. 90-92, 109 (Vol. I).<sup>11</sup>

66. In June of 1999, pursuant to a Memorandum of Agreement between the two Agencies, EPA took over lead enforcement in this matter. Tr. 16 (Vol. II); CX 59.

67. EPA inspected the Smith Farm site on September 8, 1999. There were actually two separate EPA inspection teams which visited Smith Farm. One team investigated a possible Section 404 wetlands violation, while another team investigated a possible Section 402 storm water violation.

#### **1. The Section 404 Investigation**

68. Consistent with Martin's view, it was EPA's view that the Corps had not made a determination as to whether a Section 404 permit was needed by Smith Farm at the time EPA took over lead enforcement. Tr. 92 (Vol. I).

69. The Section 404 investigation was headed by Jeffrey Lapp, who at the time was the wetlands enforcement coordinator for EPA Region 3. Tr. 71 (Vol I). This wetlands team also included Peter Stokely, a Region 3 aerial photography expert and involved in wetlands permitting enforcement, Lenore Vasilas, a soils expert with the United States Department of Agriculture's Natural Resource Conservation Service ("NRCS"), Steve Martin of the U.S. Army Corps of

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<sup>11</sup> Southern Pines was one of these sites and Lewis Farm was another. EPA initiated enforcement action against the owners of Lewis Farm identical to the enforcement action presented in this matter. *See Vico Construction Corp. and Amelia Venture Properties, L.L.C.*, 2004 EPA ALJ Lexis 146.

Engineers, and Andrew Dinsmore, a member of Lapp's staff. Tr. 107 (Vol. I), 17 (Vol. II).<sup>12</sup>

70. The purpose of EPA's wetlands inspection of Smith Farm was two-fold, *i.e.*, to confirm the presence of wetlands on the parcel and to investigate whether discharges had occurred in these wetlands and, if so, to determine their impact. Tr. 109 (Vol. I).

71. Before proceeding to the Smith Farm site, the EPA wetlands team reviewed aerial photographs, an erosion and sediment control plan, as well as standard references such as the U.S. Geologic Survey's ("USGS") topographical maps, the National Wetland Inventory ("NWI") maps, and soil survey maps. Tr. 105, 107 (Vol. I). In addition, Lapp relied upon the wetlands data sheets compiled by Corps employee Martin in the area of the Smith Farm site. Tr. 105, 107-110 (Vol. I); CXs 26 & 28.

72. A National Wetlands Inventory map is a map produced by the U.S. Fish and Wildlife Service. It consists of a five-year sequencing of aerial photographs which are interpreted to determine a wetlands signature. These photographs are used in conjunction with a United States Geologic Service "quad sheet." Tr. 104 (Vol. I).

73. Peter Stokely, EPA's aerial photography expert, explained that aerial photographs provide a three-dimensional picture of the landscape. They are more detailed than a USGS map, *e.g.*, showing whether an area is densely or sparsely forested, as well as providing a more defined look at the drainage pattern. The EPA wetlands team had aerial photographs of Smith Farm that had been taken in March 1994, March 1995, and as late as 1999. Tr. 115 (Vol. II).

74. Stokely also explained how aerial photography can be used to interpret drainage patterns. He stated that, "in this part of the country," the photographs will show riparian corridors along the streams, forming branch-like patterns. Tr. 119-120 (Vol. II). Stokely added that wetlands also can be identified through aerial photography by their vegetative structure, photographic tone, pattern, and landscape position. Tr. 120 (Vol. II).

75. As for Lapp, the wetlands team leader, he explained that he had a "good idea" that they would find wetlands on the Smith Farm site. Lapp based this expectation, in part, upon Stokely's analysis of the Smith Farm aerial photography. Stokely, EPA's aerial photography expert, had identified a "wetlands signature" in the forested portion of the Smith Farm site. This wetlands signature was largely consistent with the NWI mapping for the general area, and it was fully consistent with the NWI mapping for the specific area of the property where the land clearing and ditch digging work had been performed. Tr. 135-138 (Vol. II). *See* Stipulation 3 (September 8, 2003) (Stokely qualified to provide expert testimony "in interpretation of aerial photographs.")

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<sup>12</sup> Also present were Robert Needham, respondent's wetlands consultant, Jeffrey Paxton, the owner of Paxton Contractors, and Emile Viola, the president of Vico Construction. Tr. 111 (Vol. I).

76. In addition, immediately before visiting Smith Farm, the EPA wetlands team had spent several hours inspecting a similar Tulloch ditching operation at the nearby Southern Pines site. Tr. 152-153 (Vol. I).

77. The EPA team did not walk the entire Smith Farm site on September 8, 1999. *See* Tr. 112-113 (Vol. I) & CX 98. They did not believe that it was necessary to do so. After all, the inspection team had earlier spent a number of hours at the Southern Pines site, and respondent's wetlands consultant had informed the EPA team that the path clearing and ditch digging activities on Smith Farm were similar to those that had taken place at Southern Pines. Vico Construction and Paxton Contractors, who were also present (and who performed work on both sites), confirmed this representation. Moreover, EPA already had "pretty extensive information on site conditions in the file," and the purpose of their Smith Farm inspection was only to confirm that information. Tr. 108-109, 118, 152-153 (Vol. I); 207 (Vol. IV), 99 (Vol. VI).

78. As noted, one of EPA's primary purposes in inspecting Smith Farm was to determine whether wetlands were present. Accordingly, using a series of aerial photographs which Stokely had identified as having a "wetland signature," and overlaying these photographs onto a photograph of the site taken after respondent had engaged in the ditching activities, the inspection team selected a reference point. This reference point was an area of the Smith Farm site which had not been disturbed by respondent and, therefore, could be used to confirm the presence (or absence) of wetlands. Tr. 118-119 (Vol. I).

79. The EPA wetlands team's methodology in inspecting Smith Farm for the presence of wetlands is the same as that of Steve Martin, environmental scientist with the Corps. Both begin with a review of off-site information such as aerial photographs, historic data, and "USGS topographic quadrangle maps." After this review, both conduct a field inspection to confirm their findings. Tr. 22-23 (Vol. II).

80. The Corps' 1987 *Manual* provides for a "disturbed site" or "atypical" methodology of identifying wetlands. This methodology relies upon the use of pre-disturbance information such as aerial photographs and consideration of land characteristics of adjacent or nearby undisturbed areas. *Id.* It is assumed that prior to the disturbing activity, the disturbed area shared the same characteristics as the undisturbed reference site. Tr. 119, 126-127 (Vol. I); CX 29 at 83-93.

81. The reference point on the Smith Farm site was designated as Sample Point B. This reference site was located north of the longest east-west running ditch in the southwest quadrant on the Suffolk-side of the property. The location of reference Site B was marked by Lapp on Complainant's Exhibit 98. CX 45, Fig. 5; CX 98.

82. Sample Point B was an undisturbed area where there had been no removal of vegetative cover and soils. Tr. 124-125 (Vol. I). The EPA team concluded that Sample Point B was located in a wetland. On the basis of aerial photography, Stokely had determined that this site was located in a wetlands area. Tr. 165-166 (Vol. II). Also, upon inspecting this site, Lapp determined that the dominant vegetation at Sample Point B was wetlands vegetation. Tr. 123,

126 (Vol. I); CXs 23 & 25. Lenore Vasilas, the NRCS soils expert, took soil samples at this reference site and concluded that the soil was hydric (*i.e.*, wetlands) soil. Tr. 74-78 (Vol. III), CX 104. *See* Stipulation 4 (September 8, 2003) (Vasilas qualified to provide expert testimony “as a soil scientist.”)<sup>13</sup> Vasilas explained that “the reference site was a typical hydric soil that you would find in a Virginia coastal plain.” Tr. 87 (Vol. III). In addition, the well-monitoring data contained in Complainant’s Exhibit 25 showed this area to have wetland hydrology. Tr. 125-126 (Vol. I).<sup>14</sup>

83. Respondent’s wetlands expert, Robert Needham, concurred that Sample Point B was located in a wetlands area as shown in Respondent’s Exhibit 36. Tr. 21 (Vol. VI). *See* Stipulation 8 (September 8, 2003) (Needham qualified to provide expert testimony “on the identification and delineation of wetlands.”)

84. Reference Site B did not contain a wood chip and soil mixture. Tr. 134 (Vol. I).

85. Soil samples also were taken at two other points, Sample Points A and C, both of which were located in the cleared pathways. CX 24. These sites likewise were marked on Complainant’s Exhibit 98. At Sample Point A, there was a mixture of wood chips and soil material to a depth of six and one-half inches on top of the undisturbed soil profile. At Sample Point C, there was a four-inch layer of wood chip soil material on top of the undisturbed soil profile. Tr. 131-133. EPA’s purpose in sampling sites A and C was not to determine whether these sites were wetlands, but rather to document any soil disturbance. Tr. 209 (Vol. I).

## **2. The Section 402 Investigation**

86. EPA’s Section 402 investigation, *i.e.*, the storm water investigation, of the Smith Farm site also took place on September 8, 1999. This portion of the investigation was conducted separately from the wetlands investigation. The Section 402 investigation was headed by Kevin Magerr, who at the time was with EPA’s Water Enforcement Branch, Water Protection Division. In that position, Magerr concentrated primarily upon storm water and other wet-weather types of discharges, as well as combined sewer and sanitary sewer overflows. Tr. 192 (Vol. II).

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<sup>13</sup> The updated version of the *1987 Corps of Engineers Wetlands Delineation Manual* (CX 29) defines hydric soils as a soil that is saturated or ponded long enough during the growing season to develop anaerobic conditions in the upper part. Field indicators are used to help identify when a soil meets this definition. The two most predominant field indicators are the presence of redoximorphic features (resulting from the reduction of iron and manganese in the soil) and the presence of anaerobically decomposing organic matter. Tr. 69-71 (Vol. III); CX 104.

<sup>14</sup> Complainant’s Exhibit 25 is a wetlands determination sheet from the *1987 Manual*. It is not a wetlands delineation of the entire site. Tr. 208 (Vol. I).



87. While the Commonwealth of Virginia is the permitting authority for National Pollutant Discharge Elimination System (“NPDES”) permits, EPA retains the authority to review the permits, conduct inspections, and take enforcement action. Tr. 198 (Vol. II).

88. A permittee is required to obtain an NPDES permit for the discharge of storm water associated with construction activity. Such a permit is required before construction even begins. A permit is no longer required once the site has been stabilized -- *i.e.*, there is no water runoff or soil erosion taking place. Tr. 199 (Vol. II).

89. The NPDES permit requires that the permittee prepare a Storm Water Pollution Prevention Plan (“SWPPP”). A SWPPP requires that the permittee identify potential sources of pollutants and to list measures to reduce or eliminate those sources. Tr. 201-202 (Vol. II).

90. Erosion and Sediment Control Plans developed for a local government can be incorporated by reference into the SWPPP. David Gusman, Ph.D., a senior enforcement specialist with the Virginia Department of Environmental Quality, testified that in 1998 and 1999, the agency’s Tidewater regional office accepted Erosion and Sediment Control Plans as compliance with a SWPPP. Tr. 148 (Vol. VI). If there is a change in the E&S Plan, however, the SWPPP must be updated accordingly. Tr. 202-203 (Vol. II).

91. The *Virginia Erosion and Sediment Control Handbook* lays out the various minimum standards for erosion and sediment control. For example, it provides the specifications for construction entrances, ditch slopes, and rock check dams. Tr. 211, 213 (Vol. II).

