UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6

In the Matter of:	*	
	*	
Henry Stevenson and	*	Docket No. CWA-06-2011-2709
Parkwood Land Co.,	*	
	*	
Respondents.	*	

DECISION ON MOTIONS

On April 17, 2012, I granted a Motion for Accelerated Determination as to liability in this Class I Penalty Action under Clean Water Act (CWA) Section 309(g). That Decision rejected the jurisdictional defense on which Respondents then relied, concluding the wetlands to which Respondents discharged fill on at least two occasions were "waters of the United States" subject to CWA requirements because they are adjacent to the Neches River, a navigable water of the United States. I declined to assess a penalty at that time due to lack of evidence on amounts Complainant attributed to factors relevant to such an assessment.

Since then, Complainant has filed a Motion for Accelerated Determination as to Penalty together with a declaration by Ms. Barbara Aldridge, EPA's compliance officer, and her penalty calculation worksheet. Respondents opposed that motion in a pleading styled "Respondent's [sic] Supplemental Response to Complaintant's [sic] Motion for Accelerated Decision as to Penalty" (Supplemental Response), but the original copy of that pleading was lost in the mail. Counsel for Complainant received a service copy, however, and graciously provided a copy for the record.

In addition to responding to Complainant's Motion, the Supplemental Response raised a new liability issue, for the first time contending Respondents' discharges of fill material was

authorized by Nationwide Permit 3 (NWP 3). Construing that a request for reconsideration of the Accelerated Determination on liability, I ordered Complainant to respond, providing time for Respondents to Reply. Complainant responded with a pleading styled "Complainant's Motion in Opposition to Respondents' Supplemental Response" (Motion in Opposition) to which Respondents filed no reply. As explained below, I now grant no motion (whether implicit or explicit); a hearing is necessary to unravel this matter.

Liability. NWP 3, as it may apply to this matter, was issued by the Corps on March 12, 2007 and became effective on March 19, 2007. *See* 72 Fed. Reg. 11092 (March 12, 2007). By its terms, NWP 3 authorized repair of currently serviceable structures, including "minor deviations in the structure's configuration or filled area" and "temporary structures, fills, and work necessary to conduct the maintenance activity." 72 Fed. Reg. 1181. Belatedly, Respondents now argue their discharges of fill were authorized by NWP 3.

In response, Complainant contends Respondents' authorization was limited by the plans attached to their preconstruction notification of December11, 2006, which showed all fill would be discharged to the exterior of the levee between the wetlands at issue and the Neches River. According to Complainant, those plans ""became Respondents' effective permit" once the Corps approved them on April 17, 2007 so Respondents' subsequent discharges of fill inside the levee were unauthorized. Motion in Opposition, p. 7. NWP 3 required preconstruction notifications only under some circumstances, however, but allowed voluntary submissions "in cases where… the project proponent wants confirmation that the activity is authorized by nationwide permit." 72 Fed. Reg. 11197. Complainant identifies no NWP 3 provision or regional condition that *required* Respondents to submit preconstruction notification for the fill they actually discharged.

Hence, NWP 3 *may* have authorized Respondents' discharge of some or all of that fill regardless of the content of the notification Complainant submitted and the Corps approved. Whether Respondents were required to submit preconstruction notification for their actual discharges is an issue of mixed fact and law on which additional evidence and argument may shed light.

Complainant also argues that "[t]he discharge of dredged and fill material…was unrelated to maintenance of the levee…" Motion in Opposition, p. 8. The current record demonstrates no purpose for Respondents' fill discharges other than levee repair and associated site access, but that too is a potential issue on which Complainant may submit additional evidence and argument.

Penalty Amount. In addition to the statutory factors CWA requires, 40 C.F.R §22.47 requires consideration of "any civil penalty guidelines issued under the Act." The specific civil penalty guideline on which Complainant relies in this matter is "Clean Water Act Section 404 Settlement Penalty Policy" (Penalty Policy) issued by EPA's Office of Enforcement and Compliance Assurance on December 21, 2001. The Penalty Policy establishes a formula ("Penalty = Economic Benefit + (Preliminary Gravity Amount +/- Gravity Adjustment Factors) – Litigation Considerations – Ability to Pay – Mitigation Credit for SEPs") with which EPA enforcement staff may calculate proposed penalties. Penalty Policy at 8.

In the instant matter, Ms. Aldridge's penalty calculations reflect manipulations that appear purposed to yield a penalty amount small enough to be assessed in a Class I Administrative Penalty action. All in all, however, the penalty worksheet generally suggests Ms. Aldridge found the environmental damage associated with Respondents' violations relatively small, but Respondents' culpability great. Ms. Aldridge's views on Respondents' culpability were largely based on a history of noncompliance and familiarity with the Corps' permit program

that is not well documented in the record. Respondents concede that Mr. Stevenson, the Chief Executive Officer of Parkwood Land Co., has since 1991 been involved in four unauthorized discharges, two after-the-fact permit actions, four other permit actions, three withdrawn permit applications, and twelve requests for jurisdictional determinations. Supplemental Response, p. 5. Complainant argues that experience shows Respondents knew full well a permit was required for their discharges, but failed to seek one. Respondents counter by arguing it shows they "have a 'long history' of attempted compliance." Supplemental Response, p. 7.

Resolving those arguments requires evidence on the *specific* nature of Respondents' prior violations and interactions with the Corps. Because the current record contains none, an evidentiary hearing is necessary in this matter.

ORDER

Complainant's "Motion for Accelerated Decision as to Penalty is denied." To the extent it constitutes a motion for reconsideration of the April 17, 2012 Accelerated Decision, "Respondent's [sic] Supplemental Response to Complaintant's [sic] Motion for Accelerated Decision as to Penalty" will be decided following a hearing for receipt of additional evidence. The location, date, and time of that hearing will be set by subsequent order after conference with counsel for the parties.

September 6, 2012

Pat Rankin
Regional Judicial Officer

CERTIFICATE OF SERVICE

I, Lorena S. Vaughn, the Regional Hearing Clerk for the Region 6 office of the Environmental Protection Agency, hereby certify that a TRUE AND CORRECT copy of the Decisions On Motions in Docket No. Class I - CWA 06-2011-2709, was served upon the parties on the date and in the manner set forth below:

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U.S. FIRST CLASS MAIL - RETURN RECEIPT REQUESTED

Russell Murdock
Environmental Protection Agency
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INTEROFFICE MAIL

DATE: 9/6/12

Lorena S. Vaughn
Regional Hearing Clerk