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

BEFORE THE ADMINISTRATOR

In the matter of:	)	
	)	
	)	DOCKET NO. CWA-07-2018-0095
C&S ENTERPRISE, L.L.C.,	)	
	)	
	)	
	)	COMPLAINANT'S REPLY
	)	POST-HEARING BRIEF
	)	
Respondent	)	
	)	

Table of Contents

Table of Authorities

Cases

Statutes

Regulations

INTRODUCTION

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

SUMMARY OF ARGUMENT

Respondent's Post-Hearing Brief fails to rebut EPA's case that Respondent is strictly liable for its Clean Water Act ("CWA" or "the Act") violations, fails to discredit EPA's evidence supporting CWA jurisdiction, fails to undermine evidence of Respondent's culpability, and fails to demonstrate how Respondent's proposed penalty is not reasonable and justified. Thus, the Presiding Officer should find for EPA by assessing a penalty.

ARGUMENT

I. RESPONDENT FAILED TO DISCREDIT COMPLAINANT'S EVIDENCE THAT THE TRIBUTARY IS A WATER OF THE UNITED STATES

A. Respondent's assertion that the conditions of the lower portion of the tributary severs jurisdiction ignores evidence, Respondent's testimony, and Respondent's expert's testimony

In its Post-Hearing Brief, Respondent baldly argues that the lower portion of the unnamed tributary lacks the physical features of a defined bed and bank or ordinary high-water mark and, therefore, the connection between the upper reach of the tributary is severed from Deep Creek, rendering the entire tributary non-jurisdictional under the CWA. Respondent's Post-Hearing Brief at 10-13. It is worth noting that Respondent fails to provide any authority in

support of its theory. To that end, this assertion is not supported by statute, regulation, case law, or guidance, and appears to be entirely the product of conjecture by Respondent's expert. The assertion also ignores the following:

- Voluminous photographic evidence and testimony presented at hearing demonstrating that the lower reach of the tributary clearly exhibited jurisdictional characteristics prior to Respondent's fill, and that the clearly defined channel connected to Deep Creek. *See* AX10, pp. 1, 2, 3, 4, 5, 5b, 7, 7b, 8, 8b, 9, 9a, 12, 12a, 14, 14a, 15, 15a, 17, 18, 18a, 19, 19b, 20, 20a; AX26, p. 2, 2a: TR46: 17-25, TR47: 1-3; TR186: 3-8; TR188: 19-23; TR192: 20-23; TR194: 22-25; TR195: 15-16; TR197: 5-6; TR198: 17-22; TR227: 18-22; TR228: 2-4, 11-12; TR318: 1-5; TR319: 10-13, 22-25; TR320: 1-11; TR321: 6-8; TR322:1-4, 11-18; TR323: 15-22, 23-25; TR324: 7-14; TR330: 24-25; TR331: 3-8; TR334: 8-11, 17-25; TR336: 11-23; TR338: 3-18; TR339: 22-25; TR340: 2-14; TR341: 7-20; TR342: 13-17; TR344: 22-25; TR345: 1-11; TR347: 1-25; TR348: 24-25; TR349: 1-23; TR350: 1-5; TR351: 18-23; TR368: 4-17.
- Acknowledgements by Mr. Morrow that the tributary contained a defined bank (TR499: 1) and by Gerald Hentges, Respondent's expert, that the photographic evidence points to a physical connection between the tributary and Deep Creek in the lower portion of the tributary. TR661: 7-21, referring to AX10, p. 19 ("I do not see a lack of connection.")
- Admissions by Mr. Morrow that he recurrently plowed through the channel, thereby removing geographical features. *See* AX30, p. 6; TR501: 22-25; TR506: 16-22; TR507: 9-13 ("I planted through and harvested. Q … when you did that then -- when you leveled it off and planted it and harvested it, at least for that time period, there wouldn't have been a defined channel, correct? A No.").