92. Magerr first became aware of the activities on the Smith Farm site from the EPA Region 3 wetlands coordinator Lapp. Thereafter, Magerr visited Smith Farm on September 8, 1999, the same day that Lapp initiated the wetlands inspection. The land disturbing activities that Magerr observed on the site were similar to the activities that he had earlier observed on the Southern Pines site. Tr. 204-205, 225-226 (Vol. II).

93. At the time of Magerr’s inspection, Smith Farm had in place erosion and sediment control plans, but it did not have an NPDES permit covering storm water discharges. Tr. 226 (Vol. II). Respondent applied for an NPDES permit on September 15, 1999, after the EPA inspection. Stipulation 2 (September 8, 2003).

94. The Virginia Department of Environmental Quality issued an NPDES permit for the discharge of storm water associated with construction activity to Smith Farm Enterprises, L.L.C., effective November 10, 1999. Stipulation 10 (June 13, 2002).

95. Respondent’s Erosion and Sediment Control Plan for the City of Chesapeake-side is identified as Complainant’s Exhibit 44A. The Erosion and Sediment Control Plan for the Suffolk-side is identified as Complainant’s Exhibit 109. These E&S plans were prepared by the engineering firm Hoggard/Eure. They contained site-specific information, including schematics of the proposed ditches, check dams, construction entrances and stock piles (also referred to as

“spoil piles”) where the excavated material was to be deposited. The stock piles were located in uplands. Tr. 202 (Vol. I); CX 98.

96. However, neither the Chesapeake E&S Plan, nor the Suffolk E&S Plan, identified that finger ditches would be constructed coming off of the Tulloch ditches. Both E&S Plans (CXs 44A & 109) also failed to depict the clearing of 8-foot wide transects between the Tulloch ditches and the monitoring wells. Tr. 223-224 (Vol II).

97. During his inspection, Magerr observed that the spoil piles located in the uplands did not have silt fences and that the construction entrance on the Suffolk side was not up to specification. He also observed that the banks of the ditches were not stabilized to minimize erosion and that the check dams that were placed in the upland area did not appear to be effective. Tr. 246, 256, 259 (Vol. II).<sup>15</sup>

### **III. Discussion**

#### **A. Count I: The Wetlands Violation**

Here, EPA alleges that Smith Farm violated Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), by discharging wood chips into “waters of the United States,” without a Section 404 permit issued by the U.S. Army Corps of Engineers. 33 U.S.C. § 1344. It is undisputed that Smith Farm did not have a Section 404 permit when it cleared the wetland corridors and excavated the Tulloch ditches. Stipulation 33 (September 8, 2003).

EPA offers alternative theories to support the charge in Count I. Under one theory, complainant argues that the wood chips constituted “fill material” and that respondent violated Section 301(a) by discharging this fill without first obtaining a Section 404 permit from the U.S. Army Corps of Engineers. 33 U.S.C. § 1344(a). Under another theory, EPA asserts that the wood chips are a “pollutant” and that respondent violated Section 301(a) by not obtaining a Section 402 NPDES permit prior to discharging this pollutant into “waters of the United States.”

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U.S.C. § 1342.

Because it is found that under the facts of this case the wood chips constitute fill material and that Smith Farm violated Section 301(a) by discharging this fill material without a Section 404 permit from the Corps, EPA’s alternative Section 402 theory need not be addressed.

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<sup>15</sup> At the time of his September 8, 1999, inspection, Magerr was not aware that the Smith Farm site was located in both the City of Chesapeake and the City of Suffolk. As a result, he erroneously viewed the Chesapeake-side E&S plan (CX44A) during his visual inspection of the Suffolk-side of the property. This confusion, however, does not detract from Magerr’s observations as to the actual ground conditions on the Smith Farm site. In that regard, Magerr testified that this mistake in orientation does not change the findings in his inspection report. Tr. 264 (Vol. II), 47 (Vol. III); CX 40.

We begin with an overview of the involved statutory and regulatory provisions.

### **1. The Statutory and Regulatory Scheme**

Section 301(a) of the Clean Water Act in part provides that “the discharge of any pollutant by any person shall be unlawful” unless in compliance with a Section 404 permit issued by the U.S. Army Corps of Engineers. 33 U.S.C. § 1311(a).<sup>16</sup> Section 502(6) in part defines the term “pollutant” to include “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water.” 33 U.S.C. § 1362(6). Section 502(12) of the Act further defines the term “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12). Section 502(14) describes a “point source” as “any discernible, confined and discrete conveyance ... from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). Finally, the term “navigable waters,” critical to the resolution of this case, is defined as “the waters of the United States, including the territorial seas.” Section 502(7), 33 U.S.C. § 1362(7).

In addition, regulations promulgated by both the U.S. Army Corps of Engineers and EPA define the phrase “waters of the United States” to include:

- (1) All waters which are currently being used ... 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;
- (2) All interstate waters including interstate wetlands;
- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters: (i) which are or could be used by interstate or foreign travelers for recreational or other purposes; or (ii) from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (iii) which are or could be used for industrial purposes by industries in interstate commerce;
- (4) All impoundments of waters otherwise defined as waters of the United States under the definition;

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<sup>16</sup> “Section 404 originated as part of the Federal Water Pollution Control Act Amendments of 1972, which constituted a comprehensive legislative attempt ‘to restore and maintain the chemical, physical, and biological integrity of the nation’s waters.’ CWA § 101, 33 U.S.C. § 1251.” *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985).

- (5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;
- (6) The territorial seas;
- (7) Wetlands adjacent to waters (other than the waters that are themselves wetlands) identified in paragraphs (1)-(6) of this section;
- (8) Waters of the United States do not include prior converted cropland .... Water Treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds ...) are not waters of the United States.

33 C.F.R. § 328.3(a); 40 C.F.R. § 232.2.

Against the backdrop of this statutory and regulatory scheme, EPA argues that respondent's act of discarding the wood chips (*i.e.*, the ground slash) into the wetlands as the Tulloch ditch paths were prepared, without a Section 404 permit, constitutes a violation of Section 301(a) of the Clean Water Act.

Respondent admits that it did not have such a Section 404 permit. It argues, however, that it didn't need one because the discharged wood chips, in its view, are not fill material. Respondent also argues that, in any event, the government cannot prevail in this case because it lacks Clean Water Act jurisdiction over any Smith Farm wetlands. In other words, Smith Farm argues that the wetlands that are present on-site do not constitute "waters of the United States." This threshold jurisdictional argument is addressed below.

## **2. The Smith Farm Wetlands**

The first step is to determine whether there are wetlands on Smith Farm. The term "wetlands" is defined by both the U.S. Army Corps of Engineers and EPA as "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 328.3(b); 40 C.F.R. § 232.2. As noted, the Corps has provided guidance for identifying wetlands in the *1987 Manual*. CX 29. (Again, the existence of wetlands is characterized by (i) hydric soils, (ii) a predominance of wetlands vegetation, and (iii) wetlands hydrology. *Id.*)

It is undisputed that there are wetlands on the Smith Farm site. Respondent admits as much, stating that the wetlands that are on the property are "isolated" wetlands and hence not subject to the provisions of the Clean Water Act. *See* Resp. Br. at 33-34. The general scope of these wetlands is described below.

First, the parties stipulated that as of September 8, 1999 (the date of the EPA inspection), the soils in the forested area of the Smith Farm site are predominately hydric soils, and that the

predominant vegetation in this forested area is wetlands vegetation. Stipulations 24 & 25 (September 8, 2003). The parties further stipulated that some of the forested portions of the site in which the corridors were cleared of timber and woody debris, and in which the Tulloch ditches were excavated, satisfied the wetlands parameters set forth in the Corps' *1987 Manual*. Stipulation 26 (September 8, 2003).

Second, the evidence presented by EPA establishes that there are wetlands on Smith Farm. This evidence consists of the testimony of Lapp, Stokely, Vasilas, and Martin (the EPA wetlands inspection team), which referenced National Wetlands Inventory mapping, aerial photographs of the Smith Farm site, soil sampling, and observations of predominant wetland vegetation. *See supra*.

Third, this National Wetlands Inventory map shows approximately 180 acres of wetlands in the forested portion of the Smith Farm site. Stipulation 27 (September 8, 2003); CX 87, Fig. 3 & RX 34A. *See* Tr. 247 (Vol. I) & CX 26.

Finally, respondent's wetlands experts, Charles Wolfe and Robert Needham, conceded that the forested portions of the Smith Farm site contain wetlands. Tr. 213, (Vol. I), 9 (Vol. V), 20 (Vol. VI). Wolfe described these wetlands "as high elevation hydric soil flats." Tr. 11 (Vol. V). In addition, William Parker, respondent's soil expert, agreed with EPA's soil expert, Vasilas, that the Smith Farm site contains hydric soils. Tr. 198 (Vol. III).

### **3. The Smith Farm Wetlands Are "Jurisdictional Wetlands"**

#### **(i.) Respondent's Reliance Upon "SWANCC"**

The Clean Water Act prohibits the unauthorized discharge of pollutants to "navigable waters." 33 U.S.C. § 1311(a). The Act defines "navigable waters" as "waters of the United States including territorial seas." 33 U.S.C. § 1362(7). EPA argues that "the courts have uniformly held, that the terms 'navigable waters' and 'waters of the United States' as used in the Clean Water Act are not limited to waters that are 'navigable in fact' or 'traditionally' navigable." EPA maintains that "Congress intended that the Clean Water Act apply to a much broader array of waters than earlier statutes, such as the Rivers and Harbors Act of 1899, that had applied solely to navigable-in-fact waters." Compl. Br. at 61, citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985); *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975).

Respondent argues to the contrary, asserting that EPA failed to establish jurisdiction over its property because the site "contains isolated wetlands not adjacent or with significant nexus to navigable waters or tributaries to navigable waters." Resp. Br. at 33-34. Chiefly relying upon the United States Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001) ("SWANCC"), Smith Farm submits that the wetlands

involved in this case do not fall under Clean Water Act jurisdiction. Resp. Br. at 34-39.<sup>17</sup>

In respondent's view, under *SWANCC*'s analysis, there is no Clean Water Act jurisdiction in this case because (1) the property does not contain "navigable in fact" waters, (2) the waters are not subject to the ebb and flow of the tide, (3) there is no nexus between the property and interstate commerce, (4) the water leaving the property travels through intermittent drainage features, and (5) the water flows through non-jurisdictional uplands and man-made barriers. Resp. Br. at 38-39.<sup>18</sup>

It is the broader view advanced by EPA as to the interpretation of "navigable waters" and "waters of the United States," however, that is controlling here. As asserted by complainant, the Court in *United States v. Riverside Bayview Homes, Inc.*, *supra*, noted that Section 404 of the Clean Water Act constitutes "a comprehensive legislative attempt 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" 474 U.S. at 132, citing 33 U.S.C. § 1251. The Court also noted, "Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' S.Rep. No. 92-414, p. 77 (1972), U.S. Code Cong. & Admin. News 1972, pp. 3668, 3742." 474 U.S. at 132-133.

Thus, the Court in *United States v. Riverside Bayview Homes, Inc.*, *supra*, found that "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term 'waters' to encompass wetlands adjacent to waters as more conventionally defined." 474 U.S. at 133. Noting that the Corps' concerns that wetlands adjacent to navigable waters play a "key role in protecting and enhancing water quality," inasmuch as water moves in hydrologic cycles and pollution in this part of the aquatic system will affect the water quality of other waters within the aquatic system, the Court could not find unreasonable the Corps' conclusion that adjacent wetlands are inseparably bound up with the "waters" of the United States. 474 U.S. at 134. The Court concluded: "In view of the

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<sup>17</sup> In *SWANCC*, the Supreme Court held that the U.S. Army Corps of Engineers exceeded its authority under the Clean Water Act in promulgating the Migratory Bird Rule (51 Fed. Reg. 41,217 (1986)), by which the Corps asserted jurisdiction over a series of isolated ponds that had developed on "an abandoned sand and gravel pit ... which provides habitat for migratory birds." 531 U.S. at 162. There, the Corps had argued that such ponds constituted "waters of the United States" by qualifying as an "other water" pursuant to 33 C.F.R. § 328.3(a)(3). The Corps did not argue that its jurisdiction over the ponds was based in any way on a hydrological connection to waters of the United States.

