UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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| **In the Matter of** | ) | |
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| **Britton Construction Co.;** | ) | **Docket No. CWA-III-096** |
| **BIC Investments, Inc.; and** | ) | |
| **William and Mary Hammond** | ) | |
| | ) | |
| **Respondents** | ) | |

**INITIAL DECISION**

Pursuant to Section 309(g) of the Clean Water Act, 33 U.S.C. §1319(g), the Respondents are jointly and severally assessed a civil penalty in the amount of $2000 for discharging pollutants into the waters of the United States, without a permit issued by the United States Army Corps of Engineers, in violation of the Clean Water Act §§301(a) and 404, 33 U.S.C. §§1311(a) and 1344.

Appearances

For Complainant: Janet E. Sharke, Esq.

Assistant Regional Counsel

U.S. EPA Region 3

Philadelphia, Pennsylvania

For Respondent: Lisa M. Jaeger, Esq.

Defenders of Property Rights

Washington, D.C.

Proceedings

On November 18, 1994, the Region 3 Office of the United States Environmental Protection Agency (the "Complainant" or "Region") filed a Complaint against three Respondents: the Britton

Construction Company of Chincoteague, Virginia ("Britton Construction"); BIC Investments, Inc., also of Chincoteague ("BIC"); and William and Mary Hammond, of Falls Church, Virginia. The Complaint charged the Respondents with discharging fill material into the waters of the United States without a permit, in violation of the Clean Water Act ("CWA") §§301(a) and 404, 33 U.S.C. §§1311(a) and 1344. Pursuant to the Clean Water Act §309(g)(2)(B), 33 U.S.C. §1319(g)(2)(B), the Complaint seeks assessment of a civil penalty in the amount of $125,000 against Respondents.

On December 5, 1994, Raymond Britton filed an Answer *pro se* on behalf of all three Respondents. Respondents later retained counsel, who filed an Amended Answer on February 29, 1996. In the Amended Answer, Respondents denied the material allegations of the Complaint and raised several affirmative defenses.

The hearing in this matter convened before Administrative Law Judge ("ALJ") Andrew S. Pearlstein on August 6 and 7, 1996, in Washington, D.C. The Complainant presented three witnesses, and Respondents presented four witnesses. The record of the hearing consists of a stenographic transcript of 466 pages, and 47 exhibits received into evidence.

The Respondents filed a motion dated August 14, 1996, to hold the record open to receive into evidence copies of tax returns of the Mr. and Mrs. Hammond, Britton Construction, Raymond L. Britton, Jr., and BIC. Respondents had previously submitted affidavits and gave oral testimony concerning their ability to pay a civil penalty. Complainant opposed the motion, but did not cite any specific prejudice due to receipt of the tax returns, or raise any proposed avenues of cross-examination. In a ruling dated October 9, 1996, the Administrative Law Judge received the tax returns for the purposes of the parties post-hearing briefs, and reserved decision on their ultimate receipt for the record. By this decision, the tax returns are received into the record as, collectively, Exhibit 48.

The parties each submitted post-hearing briefs and reply briefs. The record of the hearing closed on November 15, 1996, upon the ALJ's receipt of the reply briefs.

Findings of Fact

1. William and Mary Hammond acquired several lots on Chincoteague Island, Accomack County, Virginia, in 1965. The property includes lots 9, 10, 11, 12, 13, 14, 15, and 16 in the

Wyle Maddox subdivision, located along South Main Street in Chincoteague. Lot 9 is approximately 15,000 square feet in area, while the others are all slightly more than 20,000 square feet, or about half an acre in area each. The odd-numbered lots are on the east side of South Main Street. The even-numbered lots border South Main Street on the west, and front Chincoteague Bay to their west. The Hammonds' property on Chincoteague remained vacant for many years while the Hammonds delayed plans to build a vacation/retirement home. (Exs. 33, 34; Tr. 265, 283-284).[(1)]

2. A tidal ditch controlled by a series of culverts runs along the east side of South Main Street, across the fronts of lots 9, 11, 13, and 15. This ditch is tributary to a tidal inlet, Fowling Gut, which is tributary to Chincoteague Channel and Chincoteague Bay. (Ex. 3; Tr. 37).

