UNITED STATES
ENVIRONMEN TAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF:	)	
	)	DOCKET NO. CWA-04-2000-1504
PHOENIX CONSTRUCTION	)	
SERVICES, INC.	)	
	)	
Respondent.	)	
______________________________________	)	

INITIAL DECISION

This is a proceeding under Section 309(g) of the Clean Water Act ("CWA" or "the Act"), as amended, 33 U.S.C. § 1319(g). The proceeding is governed by the United States Environmental Protection Agency's (“EPA”) Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, ("Consolidated Rules of Practice") and specifically Subpart I of the Consolidated Rules of Practice, published at 64 Fed. Reg. 40137 (July 23, 1999). The matter is currently before the undersigned Presiding Officer for assessment of a penalty against Respondent Phoenix Construction Services, Inc. ("Phoenix") for violations of Section 301 (a) of the Act by discharging pollutants into waters of the United Sates without a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344.

An Accelerated Decision on Liability was issued on January 29, 2001, finding Respondent liable for the administrative assessment of civil penalties and leaving for resolution at hearing the appropriate amount of penalty to be assessed against Respondent. The Accelerated Decision on Liability is hereby incorporated in full.

A hearing on penalty convened before the undersigned in Panama City, Florida on January 16 and 17, 2002. The Complainant EPA produced eleven witnesses, the Respondent produced two. The record of the hearing consists of a stenographic transcript ("TR") of 543 pages, and 27 numbered exhibits, 25 of which were received into evidence. The parties each submitted posthearing briefs and reply briefs. The record of the hearing closed on April 11, 2002, upon the Presiding Officer's receipt of reply briefs.

Determination of an Appropriate Penalty:

Section 309(g)(3) of the CWA lists the factors to be considered in assessing a civil penalty. These are: the nature, circumstances, extent and gravity of the violation, the ability of the violator to pay the penalty, 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.

The Consolidated Rules provide that "the complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and the relief sought is appropriate." 40 C.F.R. § 22.24(a). Complainant, therefore, has the burden of demonstrating the appropriateness of the proposed penalty.

Complainant seeks imposition of the maximum Class I penalty of $27,500. The core of the government's case with respect to remedy is that Respondent is an experienced contractor who, well aware of both state and federal permitting schemes, elected to precipitously violate the CWA. In doing so Respondent filled 3.5 acres of wetlands without regard for the process and/or the controls that would ultimately be imposed in the after-the-fact permit issued for the project. Furthermore, the Government attempts to establish the Respondent as a flagrant violator, reflected in a history of

violations pertaining to both the personal residence of Mr. James Finch, President and sole shareholder of Phoenix, as well as more recent commercial projects.

Respondent to the contrary, contends that a *de minimus* fine of approximately $10 is appropriate in light of all facts and circumstances of the case. The circumstance as portrayed by Respondent is that much confusion, rather than any intent, led to the unfortunate premature filling of wetlands. Respondent asserts that the line drawn between the permitting mechanism of the state and federal agencies was blurred such that Respondent was led to believe the state permit had been issued, and thus so had the federal permit, and that no harm was done since all the activity was ultimately permitted after-the-fact. Furthermore, Respondent attempts to show that EPA failed to establish any prior history of violations because 1) the allegations were never judicially or administratively adjudicated and 2) violations alleged to have been committed by Mr. Finch are not relevant in an action against the corporation. Each of the elements will be addressed below.

Nature, circumstance, extent and gravity of the violation:

With respect to the extent of the violation, approximately 3.5 acres of wetlands were filled without a U.S. Army Corps of Engineeers ("Corps") CWA § 404 permit.[1] Although the filling was ultimately authorized in an after-the-fact permit, Complainant contends that the manner in which Respondent implemented the construction project, specifically absent adequate erosion controls, impacted additional wetlands 10 to 15 feet beyond the construction boundary. According to Complainant's witness Michael Wylie, the impacted wetlands, while not pristine, are medium quality

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[1] The discrepancy noted in the Accelerated Decision on Liability pertaining to the acreage alleged to have been filled was clarified during the course of the penalty hearing. TR 69-70.

wetlands that perform important and valuable water quality, flood attenuation, and wildlife habitat functions. Tr 366-369; TR. 220. Similarly, another government witness, Jose Negron, characterized the quality of the wetlands as "medium to high." TR 220. Although Respondent contests the value of the wetlands filled, independent experts were not introduced to controvert what was otherwise convincing scientific testimony by the Government witnesses. Furthermore, additional testimony established that the filling itself, while ultimately permitted, caused environmental harm that would not have resulted had Respondent waited for issuance of a permit containing best management practice requirements. TR 219. The silt fences, while at some point erected, were "actually worthless", causing significant erosion, resulting in the deposit of silt approximately 6 to 7 feet beyond the permitted boundaries.[2] TR 219.