<sup>18</sup> Respondent also argues that the Supreme Court's earlier decision in *U.S. v. Riverside Bayview Homes*, 474 U.S. 121, 135 (1985), was limited to wetlands which actually abutted a navigable waterway. It argues that "[t]he EPA and the Corps *de facto* extended their authority by applying regulations so that waters claimed to be 'hydrologically connected' to navigable waters are considered jurisdictional, even when they are not adjacent to navigable waters." Resp. Br. at 34.

breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act." *Id.*

Of particular note to the circumstances of this case, the Court in *United States v. Riverside Bayview Homes, Inc.*, *supra*, stated that its reasoning "holds true even for wetlands that are not the result of flooding or permeation by water having its source in adjacent bodies of open water." 474 U.S. at 134. The Court further stated that (as is the case with the Smith Farm wetlands), "wetlands that are not flooded by adjacent waters may still tend to drain into those waters," and that as the Corps concluded, those wetlands "may function as integral parts of the aquatic environment when the moisture creating the wetlands does not find its source in the adjacent bodies of water." 474 U.S. at 135.

Respondent's reading of the United States Supreme Court's subsequent decision in *SWANCC*, *supra*, as providing a more restrictive jurisdictional approach over wetlands than as set forth by the Court in *United States v. Riverside Bayview Homes, Inc.*, *supra*, is incorrect. Contrary to the inferences which the respondent seeks to draw from *SWANCC*, that decision does not speak to wetlands that are adjacent to non-navigable tributaries to navigable waters, nor does it speak to primary tributaries. Indeed, as argued by EPA, respondent's brief "ignores the overwhelming majority of cases holding that *SWANCC* is limited to application of the Migratory Bird Rule and/or that *SWANCC* does not preclude a finding that non-navigable tributaries and their adjacent wetlands are within the jurisdiction of the Clean Water Act." Compl. R.Br. at 8 (fn. omitted). EPA is correct. A brief survey of this case law follows.

In *Treacy v. Newdunn Assocs.*, 344 F.3d 407 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004), the Circuit Court reversed the District Court's reading of *SWANCC* as invalidating the U.S. Army Corps of Engineers' 1986 definition of "waters of the United States." The District Court had held that the subject wetlands were not within the Corps' jurisdiction because they were connected to navigable waters only by way of a tributary that ran across numerous culverts. (195 F. Supp. 2d at 757-759.) The Fourth Circuit, however, held that the Corps' jurisdiction over non-Section 328.3(a)(3) "waters of the United States" remains valid even in light of *SWANCC*. *See* n.20, *infra*. The Court found that the Corps had jurisdiction in that case where the connecting tributary, an intermittent water body, traveled a long distance through natural and artificial culverts. 344 F.3d at 417. In *Newdunn*, *supra*, the Fourth Circuit explained:

In the present case, the Corps asserts jurisdiction over navigable waters (33 C.F.R. § 328.3(a)(1)), tributaries of navigable waters (§ 328.3(a)(5)), and "[w]etlands adjacent to waters (other than waters that are themselves wetlands) ..." (§ 328.3(a)(7)). The Corps defines "adjacent" to mean, "bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" 33 C.F.R. § 328.3(c). This circuit has recently concluded that, pursuant to these

regulations, the Corps intends to assert jurisdiction over “any branch of a tributary system that eventually flows into a navigable body of water.” *United States v. Deaton*, 332 F.3d 698, 711 (4th Cir. 2003) [*cert. denied*, 541 U.S. 972 (2004)]. In *Deaton*, the Corps claimed authority to regulate wetlands bordering a “roadside ditch” that took a “winding, thirty-two mile path to the Chesapeake Bay.” *Id.* at 702. Along the way to the Bay, water flowed from the Deaton’s wetlands to the roadside ditch, and then into a “culvert” on the other side of the road. *Id.* Water from the culvert drained into a second ditch, which flowed into Beaverdam Creek. Beaverdam Creek was “a direct tributary of the Wicomico River, which [was] navigable.” *Id.* The distance from the Deaton’s wetlands to a navigable-in-fact river was approximately eight miles. The *Deaton* court upheld the Corps’ exercise of jurisdiction over all these waters, finding that “the Corps’s regulatory interpretation of the term ‘waters of the United States’ as encompassing nonnavigable tributaries of navigable waters does not invoke the outer limits of Congress’s power or alter the federal-state framework.” *Id.* at 708. In dismissing a *Commerce Clause* challenge to the Corps’ regulations, the *Deaton* court summarized Congress’[s] well-articulated purpose for crafting the CWA and concluded, “The Corps has pursued this goal by regulating nonnavigable tributaries and their adjacent wetlands. This use of delegated authority is well within Congress’s traditional power over navigable waters.” *Id.* at 707. *In sum, the Corps’ unremarkable interpretation of the term “waters of the United States” as including wetlands adjacent to tributaries of navigable waters is permissible under the CWA because pollutants added to any of these tributaries will inevitably find their way to the very waters that Congress has sought to protect.*

344 F.3d at 416-417 (emphasis added).<sup>19</sup>

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<sup>19</sup> Also, in *United States v. Ashland Oil and Transportation Co.*, 504 F.2d 1317 (6th Cir. 1974), the Court explained why inclusion of tributaries within the definition of “navigable waters” is necessary to the implementation of the Clean Water Act:

It would, of course, make a mockery ... if authority [under the Clean Water Act] to control pollution was limited to the bed of the navigable stream itself. The tributaries which join to form the river could then be used as open sewers as far as federal regulation was concerned. The navigable part of the river could become a mere conduit for upstream waste.



In *Carabell v. United States Army Corps of Engineers*, 391 F.3d 704 (6th Cir. 2004), the Court found that wetlands “separated from a tributary of ‘waters of the United States’ only by a man-made berm or barrier” are considered adjacent wetlands under 33 C.F.R. § 328.3(a)(7) and “fall within the jurisdiction of the Corps for purposes of the CWA.” *Id.* at 708-709. The Sixth Circuit noted that *SWANCC* did not persuade it otherwise. The Court also remarked that only “[a] minority of courts have read *SWANCC* broadly to limit the Corps’ jurisdiction under the CWA to navigable waters and non-navigable waters that directly abut navigable waters.” *Id.* at 709.

Similarly, in *United States v. Edison*, 108 F.3d 1336, 1342 (11th Cir. 1997), the Court had recognized that “as long as the tributary would flow into the navigable body of water ‘during significant rainfall,’ it is ... a ‘water of the United States’ under the Act.” Also, in *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001), the Court classified canals as tributaries despite their intermittent flow. In doing so, the Court defined “tributary” as a “stream which contributes its flow to a larger stream or other body of water.” *Id.*

In addition, in *Bricks, Inc.*, 2003 WL 23019917, consistent with the majority approach of the Federal courts, the Agency’s Environmental Appeals Board (“EAB”) essentially rejected the same jurisdictional arguments raised by Smith Farm in this case. Like the present case, *Bricks* involved the issue as to whether a Section 404 permit was required for the landowner to discharge fill material into wetlands. In that case, the EAB stated:

“Waters of the United States” include wetlands adjacent to navigable waters or their non-navigable tributaries. *See supra* note 4 and accompanying text [(n.4 refers to the Corps’ regulations at 33 C.F.R. § 328.3(a) and to EPA’s regulations at 40 C.F.R. § 232.2, both in part defining “waters of the United States” to include adjacent wetlands)]; *see also United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (concluding that the term ‘navigable’ is of limited import, and that the Corps reasonably interpreted the term ‘waters’ to include wetlands adjacent to navigable waters); *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1325 (6th Cir. 1974) (CWA applies to tributaries of navigable waters). Wetlands are adjacent to waters of the United States if there is a “significant nexus” between the wetlands and a navigable water. *See SWANCC*, 531 U.S. at 167; *United States v. Rapanos*, 339 F.3d 447 (6th Cir. 2003); *United States v. Deaton*, 332 F.3d 698, 712 (4th Cir. 2003); *see also Riverside Bayview*, 474 U.S. at 134 (the Corps has jurisdiction over wetlands that are “inseparably bound up” with waters of the United States).

*Id.*, *Bricks, Inc.*, 11 E.A.D. \_\_ (EAB 2003), slip op. at 11.

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504 F.2d at 1326. The Court also noted: “Pollution control of navigable streams can only be exercised by controlling pollution of their tributaries.” *Id.* at 1327.

In sum, the above case law shows that wetlands adjacent to intermittent, non-navigable tributaries, which flow to primary tributaries and ultimately to navigable-in-fact waters, are “waters of the United States” and fall within the coverage of the Clean Water Act. 33 U.S.C. §§ 1311(a), 1344, & 1362(7). Respondent’s reading of *SWANCC* to the contrary is rejected, as is its reliance upon those cases representing such a minority view.<sup>20</sup>

### **(ii.) The Hydrological Connection**

It is undisputed that the wetlands involved in this case are adjacent and contiguous to water bodies which flow from Smith Farm. Tr. 24-30, 134-135 (Vol. II), 116-117 (Vol. V). What is in dispute, however, is the jurisdictional significance of these water bodies. The evidence in this case establishes that a “significant” hydrological connection exists between the waters adjacent to the Smith Farm wetlands and navigable waters. Accordingly, the Smith Farm wetlands are “jurisdictional wetlands.”

This fact is best illustrated through Figures 1 and 2 of Complainant’s Exhibit 87 (Stokely’s report), together with the testimony of Steve Martin of the U.S. Army Corps of Engineers.

Figure 1 is a portion of the U.S. Geological Service’s “100,000 series topographic map, the Norfolk Virginia quad.” It depicts “in a general way the location of Smith Farm” and it also appears to depict local drainages in relation to Smith [Farm].” Tr. 23 (Vol. II). Except for scale, Figure 1 of Complainant’s Exhibit 87 is the same as Respondent’s Exhibit 57.

Martin testified that water flows from the western portion of Smith Farm through an intermittent stream, under Shoulders Hill Road (“Route 626 to the west”), and “joins up with a number of other tributary drainages.” Tr. 24 (Vol. II). Martin stated that this system is called Quaker Neck Creek. From Quaker Neck Creek the water flows to Bennett’s Creek and then to the Nansemond River. The Corps maintains navigation channels on the Nansemond River, which eventually flows to the James River and on to the Chesapeake Bay. Martin also noted that portions of the Quaker Neck Creek and Bennett’s Creek are tidally influenced. Tr. 24, 25-26 (Vol. II).

Next, to the east of Smith Farm, as depicted in Figure 1, Martin identified a water body known as the Western Branch of the Elizabeth River (also referred to as “the Western Branch”). He explained how water flows from Smith Farm to the Western Branch as follows:

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<sup>20</sup> As is the case with *SWANCC*, respondents’ reliance upon *United States v. Wilson* is misplaced. First, the *Wilson* case involved Section 328.3(a)(3) as the government’s asserted jurisdictional basis. In the present case, however, the government asserts that Sections 328.3(a)(1), (2), (5) and (7) provide jurisdiction. Second, in a subsequent proceeding following the remand of *United States v. Wilson*, contrary to the legal proposition cited by respondents, the Fourth Circuit actually upheld the Corps’ assertion of jurisdiction in that matter on the basis of 33 C.F.R. § 328.3(a)(1), (5), and (7). *United States v. Interstate General Co.*, No. 01-4513, slip op. at 7-8 (4th Cir. July 2, 2002).

