



UNITED STATES
 ENVIRONMENTAL PROTECTION AGENCY
 BEFORE THE REGIONAL ADMINISTRATOR
 REGION 5



IN THE MATTER OF:)
) Docket No. CWA AO-028-94
 Thomas Kelly)
 and) Proceeding to Assess Class I
 Jonathan Prisk) Class I Administrative
) Penalty under Clean Water
 Respondents.) Act Section 309,
) 33 U.S.C. § 1319

DECISION AND ORDER OF THE REGIONAL ADMINISTRATOR

This is a proceeding for the assessment of a Class I administrative penalty under subsection 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g). The proceeding is governed by the United States Environmental Protection Agency's (EPA) Proposed 40 C.F.R. Part 28--CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CLASS I CIVIL PENALTIES UNDER THE CLEAN WATER ACT, THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT, AND THE EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT, AND THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES UNDER PART C OF THE SAFE DRINKING WATER ACT, 56 Fed. Reg. 29,996 (July 1, 1991), issued October 29, 1991 as superseding procedural guidance for Class I administrative penalty proceedings under subsection 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g) (Consolidated Rules). This is the decision and order of the Regional Administrator under § 28.28 of the Consolidated Rules. In summary, the decision finds Respondents Thomas Kelly and Jonathan Prisk to have violated Section 301(a) of the Clean Water Act (Act or CWA), 33 U.S.C. § 1311(a), due to the discharge of pollutants into waters of the United States without a permit issued by the Secretary of the Army.

Pursuant to Section 309(g)(2)(A), 33. U.S.C. § 1319(g)(2)(A), the decision assesses a civil administrative penalty of four thousand dollars (\$4,000) against Thomas Kelly and a civil administrative penalty of three thousand dollars (\$3,000) against Jonathan Prisk.

I. Procedural Background

This action is based upon the Fourth Amended Complaint served by EPA upon Respondents Thomas Kelly and Jonathan Prisk. The complaint, brought under Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g), alleges violation of CWA Section 301(a), 33 U.S.C. § 1311. EPA charges that the Respondents, Thomas Kelly and Jonathan Prisk, discharged certain pollutants, including fill material, onto wetland property owned by Thomas Kelly. EPA alleges that the discharge required a Section 404 permit issued by the U.S. Army Corps of Engineers (Corps), 33 U.S.C. § 1344. All parties agree that no permit had been issued. The Class I administrative penalty complaint (Administrative Complaint), proposes the assessment of administrative penalties against Thomas Kelly in the amount of Four Thousand Dollars (\$4,000) and Jonathan Prisk in the amount of Six Thousand Dollars (\$6,000).

An administrative hearing was held in this matter. Thomas Kelly testified at the hearing and submitted documents which were included in the administrative record. Jonathan Prisk did not appear or testify. Both Respondents were represented by attorney Timothy Dwyer. EPA was represented by counsel and presented its case via witness testimony and submission of documents. Written public comments were received and made part of the administrative record. Mr. Richard Persson, a public commenter, also testified in person.

II. Statutory Background

The CWA is a comprehensive statute designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act is designed to achieve this goal by controlling the discharge of pollutants at their source. See generally, *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200 (1976). Section 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant, including fill material, into "wetlands" which are waters of the United States, except in accordance with the terms of a permit issued by the Corps pursuant to section 404(a) of the Act. 33 U.S.C. § 1344(a).

A. Liability

Persons liable for unauthorized discharges of fill material into wetlands include the property owner, operator of

the point source from which the discharge occurs and any person directing the filling activity. In order to establish a violation of Section 404 of the Act, EPA must show that:

- (1) respondent is a "person" as defined by the Act;
- (2) the cited property contains a "wetland";
- (3) the wetlands constitute "waters of the United States";
- (4) respondent's activities at the site resulted in a "discharge" of a "pollutant" from a "point source," into the "wetland;" and
- (5) respondent did not have a permit for its discharge activity.

B. Penalty

Section 309(g) of the Act states that "[w]henver the Administrator finds that any person has violated section 301... of this title, ... the Administrator may, after consultation with the State in which the violation occurs, assess a class I civil penalty....The amount of a class I civil penalty ...may not exceed \$10,000 per violation." 33 U.S.C. § 1319(g). Section 309(g)(3) requires that the Administrator take into account the following factors when determining the amount of a civil administrative penalty: the nature, circumstances, extent and gravity of the violation, or violations, and with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting, from the violation, and other such matters as justice may require. 33 U.S.C. § 1319(g)(3).

III. Disputed Issues

A. Liability

In Respondents' Statement of Triable Issues, the Respondents contest whether:

- 1) the real property at issue contains wetlands;
- 2) whether "fill material" has been discharged onto wetlands; and

3) whether the alleged placement of fill material required a permit.

B. Penalty

The Respondents also contest, whether, if violations are found, EPA has properly assessed the penalties against Mr. Kelly and Mr. Prisk.