- Testimony by government witnesses Marlyn Schafer and Dr. Delia Garcia that human-made severances of a tributary do not eliminate the tributary's jurisdiction (TR48: 21-25; TR252: 3-10; TR253: 13-18), as well as case law supporting that position. *See In re J. Phillip Adams*, 2006 EPA ALJ LEXIS 33, 65 (October 18, 2006); *Leslie Salt Co. v. Froelke,* 578 F.2d 742, 755 (9th Cir. 1978); *U.S. v. Adam Bros. Farming,* 369 F. Supp. 2d 1166, 1177 (C.D. Cal. 2003).
- All parties agreed that a stream existed prior to Respondent's fill activity, that the stream had at the very least, occasional flowing water, and that the stream discharged into Deep Creek. *See e.g.*, admissions by Respondent at TR478: 14-21; TR447: 16-17; TR499: 18-21. Dr. Garcia provided significant testimony concerning the physical, biological, and chemical connection the stream would have had to Deep Creek. *See generally*, TR210-235.

Assuming *arguendo*, the lower reach of the tributary is not jurisdictional, the upper reach has an unmistakable connection to Deep Creek, fulfilling Justice Kennedy's significant nexus test per *Rapanos v. EPA*. 547 U.S. 715, 759 (2006).

B. Respondent's assertion that jurisdiction cannot be established through aerial photography interpretation is erroneous and ignores Complainant's evidence collected on-site

In its Post-Hearing Brief, Respondent asserts that CWA jurisdiction cannot be established through aerial photography interpretation ("[T]he only way to document a defined bank, defined channel bed, and ordinary high-water mark is through a site visit to observe it." *citing* Gerald Hentges's testimony at TR594: 5-11). Respondent's Post-Hearing Brief at 10. Again, Respondent provides no authority to support this position – no statute, no regulation, no reference to applicable rules of evidence or procedure, or caselaw citation. Further, and

significantly, asserting such a position did not stop Respondent's expert from making conclusions about the tributary, including jurisdiction, based on his own review of aerial images when it served his client's interests. Most notable, however, is that Respondent's conclusion that EPA based its jurisdictional findings primarily on aerial imagery ignores the substantial evidence collected on-site by three government representatives in support of the government's jurisdictional conclusion.

In the *In re: Lowell Vos Feedlot* case, the Environmental Appeals Board rejected the Respondent's position that only direct evidence can be used to prove CWA violations, holding instead that "the government can continue to use any kind of evidence, direct or inferential, to attempt to establish that an unlawful discharge occurred." EAJA Appeal No. 10-01 (May 9, 2011). Numerous courts have found aerial image interpretation to be a persuasive tool in establishing CWA jurisdiction. *See, e.g. U.S. v. Lucas*, 516 F.3d 316, 326-327 (5th Cir. 2008); *U.S. v. Donovan*, 661 F.3d 174, 185 (3rd Cir. 2011).

Respondent's assertion that the government chiefly relied on aerial imagery to prove its jurisdictional case is in error and misrepresents the breadth of evidence EPA presented at hearing. In addition to the 35 aerial images produced by EPA to substantiate jurisdiction, the record is also loaded with photographs taken on-site and the testimony of three government witnesses with a combined 62 years of federal service who conducted site visits at Respondent's property to corroborate the jurisdictional determination based on the aerial images. During these visits, each of the witnesses observed a defined bed and bank and an ordinary high-water mark in the tributary directly above the tile inlet, as well as flowing water directly above and emptying into the inlet. *See* AX1, pp. 15, 16, 19, 24; AX4, pp. 5, 6, 11; AX2, pp. 4, 5, 7, 8; TR38: 13-15; TR39: 1-19; TR 148: 3-4; TR149: 7, TR 150: 12-13; TR212: 23-24; TR216: 16-18. One of the

witnesses observed water flowing through the tile system. AX1, p. 37; AX19; TR 224: 4-5, 19-22. And two of the witnesses observed water discharging out of the tile drain and into Deep Creek. *See* AX1, pp. 49, 53; AX19; TR 45: 17-18; TR 226: 5-6; TR227: 12-13. These are direct observations of the continued physical and chemical connection between the upper reaches of the tributary and Deep Creek, despite the stream modifications by the Respondent. Corps and EPA witnesses also testified that direct observations of channel characteristics and water flow are routinely used to establish CWA jurisdiction. TR17: 21-25; TR18: 1-5; TR170: 16-21.