The eastern and southern portions of the property, primarily Chesapeake but portions of Suffolk, drain east and south into tributaries of Bailey's Creek. Bailey's Creek then discharges into the Western Branch of the Elizabeth River.

Tr. 25 (Vol. II). The Corps has issued permits for docks and marinas on portions of Bailey's Creek. In addition, portions of both Bailey's Creek and the Western Branch are tidally influenced.

Like the Nansemond River to the west of Smith Farm, the Western Branch of the Elizabeth River to the east of the property eventually flows to the James River and then on to the Chesapeake Bay. Tr. 25-26 (Vol. II).

Martin then refined his testimony based upon Figure 2 of Complainant's Exhibit 87. Figure 2 also is a USGS topographical map (1 to 24,000 scale) which encompasses Smith Farm. In Figure 2, Smith Farm is divided into four quadrants, wherein seven drainages from the property are identified. Tr. 26-27 (Vol. II). All of the seven drainages flow intermittently. Tr. 77 (Vol. II).

In explaining the significance of Figure 2, Martin began with the northwest quadrant. This quadrant drains to Drainage No. 6 (identified as a broken blue line), which flows from east to west and discharges into an intermittent stream that makes up a portion of Quaker Neck Creek. Tr. 27 (Vol. II); *see* Tr. 134 (Vol. II) (Stokely testifying that the northwest quadrant drains into Quaker Neck Creek and from there into the Nansemond River.).

Next, Martin discussed the southwest quadrant, which drains in two directions. A portion of it drains to Drainage No. 7, an intermittent stream. This intermittent stream flows west to Quaker Neck Creek and then to Bennett's Creek and ultimately the Nansemond River. The remainder of the southwest quadrant drains south to Bailey's Creek through Drainage Nos. 1 and 2, both described by Martin as a "channelized intermittent waterway." The water flow continues from Bailey's Creek to the Western Branch of the Elizabeth River. Tr. 28-29 (Vol. II); *see* Tr. 139 (Vol. II) (Stokely testimony).

The northeast quadrant represented on Figure 2 of Complainant's Exhibit 87 also drains to Bailey's Creek. "Part of it drains into the southeast quadrant, and part of it appears to drain through another intermittent drainage." Tr. 29 (Vol. II). Martin stated that ultimately the water from the northeast quadrant travels through Drainage Nos. 2, 3, 4 and 5 to Bailey's Creek and on the Western Branch of the Elizabeth River. *Id.* He added, "the wetlands on the northern portion, northeast quadrant of Smith Farm are part of a larger wetland complex that extends appreciably north of the Smith Farm property." Tr. 31 (Vol. II). *See* Tr. 134-135 (Stokely testimony).<sup>21</sup>

Finally, Martin stated that the southeast quadrant drains through Drainage Nos. 2, 3 and 4,

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<sup>21</sup> Martin also relied upon the City of Chesapeake Master Drainage Study which identified a portion of Smith Farm as draining to Bailey's Creek and a portion of the adjoining complex apparently draining to Drum Point Creek. Tr. 37 (Vol. II).

all intermittent drainages to Bailey's Creek. From there the water proceeds to the Western Branch. Tr. 29 (Vol. II); *see* Tr. 138 (Vol. II) (Stokely testimony).

Martin testified that he walked the periphery of the Smith Farm site and that he traced each of the seven drainages by walking them "down to tidal limits." Tr. 3-310 (Vol. II). (Martin was accompanied by Stokely. Tr. 139 (Vol. II).)<sup>22</sup> In that regard, Martin prepared Complainant's Exhibit 56, a USGS topographical map, which depicts the location of tidal waters on Bailey's Creek, Quaker Neck Creek, and Drum Point Creek. *Id.* ("It's basically depicting the location of a number of photographs that I took when I was on the property of this site tracing drainage." Tr. 30-31 (Vol. II).)<sup>23</sup>

Martin concluded that Quaker Neck Creek becomes tidally influenced approximately 2,600 feet along the drainage from Smith Farm. *See* CX 102 (Photograph Y). Bailey's Creek becomes tidally influenced approximately 4,200 feet from Smith Farm. Tr. 31-32 (Vol. II). *See* CX 102 (Photograph O).

In addition, Martin took photographs of the locations where the drainages extending from the Smith Farm site travel through man-made culverts.<sup>24</sup> Photograph 102A (CX 102) is taken downstream of where Drainages No. 2 and No. 3 come together. This photograph depicts water flowing through a culvert underneath Portsmouth Boulevard. Tr. 39-40 (Vol. II). Photograph 102B (CX 102) is a "depiction of water on an intermittent drainage that's coming off the site." It is taken where intermittent Drainages No. 4 and No. 5 flow together through the culvert under Old Gum Road. Tr. 40-42 (Vol. II). Photograph 102I (CX 102) shows Drainages Nos. 6 and 7, a tributary of Quaker Neck Creek, coming together and flowing through a railroad culvert. Tr. 48-49 (Vol. II). Finally, Photograph 102M (CX 102) is taken on the same drainage where the water flows through a culvert under Shoulders Hill Road. Tr. 52 (Vol. II).

There also was a considerable amount of testimony in this case regarding the "ordinary high water mark" in the various tributaries conveying water from Smith Farm to the point where Quaker Neck Creek and Bailey Creek become tidally influenced. *See* 33 C.F.R. § 328.3(e). Martin explained that "[a]lmost by definition ordinary high water mark would be associated with non-tidal conditions." Tr. 60-61 (Vol. II). He described an ordinary high water mark in terms of a clear natural line impressed on the bank, shelving, destruction of terrestrial vegetation, or the

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<sup>22</sup> Martin did not actually go onto Smith Farm property while tracing the drainages. Tr. 38 (Vol. II).

<sup>23</sup> Martin stated that the demarcation between tidal and non-tidal areas can be determined through observations of tidal fluctuations -- *i.e.*, changes in the height or the directional movement of the water -- , and differences in plant communities and aquatic invertebrates. Tr. 31 (Vol. II).

<sup>24</sup> The purpose of a culvert is to "preserve a drainage and convey flows." Tr. 26 (Vol. II).

presence of litter and debris. Tr. 48-53, 56-58 (Vol. II).<sup>25</sup> In so doing, Martin identified the presence of ordinary high water marks in photographs 102I, 102J, 102K, 102L, 102M, 102N, 102W, 102X, and 102BB of Complainant’s Exhibit 102. Martin also identified ordinary high water marks in photographs 332, 357, 359, 360, 361, 362, and 423 through 427 of Respondent’s Exhibit 34B. Tr. 132-138, 143-148 (Vol. V).

Charles Wolfe, respondent’s witness, countered by testifying that, in his view, the “ordinary high water marks” identified by Martin are actually “high water marks” because the Smith Farm lacks a “shore.” Tr. 21-27, 66-67, 91-103 (Vol. V). Respondent believes that this difference is significant. For example, in its post-hearing brief, Smith Farm submits that “[i]nstead of using shore’s ‘plain meaning,’ the EPA adopts the Corps’ approach of treating the word ‘bank’ as synonymous with ‘shore.’” Resp. Br. at 43 (citations omitted). Smith Farm believes that this point is significant because (in its view) by doing so EPA unilaterally expanded the scope of its Clean Water Act jurisdiction. See Resp. Br. at 41-44.

The point that respondent seeks to make relative to its “high water mark” versus “ordinary high water mark” argument lacks clarity and ultimately is unpersuasive. Accordingly, Martins’ testimony is accepted as establishing the various drainage characteristics in the water bodies that he observed, characteristics caused by intermittent water flow.

#### **4. The Unlawful Discharge of Wood Chips**

Count I of the complaint alleges a violation of Section 301(a) of the Clean Water Act because respondent discharged fill material onto wetlands that are waters of the United States, without a Section 404 permit from the Corps. 33 U.S.C. §§ 1311(a) & 1344. As explained below, EPA has proven this charge.

First, it already has been established that the activities at issue in this case took place in “waters of the United States.” These activities involve the deposit of wood chips onto the Smith Farm wetlands. Second, the wood chips and woody debris are “pollutants” within the meaning of Sections 301(a) and 502(6) of the Clean Water Act, which includes “biological material.” 33 U.S.C. §§ 1311(a) & 1362(6). On the facts of this case, these wood chips constitute fill material. See *United States v. Tilton*, 705 F.2d 429, 430 (11th Cir. 1983); see also, *Phoenix Construction Services, Inc.*, 11 E.A.D. \_\_, CWA Appeal No. 02-07 (April 15, 2004) (The term “‘pollutant’ has an expansive definition, and has been interpreted to included dredged and fill material.”), slip op. at 6 n.4, citing, among others, *United States v. Pozgai*, 999 F.2d 719, 725 (3rd Cir. 1993), cert. denied, 510 U.S. 1110 (1994). Third, the Kershaw used to grind the “slash” in the cleared paths, as well as the use of a stump grinder, are “point sources” within the meaning of

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<sup>25</sup> On rebuttal, Martin testified that the Corps does not consider the presence of destruction of terrestrial vegetation or the presence of a litter line as a requirement before identifying a high water mark, although they may be useful in doing so. What is required is a “change in physical characteristic, such as a clear or natural line impressed on the bank.” Tr. 137-138 (Vol. V).

Sections 301(a) and 502(14) of the Act. 33 U.S.C. §§ 1311(a) & 1362(14).<sup>26</sup> See *Borden Ranch P'ship v. Army Corps of Eng'rs*, 261 F.3d 810 (9th Cir. 2001) (finding congressional intent that courts interpret definition of “point source” broadly), *aff'd* 537 U.S. 99, 100 (2002) (per curiam).

Accordingly, the discharge of this fill material onto the wetlands on the Smith Farm property constituted the discharge of “pollutants” from a “point source” requiring a Section 404 permit. This finding of unlawful discharge is based solely on the fact that substantial amounts of wood chips were deposited on the Smith Farm wetlands.

We begin with the definition of the term “fill material.” This term is not defined in the Clean Water Act. It is, however, defined by both the Corps and EPA, although somewhat differently. At the time of the events of this case, the Corps’ definition provided in part that “fill material” was “any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of an [*sic*] waterbody.” 33 C.F.R. § 323.2(e) (1998). The EPA defined “fill material” in part as “any ‘pollutant’ which replaces portions of the ‘waters of the United States’ with dry land or which changes the bottom elevation of a water body for any purpose.” 40 C.F.R. § 232.2 (1998).<sup>27</sup>

While the Corps and EPA had slightly differing definitions of “fill material” when the events of this case took place, their definitions of the term “discharge of fill material” was identical. Their respective regulations provided:

The term *discharge of fill material* means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary to the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt or other materials for its construction; site-development fills for recreational, industrial, commercial, residential and other uses, causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures, such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs.

33 C.F.R. § 323.2(f) & 40 C.F.R. § 232.2.

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<sup>26</sup> A “point source” is “any discernible, confined and discrete conveyance ... from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14).

<sup>27</sup> The Corps and EPA have since engaged in joint rulemaking whereby both Agencies have adopted the EPA definition of “fill material.” 67 Fed. Reg. 31129 (May 9, 2002).

The evidence supporting this violation can be stated briefly. It is, however, nonetheless compelling. The finding of an unlawful discharge of fill material in this case is based on the substantial amounts of wood chips that were placed onto the Smith Farm wetlands.