IV. Testimony at Hearing

Respondent Thomas Kelly owns property, identified as Section 16, T. 5N, R. 13E in Jefferson County, Wisconsin. The property is located adjacent to Lake Koshkonong. On the Kelly property, immediately shoreward to the west and adjacent to Lake Koshkonong, is a depressional "swale" area. EPA approximates the entire swale area to be 3.5 acres in size. Stip. 6, Tr. 48-9,59. The swale is bounded by an ice ridge on the east and a strand of pine trees on the west. The swale extends the entire length of the Kelly property. Tr. 47, 86-88, C Ex. 2, 6.

On August 24, 1990, Dale Pfeiffle of the U.S. Army Corps of Engineers conducted an inspection of the Kelly property. Tr. 41. He observed and classified the vegetation growing in the swale and testified that the swale had a predominance of hydrophytic vegetation. Tr. 57, 73. The 1987 Corps of Engineers Wetlands Delineation Manual defines hydrophytic vegetation as plant matter that is adapted to life in saturated soil conditions. Tr. 37, R. Ex. 1 p.13.

During his August 24, 1990 inspection, Mr. Pfeiffle also observed that the entire swale area was inundated with one to four inches of water. Tr. 57. Wetlands hydrology is the presence of water at or near the surface of an area for a duration of sufficient length to support hydrophytic vegetation. Tr. 38. The presence of standing water is a positive indication of wetlands hydrology. Tr. 58. Based upon the predominance of hydrophytic vegetation and the inundation of the surface of the swale with water, Mr. Pfeiffle concluded that the swale area of the Kelly property is a wetland. Tr. 58. The U.S. Geological Survey's quadrangle map of the Busseyville, Wisconsin area has shown a marsh and wooded marsh on the Kelly property since 1961. Tr. 59. Mr. Pfeiffle testified that on August 28, 1990, he spoke to Respondent Kelly regarding his determination that the swale area was a

wetland. Tr. 80. Mr. Pfeiffle testified that he explained to Mr. Kelly the Clean Water Act requirement that discharges of dredged or fill material into wetlands must be permitted. Tr. 80-82. On the same date, Mr. Pfeiffle sent to Respondent Kelly an application for an after-the-fact permit. In the August 28, 1990 conversation, Mr. Pfeiffle had stated his opinion that issuance of the permit was unlikely. Tr. 82-3.

On September 11, 1990, Mr. Pfeiffle again inspected the Kelly property. He took two soil borings of the swale area. Using the Munsell color chart, Mr. Pfeiffle determined that the soil in the swale area had a value of 2 and a chroma of zero; the color of the soil was black. Tr. 69. A chroma of 1 or less is an indication of a hydric soil. Hydric soil has formed characteristics, including gray or black coloring, under saturated flooded or ponded conditions. Tr. 38.

On November 1, 1990, Ben Wopat of the Corps sent to the attorney, who was at that time representing Mr. Kelly, a letter describing the wetland characteristics observed by Mr. Pfeiffle during his 1990 inspections. The letter stated that the swale area of the property was a wetland. A copy of the letter was sent to Respondent Kelly. Tr. 83, Cex.11.

In November 1990, U.S. EPA issued to Respondent Kelly an Administrative Compliance Order (ACO) pursuant to Section 309(a) of the Act, requiring Mr. Kelly to remove the fill material from the wetlands identified by Mr. Pfeiffle. Tr. 217-8. Mr. Kelly indicated that he intended to comply with the terms of the order. To monitor compliance, Gregory Carlson of U.S. EPA inspected the Kelly property. Photographs dated between April 3 and 21, 1991, show that the area identified by Mr. Pfeiffle as the wetland, and subject to the administrative order, was flooded. Respondent Kelly testified that he was unable to comply with the timetable in the ACO for removal of the fill because of the flooding conditions. Tr. 309, 231. Respondent Prisk, working for Prisk Construction, removed the fill in July 1992. Tr. 232-33.

On February 1, 1994, in response to a citizen's complaint, William D. Meyer of the Corps inspected the Kelly property. Tr. 161-2. During the February 1, 1994 inspection, Mr. Meyer observed Respondent Prisk operating a backhoe in the swale area. Tr. 164-66. Mr. Meyer observed Respondent Prisk using the backhoe to excavate a pit and then sidecast the dredged material into the area immediately adjacent to the

pit. Tr. 164-67. The pit was in the swale area which had been identified as a wetland by Mr. Pfeiffle in 1990. The backhoe was being used to gather vegetative debris and place it into a series of pits dug by Respondent Prisk. In hearsay testimony, which was unrefuted at the hearing, Mr. Meyer testified that Respondent Prisk indicated that he was aware of the wetlands permitting requirements of the Clean Water Act. Mr. Meyer stated that Respondent Prisk admitted that he knew that a permit was required because of actions involving his father and an illegal fill immediately adjacent to the Prisk residence. Tr. 165-68.