Another aspect of the gravity component to consider is the number of days during which the violation occurred. Uncontested testimony by witnesses for Complainant established that filling activity of wetlands occurred, at the very minimum on May 4, 1999. TR 421-422. Furthermore, according to testimony of Respondent's witness, Edmond Schoppe, IV, project manager for the Frank Brown Park project, the filling would have occurred over a two or three day period. TR 473. Specifically, according to Mr. Schoppe, this particular activity would have begun on a Saturday, continued on Monday and stopped on Tuesday. TR 506. It was also established by eye witness account that

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[2] Seeking higher penalties Complainant attempted to establish that an additional area of unpermitted fill existed where sand had been pumped from a storm water detention pond created by Respondent into a wetland area. I find the evidence pertaining to this activity inadequate to support a penalty. This allegation was neither included in the initial administrative complaint nor considered in the Accelerated Decision on Liability. Furthermore, the evidence introduced with respect to this activity and the harm resulting therefrom, was too vague and inconclusive to support an assessment of penalty.

Respondent, after being notified to stop filling continued to conduct activity in the same area on May 6th and 10th. This work, even if confined to leveling dirt over the area already filled, was a CWA violation as well. *See* United States v. Brace, 41 F 3d 117, 127-128, (3rd Cir. 1994); United States v. Huebner, 752 F2d 1235, 1243 (7th Cir. 1985). I conclude, that based upon the evidence, the illegal activity occurred on at least five separate days.

It would be remiss to assess a penalty based upon harm to the environment resulting from the filling of the 3.5 acres of wetlands while ignoring the fact that the filling of those wetlands was ultimately authorized in a permit. Furthermore, it is important to distinguish this case from the more typical scenario in which an after-the fact permit resolves illegal activity for which a permit application had not been pending. To the contrary, in this case the filling of the 3.5 acres of wetlands was not only proposed, planned and detailed in an application but was undergoing review and discussion at or about the same time the activity occurred. Based upon information conveyed by the Florida Department of Environmental Protection (DEP) to the permittee, the City of Panama Beach, the filling of these wetlands was going to be permitted imminently, albeit contingent upon a certain degree of acceptable mitigation and sufficient management practices. TR 195. The question is to what extent, if any, this serves as either a mitigating or more damaging factor in assessing a penalty against Respondent. An interesting position in a similar situation was taken by Administrative Judge Moran in his recent decision in the case In the Matter of William H. Jarvis, Docket No. CWA-04-2000-1509, 2002 EPA ALJ LEXIS 21. As in the matter at hand, issuance of a permit was imminent at the time Jarvis acted precipitously. As stated by Judge Moran, "it is fair to state that it was not whether Jarvis would be [sic] a permit for his project but only when the permit would be issued". Id. at 20. Judge Moran

distinguished those facts from the situation in which one "merely proceeds to discharge pollutants without any concern for the need for a permit", presumably a more egregious act. Weighing that fact along with others, Judge Moran reduced the penalty from the $30,000 proposed to $10,000. However, it is important to distinguish Jarvis from the Respondent in this case, because Phoenix had not been the entity that applied for the permit. Rather this Respondent, aware that the City had applied for a permit nevertheless proceeded with the work prior to completion of the permitting process.