First, Steve Martin of the U.S. Army Corps of Engineers testified that on his January 6, 1999, site visit he observed wood chips in the cleared corridors ranging “in depth anywhere from about a half-inch to as much as five inches.” Tr. 237 (Vol. I).<sup>28</sup> (The EPA inspection did not take place until the following September.) Martin measured the depth of these chips by using a soil auger. *Id.* The wood chips observed by Martin were the result of Vico Construction’s and Paxton Contractor’s slash-clearing operation. Martin did not see any such wood chips in the undisturbed forested area of Smith Farm. Tr. 258 (Vol. I).

In addition to Martin’s testimony, the testimony of individuals on the EPA wetlands inspection team adds further support for the finding that substantial amounts of wood chips were deposited by respondent’s agents onto the cleared wetlands corridors. Again, this EPA inspection took place on September 8, 1999.

Jeffrey Lapp, the EPA wetlands team leader, stated that at Sample Point A on the property, there was a mixture of wood chips and soil material to a depth of six and one-half inches on top of the undisturbed soil profile. Tr. 133, 148-149 (Photographs 0793 & 0794) (Vol. I). Sample Point A was located in a wetlands area that had been cleared of timber and woody debris. Lapp further stated that the team observed a four-inch layer of wood chips and soil material on top of the undisturbed soil profile at Sample Point C, also located in a wetlands area that had been cleared of timber and woody debris. *Id.*

Lenore Vasilas, the soil scientist with the Natural Resources Conservation Service, similarly testified that she observed six and one-half inches of wood chips mixed with dark mineral material on the surface at Sample Point A. Tr. 81 (Vol. III). Vasilas also observed up to four inches of wood chips mixed with surface material at Sample Point C. Tr. 81-82 (Vol. III).

Thus, the testimony of the EPA witnesses as to the substantial breadth of the discharge of wood chips is sufficient to establish the Section 301(a) violation alleged in Count I. Granted, William Parker, a “soil expert” retained by respondent, testified that he did not observe the kind of accumulation of wood chips at Sample Point A that the EPA witnesses testified that they observed. Tr. 160-164 (Vol. III). Nonetheless, Parker’s first visit to the Smith Farm site was in March of 2000, well after the actual discharge of the wood chips onto the wetlands, and well after the January 6, 1999, visit by the U.S. Army Corps of Engineers and the September 8, 1999, inspection by EPA.

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<sup>28</sup> Martin also described the wood chips as follows: “They range in size from small, almost regular pieces of wood, say the size of change, quarter, a half dollar, on up to very irregular pieces of wood, perhaps six, eight, 10 inches long and maybe half-inch to two inches in width fragments, shards of wood.” Tr. 257 (Vol. I).

Parker did return to the Smith Farm property in March of 2002. During this visit he collected 55 samples in an effort to determine if there was fill material in the wetlands, and, if so, to determine how much fill there was and where it occurred. Tr. 165-174 (Vol. III). He concluded that the amount of wood chips on site was consistent with normal logging silviculture operations. Tr. 178 (Vol. III). He also acknowledged, however, that of the 32 samples taken in disturbed areas, 22 of the samples had either wood chips with woody debris or woody debris with no wood chips. Tr. 190-191 (Vol. III), 244 (Vol. V).

Parker's March, 2002, inspection suffers even more so from the passage of time. It took place approximately two and one-half years *after* the September, 1999, inspection by EPA. Accordingly, to the extent that Parker's findings in March of 2002 contradict the findings of EPA in September of 1999 (and even that is not certain), they simply are not enough to rebut the EPA evidence that a substantial amount of wood chips (fill material) had been discharged onto the wetlands.

In sum, the substantial amount of wood chips discharged onto the wetlands constitutes an unlawful discharge of a pollutant. EPA maintains, in part, that it was respondent's "intent to raise the bottom elevation of the wetlands for the purpose of creating a driving surface." Compl. Br. at 74. That proposition is not supported by the record inasmuch as several of respondent's witnesses testified that the chips were distributed randomly and that, in any event, they could not support the weight of the construction equipment. *See, e.g.*, Tr. 74 (Vol. VI).

For purposes of establishing a violation here, however, it is quite sufficient that respondent intentionally discharged huge quantities of wood chips onto its jurisdictional wetlands. This conduct satisfied the then-applicable EPA definition of "discharge of fill material" which "means the addition of fill material into waters of the United States." 40 C.F.R. § 232.2 (1998). This conduct also satisfied the Corps' then-applicable definition of "discharge of fill material" which references a "primary purpose of replacing an aquatic area with dry land or of changing the elevation of an [sic] waterbody." 33 C.F.R. § 323.2(e) (1998). Given the intentional conduct of Smith Farm to discharge this fill material onto the wetlands, and given the obvious and expected result that such a discharge, as had occurred in this case, would inevitably serve to replace an aquatic area with dry land or change the elevation of a waterbody, it defies logic to conclude that the Corps' definition of "discharge of fill material" was not met in this instance.

In addition to alleging the discharge of the wood chips into the jurisdictional wetlands, EPA further alleges that Smith Farm also violated Section 301(a) of the Act by similarly discharging, without a Section 404 permit from the Corps, dredged material excavated from the Tulloch ditches. According to EPA, "[t]his light colored soil is consistent with 'C' Horizon soil that would have been in the soil profile and in the ditch bottoms, which would make it dredged material." Compl. Br. at 79. A related argument is complainant's assertion that the evidence also shows "significant soil movement attributable to the movement of vehicles throughout the site."



*Id.*<sup>29</sup>

EPA builds its case around the testimony of Lapp, Vasilas, and Martin, all of whom testified that they observed light colored soil on the surface of the wetlands in the southwest quadrant of the site and, or, observed significant soil movement caused by the tracks of respondent's construction vehicles. *See* Tr. 143-148, 270 (Vol. I), 84-85 (Vol. III), 240 (Vol. V); CXs 26, 27 & 41.

The testimony of these witnesses, however, is not as clear as EPA believes it to be. It is undisputed that the witnesses observed what they believed was light colored soil on the surface of wetland areas, as well as ruts and tracks caused by the timbering, path-prepping, and excavating equipment. Yet, the scope of these disturbances is unclear to this Tribunal. EPA asserts that they are more than *de minimis*, but yet its citation to the record evidence fails to present a clear picture as to the specific scope and nature of this alleged violation.

### **5. Respondent's Silviculture Exemption Defense**

Smith Farm submits that “[t]he activities at the Property are also not regulated because the activities are exempt from CWA regulation as silviculture operations.” Resp. Br. at 46, citing 40 C.F.R. §§ 122.3(e) & 232.2 and 33 C.F.R. § 323.4. Respondent summarily addresses this defense, noting that the clearing and ditch digging activities that it engaged in on the site were related to its historical involvement with timbering. This argument is rejected based upon the overwhelming evidence to the contrary.

The only witness to testify in detail regarding silviculture operations was James Gregory. He was accepted as an expert in silviculture practices. Tr. 272 (Vol. IV). Gregory was of the opinion that the activities that took place on the Smith Farm site did not qualify as silviculture. (“I would not characterize it as silviculture at all.” Tr. 293 (Vol. IV.))

Gregory based his opinion on a number of factors. First, it is common to avoid operating on poor draining soils, such as that found on Smith Farm, during wet weather. Tr. 275-276 (Vol. IV). Yet, the timbering, clearing, and excavating activities at issue in this case took place

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<sup>29</sup> EPA also argues that “the record shows that check dams were placed in pre-existing tributaries, specifically, drainages 6 and 7.” Compl. Br. at 80. According to EPA, this is further evidence of an unlawful discharge of fill material without a Section 404 permit. In support of this argument, EPA cites the testimony of Robert Needham at transcript pages 215 to 220 (Vol. V), as well as to Respondent's Exhibit 15. A reading of Needham's testimony, however, shows that, at least in his view, the check dams were not placed in jurisdictional wetlands. Instead, they were placed “in these historic farm ditches in the prior converted crop land, those were manmade ditches in high ground that had never been regulated before.” Tr. 216 (Vol. V). On balance, the transcript pages and the exhibit cited by EPA, without a more detailed explanation or a more focused argument, are not enough to persuade this Tribunal of yet another instance of violation.

during wet weather months. Second, it is the practice in silviculture operations to install a minor drainage system prior to harvesting the timber. Tr. 277 (Vol. IV). Here, a major drainage system was installed (*i.e.*, the Tulloch ditches) and that was done *after* the land had been timbered. Moreover, Gregory testified that, in normal silviculture practice, after the access roads and minor drainage system have been installed there is a delay ranging from one to three years. This allows for the lowering of the water table to occur, as well as for the land to dry. Tr. 277-278 (Vol. IV). There was no such delay at Smith Farm.

Third, because of the very high cost of draining the land, it is normally a part of the silviculture operation to “clear-cut” the timber. Tr. 278 (Vol. IV). Here, however, only corridors and transects for the monitoring wells were cleared of timber. Fourth, grinding up the woody debris that remains after timbering, as was done in this case, is not ordinarily done in a normal silviculture operation. Nor is it common to transport the dredged material to uplands, as was done here. Silviculture exemptions allow for a minor drainage ditch to be dug and for the dredged material to be deposited around the ditch. Tr. 279 (Vol. IV). Finally, as explained by Gregory, installing monitoring wells is not consistent with normal Silviculture practice, nor is clearing 35 to 50-foot wide corridors (“[t]ypically a corridor only half that wide would be needed for minor drainage in ordinary silviculture”). Tr. 283-284 (Vol. IV).

Accordingly, Smith Farm has failed to show that its activities fall within the silviculture exemption of Section 404(f) of the Clean Water Act. 33 U.S.C. § 1344(f). In order for this exemption to apply, it must be shown that the landowner is managing the site for timber and there is evidence that it will be continued to be managed for timber production. Tr. 292 (Vol. IV). Clearly, that was not the case at Smith Farm.

## **6. Smith Farm’s Activities Had Not Been Approved by the Corps**

Smith Farm also argues that it can not be found in violation of Section 301(a) because its land clearing and ditch digging activities followed the ground rules that both the U.S. Army Corps of Engineers and the nearby Southern Pines site had previously agreed upon. Smith Farm reasons that the same timber clearing and ditch excavation occurred on its property as had taken place on Southern Pines. Moreover, respondent states that it informed the Corps of its planned activities and that the Corps voiced no objection either before it began to clear the timber and dig the Tulloch ditches, or even after it started ,when its employee, Steve Martin, witnessed these activities in progress. Resp. Br. at 47-49.

Respondent’s argument is wholly without merit. The circumstances involving the U.S. Army Corps of Engineers’ involvement in this case have been set forth, *supra*, and they do not reflect any outright approval, or subtle acquiescence, by the Corps of the Tulloch ditching activities that took place on the Smith Farm site. First, respondent’s reliance upon the correspondence between the Corps and Souther Pines is misplaced. *See* RXs 10 & 11. There, the Corps explicitly stated, “This is a case specific determination and does not apply to any other site.” RX 11.

Second, the Corp’s letter to Southern Pines further stated, “as long as your project does not

include a more substantial discharge that would trigger Section 404 regulation, a Corps permit will not be required for the excavation of ditches in wetlands on the Southern Pines site.” RX 11. Smith Farm’s reliance upon the “Southern Pines letter,” accordingly, is greatly misplaced. As noted in the analysis section of the Count I violation, even if the precise terms of the Corps’ Southern Pines letter were to apply to the Smith Farm Tulloch ditch operation, those terms were not met by respondent. The fact that a violation occurred in this case is due to the rather substantial amounts of wood chips that respondent discharged onto its wetlands.