Mr. Meyer observed at least seven additional areas in the wetland that looked similarly disturbed. Tr. 169-171. Each of the eight disturbed areas was between 1000 and 5000 square feet in area. Tr. 171-72. Respondent Kelly testified that Respondent Prisk worked for two partial days to excavate the pits, fill them with vegetative debris and backfill the pits. Tr. 326. Neither Respondent Kelly, nor Respondent Prisk had applied for a permit to place dredged or fill material into the Kelly wetland.

On February 10, 1994, Mr. Meyer again inspected the Kelly property. This time he was accompanied by Gregory Carlson of U.S. EPA. Tr. 176. On this inspection, Messrs. Meyer and Carlson observed and paced the area that they determined had been disturbed by the filling activity. Tr. 237-38. By EPA's calculation, the disturbed area, containing at least eight pits, was approximately 936 feet in length and 100 feet wide. EPA considered that an area of 2.1 acres, much larger than the actual size of the pits, had been "disturbed" by the excavation. This was due to damage caused by operation of heavy equipment on the wetland. Tr. 237-44. This inspection was undertaken while there was snow cover on the ground. Mr. Carlson testified that he observed sheared vegetation and large clots of earth poking through the snow in the swale. Tr. 237. Mr. Meyer returned to his office and discussed with his supervisors the fact that the 1994 fill operation took place in the area that had been the subject of the 1990 Administrative Consent Order. Because the Corps considered this repeat behavior, the Corps sent to U.S. EPA a letter requesting that U.S. EPA initiate an enforcement action for the 1994 violation. C. EX.13. Mr. Meyer testified that it is the policy of the Corps to refer for enforcement to U.S. EPA repeat cases of violation. Tr. 85-86. In June 1994, Mr. Carlson began to prepare the case and draft the complaint. The

complaint was issued in September 1994. It required review and signoff by six Agency personnel. Thomas Kelly testified that he is employed by a furniture business. He purchased the lakefront property with the intent to develop it. He had the property rezoned, dealt with historical preservation issues and received a local county permit to fill. Tr. 303. Upon receipt of the local permit, Mr. Kelly cleared the property of box elders, opportunistic trees which had overgrown the property. A portion of the property had become an unauthorized garbage dump and he cleared the land of the debris. Tr. 304. Mr. Kelly then began to fill the property in conformity with local permit issued by Jefferson County. When Mr. Pfeiffle visited the property in 1990, the Corps representative warned Mr. Kelly and Mr. Prisk, who was operating the backhoe, that they might be in violation of the Clean Water Act for filling a wetland. Tr. 306. Mr. Pfeiffle sent Mr. Kelly the application for an after-the-fact permit. Mr. Kelly waited several weeks, heard nothing from the Corps and, based upon the advice of his counsel, resumed his fill operation. Tr. 307. The Corps then reinspected the property. Mr. Kelly entered an into an Administrative Consent Order and complied with its requirements for the restoration of the wetland. In achieving the restoration, Mr. Kelly worked closely with the Corps. Tr. 313.

Mr. Kelly testified that his current problem began with flooding that occurred in 1993. To clear the damage, Mr. Kelly cleared out brush and cut up downed trees. As the vegetative debris would not burn in pits, he burned it directly on the property. Tr. 309. Mr. Kelly then asked his friend, Jonathan Prisk, to help him bury the root stumps because they were waterlogged and would not burn. Tr. 310. Mr. Kelly stated that there were six or seven big tree stumps along the shoreline. Mr. Prisk dug out the stumps "put them in the hole and covered it back up and racked it up with the bucket...." Tr. 310.

Mr. Kelly estimated that there were about four pits, 15 feet by 15 feet, and six feet deep. Tr. 311. Mr. Kelly testified that he always tried to be cooperative with the federal authorities. Tr. 313.

V. DISCUSSION OF LIABILITY ISSUES

A. The Existence of a Wetland

"Wetlands" are defined as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas." 33 C.F.R. 328.3(d). The key to identifying a wetland is the presence of vegetation "typically adapted for life in saturated soil conditions." 33 C.F.R. 323.2(c). The Corps takes a three parameter approach to determine the existence of a wetland. The Corps looks for the presence of hydric soils, wetlands hydrology and indicators of hydrophytic vegetation. Tr. 37-39.

To help determine the existence of a wetland, the Corps has drafted its Wetlands Delineation Manual. There are 1987 and 1989 versions of the manual. While neither manual has been promulgated into law, the 1989 version was in effect and used by the Corps as "guidance" in 1990, when Mr. Pfeiffle made his wetland determination concerning the Kelly property.

Initially, I note that arguments by the Respondents concerning the requirements set out in the 1987 Manual are inapplicable. The guidelines set out in the 1989 Manual are the guidance in this matter. Furthermore, both Delineation Manuals are merely tools to be used in determining the existence of a wetland. They have not been promulgated into law and have no binding effect. See *U.S. v. Ellen*, 961 F.2d 462 (4th Cir. 1992).