3. Gerald Tracy, an environmental scientist with the United States Army Corps of Engineers (the "Corps"), stationed in the Accomack field office, inspected the Hammond property in March 1987, in connection with a permit application on an adjacent property. At that time he observed that the Hammond site supported a predominance of wetland vegetation, concentrated most densely in the fronts of lots 9 and 11, along the tidal ditch. The wetland plants present at that time included salt marsh cord grass (spartina alterniflora), salt bush, salt grass, salt meadow cord grass (spartina patens), salt marsh elder, bayberry, and phragmites. Loblolly pine was present on the slightly higher ground further east on the site. The site had a thin layer of dark, organic, hydric soil, indicative of saturated conditions and wetlands. (Tr. 37-38).

4. The area characterized by predominantly wetland vegetation occupied primarily the front, or western portions of Lots 9 and 11. The site graded into upland soils and vegetation, indicated by the loblolly pines, to the east and north. Wetland soils occupied approximately 60% of lots 9 and 11, according to the Accomack County soil survey. (Ex. 9; Tr. 75).

5. In 1986 the Corps concluded a survey of wetland areas on Chincoteague Island, called the "Advanced Identification Study of Chincoteague Island, Virginia." Its purpose was to advise residents in advance of the general suitability of areas on the island with respect to dredging and filling that would require Section 404 permits as regulated wetlands. The study included public notice, hearings, and comment. The Advanced Identification Study produced a map based on aerial photography that indicated wetland areas unsuitable for filling. The major

part of the Hammonds' lots 9 and 11 were marked as such wetland areas on that map. (Exs. 2, 16, 17; Tr. 151-154).

6. In the late 1980's, the Hammonds' lot 9 started being used for the casual dumping of household garbage and debris, including large appliances and furniture. Lot 9 is also adjacent to Doe Bay Drive, a private unpaved road extending east from South Main Street, that provides access for dumping. Mr. Hammond occasionally had his friend and associate, Raymond L. Britton, Jr., the President of Britton Construction Company, arrange to have the trash hauled off the property. In July of 1988, Mr. Hammond arranged through Mr. Britton to have a local heavy equipment operator clean up the garbage and bulldoze the brush from these lots. The contractor, James Ballard, performed this work in July or August 1988. He removed the debris and cleared the front part of the lot of its underbrush. He also bulldozed the upper layer of soil in that area. Mr. Ballard then scraped soil from the higher rear portion of the lots and pushed it into the front area, behind the tidal ditch. Mr. Ballard is now deceased. (Ex. 32; Tr. 268-270, 274).

7. The site, lots 9 and 11, continued to be used for the dumping of garbage. Mr. Tracy visited the site again in May 1989, after receiving complaints of garbage dumping in the area. He observed the bulldozed area and saw that the front of the site had been invaded by phragmites, or common reed, a wetland species. Garbage and debris were present on the northern part of the site, along Doe Bay Drive. (Ex. 5; Tr. 47).

8. Mr. Tracy next visited the site on February 6, 1990. At that time, most of the site was completely denuded of vegetation and covered with a yellowish sand fill. Fresh tracks on the surface, and the complete lack of vegetation, indicated that this activity had occurred shortly before the date of his visit. A strip along the ditch in the front of the property, and the area in the rear occupied by the loblolly pines were not scraped and filled. Mr. Tracy estimated the filled area as 31,000 square feet. Mr. Tracy took an aerial photograph of the site showing these conditions on February 21, 1990. (Ex. 6; Tr. 49-51).

9. After receiving complaints from the local authorities, Mr. Hammond had Mr. Britton, the president of Britton Construction Company, again remove the garbage from the site during the last weekend of May 1990. (Tr. 334).

10. Mr. Tracy's inspections led the Corps, on May 15, 1990, to send the Hammonds a notice that the unauthorized placement of

fill on lots 9 and 11 constituted a violation of the Clean Water Act §404. The notice ordered the Hammonds to cease and desist any unauthorized filling activities, and to provide a written response to facilitate the Corps' investigation. The Corps sent a copy of this notice to the EPA Region 3 Office in Philadelphia, as well as to other federal and Virginia state agencies. (Ex. 7).