Finally, to the extent that respondent relies upon its meeting with Nick Konchuba of the U.S. Army Corps of Engineers as evidence of the Corps’ approval in this case, its reliance likewise is misplaced. The fact that Smith Farm may have generally outlined its Tulloch ditching intentions to Konchuba, and outlined those methods in a letter to the Corps (RX 14), in no way constitutes the Corps’ approval for the discharge of substantial amounts of wood chips onto jurisdictional wetlands. The Smith Farm letter to Konchuba (RX 14) merely tracts the Corps’ letter to Southern Pines in generally identifying the land clearing and ditch excavation methodology. As noted earlier with respect to the Southern Pines letter, even if those general ground rules were to apply with to the Smith Farm site, they were not complied with in this case given the substantial discharge of wood chips. In that regard, it is most telling that on cross-examination, respondent’s wetlands consultant, Needham, stated that he had communications with the Corps’ Wilmington District in which he was warned that significant accumulations of wood chips can be fill material. Tr. 11 (Vol. VI).

In sum, respondent did not establish that the U.S. Army Corps of Engineers gave approval to the land clearing and Tulloch ditching activities that EPA subsequently found in violation of the Clean Water Act. Respondent also did not establish that the Corps engaged in any conduct which would estop EPA from prosecuting this case. *See Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990); *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984).

## **B. Count II**

“The Clean Water Act authorizes EPA to regulate storm water discharges into waters of the United States from a variety of sources, including construction sites.” *Phelps Dodge Corporation, Verde Valley Ranch Development*, 10 E.A.D. 460, 463 (EAB 2002) (fn. omitted). Section 402(p)(2)(B) of the Act requires the issuance of storm water permits for “[a] discharge associated with industrial activity.” 33 U.S.C. § 1342(p)(2)(B).<sup>30</sup> When the Tulloch ditching events in this case took place on Smith Farm, the term “industrial activity” included “construction activity” such as “clearing, grading, and excavation” where five or more acres of total land area was disturbed. 40 C.F.R. § 122.26(b)(14)(x) (1998).

Here, EPA charges that respondent violated Section 301(a) of the Clean Water Act,

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<sup>30</sup> Section 402(p) was enacted as part of the Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (1987).

33 U.S.C. § 1311(a), by discharging storm water associated with construction activity without a Section 402 permit into “waters of the United States.” 33 U.S.C. § 1342. In the Amended Complaint, EPA alleges that “[t]he clearing, excavating, spreading and related activities at the Site constitute ‘industrial activity’ within the meaning of § 402(p) of the Act and 40 C.F.R. §§ 122.1 and 122.26(b)(14).” Amend. Compl., ¶ 28. The complainant further alleges that Smith Farm’s construction activities resulted in the discharge of “pollutants,” contained in storm water runoff, from a “point source” on site (*i.e.*, the equipment) to wetlands and ditches which discharge into unnamed tributaries, all of which are “waters of the United States.” Amend. Compl. ¶¶ 29 & 30. Thus, EPA concludes, “Respondent[’s] discharge of pollutants without an NPDES permit between November 1998 and November 10, 1999, violates Section 301 of the Act, 33 U.S.C. § 1311.” Amend. Compl., ¶ 35.<sup>31</sup>

In order to prove a violation of Section 301(a) in this case, the burden of proof is upon EPA to show that respondent: (1) discharged a pollutant; (2) from a point source; (3) into a navigable water; and (4) without a NPDES permit. *Larry Richner*, 10 E.A.D. 617, 620 (EAB 2002). As explained below, EPA also has met this burden.

### **1. The Five-Acre Threshold**

A preliminary inquiry is whether respondent’s land disturbance activities affected at least five acres. 40 C.F.R. § 122.26(b)(14)(x) (1998). In determining whether this five-acre threshold requirement has been met, construction activity in both wetland and non-wetland areas is taken into account. Tr. 197 (Vol. II).

In this case, respondent clearly satisfied this five-acre threshold. The proposed area to be disturbed on the Suffolk-side of the property alone exceeded five acres. In that regard,

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<sup>31</sup> EPA also concludes, “Respondent[’s] discharge of pollutants in violation of their NPDES permit from November 10, 1999 to January 17, 2001, violates Section 301 of the Act, 33 U.S.C. § 1311.” Amend. Compl., ¶ 36. As noted, Smith Farm obtained an NPDES which became effective on November 10, 1999. Stipulation 10 (June 13, 2002). EPA submits that one of the terms and conditions of this NPDES permit was the development and implementation of a Storm Water Pollution Prevention Plan (*i.e.*, the “SWPPP”) within 30 days of the effective date of the permit. In the Amended Complaint, EPA charges that respondent did not develop and implement a SWPPP until January 17, 2001. Amend. Compl., ¶¶ 33 & 34. However, this allegation must fail in light of the fact that during 1998 and 1999 the Virginia Department of Environmental Quality, Tidewater Regional office, accepted Erosion and Sediment Plans in lieu of a SWPPP. Tr. 148 (Vol. VI). In as much as respondent did, in fact, have E&S Plans from the Cities of Chesapeake (CX 44A) and Suffolk (CX 109) at the time it began its Tulloch ditching operation, this additional allegation must fail. Whether respondent was in full compliance with the two E&S Plans, however, is a different story.

respondent's Erosion and Sediment Control Plan for the Suffolk portion of its property listed 7.147 acres of land to be disturbed by the Tulloch ditch construction activity. Tr. 207-209 (Vol. II); CX 109. In addition, the E&S Plan for the Chesapeake-side of the property listed 3.562 acres of land that was to be disturbed. CX 44A. While the construction activity on the Suffolk portion of the property alone satisfies the minimum acreage requirement, these two E&S Plans represent a common plan of development, and therefore can be considered together. Tr. 196-197 (Vol. II). As such, they totaled 10.709 acres of land that was to be disturbed. In addition, Stokely testified that, based upon his aerial photography analysis, 13,550 linear feet of ditches dug in a 50-foot wide cleared swath had been constructed in the wetlands. Tr. 153 (Vol. II). The parties also stipulated that the Timber Agreement between Smith Farm and Old Mill allowed the timber company "to log approximately 11.34 acres in the forest area on the Smith Farm." Stipulation 8 (June 13, 2002).

## **2. The Violation**

It is undisputed that Smith Farm did not have a Section 402 NPDES permit when it began clearing the wooded corridors and excavating the Tulloch ditches.<sup>32</sup> It also previously has been found, with respect to the Section 404 violation alleged in Count I, that the Tulloch ditches were excavated in jurisdictional wetlands. In other words, these wetlands are "waters of the United States." Thus, in order to establish the Section 301(a) violation alleged in Count II, all that remains is for EPA to show that Smith Farm discharged a pollutant from a point source. *Larry Richner, supra*.

The term "pollutant" includes "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, *rock, sand, cellar dirt*, and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. §1362(6) (emphasis added). Recognizing this "broad" definition, the Court in *Driscoll v. Adams*, 181 F.3d 1285 (11th Cir. 1999), *cert. denied*, 529 U.S. 1108 (2000), stated, "[w]hen rain water flows from a site where land disturbing activities have been conducted, such as grading and clearing, it falls within this description." 181 F.3d at 1291, *citing Hughey v. JMS Development Corp.*, 78 F.3d 1523, 1525 n.1 (11th Cir. 1996).

In this case, Kevin Magerr of EPA provided ample support for EPA's theory that storm water carrying pollutants was discharged into the Tulloch ditches on the Smith Farm site. First, Magerr performed calculations demonstrating that storm water runoff occurs in the cleared and excavated area (*i.e.*, the disturbed area) of Smith Farm whenever there is a rainfall event of 0.32 inches or greater, over a 24-hour period. He made this calculation using the Natural Resource Conservation Service's "SCS Runoff Curve Number method." Tr. 266-271 (Vol. II); CX 36.

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<sup>32</sup> Indeed, Smith Farm did not even apply for an NPDES permit until September 15, 1999, *after* the EPA inspection in this case. Stipulation 2 (September 8, 2003). An NPDES permit was eventually issued by the Virginia Department of Environmental Quality, but that permit did not take effect until November 10, 1999. Stipulation 10 (June 13, 2002).

In making this calculation, Magerr selected the hydrologic soil group “B,” upon the advice of soils expert Lenore Vasilas. Magerr also selected a value from Table 2-2a, which refers to “Runoff curve numbers for urban areas.” Magerr explained, “Under that sub-classification, it talks about newly graded areas, and that characteristic is what I observed out at the site.” Tr. 272-274 (Vol II). He added that because there was no vegetation at the particular area of the site, “It fit the description, absolutely.” *Id.*<sup>33</sup>

Having determined that a storm water runoff occurs with a rainfall of 0.32 inches or greater, Magerr then referred to Complainant’s Exhibit 90, the rainfall data from the Suffolk Lake Kilby weather station.<sup>34</sup> This weather data is compiled by the National Oceanic Atmospheric Administration. Tr. 276 (Vol. II). Presumably, EPA’s reference to this exhibit was to show, according to Magerr’s 0.32 inch rainfall calculation, the exact number of days that there was storm water runoff in the cleared corridors of Smith Farm. *See* Tr. 276-282 (Vol. II).

Second, the observations of Magerr during his September 8, 1999, storm water inspection of Smith Farm provide concrete support for his mathematical calculation as to when storm water runoff would be expected to occur in the cleared areas of respondent’s site. Specifically, Magerr observed significant evidence of erosion as a result of respondent’s Tulloch ditching construction activity.<sup>35</sup> Testifying with respect to Disk 4, Photograph 4 of Complainant’s Exhibit 96, Magerr identified “sloughing of the bank” (*i.e.*, a failure of the bank), as well as “a lot of rilling” and gullying, all evidence of erosion. Tr. 235 (Vol. II). In this photograph, Magerr also identified “a lot of silt” in the channel. *Id.* In addition, Magerr referenced Disk 4, Photograph 5 (CX 96), to show that one of the Tulloch ditches had the appearance of a “U-shape” instead of a typical “V-shape.” He attributed this shape to the fact that sloughing had occurred because the sides of the ditch were unprotected. Tr. 236 (Vol. II).<sup>36</sup>

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<sup>33</sup> The numeric value of “86” used by Magerr to represent the newly graded area that he observed is the same numeric value used for “Bare soil” in Table 2-2b, “Runoff curve numbers for cultivated agricultural lands.” Tr. 275 (Vol. II). On cross-examination, Magerr stated that he used the newly graded classification to determine run-off because there just wasn’t enough vegetation to indicate that it should be another classification. Tr. 29 (Vol. III).

<sup>34</sup> U.S. Army Corps of Engineers environmental scientist Martin stated that for precipitation data relative to Smith Farm, he would look to the Norfolk weather station and then to Lake Kilby. Tr. 62 (Vol. II). Needham, respondent’s wetlands expert, however, stated that he uses data from the Lake Kilby station. Tr. 9 (Vol. VI).

<sup>35</sup> Magerr’s testimony is limited to the ditches on the Suffolk-side of the property. He did not inspect any of the ditches on the Chesapeake-side. Tr. 28 (Vol. III).

<sup>36</sup> Magerr also referenced other photographs showing erosion problems along the constructed Tulloch ditches. For example, Disk 5, Photographs 8 and 9 (CX 96) show sloughing, rilling, gullying and silt accumulation. Tr. 238-239 (Vol. II). In addition, Roll 4, Frames 21 and 24 (CX 41) depict bank failure. Tr. 252-253 (Vol. II).