Three Parameter Approach of the Corps:

1. Evidence of Hydrophytic Vegetation

Mr. Pfeiffle testified that during his August 24, 1990 inspection of the Kelly property, he observed vegetation including black willow, sandbar willow, broadleaf arrowhead, jewelweed, duckweed, sedge, stinging nettle and reed canary grass in the swale area. Tr. 49, 61, 73. Mr. Pfeiffle stated that 80 to 90 percent of the swale area was covered by vegetation with an indicator status of obligate. Tr. 52. Plant species with an indicator status of obligate occur in wetlands

99 to 100 percent of the time. Tr. 52. The remainder of the swale area was covered by plant types with indicator status of facultative plus, facultative wet, facultative wet plus, or obligate. Tr. 52-3. Plant species with an indicator status of facultative wet plus occur in wetlands more than 75 percent of the time. Tr. 53. Plants with an indicator status of facultative wet have a probability of occurring in a wetland 66 to 99 percent of the time. Tr. 38. The indicator status which Mr. Pfeiffle assigned to each species of plant after his 1990 visit is consistent with system outlined in the National List of Plant Species that Occur in Wetlands, North Central Region of the United States (National List of Plants). C. Ex. 3.

While Respondents argue that the vast majority of plant types which Mr. Pfeiffle identified occur regularly in non-hydric soils, the more important statistic is the percentage of area covered by each species. Convincingly, 80 to 90 percent of swale area was covered by tree and shrub canopies of the obligate species. Obligate species occur in wetlands 99 to 100 percent of the time. Tr. 52. This means that 80 to 90 percent of the swale was covered with vegetation that occurs in wetlands 99 to 100 percent of the time.

2. Evidence of Hydric Soils

Respondents argue that Mr. Pfeiffle performed no soil tests, did not know if the soil was organic or mineral, could not state if the soil was poorly drained or contained a horizon and did not evaluate the soil redox potential. Contrary to these assertions, Mr. Pfeiffle testified that on September 11, 1990, he dug two holes and examined the soil on the Kelly property. He testified that the soil contained no horizons. Tr.66-69, 112. Mr. Pfeiffle also testified that he used the Munsell Soil Color Chart to determine that the soils are hydric, not organic. Tr. 112-119. While Respondents claim that without knowledge as to soil makeup, Mr. Pfeiffle cannot use the Munsell Soil Color Chart to classify the soil, the record does not support this claim. Tr. 119, C. Ex.5.

Respondents also argue that Mr. Pfeiffle failed to testify as to stratigraphy, topography, soil permeability and failed to perform a wetlands delineation as required by the 1987 Wetlands Manual. As stated previously, the manuals are only guidance and at the time of the 1990 assessment, the 1989

Manual was in effect. It did not contain a delineation requirement.

3. Wetlands Hydrology/Inundation with Water

The existence of flooding and inundation or saturation with water is another criteria used to determine the existence of a wetland. Tr. 37-39. Mr. Pfeiffle testified that during his inspections, the swale area was inundated with one to four inches of water. Tr. 93-94. Complainant submitted photographs taken during the inspections which support the statement. C. Ex. 2. Mr. Richard Persson, a sportsman who has been visiting the site for nearly fifty years, testified that there wasn't a year when the area was dry; it was a marshy area and even when the lake was low, there was water in the area between the ice ridge and the lake (swale area). Tr. 139. The extreme southern end of the Kelly property, lot 1, always had standing water. As you walked north, toward lot 7, the amount of standing water diminished. Tr. 139. However, unless you wanted to walk from bog to bog, you need hip boots to cross the swale. Tr. 140. Mr. Kelly, himself, testified that he was unable to remove fill material in 1991 due to water on the property, that waterlogged stumps were located on the shoreline, that it was not unusual for water to flood across the top of the ice ridge in spring and that in 1992 there was three feet of water in the wetlands for most of the summer. Tr. 138-42, 308-311, 329.

4. Other Factors

Respondents argue in their written Closing Argument that the report of their expert Gehard Lee, supports the argument that the soil on the Kelly property is not hydric. Respondents assert that the Lee report shows B slope, Whelan slit loam and Aquic Hapludol. However, Mr. Lee's report is not part of the record. Respondents cite to the report as Respondents' Exhibit 8. Respondents' Exhibit 8 in the administrative record is the affidavit of William D. Meyer prepared in support of

Complainant's Motion for Summary Determination and Accelerated Decision. R. Ex. 8.

Respondents also argue that Mr. Pfeiffle did not consider weather conditions. Mr. Pfeiffle stated that late August is typically a dry time of year. Tr. 122. Respondents did not present any evidence to the contrary.

Conclusion re Existence of a Wetland

Given the totality of the evidence, I find that the cited property is a wetland within the meaning of 33 C.F.R. 328.3(d).

B. Discharge of Dredged or Fill Material

In Respondents' Statement of Triable Issues, the Respondents also contest whether "fill material" has been discharged onto a wetland.