A significant penalty may be imposed if there is a risk or potential risk of environmental harm even absent proof of actual deleterious effect. U.S. v. Smithfield Foods, Inc., 972 F. Supp. 338, 344 (E.D. Va. 1997), citing Natural Resource Defense Council, Inc. v. Texaco Refining & Marketing, Inc., 800 F. Supp. 1,21 (D. Del. 1992); U.S. v. Roll Coater, Inc., 21 Envtl. L. Rep. 21073, 21075 (S.D. Ind. 1991). The essential factors to consider in this case in determining gravity of the environmental harm is not limited to environmental harm from the filling of 3.5 acres of moderate quality wetlands but to 1) lack of erosion controls and the damage resulting therefrom, and 2) harm resulting or *potentially resulting* from the defiance of a regulatory program established to restore and maintain the chemical, physical, and biological integrity of the Nations's waters. Harm to a regulatory program has been the basis for imposition of significant penalties in many other CWA Class I and Class II cases. *See* In the Matter of: City of Fairview, Docket No. CWA-IV 96-510, 1998 EPA RJO LEXIS 8; In the Matter of Atlantic Beach, Docket No. CWA-IV-93-520, Decision and Order of the Regional Administrator; In the Matter of Battelle Memorial Institute, Docket No. CWA-4-94-509, Decision and Order of the Regional Administrator; United States v. Van Leuzen, 816 F. Supp. 1171 (S.D. Tex. 1993); In the Matter of John Simon d/b/a SHE Rentals, Docket No. CWA-III-156, 1997 EPA RJO LEXIS 13.

Weighing these factors, the nature, circumstance and gravity of this violation was significant. It is the defiance of the regulatory process that could, if uncurtailed, lead to immeasurable environmental harm. The CWA regulatory program is set up to provide for review by the public of potential activity, including review and comment by other regulatory agencies. Maintaining the integrity of the process is vital. Respondent's activity taking place without the benefit of outside regulatory review is egregious and warrants a substantial penalty.

There is the additional aspect of harm to the environment extending 15 feet beyond the boundary of the permitted area that should be penalized as well. Had Respondent waited for the appropriate permit it would have mandated compliance with particular erosion controls. The failure to put silt fences in place and/or adequately install and maintain those that were, led to needless and rather wanton destruction of wetlands vegetation. I am in agreement with Complainant's assessment that this element of the penalty calculation calls for an assessment of $20,000.

Ability of the Violator to Pay the Penalty:

The fact that Respondent is able to pay the penalty is not an issue in this case.

Prior History of Such Violations:

Complainant is seeking $5000, a 25% increase to the base penalty for Respondent's prior history of violations. A great deal of testimony was presented by Complainant pertaining to what was characterized as an extensive history of flagrant disregard and abuse of the regulatory process. TR 260-293, TR 151 -160. Respondent, on the other hand, takes the position that the allegations are either irrelevant because they are attributable to Mr. Finch individually, or unproven, as they were never adjudicated. TR 302.

The threshold issue is whether the allegations of past violations establish a prior history of violations sufficient to support increasing the penalty. The evidence introduced at the hearing for the purpose of establishing a prior history of violation for penalty purposes pertained to events summarized as follows:

a) Bulkhead # 1- Mr. Finch, President and sole stockholder of Respondent corporation, was cited for constructing a bulkhead into Large Bayou at his personal residence in 1984, and backfilling behind it to create additional dry land in what has been part of Large Bayou, without necessary permits. However, the enforcement contacts were not followed up with any formal enforcement action.

b) Bulkhead # 2 (asserted by Mr. Finch to have been a renovation to the bulkhead built in 1984) - In 1996, Mr. Finch allegedly worked on another unauthorized bulkhead waterward of the bulkhead he constructed in 1984. A Consent Order required him to pay a penalty and do restoration work.

c) In 1998 Finch was notified in connection with a violation involving destruction of sea grass beds when a subcontractor parked a barge on the sea grass. However after a line of questioning regarding a letter addressing these issues, the exhibit itself was withdrawn.

d) Respondent received notification of a possible violation in connection with a sewage spill while working as a contractor on the Millville waste water treatment plant. Again, at the hearing the notification letter was withdrawn from evidence.

e) On May 25, 2000, Finch received a Notice of Non-Compliance (Complainant's Exhibit "C Exh." 21) from the Corps for failure to install a sewage pipeline across St. Andrews Bay in accordance

with permit conditions. The condition required installation either 10 feet below channel depth or 4 feet below the mudline, whichever is greater. Approximately 1500 feet of the pipeline was installed without cover, thereby being at risk of a dredge or ship's anchor breaking the pipeline.