In sum, EPA clearly established the discharge of a pollutant into the Tulloch ditches. The final element of proof concerns a point source. A “point source” is “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel ... from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). The Tulloch ditches constructed by Smith Farm precisely fit the definition of a point source, as does the equipment used by Paxton Contractors to excavate the ditches. Accordingly, EPA has satisfied all the elements of proof to establish the alleged Section 301(a) violation for discharging storm water associated with construction activity without a Section 402 permit.

Asserting that there was no such violation, Smith Farm raises a number of additional arguments, none of which are persuasive. First, respondent argues that under the United States Supreme Court’s decision in *SWANCC*, discussed *supra*, EPA lacks jurisdiction to require a Section 402 permit. Resp. Br. at 54. Respondent’s reliance upon *SWANCC* has previously been rejected and it need not be repeated here.

Second, respondent suggests that some type of estoppel defense exists, stating that initially it had been informed by the Virginia Department of Environmental Quality (“Virginia DEQ”) that a Section 402 permit was not required. Smith Farm further states that once informed by the Virginia DEQ as to the need of such a permit, Vico Construction immediately set about obtaining one. Resp. Br. at 55-56. As support for this argument, respondent cites to the testimony of James Boyd, a managing member of Smith Farm Enterprises, L.L.C. A review of the cited testimony (Tr. 279 (Vol. III)), however, is not sufficient to support Smith Farm’s version of events that it was informed that a Section 402 permit was not needed. The testimony of James Boyd is, at best, inconclusive on this issue and, at worst, it suffers from a lack of detail and clarity. Moreover, subsequent to Mr. Boyd’s conversation with the Virginia DEQ, respondent received a letter from this State agency, dated May 25, 1999, informing it that “it appears these projects [which included Smith Farms] will need a general stormwater permit for the proposed construction activity.” CX 97.

Third, respondent submits that “localities administer Erosion and Sediment Control plans, which are largely equivalent to the Storm Water Pollution Prevention Plan that would have been created in connection with a Section 402 permit. *See* Tr. 148 (Vol. VI) (In 1998 and 1999, Virginia DEQ accepts E&S Plan in compliance with a SWPPP). The problem here, however, is that respondent did not have a NPDES permit when it began construction and an E&S Plan (or even a SWPPP) is not the equivalent of a NPDES permit.

Finally, in an apparent reference to Lawrence Cahoon, a Professor of Biological Sciences and an expert on the impact of storm water runoff on water quality (Tr. 6, Vol. IV), respondent states, “[t]he only water quality expert to testify at trial found that the water quality at the Property was excellent and that erosion control features were ‘entirely effective.’” Resp. Br. at 75, citing Tr. 19, 24, & 30 (Vol. IV) (fn. omitted).

Respondent’s citation to the testimony and opinion of Cahoon (RX 28) is unpersuasive. First, Cahoon did not inspect Smith Farm until March 22, 2000. Again, the Tulloch ditching

activity on the site began around mid-December of 1998, and the EPA inspection took place on September 8, 1999. The circumstances of the property as they existed at the time of Cahoon's visit are so far removed from the critical events in this case as to be of extremely limited value. Moreover, the findings of Cahoon as to the conditions he observed in March of 2000 do not alter the conditions of the land disturbance as observed and documented by Magerr in September of 1999. Accordingly, it is the testimony of Magerr that is credited in this matter.

#### **IV. Civil Penalty**

EPA seeks a civil penalty of \$105,500 for the two Section 301(a) Clean Water Act violations that are the subject of this case. As set forth below, Smith Farm is assessed a civil penalty of \$94,000. Of this amount, \$80,000 is assessed for Count I (the Section 404 permit violation) and \$14,000 is assessed for Count II (the Section 402 permit violation). 33 U.S.C. §§ 1319(g)(1) & (g)(2)(B). These penalty amounts have been determined pursuant to the penalty criteria of 33 U.S.C. § 1319(g)(3).<sup>37</sup>

##### **1. Nature, Circumstance, Extent and Gravity**

###### **(i.) Count I**

The nature of the violation in Count I is the discharge of substantial amounts of wood chips into jurisdictional wetlands without a Section 404 permit.

The extent of this violation is fairly considerable. In that regard, respondent's Erosion and Sediment Control Plans for the Chesapeake-side of its property (CX 44A) and for the Suffolk-side of its property (CX 109) show that 10.709 acres of land was to be disturbed in the timber clearing and Tulloch ditch excavation. Moreover, based upon aerial photography, EPA established that 9,660 lineal feet of Tulloch ditches had been dug. Also, these aerial photographs show that as

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<sup>37</sup> Section 309(g)(3) of the Act provides:

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, circumstance, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violation, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

33 U.S.C. § 1319(g)(3).



much as 24 acres of wetlands may actually have been cleared, and then filled with wood chips, as a result of the Tulloch ditching operation. Tr. 199 (Vol. I). In either event, whether the lower figure of 10.709 acres is used, or the higher figure of 24 acres, the result is the same. The bottom line is that the extent of the Count I violation is very considerable.

The gravity of this violation is serious. Jeffrey Lapp, the EPA wetlands team leader, identified the importance of wetlands to the environment. He explained:

Within the tributary system a number of functions and values have been attributed to wetlands. Primarily they do things such as flood storage, which you have when you have a large flood event. Water goes into a wetland system, and because of the way the system is designed, they sort of act as a sponge, if you will, holding the water in, and then they slowly release that water back into the tributary system which does two things. One is it provides minimizing impacts of flood events downstream, and also it prolongs the time which water is within the tributary system. So it keeps water at a level in the system as opposed to being very flashy where it would be filled like a trib would be filled with water and then lose its water. So it provides base flow, is the term of art.

Tr. 76-77 (Vol. I). In addition, Lapp testified that wetlands serve to slow down water and that this helps reduce the sediment levels in storm water. Tr. 77 (Vol. I).<sup>38</sup> See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (“wetlands adjacent to navigable waters do as a general matter play a key role in protecting and enhancing water quality.”)<sup>39</sup>

Steve Martin of the U.S. Army Corps of Engineers likewise testified to the environmental value of wetlands. He stated that wetlands perform the important functions of denitrification and flood storage, as well as provide habitat for various species such as salamanders, amphibians,

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<sup>38</sup> Lapp also testified in *Vico Construction Corp. And Amelia Venture Properties, L.L.C.*, 2004 EPA ALJ Lexis 146, 90, another of the Tidewater Virginia wetlands cases. There, Lapp connected the wetlands sediment control function with ground water purification. In that case, Lapp also recognized the erosion stabilization properties of wetlands vegetation.

<sup>39</sup> It is noteworthy that the Court in *United States v. Riverside Bayview Homes, Inc.*, *supra*, did not find unreasonable the U.S. Army Corps of Engineer’s conclusions that wetlands may serve “to filter and purify water draining into adjacent bodies of water” (33 C.F.R. 320.4(b)(2)(vii) (1985); “to slow the flow of surface runoff into lakes, rivers and streams and thus prevent flooding and erosion” (33 C.F.R. 320.4(b)(2)(iv) & (v)); and that “adjacent wetlands may ‘serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic ... species.’” (33 C.F.R. 320.4(b)(2)(i)). 474 U.S. at 134-135.

reptiles, and ground nesting birds. Tr. 138-139 (Vol. V).

Charles Wolfe, one of respondent's wetlands experts, takes issue with the value that EPA places upon the wetlands located on Smith Farm. On Respondent's Exhibit 34A, Wolfe marked the non-tidal wetlands on Smith Farm in pink and the tidal wetlands located off of the property in yellow. He stated, "The most significant difference between these two is that there is very limited exchange of the pink wetlands with navigable waters." Tr. 11-12 (Vol. V). Wolfe characterized this situation as "basically a one-way street." Tr. 12 (Vol. V). In Wolfe's view, this condition makes the Smith Farm wetlands less environmentally valuable. *Id.*

Steve Martin of the U.S. Army Corps of Engineers was recalled as a witness in part to rebut Wolfe's devaluation of the Smith Farm wetlands. While Martin acknowledged that the Corps does recognize that wetlands serve different functions, and that some are in fact more valuable than others, he nonetheless took issue with Wolfe that such was the case here. Tr. 138, 156 (Vol. V). Martin explained:

As I understand it, the characterization was that they were somehow less valuable than bottom land hardwood swamps.

What we're dealing with is a continuum. The wetlands on the Smith Farm site are seasonally saturated, inundated, high up in the landscape. They perform certain water quality related functions that bottom land hardwood swamps do [not], and vice versa.

For instance, the wetlands on Smith Farms, because of the seasonal wetting and drying, the periodic wetting and drying out are more likely to perform nitrification. The more inundated hardwood swamps might be more likely to allow for suspended sediments to settle out and absorb the metals and phosphorous.

From a habitat standpoint, which is an important function of a lot of wetlands, a bottom land hardwood swamp is more likely to support a different suite of wildlife species than a mineral flat forested wetland such as Smith Farms. A bottom land hardwood swamp might be more inclined to support beaver, mink, species of the nature; whereas, property like the Smith Farms might be more likely to support less aquatic species, certain salamanders, amphibians, some reptiles. And in terms of geotropical migratory birds, for instance, a place like Smith Farms would support a lot of ground nesting birds others might not. There's differences in terms of habitat types provided by the two different systems.

In addition, something like the Smith Farms is likely to prove valuable in terms of flood storage. Storing precipitation and then releasing it more slowly into the receiving streams, it my help

contribute to base flow of those streams. I would view all of those as being important functions.

Tr. 138-140 (Vol. V).

Upon consideration of the conflicting testimony of Wolfe and Martin, it is the testimony of Martin that is credited. In that regard, Wolfe's testimony is conclusory; no explanation is offered as to why the non-tidal wetlands of Smith Farm are worth less than the nearby tidal wetlands. Wolfe simply gives the "bottom line."

Martin's testimony, on the other hand, is considerably more substantial. He provides specific reasons as to why the Smith Farm wetlands are as valuable as wetlands that are tidally influenced. Moreover, even if Wolfe's opinion were correct (*i.e.*, that the Smith Farm wetlands are of the less valuable type), it still begs the question as to how much these non-tidal wetlands are worth? Martin's testimony answers that question. Martin identified the significant environmental and habitat value of the Smith Farm wetlands.

## **(ii.) Count II**

The nature of the violation in Count II is the discharge of storm water associated with construction activity into "waters of the United States" without a section 402 permit. The result of this violation was that pollutants were carried by the storm water and discharged into waters of the United States. In that regard, between January 1, 1999, and September 15, 1999, there were 39 days in which rain events were sufficient (*i.e.*, greater than 0.32 inches) to cause water runoff. Magerr observed the result of these storm water runoffs in the form of ditch erosion and sediment being deposited in the waters of the United States.

Magerr testified that the consequences of this section 402 related violation were "fairly severe." Tr. 283 (Vol. II). His determination as to the severity of this violation is directly on point. In that regard, his testimony as to the sloughing, rilling, gullying, general bank failure, and sediment in the waterways is credited. Moreover, Magerr's eyewitness account of these conditions are fully supported by the photographs contained in his inspection report, Complainant's Exhibit 40.

In addition, the inspections required by both the NPDES permit and the E&S Plans require certain inspections. Jamie Bohlander, an employee of Vico Construction, however, testified that he did not conduct any Erosion and Sediment Control inspections of the Smith Farm site until May 22, 2000. Tr. 105-106 (Vol. IV); RX 40. EPA also offered evidence showing that respondent failed to comply with other aspects of its E&S plans and that this adversely affected its ability to prevent storm water runoff. This included the improper placement of check dams and the failure to install adequate silt fencing.