Fill material, defined 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 is a "pollutant" within the meaning of section 502(6) of the Act, 33 U.S.C. § 1362. *United States v. Huebner*, 752, F.2d 1235 (7th Cir. 1984), cert. denied, 474 U.S. 817 (1985); *U.S. v. Cumberland Farms of Connecticut Inc.*, 647 F. Supp. 1166 (D.Mass. 1986), 826 F.2d 1151 (1st Cir. 1987); 40 C.F.R. 232.2(g). The discharge of pollutants from a point source is defined to mean "any addition of any pollutant to navigable waters from any point source." Bulldozers and other earth moving equipment are point sources. *Avoyelles Sportsmen's League, Inc. v. March*, 715 F.2d 897 (5th Cir. 1983). "Waters of the United States" is defined as "all waters which are currently used, were used in the past, or may be susceptible to use in interstate commerce." 33 U.S.C. § 1251. Wetlands which are adjacent, neighboring or bordering to tributaries of waters which are or may be used in interstate commerce are considered waters of the United States. 33 C.F.R. 328.3(a).

The activities in question took place upon property that is immediately adjacent to Lake Koshkonong. Lake Koshkonong is an impoundment of the Rock River, a navigable, interstate waterway that empties into the Mississippi River. Stipulations 7, 8. Respondents stipulated that they used to backhoe to place vegetative debris into the holes or pits. Stipulation

13. Respondents stipulated that they sidecast dredged material adjacent to the holes or pits. Stipulation 13. Respondents stipulated that they buried vegetative debris with the dredged material. Stipulation 15.

Conclusion re Discharge of Dredged or Fill Material

The record supports a finding that the Respondents discharged fill or dredged material into a wetland.

C. Requirement for a Permit

The Respondents have raised as a Triable Issue the question of whether or not a permit was required for placement of the fill material on Mr. Kelly's land. As will be more fully discussed below, the record supports the finding that the Respondents are "persons" for the purposes of the CWA; the land is a wetland, which is a "water of the United States;" and the Respondents activities resulted in the discharge of a pollutant from a point source. In these circumstances, the Act is clear that the Secretary of the Army must issue a permit for the discharge of dredged or fill materials into navigable waters of the United states. 33 U.S.C. § 1344.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO LIABILITY

Based upon the Consolidated Rules Section 28.2(b) administrative record in this matter, I make the following Findings:

1. Respondent, Thomas Kelly, is a "person" within the meaning of subsection 502(5) of the Act, 33 U.S.C. § 1362(5).
2. Respondent, Jonathan Prisk, is a "person" within the meaning of subsection 502(5) of the Act, 33 U.S.C. § 1362(5).
3. Thomas Kelly holds title to property situated in the southeast one-quarter of Section 16, Township 5 North, Range 13 East, Sumner Township, Jefferson County, State of Wisconsin. Answer p.4, Stipulation 4.
4. The property borders Lake Koshkonong, which is part of the Rock River. The Rock River is an interstate waterway that runs through Wisconsin and Illinois and empties into the Mississippi River, a navigable interstate waterway. Stipulations 7 and 8.

5. Immediately shoreward of and adjacent to Lake Koshkonong, on the Kelly property, is a depressional swale area of approximately 3.5 acres. Answer p. 14, Stipulation 6.
6. On August 24, 1990, a representative of the Corps observed that more than 90 percent of the swale area was covered by a predominance of wetland or hydrophytic vegetation with an indicator status of obligate. Tr. 52.
7. A plant species with an indicator status of obligate will occur in a wetland 99 to 100 per cent of the time. Tr. 52.
8. On August 24, 1990, the swale area was inundated with one to four inches of water. Tr. 57, Compl. Ex. 2.
9. At the September 11, 1990 inspection, the Corps representative determined that the swale area contained hydric soils. Tr. 69.
10. Hydric soils form certain characteristics under flooded or ponded conditions, including gray or black coloring. Tr. 38.
11. Over the last 50 years, the swale was annually inundated with water, often for 30 to 60 days at a time. The swale was used by sportsmen for duck hunting. Tr. 138-140.
12. Based upon the existence of a predominance of hydrophytic vegetation, hydric soil and inundation with water, the swale area of the Kelly property is a "wetland" as defined by 40 C.F.R. 232.2.
13. These wetlands are "waters of the United States" within the meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7); 40 C.F.R. § 232.2.
14. Prior to being disturbed, the wetlands on the Kelly property provided wildlife habitat and performed purification and nutrient uptake functions. Tr. 79-80, 146-47.
15. On February 1, 1994, Respondent Prisk operated a backhoe on the Kelly property. Ans. P. 5; Stipulation 5.
16. Respondent Prisk used the backhoe to dig pits in the swale area of the Kelly property. Ans. P. 6; Stipulation 12.

17. Respondent Prisk sidecast the dredged material into the swale area and used the backhoe to push vegetative material into the pits. Ans. P. 7, 8; Stipulation 13.

18. After depositing the vegetative material into the excavated pits, Respondent Prisk used the backhoe to redeposit the dredged material onto the pits and bury the vegetative debris. Ans. P. 9; Stipulations 14 and 15.