Relying upon the *A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties*, promulgated by EPA on February 16, 1984, Judge Pearlstein in the case, In the Matter of Urban Drainage and Flood Control District, and Kemp & Hoffman, Inc., Docket No. CWA-VIII-94-20, 2998 EPA ALJ LEXIS 42, provides the following guidance for evaluating the relevance of prior violations: "similarity of the previous violation(s); their recency; number of prior violations; and the violator's responses or corrections of previous problems." Absent documentary evidence establishing the prior violation, probative testimony at hearing explaining the circumstances of any prior violation would suffice. Taking this approach while I find the five incidents described above very relevant to Respondent's culpability for purposes of penalty assessment they do not sufficiently establish the prior history of violations contemplated by the statute. With respect to the 1984 bulkhead activity, I find the lack of recency problematic. Even without narrowly restricting the scope of previous violations to those occurring within the previous five years as suggested by the court in the case, United States v. ConAgra , 1997 U.S. Dist. LEXIS 21401, a sixteen year old encounter with a regulatory agency is simply too distant in time. The second bulkhead violation, occurring in 1996 while neither too remote nor dissimilar from the current violation, also presents problems with respect to triggering an adjustment upward to the base penalty. Both the 1996 and 1984 bulkhead violations were in fact, committed by Mr. Finch, individually, at his personal residence. The absence of case law in which prior violations of an individual corporate officer are considered in

assessing a penalty against the corporation leads me to conclude that it is inappropriate to do so here.[3] However, while these violations are not what the statute intended as establishing a prior history of violations, they are quite relevant to the Respondent's culpability and will be discussed below.

With respect to the sea grass incident and Millville sewage spill I find the testimony presented, in the absence of documentary support, simply too inconclusive to support additional penalty. I find that the record does not support Complainant's argument that Respondent admitted these violations through the testimony of Mr. Finch. The letter referred to as a notification of the sea grass incident was withdrawn from evidence, and Mr. Finch testified that it was mistakenly sent to him instead of a subcontractor. TR 275, TR 277-278. Similarly, Mr. Finch testified that Phoenix had nothing to do with the alleged Millville waste water treatment violations. TR 281. That notification letter was also withdrawn as an exhibit.

The one remaining violation Complainant introduced to support an increase in the penalty for prior history of violations, is Phoenix's citation for failure to comply with a permit condition for burial of the pipeline in St. Andrews Bay. First, contrary to Respondent's contentions that the violations were not finally adjudicated and therefore should not impact penalty in this matter, both informal and formal enforcement actions are relevant. *See* In re C. L. "Butch" Otter and Charles Robnett, Docket No. CWA-10-99-0202 (ALJ Charneski April 9, 2001). I am in agreement with Complainant, that the issue is whether there is adequate direct evidence, testimonial or documentary, in the record to support consideration of the prior history. See Hawaii's Thousand Friends v. City and County of Honolulu, 821

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[3] United States v. Weisman, 736 F. 2d 421 (7th Cir. 1984), cited by Complainant, addresses the relevance of prior bad acts of a defendant in a criminal case, and is inapposite to the facts at hand.

F. Supp. 1368, 1388. (D. Haw. 1993). The documentary evidence pertaining to this violation consists of 1) a March 11, 1996 letter from the Corps to Bay County authorizing the project for installation of the subaqueous transmission line along with the attached General Permit for the work containing conditions for burial of the line (C Exh. 24); and 2) a Notice of Noncompliance dated May 25, 2000 issued to Phoenix Construction Services, Inc. notifying it of failure to comply with the terms and conditions of the aforementioned Corps Permit (C Exh. 21). The testimony addressing this violation is found at TR 281-293. The facts established are that a project for burial of a pipeline in St. Andrew's Bay was authorized, the permit required burial at a certain depth, and that a subcontractor of Phoenix sometime in 1999 failed to fully comply with that permit condition. Mr. Finch, denied any liability, claiming that those responsible for the project itself along with the permittee authorized the work done in the manner in which it was done by its subcontractor. However, of some concern is that reference, albeit vague, was made to there being ongoing unresolved litigation about this activity. as well as a grand jury hearing on the matter. TR 293, TR 282. I am persuaded that the pipeline burial was out of compliance at least at or around the same time as the Frank Brown Park violation which is the subject of this proceeding. Furthermore, a Notice of Non-Compliance, while not a final adjudication is sufficient indication that a violation has occurred. However, without benefit of a final resolution to a matter significant enough to warrant convening of a grand jury, the outcome of which is not clearly established in the record before me, I am reluctant to affix a sum certain to the violation, thereby drawing an independent and possibly premature conclusion regarding the extent of Respondent's liability and/or guilt. However, notwithstanding limitations regarding this and the other four incidents as

prior violations referenced in the Act, this rather extensive involvement with the environmental regulators is extremely relevant in reflecting Respondent's culpability, and will be addressed below.