11. The Hammonds did not respond formally in writing to the cease-and-desist notice, but Mr. Hammond authorized Mr. Britton to meet with the Corps on his behalf. During the ensuing year, Mr. Britton and Mr. Tracy met several times on the site to discuss a plan to mitigate the loss of wetlands. Mr. Britton informed Mr. Tracy of his and Mr. Hammonds' plan to erect a three-unit townhouse on the site, which would render full restoration of the wetland area impracticable. In an on-site meeting on June 4, 1991, the Corps and the Hammonds, through Mr. Britton, finally agreed upon a mitigation plan. (Ex. 8; Tr. 55-60, 339-340).

12. The mitigation plan was memorialized in a letter dated August 29, 1991, from the Corps to the Hammonds (with a copy sent to Britton Construction Company). Mr. Britton was to lower the elevation of the land and restore wetland vegetation to an area extending 515 linear feet along South Main Street, and 60 feet in width, for a total of approximately 31,000 square feet. This mitigation area would thus occupy the front, or western portions of lots 13 and 15, as well as the front of lots 9 and 11, along the tidal ditch adjacent to South Main Street. The letter also directed the Hammonds to submit a written mitigation plan within 30 days incorporating the following elements: planting and fertilization of spartina patens; improving the tidal ditch; placing deed restrictions on the lots; and limiting structures in the mitigation area to open-pile walkways. (Ex. 8).

13. Mr. Britton then, from late 1991 until May 1993, went ahead with the excavation of the mitigation site to wetland elevations. He also opened the culverts in the tidal ditch, allowing tidal inundation on the site. In a meeting on the site on May 4, 1993, Mr. Tracy observed that the site was becoming naturally revegetated with wetland vegetation. In a letter dated May 13, 1993, sent to Mr. Britton and to Mr. Hammond, the Corps recognized the completion of this portion of the mitigation work. The letter stated that the site would be monitored until the spring of 1994 to determine the success of the natural revegetation. If it was not 80% revegetated by then, additional

plantings would be directed. The letter concluded by stating that the Corps was reactivating several pending permit applications by Britton for unrelated projects, due to completion of the mitigation actions thus far. Mr. Tracy attached a sketch map of the mitigation area to the May 13, 1993 notice. (Ex. 13; Tr. 117).

14. During this period, from October 1991 into 1992, the Respondents constructed a three-unit townhouse building on lot 9. Mr. Hammond had entered into a verbal agreement with Mr. Britton for this project. Mr. Britton was to handle the construction and paperwork at his own cost, in return for one third of the profits. The Hammonds would provide the property and retain two thirds of the profits. The actual construction was done by BIC Investments, Inc., as the general contractor. The president of BIC was David T. Britton, Raymond L. Britton, Jr.'s son. Raymond Britton also worked for his son's company, BIC, as an employee, with primary responsibility for obtaining the necessary permits for the construction. (Tr. 295-296; 367).

15. Mr. Britton, on behalf of Respondents, obtained a sewer line permit, and a road crossing permit, in connection with the town house project, from the Corps and local agencies. Respondents did not apply for or obtain a permit from the Corps to dredge or fill the site, however. (Tr. 62, 347).

16. On February 8, 1994, Mr. Tracy of the Corps, and William Hoffman of the Region, inspected the site and observed that a small area of about 3000 square feet in the northern part of the site, along Doe Bay Drive, had been filled with sand. Mr. Britton had traded a tire to a friend for a load of road fill. The pile of sand had been left at the edge of the site, from where some of it had washed into the site during rainstorms. (Tr. 60, 110, 362; Ex. 22).

17. The Region 3 Office of the EPA then requested lead enforcement authority from the Corps to prosecute this proceeding, along with several others in Chincoteague. (Ex. 30). Under the "Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning Federal Enforcement for the Section 404 Program of the Clean Water Act" (the "MOA"), §III (d)(1), the EPA may request lead enforcement status for repeat or flagrant violations, or for a particular case or class of cases. (Ex. 28, p. 3-4).

18. The Region then notified the Respondents of its assumption of enforcement authority in separate letters dated March 17,

1994. These notices stated that EPA had determined that the mitigation plan had not been successfully implemented. (Ex. 21). This was followed by an Order for Compliance sent to the Respondents on May 19, 1994. This document ordered Respondents to cease all filling activities at the site, and to submit a written mitigation plan to EPA within 30 days. (Ex. 22).