Further, Respondent's assertion that EPA failed to analyze "reference sites" to establish jurisdiction, thereby failing to comply with Corps guidance, is also in error. Respondent's Post-Hearing Brief at 10-12. First, Mr. Hentges references NRCS, not Corps, guidance. As previously established, the NRCS is not the CWA permitting authority. Second, importantly, the referenced guidance speaks to *wetland* determinations where a wetland is "disturbed," not to establishing stream jurisdiction.[1] And to be clear, the EPA is asserting jurisdiction over the stream in this discussion. Moreover, direct observations of the stream directly above the tiled portion of the stream along with analysis of aerial imagery, topographic maps, and soil surveys obviate the need for "reference site" analysis.

C. Respondent's assertion that the tributary did not include an abutting wetland ignores evidence collected on-site and Respondent's own expert's testimony

In its Post-Hearing Brief, Respondent concludes that EPA failed to establish the presence of jurisdictional wetlands abutting the unnamed tributary prior to Respondent's disturbance of

[1] Respondent's assertions about stream and wetland jurisdiction are tangled. Section II of Respondent's Post-Hearing Brief starts out with a discussion of the lower reaches of the tributary in the context of making jurisdictional determinations for streams and then inexplicably shifts to wetlands determinations and guidance on pages 10 and 12, and then back to streams on page 13.

the site. At 13-14. The conclusion relies mainly on Respondent's expert's analysis of a USDA Soil Survey marked as AX27. Mr. Hentges argues that the survey "indicates that, in a blanket way, these soils are not hydric" and, therefore, conclusions about CWA wetland jurisdiction are specious. Respondent's Post-Hearing Brief at 13-14.

Once again, Respondent ignores evidence collected on-site to corroborate jurisdictional conclusions. During those visits, EPA and Corps personnel identified the presence of wetland hydrology, vegetation, and soil surrounding the tributary directly above the tile inlets during on-site inspections and concluded the same conditions would have existed downstream prior to Respondent's clearing and filling. TR40: 16-22; TR41: 1-7; TR219: 11-15; TR223: 6-13; TR219: 22-24.

Mr. Hentges's conclusions regarding the presence of wetlands are also undermined by his own testimony during cross exam when Mr. Hentges affirmed he observed wetland characteristics during his on-site visit to Respondent's property:

> Q Okay. Thank you. And so, you're saying here, that that area has -- likely has or is developing wetland characteristics, correct?
> A Yes. And let me clarify that a part of that was based on my site visit too. You could see it then.
> Q Correct. So, you saw wetland vegetation growing back there, correct?
> A I saw what appeared to be wetland vegetation. It was early in the growing season, so there wasn't much, and I don't identify plants anymore, but it just had the look of it, the feel of it.
> Q Yeah. Does that make you think that it probably had the look and feel of it before it was filled in?
> A Well, it's hard to say. There's different components now. You know, now that that tile line's in, that water's in the subsurface, in the rift zone even a little deeper than it was, and it's, you know, it could provide a source of hydrology. But I think -- my overall answer is I believe as long as that area's not farmed it will eventually show characteristics of a wetland." TR622: 17-25; TR623: 1-15.

Respondent cites Mr. Hentges's "boots on the ground' experience in the field" as "invaluable in analyzing the information presented by aerial images …" (Respondent's Post-

Hearing Brief at 13). And much of Respondent's Post-Hearing Brief discusses the necessity essential nature of on-site observations. At 12. In the case of wetland identification, Mr. Hentges's field observations appear to corroborate EPA's and the Corps' findings. So, it is curious that Mr. Hentges's ultimate conclusions about wetlands, as represented in Respondent's Brief are based on a review of a soil survey map that appears to discount his earlier field observations. Overall, one must conclude that Respondent's applicable evidentiary standard is whatever best serves his interests.