Degree of Culpability:

Culpability can best be determined by asking "how blameworthy is this Respondent." The postures taken by the parties, Complainant seeking the maximum allowable penalty under a CWA Class I action, and Respondent viewing a $10 fine as appropriate, to a large extent reflects their divergent positions with respect to the degree of Respondent's culpability.[4]

While the CWA is undeniably a strict liability statute knowledge of the legal requirements that were violated, willfulness or negligence with respect to the activity and disregard for regulatory controls are all relevant to determining penalty. The various encounters that this corporate Respondent and its principal officer, James Finch, had over two decades with the DEP and Corps reflect, if not a complete disregard for regulatory controls, certainly a trivializing of the importance of such controls. For example, one rather telling piece of evidence in the record is Mr. Finch's statement that paying the government five or six hundred dollars for the violation pertaining to the unpermitted bulkhead was to get them [the government] to go away and leave me alone." TR 272. It is reasonable to attribute the knowledge of the individual corporate officer responsible for the activities of the corporation onto that corporation for the purpose of measuring culpability. Mr. Finch, as president and sole shareholder

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[4]In pleadings Complainant has indicated that it pursued a Class I action prior to developing all information ultimately presented at hearing, but believe a penalty greater than that amount would have been warranted through the pursuit of a Class II action. While duly noted that Complainant may have elected in its discretion to pursue a Class II action had it to do over, the maximum allowable penalty in the case before the undersigned is $27,500.

directed the filling of the 3.5 acres of wetlands.[5] Phoenix Construction Services, Inc. completed $ 45 million in projects in 2001, many of which were conducted near water. TR 253. Despite the extent of this project activity, Mr. Finch attempted to distance himself and his company from the permitting process, repeatedly asserting that the City's consulting engineer was one hundred percent responsible for obtaining the permits. TR 256. While Mr. Finch may be technically correct about the entity responsible for actually obtaining permits, reliance upon that fact to excuse what would have been reasonable precaution is unacceptable. Even assuming that Respondent had reason to believe permits had been issued and/or that verbal assurance of permit issuance was sufficient, the company could have protected itself merely by requiring a copy of the necessary permits to be shown to them prior to commencement of the work. U.S. v. Board of Trustee of Florida Keys Community College, 531, F. Supp. 267, 274. Therefore, inasmuch as the two bulkhead and pipeline incidents set forth above may not warrant an increase in penalty for prior history of violations, they significantly contribute to Respondent's degree of culpability. An increase in the base penalty of $3,000 is warranted.

Economic Benefit:

The theory behind assessing a penalty that at the minimum recoups the economic benefit gained by a violator is to "prevent a violator from benefitting from his noncompliance, while those in the regulated community who comply suffer a competitive disadvantage." Paul L. Smith v John Hankinson,

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[5]Mr. Finch claimed he was given the go ahead at a picnic by a City Councilman, Mike Thomas and the Mayor of Panama City, Phillip Griffiths. TR 256. However, given the fact that this information was unsupported by introduction of testimony by either the Councilman or Mayor, I find it lacks credibility.

1999 U.S. Dist. LEXIS 5151. The preferred method for determining economic benefit in a case such as this is the widely, although not exclusively, used "cost-avoided" method. This measures capital expenditures an owner or operator avoids by failure to comply with the CWA. United States v. Municipal Authority of Union Township, 150 F. 3d 259, 266 (3d Cir. 1998). Furthermore, a court need only make a "reasonable approximation" of economic benefit. Sierra Club v. Cedar Point Oil Co., 73 F3d 546 (5th Cir. 1996); Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc., 913 F. 2d 64, 80 (3d Cir. 1990).

Complainant claims that Phoenix's economic benefit was $5775. This is based upon the theory that this sum would have been the cost to Phoenix of leaving its equipment idle at the site during the same five days spent to conduct the illegal activity. TR 192, 297, 490, 491-492. By using the equipment to conduct the illegal activity Phoenix avoided those costs. Specifically, and according to James Finch's testimony the cost of a bulldozer to Phoenix was $50. per hour and a front end loader $65. per hour. TR 297-299. Conservatively, one bulldozer and one front end loader were used to do the filling activity. Calculating that the equipment was used seven hours each day over the five day period, that would total $4025.[6]

However, there is a fallacy to Complainant's theory. First, it assumes that Respondent would have left its equipment sitting idly on site rather than remove it pending permit issuance. TR. 490. The cost of doing this would have been far less than what Complainant claims is Respondent's economic saving. In the alternative, applying Complainant's theory that the equipment would have sat idly pending

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[6] Complainant's estimate is higher based upon the assumption that two bulldozers were used. The fact that more than one was used was not established in the record.

permit issuance, one can estimate the per day costs over the entire extended period it took to complete the permitting process. Neither this nor Complainant's approach would be accurate.