19. On May 27, 1994, Mr. Britton replied on behalf of Mr. Hammond and David Britton, acknowledging receipt of the Compliance Order. Mr. Britton stated that he was trying his best to comply with the requirements of the Order. He had already lowered the site to the required elevation, and was continuing to consult with Mr. Tracy on the revegetation plan and other requirements. (Ex. 23). EPA responded in a letter on June 16, 1994, that acknowledged Respondents' efforts, in consultation with the Corps, to reestablish native wetland vegetation on the site. The letter also expressed the Region's concern over the lack of a written restoration plan approved by EPA. (Ex. 24).

20. After additional meetings on the site in the summer of 1994, Mr. Tracy determined that the natural revegetation on the site was only partially successful, and some planting of spartina and other wetland species was necessary to prevent the spread of phragmites, which is considered a nuisance species. Mr. Britton went ahead with planting of salt marsh grasses in the designated areas. He also maintained the culverts to allow for tidal inundation of the mitigation area, removed the recent fill, and placed straw bales to prevent further sedimentation. Mr. Britton described this work in a letter to William Hoffman of EPA dated July 13, 1994. (Ex. 25). That letter enclosed a two-page hand-drawn map of the mitigation site, showing the areas in which this work was done or intended. (Ex. 29).

21. The EPA filed the Complaint in this proceeding on November 28, 1994. Mr. Britton filed an initial Answer on behalf of all Respondents on December 5, 1994.

22. By September 1995, the mitigation site was 85% revegetated with wetland vegetation. The site was excavated to its original wetland elevation, and the culverts controlling the tidal ditch along the site were maintained to allow tidal inundation. On October 18, 1995, Mr. Tracy of the Corps wrote a memorandum to counsel for EPA stating that, based on his inspection of the site on September 7, 1995, the mitigation site now satisfied the Corps' requirements. (Ex. 10).

23. The construction of the townhouses has been a break-even proposition for Respondents. Additional residences could be constructed on the adjacent lots in the future. The property had been rezoned by the Town of Chincoteague to allow only multiple dwellings. The Hammonds sold Lots 9 and 10 to the purchasers of the townhouses, and retained title to the adjacent lots. The three units sold for a total of approximately $479,000, minus commissions and closing costs. Respondents' costs for construction were approximately $455,000. BIC, Inc. was paid approximately $100,000 for this project, for construction of the units and site preparation for the sewage leaching fields. (Ex. 37; Tr. 290-302, 392).

24. Raymond L. Britton, Jr., was the President of the Britton Construction Company. (Tr. 332, 419). That company ceased actively doing business in 1990. However, it has not filed dissolution papers. It filed an amendment to its articles of incorporation changing its name to BIC Construction, Inc., approved by the State of Virginia on March 18, 1994. (Ex. 45). This change allowed David Britton's company, BIC, to take advantage of Raymond Britton's class A contractor's license and to bid for bigger jobs. BIC Construction, Inc., and BIC Investments, Inc., are in effect the same company, with the same personnel. (Tr. 364, 404). Tax returns for BIC give the name as "BIC, Inc." (Ex. 48, p. D-1-3).

25. Both BIC and Britton Construction were or are small companies, with four or five employees. After paying salaries to the employees and themselves, neither BIC nor Britton retained any profits in any of the years relevant to this proceeding. (Ex. 48, p. A-1-4, D-1-3; Tr. 380-386). They did, however, have substantial gross receipts or sales when doing business. Britton Construction's gross sales in 1987, 1988, 1989, and 1990, were, respectively, approximately $983,000; $327,000; $400,000; and $172,000. BIC's gross receipts or sales in 1993, 1994, and 1995 were, respectively approximately $623,000; $499,000; and $455,000. (*Id.*). Raymond Britton's personal gross income from 1993 to 1995 averaged about $11,000 per year. (Ex. 48, p. B-1-4).

26. William Hammond is 80 years old, and retired from the military. His wife, Mary Lee Hammond is 75, and runs a small ballet studio for children, part-time. Their gross income from 1993 to 1995 averaged about $35,000 per year. (Exs. 35; 36; and 48, p. C-1-6). The Hammonds still own several lots on Chincoteague, as well as their home in Falls Church and a small property in Florida. (Ex. 35).