## **2. Ability to Pay**

It is well-established that "a respondent's ability to pay may be presumed until it is put in

issue by the respondent.” *Donald Cutler*, 2004 EPA App. Lexis 29, 28 (citations omitted), 11 E.A.D. \_\_ (EAB). The *Donald Cutler* decision cites *CDT Landfill*, 2003 EPA App. Lexis 5, 89, 11 E.A.D. \_\_ (EAB). There, the Environmental Appeals Board stated:

With regard to the ability-to-pay penalty factor, we have held that “a respondent’s ability to pay may be presumed until it is put at issue by a respondent,” because the Agency’s ability to gather the necessary financial information about a respondent is limited and the respondent is in the best position to obtain the relevant financial records about its own financial condition. *Spitzer Great Lakes*, 9 E.A.D. at 321 (quoting *In re New Waterbury*, 5 E.A.D. at 541)... Moreover, “where a respondent does not raise its ability to pay as an issue in its answer, or fails to produce any evidence to support an inability to pay claim after being apprised of that obligation during the pre-hearing process, the Region may properly argue and the presiding officer may conclude that any objection to the penalty based upon the ability to pay has been waived.” *Spitzer Great Lakes*, 9 E.A.D. at 321 (citing *New Waterbury*, 5 E.A.D. at 542).

2003 EPA App. Lexis 5, at 89.

In the present case, Smith Farm did not raise an ability-to-pay defense in its Answer to the Amended Complaint. Nor did Smith Farm even seek to place this defense in issue, or in any way address this matter, at the hearing. The fact is that respondent has raised this ability-to-pay defense for the first time in its post-hearing Reply Brief. See Resp. R.Br. at 22. In light of the *Donald Cutler*, *supra*, *Spitzer Great Lakes*, *supra*, and *New Waterbury*, *supra*, decisions, it is held that Smith Farm’s ability-to-pay argument is untimely and is deemed to have been waived.

### **3. History of Violations**

EPA concedes that respondent has no history of violations of the Clean Water Act. Compl. Br. at 101.

### **4. Degree of Culpability**

#### **(i.) Count I**

In discharging the wood chips into the wetlands without a Section 404 permit, respondent was highly negligent. Smith Farm was aware that its site contained wetlands well before it initiated the Tulloch ditching operation. In fact, Robert Boyd was aware of this fact as far back as 1991, even before Smith Farm Enterprises, L.L.C., obtained ownership of the property. Still, respondent discharged a substantial amount of wood chips onto its wetlands. In doing so,

Smith Farm sought to shield itself from liability in arguing that it complied with the ground rules set forth in the “Southern Pines” letter from the U.S. Army Corps of Engineers. The Southern Pines letter, however, specifically concerned the Southern Pines site and no other. Moreover, the deposit of wood chips in the substantial amounts that occurred in this case would be inconsistent with the Southern Pines ground rules, even if they were to apply in this case.

## **(ii.) Count II**

With respect to the Section 402 permit violation, Smith Farm was also highly negligent. First, it did not obtain an NPDES permit until after the EPA inspection took place. As noted, that inspection occurred on September 8, 1999, and it thereafter sought a permit from the Virginia Department of Environmental Quality on September 15, 1999. Moreover, as early as May 25, 1999, the Virginia DEQ had informed Smith Farm in a correspondence that “it appears these projects [which included the Smith Farm project] will need a general stormwater permit for the proposed construction activity.” CX 97. Yet, respondent failed to timely obtain a Section 402 permit.

Second, respondent simply did not take appropriate measures to stabilize the ditch banks to ensure that sediment would not reach the waters of the United States. The testimony of Kevin Magerr, supported by the photographs he took, show substantial bank failure. Also, respondent failed to ensure that the stock pile, located in the upland area, had proper silt fencing to prevent soil runoff.

Third, under the heading of miscellaneous considerations, it must be noted that respondent did not conduct and Erosion and Sediment control inspections within the time prescribed in the NPDES permit and its E&S Plans. As noted, Vico Construction did not begin such inspections of the Smith Farm site until May 22, 2000, well after the adoption of the NPDES permit and the E&S Plans (CX s 44A & 109).

## **5. Economic Benefit**

“A critical component of any penalty analysis under the Clean Water Act is the economic benefit enjoyed by a permittee as a result of violating the law. The goal of economic benefit analysis is to prevent a violator from profiting from its wrongdoing....” *United States v. Ludlum Steel Corp.*, 187 F. Supp. 2d 426 (W.D.Pa. 2002). The economic benefit for the two Clean Water Act violations at issue in this case was performed by Jonathan Shefftz, a Senior Associate with Industrial Economics, Incorporated. Shefftz was accepted as an expert in the field of economic benefit. Tr. 126-127 (Vol. III).

Shefftz’s economic benefit calculations are set forth in a report that he prepared, Complainant’s Exhibit 103. His methodology is explained as follows:

The economic benefit calculation is based on the concept of the “time value of money.” For example, in simple terms, a dollar yesterday is worth more than a dollar today since one had

investment opportunities for yesterday's dollar. Thus, the further in the past the dollar is, the more it is worth in "present-value" terms. The greater the time value of money (i.e., the greater the "discount" or "compounding" rate), the more value past costs have in present-value terms.

To calculate the Respondent[']s economic benefit, I use standard financial cash flow and net present value analysis techniques, based on modern and generally accepted financial principals. First I adjust the avoided compliance costs for their tax deductibility, then bring them forward from when they would have been incurred to the present....

CX 103 at 3.

The result of Shefftz's application of this methodology appears in a chart at page 4 of his report. (Shefftz's testimony discussing his financial analysis appears at Transcript pages 132-158 (Vol. III)).

**(i.) Count I**

When Smith Farm discharged the fill material (*i.e.*, the wood chips) into the jurisdictional wetlands without a Section 404 permit from the U.S. Army Corps of Engineers, it avoided certain costs associated with obtaining such a permit. One of the costs associated with obtaining a Section 404 permit is the cost of "mitigation."

In that regard, a prerequisite for obtaining a Section 404 permit is the avoidance, or minimization, of impacts to wetlands. To the extent that impacts to wetlands are unavoidable, a permittee must mitigate the impact by replacing the wetlands through restoration or preservation of other wetlands.<sup>40</sup> One way to do this is by purchasing "credits" in a mitigation bank. Tr. 75-76, 220-224 (Vol. I), 155-156 (Vol. V).<sup>41</sup> When purchasing mitigation bank credits in connection

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<sup>40</sup> Corps employee, Steve Martin, explained that the Section 404 permitting process requires the permittee to "identify any wetlands in which impacts on waters or wetlands could be avoided or minimized before the applicant goes to the time and expense of actually submitting an application." Tr. 219 (Vol. I). Martin further explained, "[The Corps] would basically be charged with authorizing the least environmentally damaging practical alternative." *Id.* "If it is permissible, then we would go forward with the permit process. *Typically a permit would be contingent upon acceptable compensatory mitigation, mitigation that would offset the unavoidable impacts, basically the impacts that remained after avoidance and minimization.*" Tr. 220 (Vol. I) (emphasis added); *see* Tr. 76, 78-79 (Vol. I).

<sup>41</sup> "[A] mitigation bank is a facility where wetlands are restored and then the credits that would be generated ... can then be sold to third parties needing credits.... So in a mitigation bank

with a project requiring a Section 404 permit, Federal mitigation guidelines prefer that the permittee use a mitigation bank in the same watershed as the proposed project in order to preserve the functions and values that will be impacted by the project. Tr. 221-223 (Vol. I).

Martin is the chairman of several mitigation banks in the Norfolk District. Martin testified that, during the 1998-1999 time frame, the approximate cost per acre for wetlands restoration in the Nansmond or Western Branch of the Elizabeth River watersheds (where the Smith Farm is located) would have been between \$45,000 and \$55,000. Tr. 221-224 (Vol. I).

Emile Viola, president of Vico Construction, provided a significantly lower value for an acre of wetlands. Viola has an ownership interest in White Cedar Mitigation Bank, which is located in the “southern part of Chesapeake.” He testified that during the 1998-1999 time frame, the cost “per credit” (one acre equaled one credit) was between \$10,000 and \$12,000. Tr. 203 (Vol. IV). While Viola provided this information on cross-examination, it is unclear whether this mitigation cost reflects the mitigation cost for wetlands restoration in the Nansmond or Western Branch of the Elizabeth watersheds. Given the fact that Martin specifically addressed the mitigation costs for this area, and that Martin likewise is associated with mitigation banks in the Norfolk District, it is Martin’s mitigation cost estimate that is accepted.<sup>42</sup>

Shefftz calculated the economic benefit from respondent’s non-compliance with Section 301(a) as ranging between \$141,367 and \$304,482. Tr. 133 (Vol. III); CX 103 at 4. The lower end of this range is based on mitigation for 13 acres (*i.e.*, the discharges to wetlands associated with the creation of the cleared corridors) and the higher end of the range is based on mitigation for 28 acres (*i.e.*, the discharges to wetlands that were cleared, but not ditched). CX 103 at 3; see Compl. Br. at 91.

## **(ii.) Count II**

Shefftz concluded that the economic benefit that respondent derived from a failure to obtain, and comply with, a NPDES permit under the circumstances of this case amounted to \$6,594. CX 103 at 4. This included the cost of installing appropriate erosion and sediment controls, specifically the costs of maintaining a construction site entrance and installing silt fencing, as well as the costs for proper record keeping. Tr. 135-136 (Vol. III).

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..., the sponsor of the bank may restore a large acreage of wetlands, and then ... as a permit comes down the line that needs mitigation, this person could conceivably sell those credits ... to that third party to satisfy their mitigation needs.” Tr. 221-222 (Vol. I).

<sup>42</sup> In any event, Martin testified that the Corps typically requires a two-to-one compensation ratio for impacts to forested wetlands (*i.e.*, two acres of compensation for each acre of forested wetlands impacted), which is the case with the Smith Farm wetlands. Tr. 157-158 (Vol. V). Thus, even if Viola’s lower valuation figures were accepted, that mitigation cost estimate would be doubled.

## **6. Other Matters As Justice May Require**

There were no considerations taken into account under this criterion that affected the penalty determination in this case.

### **ORDER**

It is held that Smith Farm Enterprises, L.L.C., violated Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), as alleged in Count I, by discharging fill material into “waters of the United States,” without having obtained a permit from the U.S. Army Corps of Engineers pursuant to Section 404 of the Act. 33 U.S.C. § 1344. It is further held that respondent violated Section 301(a) of the Clean Water Act, as alleged in Count II, by discharging pollutants associated with storm water, without having obtained a National Pollutant Discharge Elimination permit pursuant to Section 402 of the Act. 33 U.S.C. § 1342.

For the Section 301(a) violation involving the Section 404 permit, Smith Farm Enterprises, L.L.C., is assessed a civil penalty of \$80,000. For the Section 301(a) violation involving the Section 402 permit, respondent is assessed a civil penalty of \$14,000. 33 U.S.C. § 1319(g). Respondent is directed to pay this civil penalty within 60 days of the date of this order.<sup>43</sup>

Unless an appeal is taken to the Environmental Appeals Board pursuant to 40 C.F.R. § 22.30, this decision shall become a Final Order as provided in 40 C.F.R. 22.27(c).

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Carl C. Charneski  
Administrative Law Judge

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<sup>43</sup> Payment is to be made by certified or cashier’s check, payable to “Treasurer of the United States of America,” Mellon Bank, EPA Region 3 (Regional Hearing Clerk), P.O. Box 360515, Pittsburgh, Pennsylvania, 15251.