D. Respondent's activities were not exempt from CWA 404 regulations

Respondent's contention that its fill activities were exempt from CWA 404 permitting is illogical and easily dismissed. The plain language of the applicable regulations unambiguously prohibits Respondent's actions. As pointed out in Respondent's Post-Hearing Brief, "normal farming operations such as plowing, seeding, cultivating, minor drainage, and harvesting … are exempt from section 404" so long as the operations do not "convert an area of the water of the U.S. into a use to which it was previously subject" or do not impair the "flow or circulation" of the water. 40 C.F.R. § 232.3(b). The regulations go on to define "minor drainage" and make clear that this practice applies only to drainage of "uplands (dryland)." 40 C.F.R. § 232.3(d)(3)(i)(A).

In a case with similar facts as the present case, the 3rd Circuit held that a farmer's excavation on his farmland and "burying of several miles of plastic tubing" to drain wetlands clearly fell outside the scope of "minor drainage" and "continuing maintenance." *U.S. v. Brace*, 41 F.3d 117, 128 (3rd Cir. 1994). The Court also held that Brace was not entitled to the exemption because he converted a water of the U.S. into another use. *Id.* at 127, 128.

At hearing, Respondent admits that he tiled the unnamed tributary and filled the channel in with dirt thus changing the use to dry land. TR510: 20-25; TR511: 1-4. At issue, once again, because the fill activities are admitted and the change in use is clear, is whether the tributary is jurisdictional under the CWA.

Respondent's Post-Hearing Brief attempts to contend that, because there is no regulatory definition of tributary, EPA's conclusions that Respondent converted a jurisdictional tributary to dry land is done "without regulatory support." Respondent's Post-Hearing Brief at 16. If taken to its logical conclusion, this circular argument would mean that EPA or the Corps could never designate a jurisdictional tributary simply because the regulations do not define it. Of course, this argument ignores all the relevant and clarifying case law (*see, e.g. Rapanos v. EPA*, 547 U.S. 715 (2006) and its progeny), decades of CWA implementation, congressional intent, as well as the ample evidence provided by the government, as outlined above and in Complainant's Post-Hearing Brief.

II. MR. MORROW FILLED IN THE TRIBUTARY IN CONJUNCTION WITH THE SALE OF LAND TO AVOID IOWA SETBACK REGULATIONS

In its Post-Hearing Brief, Complainant asserts that Respondent filled in the tributary when he sold a portion of his property to an animal feedlot owner, thereby avoiding the State's setback regulations for animal feedlots and "waters of the state." At 28, 29. Respondent asserts that EPA's position is "unjustified."[2] Respondent's Post-Hearing Brief at 16. However, this assertion directly contradicts Respondent's testimony at hearing:

---

[2] Respondent also asserts that EPA "erroneously tried to prove that [Respondent] owned the hog confinement operation." Respondent's Post-Hearing Brief at 16-17. While the true owner of the hog operation may be wholly irrelevant to this matter, EPA must respond to Respondent's mischaracterization that EPA attempted to prove at the hearing that Respondent owned the hog confinement. In making this argument, Respondent cites to the testimony of Bert Noll. *Id.* In actuality, EPA never suggested at the hearing that Respondent owned the confinement. Instead,

Q Right. Okay. So, at this hearing you -- according to the NRCS document you testified that you had closed in the gully, and we're referring to the tributary here, correct?
A Um-hmm. Q Because of the DNR setback regulations, is that correct?
A That is not the total reason I filled it in, no.
Q Okay. But did you testify to that at this particular hearing?
A That that was the sole reason of doing it, no.
Q Did you testify at the hearing that that was a partial reason why you closed up the tributary?
A By the way the letter reads, I would say it is. TR515: 10-25; TR516: 1

In order to believe Respondent's position that Mr. Morrow did not fill in the tributary in conjunction with the sale of his land and to avoid Iowa regulations, one must ignore: (1) the Corps' Marlyn Shafer's testimony that in 2015, Mr. Morrow told him directly that he filled in the tributary because it "… was within the limits set by the Iowa Department of Natural Resources." TR32: 5-7; (2) that Mr. Shafer contemporaneously memorialized the conversation in a telephone conversation record (AX9, p. 1); (3) that Mr. Shafer summarized the conversation back to Mr. Morrow in a letter sent by the Corps in October 2015 (AX18, p. 1); (4) that Mr. Morrow testified at a 2016 NRCS hearing about his interest in filling in the tributary "as the DNR required it eliminated in order to put in the hog building …" (AX11, p. 11); and (5) that Mr. Morrow