19. Eight pits were dug, disturbing 2.1 acres of the swale. The disruption was caused not only by the actual size of the pits, which were estimated to range from 1000 square feet to 5000 square feet, but also by operation of the backhoe on the swale to dig, sidecast and fill the pits. Tr. 170-172.

20. The swale area in which Respondent Prisk operated the backhoe, dug pits, sidecast dredged material, deposited vegetative debris and redeposited the dredged material was the same area identified as a wetland by the Corps representative to Respondent Kelly in 1990. Tr. 163-176, 312.

21. Respondent Prisk performed the work in the swale area of the Kelly property on February 1, 1994, with the knowledge and at the direction of Respondent Kelly. Stipulation 16.

22. Respondent Kelly had knowledge of the Clean Water Act's prohibition on placing fill material into a wetland without a permit since at least August 28, 1990, the date upon which Dale Pfeiffle of the Corps discussed the permitting and fill requirements of the CWA with Mr. Kelly. Tr. 80-82.

23. Respondent Prisk admitted knowledge of the Clean Water Act's prohibition on placing fill material into a wetland without a permit in a conversation with William Meyer, of the Corps on February 1, 1994. Tr. 165-68.

24. Fill material is a "pollutant" within the meaning of Section 502(6) of the Act, 33 U.S.C. § 1362(64) and 40 C.F.R. § 232.2.

25. Earth-moving equipment, such as the backhoe used in this case to discharge fill material to the waters of the United States is a "point source" within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14).

26. Section 301(a) of the Act, 33 U.S.C. § 1311(a) prohibits the discharge of pollutants from point sources to waters of the United States except in compliance with specified sections of the Act, including Section 404 of the Act, 33 U.S.C. § 1344.

27. At no time during the discharges of pollutants to waters of the United States described above, did the Respondents have a permit from the Secretary of the Army issued under Section 404 of the Act, 33 U.S.C. § 1344. Answer p. 15; Stipulation 9.

28. Respondents have violated Section 301(a) of the Act, 33 U.S.C. § 1311(a), by discharging pollutants from a point source to waters of the United States without authorization.

29. Under subsection 309(g)(2)(A) of the Act, 33 U.S.C. § 1319(g)(2)(A), the Respondents are liable for the administrative assessment of a class I civil penalty in an amount not to exceed \$10,000 per violation, with a maximum civil penalty of \$25,000.

VII. CIVIL PENALTY ASSESSMENT

As stated earlier, in determining the appropriate administrative penalty, Section 309(g)(3) of the Act, 33 U.S.C. 1319(g)(3), provides that the Administrator should: ...take into account the nature, circumstances, extent and gravity of the violations, and with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

In addition, as a general principle, Section 28.26(h) of the Consolidated Rules limits the Presiding Officer to consideration of any applicable Agency policy except any Agency policy, or portion thereof, that applies to settlement of a penalty claim concerning the assessment of an administrative penalty. Complainant seeks a penalty of \$4,000 against Thomas Kelly and \$6,000 against Jonathan Prisk, characterizing their violations as "flagrant" and repeated. Respondents counter that the violations, if any, were temporary and minor. Respondents assert that assessing penalties in this case is inappropriate. Based upon the administrative record, I have taken into account the specific

following matters in determining the appropriate civil penalty:

STATUTORY FACTORS:

A. Nature: This is a case of unauthorized discharges of pollutants to waters of the United States. Wetlands serve the important ecological functions of acting as storage areas for storm and flood waters, as prime natural recharge areas, and as part of the natural water filtration process. See *United States v. Weismann*, 48 F. Supp. 1311, 1346 (M.D. Fla. 1980). Wetlands also serve as important habitat for migratory waterfowl and other animals. The seriousness of the violations should be measured against the Act's objectives of preserving these important ecological areas. This factor applies equally to both Respondents.

B. Circumstances:

Thomas Kelly

At the August 28, 1990 inspection conducted by Dale Pfeiffle, Respondent Kelly was informed that the Corps considered the swale area of the Lake Koshkonong property a wetland, under its jurisdiction. Mr. Pfeiffle, the Corps' representative, explained the federal wetland requirements and sent Mr. Kelly an application for a federal after-the-fact permit concerning the disturbed area. At that time, Mr. Kelly had a local Jefferson County fill permit. Respondent Kelly testified that he was in compliance with the terms of the local permit. Mr. Kelly ultimately entered into a federal Administrative Compliance Order (ACO), restored and monitored the wetland. This was the exact area which was the site of the 1994 violation. Clearly in February 1994, Respondent Kelly had specific knowledge that the swale area was considered a wetland under the CWA and dredge or fill operations required a permit issued by the Secretary of the Army.