27. Britton Construction Company had extensive experience in work that required obtaining various permits from the Corps and other state and local agencies. On December 3, 1992, the Corps sent Mr. Britton a letter notifying him that his company was believed to have committed violations at several projects, including the Hammond site at issue here. The letter also cited a 1982 violation that resulted in a $500 penalty. The letter threatened revocation of Britton Construction Company's authority to use nationwide permits if any future violations were found. (Ex. 12).

Discussion

- Existence of Regulated Wetlands

The Respondents here are charged with the prohibited discharge of pollutants into the waters of the United States, in violation of the CWA §301(a), 33 U.S.C. §1311(a). That statute prohibits such discharges that are not in compliance with (among other sections of the Act) section 404 of the CWA, 33 U.S.C. §1344. Section 404(a) requires the Secretary of the Army, through the Corps, to issue permits for the discharge of dredged or fill material into the navigable waters of the United States. The "waters of the United States" include wetlands adjacent to interstate or intrastate waters that are susceptible to use in interstate commerce. 40 CFR §230.3(s)(7). *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985). "'Wetlands' means 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." 40 CFR §230.3(t).

Respondent has challenged the Region's determination that the site, the Hammonds' lots 9 and 11, consisted of regulated wetlands. However, Respondents have not produced any substantial evidence to contradict that of Complainant's witnesses, Gerald Tracy and Peter Stokely, both qualified experts in wetlands identification. Their testimony was corroborated by soil survey maps, aerial photographs, and the Advanced Identification Study for Chincoteague. (Exs. 2, 9, 16, 17, 18, and 19). This evidence demonstrated that most, if not all, of the site met the definition of wetlands in 40 CFR §230.3(t). Prior to its disturbance by Respondents or their agents in 1988, the site supported a prevalence of vegetation typically adapted for life in saturated soil conditions. (Findings of Fact, or "FF" ##3,4).

The site is also adjacent to Fowling Gut, which is tributary to Chincoteague Bay, an arm of the United States territorial sea. (See 40 CFR §230.3[r]). Hence, the wetlands on the site are "waters of the United States" for which a permit is required under the CWA §404 to discharge any fill material.

It is true, however, that the exact boundary of the wetland area on the site was never delineated on the ground. Mr. Tracy's estimate of 31,000 feet was just that -- an estimate -- of the filled area, not of the area of preexisting natural wetlands. Mr. Tracy also testified that the rear, eastern portion of the site, was dominated by loblolly pine and graded into upland vegetation. About 60% of the site was characterized by wetland soils according to the County soil survey map. (FF #4). The combined area of lots 9 and 11 is approximately 37,000 square feet. Thus, while the area of filled wetland may not have been quite 31,000 feet, it was in the neighborhood of at least 60% of the site's area, or about 22,000 square feet. The actual area of filled wetlands can thus only be estimated from the record as between 22,000 and 31,000 square feet.

- Statute of Limitations

Respondent contends that this claim is barred by the five-year statute of limitations applicable to proceedings for civil penalties, pursuant to 28 U.S.C. §2462. Administrative enforcement proceedings are subject to this statute. 3M Company v. Browner, 17 F.3d 1453.

The Complaint in this proceeding was filed on November 28, 1994. Respondent contends that the activity on the site that gave rise to this action was the trash removal and backfilling undertaken by Mr. Ballard in July of 1988, more than five years before the Complaint was filed.

The statute of limitations does not bar this proceeding for two reasons. First, the evidence shows that some subsequent filling activity took place at the site within five years of the filing of the Complaint. In addition, the prevailing authority holds that the discharge of fill into wetlands without a permit is a continuing violation that tolls the statute of limitation while the fill remains in place.

The inspection that gave rise to the Region's Complaint actually took place on February 8, 1994. Some additional fill had recently washed into the site as a result of Mr. Britton's exchange of a tire for road fill. (FF #16). As will be discussed

further below, Mr. Britton was acting at that time on behalf of all the Respondents with respect to activities on the site. Thus, regardless of what took place earlier, the latest evidence of filling on the site dates from February 1994, less than one year before the filing of the Complaint.