---

EPA asked Mr. Noll whom he understood to own the hog confinement. TR105: 16-19 (Q. And was the confinement feed lot, as far as your understanding, was that to be owned by C&S Enterprise? A. Yes"). Emphasis added. Mr. Noll further clarified that when he received a map from Pinnacle, a consultant, depicting the proposed location of the hog confinement building (AX14, p. 5), it included the name "Morrow Site 1." TR124: 21-125:10. Mr. Noll further testified that when the map was submitted to him, he had no way of knowing Mr. Morrow might sell a portion of his property to another entity for a hog confinement and was at that time unfamiliar with MCM Pork (the entity that would actually own/operate the hog confinement). TR125:11-19. Further, AX12, p. 1, an EPA memo to the file, states that EPA had a conference call with Mr. Noll to discuss "the hog confinement facility that was constructed *land sold by C&S Enterprises*." AX14, p. 1. *Emphasis added.* It appears clear from the transcript that Mr. Noll was simply mistaken and/or confused as to who owned the hog confinement. To that end, EPA's correct understanding that MCM Pork, LLC, and not Respondent, owned the hog confinement is evidenced in at least two of EPA's prehearing submissions. In EPA's Pre-Hearing Exchange at p. 2, in the description of Bert Noll's expected testimony, EPA stated that Mr. Noll would testify about "his interactions with Respondent and MCM Pork, LLC, the company that built the swine animal feeding operation on a portion of Respondent's property sold to the LLC." Emphasis added. Further, AX12, an IDNR Notice of Intent for NPDES Coverage Under General Permit, submitted into evidence by the EPA, clearly indicates that the owner of the confinement is MCM Pork, LLC. AX12, p.2.

testified at the October 2018 EPA hearing that the Iowa regulations were at least a "partial" reason for filling in the tributary. TR515: 10-25; TR516: 1. Complainant proffers that, concerning this matter, the record speaks for itself.

III. RESPONDENT'S RELIANCE ON NRCS AND FSA IS IRRELEVANT AS THE CLEAN WATER ACT IS A STRICT LIABILITY STATUTE AND NEITHER THE NRCS NOR THE FSA IS A CWA PERMITTING AUTHORITY

In defense of Scott Morrow's unauthorized placement of fill material, Respondent's Post-Hearing Brief asserts that Mr. Morrow "had no idea the drainage way in this case would be considered a water of the United States." Respondent's Post-Hearing Brief at 1. Further, the Brief avows that Mr. Morrow "justifiably relied on" an alleged verbal approval by a Natural Resources Conservation Service ("NRCS") representative and a 2013 Farm Service Agency ("FSA") document stating that a portion of Mr. Morrow's property "does not contain a wetland." *Id.* at 6, 7; referencing RX4.

The CWA is a strict liability statute and EPA need not prove knowledge of the law or intent to break the law to impugn liability. *U.S. v. Bailey*, 571 F.3d 791, 805 (8th Cir. 2009). The Eighth Circuit held that such liability extends to a violator's failure to procure a CWA Section 404 permit even when the violator did not know he or she needed one. *Id.* Courts have found that a violator's reliance on statements by government officials that the violator is not subject to CWA requirements is not an adequate defense to liability. *See, e.g. U.S. v. City of Hoboken,* 675 F.Supp. 189, 199 (D. N.J. 1987), citing *Heckler v. Community Health Services of Crawford County,* 467 U.S. 51, 63 (1984) ("[T]hose who deal with the Government are expected to know the law and may not rely on the conduct of government agents contrary to law.") This includes reliance on "mere verbal representations" made by government officials that certain CWA

requirements do not apply. *Public Interest Research Group of New Jersey v. Yates Industries, Inc.*, 757 F.Supp. 438, 445 (D. N.J. 1991).