Adopting Complainant's proposal for estimating economic benefit is inviting. Searching for a motive for Phoenix to have commenced activity prematurely, it is conceivable that it was faced with escalating costs of its equipment sitting idly on site. However rebutting this claim, Phoenix contends that any additional costs it would have incurred would have been recovered from the City due its having let the contract prior to having all permits in hand. TR 490. This too, while speculative is conceivable. For these reasons, and because the gravity based penalties are already substantially in excess of the economic benefit, no assessment on this basis is warranted.

Such Other Factors as Justice May Require:

The factors at issue in this case that justice may require be given consideration are that 1) a joint application was submitted and pending for permits from the state and federal agencies and 2) the City of Panama Beach, rather than Respondent, was the permittee. Any confusion or assumptions made by Respondent with respect to the permitting process itself, including distinctions between the federal and state processes, could have stemmed from getting all information indirectly through the City's Engineer. This would be significant if Phoenix had established both that the City was disseminating incorrect and/or misleading information, and that Phoenix relied upon this inaccurate information to its detriment. The law will recognize the difference in the culpability between the permittee and the contractor in the assessment of penalties, the common scenario being the contractor being assessed a much lower penalty than the project sponsor due to the contractor's lack of input into conducting the illegal activity. In Urban Drainage the contractor, Kemp and Hoffman was assessed $5,000 when the District itself

was assessed $75,000. Similarly, in United States v. Florida Keys Community College, *Supra*, the contractor was fined $300 when the landowner was fined $15,000 and in United States v. Van Leuzen, *Supra* at 1175, the contractor was fined $900, and the landowner was required to pay the equivalent of $33,000. However, a review of pertinent portions of the record in this proceeding indicates that this does not appear to be the case. Al Shortt, City Engineer, through whom Phoenix was kept apprized of the progress of the wetlands permitting process, indicated that he "was led to believe that the mitigation plan upon which permit issuance was contingent had been approved, and that the permit issuance was imminent. TR 195. He stated, "...They [the State DEP] said that looked like that would be acceptable to them and BDI [the City's consulting engineers] was preparing the final paperwork to submit to them..." TR 196. Furthermore, Ted Shoppe, project supervisor, a very credible witness, testified that Mr. Shortt told him, "off the record we have an agreement." TR 472. Not only is there nothing to indicate that Phoenix was either told, or led to believe that a permit had been issued, but to the contrary the information the City had and passed along to Phoenix made clear that a written permit would be issued in the very near future, but definitely had not yet been issued. In light of Phoenix's experience in the construction industry, it knew or should have known that without a written permit commencing work would be a violation. Respondent simply relied to its detriment upon verbal assurances that permit issuance was forthcoming. It is also significant that Mr. Shoppe indicated that he would not have proceeded with the work before the written permits had been issued. TR 479.

While joint applications are not unusual I do think some confusion over the status of the Corps permit may have occurred as a result of the joint process.[7] However, to the extent that both the City and Phoenix may have assumed that the Corps permit would "piggyback" that of the DEP, that does not serve as a mitigating factor in assessing a penalty against Phoenix. TR 331. All one can conclude from this assumption was that the Corps permit had not been issued yet either. I find no other factors merit consideration under this criterion.

The penalty assessed must satisfy the congressional intent for both specific and general deterrence. Tull v. United States, 481 U.S. 412 (1977). In consideration of that mandate and the statutory factors set forth above, the appropriate penalty in this case is **$23,000**.

Findings of Fact and Conclusions of Law:

Section 22.27(a) of the Consolidated Rules, 40 C.F.R. § 22.27, provides that when reaching an initial decision, the presiding officer shall set forth the findings of fact and conclusions of law. The Findings of Fact and Conclusions of Law contained in the January 29, 2001, Accelerated Decision on Liability are incorporated herein. The undersigned Presiding Officer's Findings of Fact and Conclusions of Law on the penalty phase of this proceeding are as follows:

1. Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), lists the following factors to be considered in assessing a civil penalty: the nature, circumstances, extent and gravity of the violation, the ability of the violator to pay the penalty, any prior history of such violations, the degree of culpability,

[7] It was unusual that all permits had not been issued prior to the City letting the job to the contractor. TR 472

economic benefit or savings, if any, resulting from the violation, and such other matters as justice may require.