Jonathan Prisk

Initially, I note that Respondent Prisk was properly served and aware of the hearing date and location. He was represented in the proceedings by counsel and chose not to appear or testify at the hearing. Among the most damaging evidence against Respondent Prisk were unrefuted statements containing hearsay made by both EPA witnesses and Respondent

Kelly. Hearsay, which is reliable and not otherwise improper, is admissible, Richardson v. Perales, 402 U.S. 389 (1971); Section 28.26(d) of the Consolidated Rules. Hearsay may constitute substantial evidence if it has probative force. Sch. Bd. Of Broward Cty., Fla v. HEW, 525 F.2d 900 (5th Cir. 1976). However, I also note that EPA could have strengthened its case by compelling the attendance of Respondent Prisk through the issuance of a subpoena under by Section 28.11 of the Consolidated Rules.

I find that Respondent Prisk had knowledge of the CWA permitting requirements. He was employed by Respondent Kelly in the summer of 1992 to remove unauthorized fill that was the subject of the 1990 ACO. In discussing scope of work, it is hard to imagine a scenario where the parties would not discuss the permitting issues. Evidence of this knowledge is buttressed by the hearsay testimony of Corps' employee, Mr. Meyer, that in February 1994, Jonathan Prisk admitted knowledge of the CWA wetland permitting requirements. Tr. 169, 252, C. Ex. 12.

EPA has submitted a Prisk Construction document with the names of Darrell Prisk and Jonathan Prisk, father and son, on the letterhead. C Ex. 19. On the strength of this document, EPA asserts that Jonathan Prisk was a principal of Prisk Construction and should be held to the level of knowledge of an owner. In argument, Respondent Prisk's attorney challenges the characterization of Prisk as a principal, rather than an employee. I do not find that EPA has made a convincing showing that Respondent Prisk was a principal of Prisk Construction. The evidence supports a finding that Respondent Prisk worked as an employee on the Kelly site in both 1992 and 1994. However, as stated above, I do find that Respondent Prisk, an experience backhoe operator, was aware of wetland permitting requirements.

C. Extent: Respondent Prisk operated a backhoe on the swale. Mr. Carlson testified that the disrupted area was 100 feet in width and 936 feet long, slightly over two acres. Mr. Carlson testified that eight pits were excavated and that he saw the disruption despite snow cover. Mr. Kelly testified that between four and six pits of no more than fifteen feet by fifteen feet were dug. Tr. 311. Given the operation of a backhoe, with the need to dredge, sidecast and simply move about, it is apparent that the disruption of the wetland is

greater than the size of the excavation. I find that 2.1 acres were impacted.

D. Gravity: Unpermitted discharges are considered to be very serious violations of the Clean Water Act. The prohibition of unpermitted discharges is not new, having been enacted in 1972. (Oct. 18, 1972, Pub. L. 92-500, § 2, 86 stat. 844). The vegetative cover is used for resting, nesting and foraging by wildlife. Destruction of the vegetative root system encourages the invasion of less desirable alien, non-native woody species into the ecosystem.

E. Respondents' Ability to Pay: In a proceeding under the Consolidated Rules, a respondent is to bear the burden of going forward to present exculpatory statements as to liability and statements opposing the Complainant's request for relief. See § 28.10(b)(1). The administrative record does not contain clearcut evidence of inability to pay by either respondent. Respondent Kelly has testified as to economic hardship because he had to return downpayments on the subdivided properties and of financial difficulties caused by his attempted development of the land. The record also reflects Mr. Kelly's ability to obtain an \$200,000 loan on the property. Tr. 256. There is nothing in the record as to Respondent Prisk's inability to pay a penalty. Respondent Prisk did not raise inability to pay the proposed penalty as an affirmative defense. EPA was unable to obtain Dun and Bradstreet reports either respondent. Tr.256.

On the basis of this record, I find that it would be inappropriate to mitigate the penalty on these grounds. The record does not support a reduction in penalty for either respondent due to inability to pay.

E. Economic benefit or savings resulting from the violations:

Complainant did not submit evidence of economic benefit to either respondent due to the violation. The record supports a determination of no economic benefit.

F. Prior History of Violation:

Thomas Kelly entered into an Administrative Compliance Order concerning the same type of violation on the same wetland in 1990. EPA has submitted no information indicating

that Jonathan Prisk was the subject of a prior enforcement action under the Act.

G. Degree of Culpability:

Thomas Kelly's conduct reflects a serious degree of culpability. Respondent Kelly was aware of the permitting requirement based upon the 1990 ACO. While Mr. Kelly was cooperative each time he was found to have filled the wetland, this does not diminish his responsibility and liability for the violation. He was both owner of the property (illegally filled two times) and he directed the operation of backhoe operator Jonathan Prisk.

Jonathan Prisk, an experienced heavy equipment operator had knowledge of the wetland regulations. As a backhoe operator directed by Respondent Kelly, Respondent Prisk has a lesser degree of culpability.

**H. Other Factors as Justice May Require:
Retaliation Against the Respondents**

Respondents allege that Mr. Kelly was being punished for pursuing his right to apply for an after-the fact-permit. Respondents also argue that the penalties assessed against Jonathan Prisk are retaliatory. The evidence does not support these allegations.