In addition, the exact date of the earlier filling activity that gave rise to the initial cease-and-desist notice by the Corps is not definitively established by the record. Mr. Hammond testified that he hired Mr. Ballard to clear the site in the summer of 1988. Mr. Britton denied doing any work on the site until May 1990, but this is contradicted by Mr. Hammond's testimony. Mr. Hammond testified that Mr. Britton had earlier arranged for the removal of trash from the site. Mr. Britton also introduced Mr. Hammond to Mr. Ballard. (Tr. 268-269). Mr. Tracy's contemporaneous memo indicated he was told by Mr. Hammond that Mr. Britton had been working on the site shortly before February 1990. (Ex. 31).

The best evidence of the condition of the site during this period is an aerial photograph taken by Mr. Tracy of the Corps on February 21, 1990. (Ex. 6). This photograph shows the site scraped completely clean and covered with bare sand, in which fresh vehicle tracks are visible. While memories of long past activities and dates may be inaccurate, the photograph doesn't lie. Mr. Tracy's testimony indicates the site changed to this appearance between his two visits in May 1989 and February 1990. This suggests that Mr. Ballard may have actually done some or all of his work in late 1989 or early 1990, rather than 1988, or that Mr. Britton or someone else also worked on the site during that period.

Of course, neither the Corps nor EPA can have the site under constant surveillance. Those agencies can only testify as to their observations on those infrequent occasions when they actually conduct field inspections. The Respondents are in a better position to be aware of any ongoing activity on their own site. The testimony of Mr. Tracy and his photograph establish that filling occurred shortly before February 1990, in addition to the other admitted activities in 1988 and 1994. Such filling activity occurring after November 28, 1989 would also be within five years preceding the filing of the Complaint.

Finally, the prevailing authority holds that the violation of discharging fill into regulated wetlands without a permit is a violation that continues, tolling the statute of limitations, so long as the illegal fill remains in place. See *Sasser v.*

*U.S.E.P.A.*, 990 F.2d 127, 129 (4th Cir., 1993); and *U.S. v. Reaves*, 923 F.Supp. 1530, 1534 (D. Fla. 1996). Under this standard, the violation here continued at least until the excavation of the mitigation site began in 1991. Therefore, this proceeding was commenced within five years of the accrual of the violation, and is not barred by the statute of limitations in 28 U.S.C. §2462.

- Liability of the Respondents

In order to be held liable for the violations alleged in this proceeding, Respondents must be found to have discharged fill into the waters of the United States without a section 404 permit issued by the Corps. There is no dispute that the Respondents are "persons," and that the placement of fill material by earthmoving equipment constitutes the "discharge" of a "pollutant" from a "point source" as those terms are defined in the CWA. (CWA §§502[5,6, 14, 16]; Ex. 1). The discussion above also concludes that the Hammond site contained wetlands, regulated as waters of the United States. None of the Respondents had a Section 404 permit to discharge fill into wetlands. (FF #15).

Respondents argue, however, that their activities did not, at least in the 1988-1990 period, constitute the discharge of fill material onto the site. The discussion above with respect to the statute of limitations also outlines the factual circumstances relating to the violation. The aerial photograph taken in February 1990 (Ex. 6) shows the site covered with fresh sand. Although the Respondents testified that the ostensible purpose of the initial work on the property was only the removal of trash, that work, as well as the apparent later activity on the site, also resulted in the discharge of fill. On Mr. Hammond's instruction, Mr. Ballard denuded the wetland area of its vegetation, and filled it with soil scraped from the upland area. (FF #6). This activity went well beyond the mere removal of garbage, and constituted the discharge of fill, even under the narrower definition of the "discharge of fill" in effect at that time, according to Respondent's expert witness Bernard Goode (Tr. 430). In addition, the later sedimentation of a small part of the site in early 1994 also constituted the discharge of fill material. (FF #16).

These facts demonstrate that the violation of discharging fill into wetlands without a permit was committed on the Hammond site. It remains to be determined, however, whether liability for this violation attaches to any or all of the Respondents.

This will require analysis of the facts with respect to the actions of each of the three named Respondents, and a consideration of Respondent's affirmative legal defenses.