Neither the NRCS nor the FSA are the permitting authorities under the CWA. Only the Army Corps of Engineers provides authorization under Section 404 of the CWA to place fill material into waters of the U.S. 33 U.S.C. § 1344(a). Although Mr. Morrow claimed he was told by NRCS employee Regina Leer[3] that he could proceed with filling wetlands on his property and tiling the tributary, the NRCS did not have the legal authority to approve such work. Further, Mr. Morrow acknowledged he never received written authorization from any government official. TR512:3-6. Thus, the issues concerning NRCS and FSA communications have no legal relevance concerning Respondent's liability.

Regardless, from an equitable perspective, the evidence in this case and testimony by Mr. Morrow undermines his purported confusion about the NRCS and FSA communications. Mr. Morrow is an experienced farmer. He grew up on a farm and help his parents farm as a youth. TR441:11-17; TR446:10-18. After graduating high school in 1976, he owned and operated a farm from at least 1978 until 1986. TR441:18-443:25. In 2006, Respondent purchased a farm and Mr. Morrow got back into farming. TR444:19-445:8. In March of 2008, Respondent took possession of the subject farm. TR445:9-13.

Mr. Morrow testified that he had considerable experience in dealing with NRCS. (". . . I worked with [NRCS] quite often." TR449:15-450:3; "I was in the NRCS and FSA office quite often." TR456:14-25). Not surprisingly, considering his extensive farming background, Mr. Morrow also testified that he knows the differences between the NRCS and the FSA, stating that the FSA deals with crops and government programs and the NRCS handles the "actual land part

[3] Respondent listed Ms. Leer as a witness in its Prehearing Exchange, but then chose not to call her at the hearing.

of agriculture along with FSA." TR455:15-456:2.[4] Prior to performing the work at issue in this case, Mr. Morrow knew that the NRCS handled wetlands determinations. In fact, Mr. Morrow testified that in the spring of 2011, he went to his local NRCS office to request a wetland determination for the entire farm at issue. TR479:6-17; TR528:13-24. To that end, Mr. Morrow testified that he had previously received a couple wetlands determinations from NRCS, including one or more in writing. TR548:4-7.

Mr. Morrow claims in this case that he thought a two-page document from the FSA (RX4), not NRCS, constituted a wetlands determination.[5] First, Don Carrington of NRCS also testified that FSA does not have the authority to make wetland determinations on behalf of the NRCS. TR77: 6-8. Second, Mr. Morrow's claimed misunderstanding is curious, considering the fact that he had sought and received prior written wetlands determinations from NRCS in the past, and the fact that there is nothing in the record to support that FSA had ever issued Mr. Morrow any prior wetlands determinations.

The timeline of these alleged events also casts doubt on the justification for Mr. Morrow's acts in this case. Mr. Morrow testified that in the fall of 2009, he received verbal authorization to fill in/tile the unnamed tributary at issue from Regina Leer of NRCS. TR527: 2-16. Mr. Morrow admits that Ms. Leer is not qualified to make wetlands determinations. (TR512: 4-17). In the spring of 2011, Mr. Morrow purportedly requested a wetlands determination from

---

[4] Don Carrington of NRCS testified that NRCS makes wetland determinations at the request of landowners so they can make decisions regarding implementing drainage activities which may have effects on a landowner's eligibility for USDA benefits. TR72:19-73:2.

[5] Respondent asserts in its Post Hearing Brief that the FSA document dated December 13, 2013, RX4, was issued "as a result" of Mr. Morrow's request for a wetlands determination to NRCS in 2011. Respondent's Post-Hearing Brief at 6. Respondent's Brief refers to RX4 as a "wetlands determination from FSA." Respondent's Post-Hearing Brief at 7. There is no record evidence to support these assertions and they are directly contradicted by NRCS' Don Carrington's testimony that FSA is not authorized to make wetlands determinations on behalf of NRCS nor for any purposes under the Food Securities Act. TR77: 6-11. Mr. Carrington further testified, referring to the FSA document, RX4, that FSA did not make a wetlands determination. TR85:5-9.