Deterrent Effect of a Penalty

Complainant argues the necessity of imposing a substantial monetary penalty in order to drive home to Respondents and the regulated community the fact that the Clean Water Act cannot be violated with impunity. *Tull v. United States*, 481 U.S. 412 (1987). Deterrence is an important goal of penalty assessment. This includes both "specific" deterrence of a particular respondent, as well as "general" deterrence in dissuading others in the regulated community from violating the law. "[T]he penalty should persuade the violator to take precautions against falling into noncompliance again (specific deterrence) and dissuade others from violating the law (general deterrence)." EPA General Enforcement Policy #GM-21.

The Respondents actions have generated strong feelings in the community. Kathleen Wygans of Janesville Wisconsin submitted petitions signed by more than 100 area residents. The petitions state that Mr. Kelly has "bettered" the land through filling operations. On the opposite side of the issue, Mr. Persson, the representative of a sporting club which has hunting rights on the Kelly property, appeared at the hearing and testified as to the value he, and others, place upon the continued existence of wetlands.

The appearance of the land is not at issue here. Congress has mandated that EPA protect waters, including wetlands, of the United States through control of the placement of dredged and fill material into such waters. The Respondents cannot ignore these requirements, even if they prefer the aesthetics of filled areas. Given the Respondent Kelly's continued disregard for the wetlands regulations and Respondent Prisk's disregard, despite knowledge of the wetlands requirements, the civil penalties for this violation must reflect the need for both specific and general deterrence.

Conclusion

I find that EPA has proposed an appropriate penalty against Thomas Kelly. However, the penalty assessed in this Decision and Order against Respondent Prisk differs from the EPA proposal. It reflects the finding of lesser culpability of Respondent Prisk. Based upon the administrative record and the statutory factors, I determine that, as to Thomas Kelly, the appropriate penalty in this case is **Four Thousand Dollars (\$4,000)**.

Based upon the administrative record and the applicable law, I determine that, as to Jonathan Prisk, the appropriate penalty in this case is **Three Thousand Dollars (\$3,000)**.

VIII. ORDER

On the basis of the administrative record and applicable law, including § 28.28(a)(2)(ii) of the Consolidated Rules, Respondents are hereby ORDERED to comply with all the terms of this ORDER:

A. Respondent Thomas Kelly is hereby assessed a civil penalty in the amount of \$4,000 (Four Thousand Dollars) and ORDERED to pay the civil penalty as directed in this ORDER.

B. Respondent Jonathan Prisk is hereby assessed a civil penalty in the amount of \$3,000 (Three Thousand Dollars) and ORDERED to pay the civil penalty as directed in this ORDER.

C. Pursuant to § 28.28(f) of the Consolidated Rules, this ORDER shall become effective 30 days following its date of issuance unless the Administrator suspends implementation of the ORDER pursuant to § 28.29 of the Consolidated Rules (relating to sua sponte review).

D. Each Respondent shall, within 30 days after this ORDER becomes effective, forward a cashier's check or certified check, payable to "Treasurer, United States of America," for the penalty assessed against him in Paragraph A or B of this Order. Each check shall note the docket number of this case. The checks shall be sent to:

United States Environmental Protection Agency
Region 5
P.O. Box 70753
Chicago, Illinois 60673

In addition, Respondents shall mail copies of the checks, by first class mail, to:

Regional Hearing Clerk (R-9J)
United States Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

E. In the event of failure by a Respondent to make payment within 30 days of the date this ORDER becomes effective, the matter may be referred to the United States Attorney for collection by appropriate action in the United States District Court pursuant to subsection 309(g)(9) of the Clean Water Act, 33 U.S.C § 1319(g)(9).

F. Pursuant to 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will therefore begin to accrue on

these civil penalties if they are not paid as directed. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 4 C.F.R. § 102.13(c). A late payment handling charge of fifteen dollars will be imposed after 30 days. In addition, a penalty charge of six percent per year will be assessed on any portion of the debt which remains delinquent more than 90 days after payment is due. However, should assessment of the penalty charge on the debt be required, it will be assessed on the first day payment is due under 4 C.F.R. § 102.13(e).

Judicial Review

Respondents against whom these civil penalties are assessed and members of the public who have commented on the proposed assessment of the penalty have the right to judicial review of this ORDER under subsection 309(g)(8) of the Clean Water Act, 33 U.S.C. § 1319(g)(8). Respondents or the public commenters may obtain judicial review of these civil penalty assessments in the United States District Court for the District of Columbia or in the United States District Court for the District in which the violation is alleged to have occurred by filing a notice of appeal in such court within the 30-day period beginning on the date this ORDER is issued (5 days following the date of mailing under § 28.28(e) of the Consolidated Rules) and by simultaneously sending a copy of such notice by certified mail to the Administrator and to the Attorney General.

IT IS SO ORDERED.

Date: 8/5/98

_____/s/_____
David A. Ullrich
Acting Regional Administrator

Prepared by: Regina Kossek, Presiding Officer, Region 5