2. Under Section 309(g)(2)(A), as amended by the Civil Monetary Penalties Inflation Adjustment Rule, 40 C.F.R. Part 19, class I penalties cannot exceed a maximum amount of $27,500.

3. Respondent, a contractor on the Frank Brown Project in Panama City Florida filled 3.5 acres of wetlands without a CWA § 404 permit issued by the Corps.

4. The wetlands filled and impacted were of medium quality that perform important and valuable water quality, flood attenuation, and wildlife habitat functions.

5. The illegal activity was conducted over a minimum of five days in May 1999, to wit: May 1 , May 3, May 4, May 6 and May 10, 1999.

6. Respondent was notified to cease work by a representative of the State DEP while visiting the site on May 4, 1999.

7. Respondent continued work after being notified to stop. The spreading and leveling of topsoil in wetlands without a permit was also a violation of section 309(g) of the CWA, 33 U.S.C. § 1319(g).

8. The work was performed at the direction of President and sole shareholder James Finch.

9. Respondent was aware that the federal CWA section 404 permit had not yet been by the Corps, although it was reasonable to expect that it would be issued in the very near future. The City of Panama Beach notified Respondent that a conceptual agreement had been reached with the DEP on the proposed mitigation plan and that the City anticipated receiving permits shortly.

10. Respondent, although not the permittee, is an experienced contractor that conducted extensive activity near water and was aware, or should have been aware, that filling wetlands in the absence of a written federal permit was illegal.

11. Respondent's illegal activity was done without implementation of management practices and controls that would have been included in a permit. Respondent failed to install and adequately maintain erosion control devices, resulting in the deposit of silt approximately 6 to 7 feet beyond the boundaries of the permitted area.

12. Respondent's activity resulted in harm to the regulatory program in that it circumvented the review by the public and regulatory agencies that is essential to maintain the integrity of the process.

13. In light of these factors, the nature, circumstances, extent and gravity of the violation was significant.

14. Respondent is able to pay the penalty and did not raise this issue during these proceedings.

15. There were a number of encounters with the state environmental agency as well as the Corps regarding violations of environmental statutes by James Finch and the Respondent. These violations contributed to the culpability of the Respondent. These included a 1984 and 1996 notification to Mr. Finch of violations pertaining to a bulkhead construction into Large Bayou at his residence, and a May 2000 notification to Phoenix of a violation regarding the installation of a sewage pipeline across St. Andrews Bay. These violations indicate knowledge of the environmental law that further exacerbate Respondent's culpability in this action.

16. Economic benefit was not sufficiently established. Furthermore, gravity based penalty would be in excess of economic benefit so no assessment for that factor is warranted.

17. Congress intended that the penalty satisfy the need for both general and specific deterrence.

18. Upon consideration of the penalty factors, and a review of the evidence at hearing and the administrative record in this matter, Respondent is assessed a penalty of $23,000.

ORDER

1. A civil penalty of **$23,000** is assessed against Respondent, Phoenix Construction Services, Inc.

2. Payment of the full amount of this civil penalty must be made within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c), as provided below. Payment shall be made by submitting a certified or cashier's check in the amount of $23,000, payable to the Treasurer, United States of America, and mailed to:

Regional Hearing Clerk
U.S. EPA , Region 4
P.O. Box 100142
Atlanta, Georgia 30384

3. A transmittal letter identifying the case, EPA docket number, and Respndent's name and address.

4. If Respondent fails to pay the penalty within the prescribed statutory period after entry of this Order, interest on the penalty may be assessed. See, 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

5. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision will become the final order of the Agency forty-five (45) days after service upon the parties and without further proceedings unless (1) a party moves to reopen the hearing within twenty (20) days after service of this Initial Decision, pursuant

to 40 C.F.R. § 22.28(a); (2) an appeal to the Environmental Appeals Board is taken within thirty (30) days after this Initial Decision is served upon the parties; or (3) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision, pursuant to 40 C.F.R. § 22.30(b).

Date: August 1, 2002

SUSAN B. SCHUB
Regional Judicial/Presiding Officer