NRCS for the entire property. The record is unclear as to whether NRCS received this request at that time. The NRCS wetlands determination, AX11, indicates that the request was submitted on July 20, 2015. AX11, p. 6. In any event, the record is clear that NRCS issued its wetlands determination on March 11, 2016 finding there were wetlands in or abutting the unnamed tributary at issue. *Id.*

It is further undisputed that Mr. Morrow filled in the tributary in April of 2015 (TR489:20-24), more than five years after his alleged discussion with Regina Leer, more than one year after receiving the FSA document, just a few months before he sold a portion of the land to the owner of a hog confinement (TR491:7-11) and almost a year before NRCS issued its wetlands determination. Mr. Morrow further testified that he did not contact NRCS nor the Corps in the spring of 2015 before beginning the fill activities at issue. TR512:22-513:10.

Complainant asserts that Mr. Morrow's purported reliance upon an alleged verbal permission from NRCS five years prior to the fill activities, and upon a two-page FSA document issued more than a year prior to the fill activities (that he knew, or should have known, was not at actual wetlands determination, due to his prior interactions with NRCS), was unjustified.

IV. COMPLAINANT'S PROPOSED PENALTY IS CONSERVATIVE AND JUSTIFIED

Respondent contends that EPA's proposed $40,500 penalty is "unjustified" as it purportedly does not provide evidence of "substantial environmental harm." Respondent's Post-Hearing Brief at 17. This blanket assertion ignores Dr. Delia Garcia's lengthy testimony concerning the harm to the unnamed tributary, the wetlands, Deep Creek, and the watershed. Dr. Garcia elucidated the impacts, including changes in the flow of the tributary resulting in downstream erosion (TR229: 1-15), loss of aquatic habitat (TR230: 3-12; TR231: 9-16),

diminished water quality (TR231: 1-5), and lost wetland functions of pollutant filtering and flood storage (TR231: 20-25; TR232: 1-5). Respondent does not indicate how or why such reported impacts do not qualify as "substantial environmental harm."[6]

Complainant's Post-Hearing Brief asserts that, in addition to the environmental harm to the tributary, wetlands, Deep Creek, and the watershed, Respondent enjoyed a significant economic benefit amounting to tens of thousands of dollars from the sale of his property to the animal feeding operator, the significant value of the manure from the operation, plus the increased value of his property by tiling the tributary. At 28.

In *In re: John Crescio, III*, ALJ Biro held that economic benefit can include "wrongful profits" in addition to avoided regulatory compliance. 2001 WL 537494 (May 17, 2001). Thus, Mr. Morrow's penalty should include an amount reflecting income generated through the sale of the property as well as the increased value to his property. Considering the gravity of the environmental harm, Respondent's culpability, and "other matters as justice may require," as discussed in Complainant's Post-Hearing Brief, EPA's proposed $40,500 is justified even if the economic benefit component is removed. At 33. Thus, the proposed penalty is conservative and wholly justified.

CONCLUSION

EPA proves in its initial brief and herein by a preponderance of the evidence that Respondent is a person who discharged pollutants from a point source into waters of the United States without obtaining a CWA Section 404 permit. EPA also demonstrates that Respondent enjoyed a significant economic benefit from his violation and that the extent of harm to the

[6] Further, Respondent's unsubstantiated conclusions about environmental harm are undermined by his expert's admissions at hearing, acknowledging the ecological importance of stream and wetland functions. TR629:3-20.

environment is substantial. Respondent's failure to comply with the CWA warrants an assessment of a proposed penalty of $40,500.

Respectfully Submitted,

Date: 3/15/2019

Britt Bieri
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 7
11201 Renner Boulevard
Lenexa, Kansas 66209
(913) 551-7647
bieri.britt@epa.gov

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of March 2019, I sent via the OALJ E-filing system a copy of this Reply Post-Hearing Brief to the EPA Headquarters Hearing Clerk and sent one true and correct copy via email to Mr. Eldon McAfee, Esq. at eldon.mcafee@brickgentrylaw.com.

Britt Bieri
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 7
11201 Renner Boulevard
Lenexa, Kansas 66209
(913) 551-7647
bieri.britt@epa.gov

Signature of Sender