Respondents raise a broad defense to the charge in the nature of estoppel. Respondents contend that EPA is barred from pursuing this enforcement action due to the prior action taken by the Corps and Respondents' compliance with the Corps' directives. In this vein, Respondents also raise arguments with respect to the legal doctrines of res judicata, and claim that they were deprived of their right to due process of law. Alternatively, Respondents argue that, if not a complete bar to liability, these defenses militate toward not imposing any civil penalty. The Respondent BIC also disputes its responsibility for any filling of the site. The discussion below will first address the liability of each of the Respondents under the facts revealed by the record. That will be followed by a discussion of Respondent's defenses, and of the penalty assessment.

-- Mr. and Mrs. Hammond

Individual liability for the discharge of pollutants without a permit under the CWA is predicated on either performance of the violative conduct, or responsibility for or control over the work. *U.S. v. Bd. Of Trustees of Fla. Keys Comm. College*, 531 F. Supp. 267, 274 (S.D. Fla., 1981). As the owners of the site throughout the entire relevant period, the Hammonds are liable for all the filling activities. The actions of Mr. Ballard, Mr. Britton and Britton Construction, as well as the construction of the townhouses by BIC, were all authorized directly by Mr. Hammond. Therefore, Mr. and Mrs. Hammond are liable for the violation of discharging fill into a wetland without a permit.

-- Britton Construction Company

As discussed above, the record does not definitively establish the time that Raymond L. Britton, Jr., or his company, the Britton Construction Company, first became responsible for filling activities on the site. By May 1990, Mr. Britton was Mr. Hammond's agent on the site and primary actor in all activities, as well as in regulatory contacts with the Corps and EPA. (FF #9). Mr. Britton denied prior involvement, but testimony of Mr. Hammond and Mr. Tracy indicated that he was instrumental in arranging for the initial filling of the site by Mr. Ballard in 1988. (FF #6). Afterwards, he was virtually solely responsible for all activities on the site, including completing the remedial plan and the additional filling in 1994. In its

entirety, the factual record does not provide a sufficient basis to distinguish Mr. Britton's (and therefore his company's) liability for the violation from that of his principal, the Hammonds.

In general, the witnesses, including Mr. Britton himself, referred to his actions as an individual, rather than in terms of his company, Britton Construction. Mr. Britton was the president of the company, and presumably remains so. (FF #16). Mr. Britton testified that the company has been inactive since 1990, but it has not filed for dissolution with the Virginia Secretary of State. Rather, it did file a change of name to BIC Construction Co., which, according to Mr. Britton, is identical to the Respondent BIC Investments, Inc. (FF # 25).

The precise legal status of Britton Construction Company is not entirely clear on this record. Complainant has not moved to amend the Complaint to change the name of any of the Respondents. The lines between these small, family-held companies, and the individuals who run them, are blurred by the actions and practices of Respondents. This obfuscation is not believed intentional, but is apparently the result of an informal way of doing business among friends and relatives in a small town. Nevertheless, it is incumbent on Respondents, if they are to avoid liability, to produce evidence that a particular Respondent did not commit the violation. To the extent they do not produce such evidence, adverse inferences could be drawn concerning the status of the two corporate Respondents.

With respect to Britton Construction Company, the record shows that it still exists (although perhaps transformed into BIC), and may be held liable for the actions of its President, Raymond Britton, Jr. Corporations are bound and may be held liable for the actions of its officers, directors, and employees, within the scope of their employment or authority. 18B Am.Jur. 2d §1663. Hence, the Britton Construction Company is also liable for the violation of filling a wetland without a permit.

-- BIC Investments, Inc.[2]

The record as a whole indicates that the actions of the three Respondents cannot be artificially separated. The three Respondents worked together in a joint enterprise to develop the site by constructing residences. Mr. Hammond supplied the property, and was a partner with Raymond Britton, who arranged for his son's company, BIC, to be the general contractor. The

Britton Construction Company at one point changed its name to BIC Construction. (Ex. 45). Raymond Britton, Jr., was also a key employee of BIC, responsible for ensuring its regulatory compliance, and whose contractor's license was used by BIC to bid on jobs. (FF #25). Mr. Hammond himself believed that BIC was Raymond Britton's company. (Tr. 311-312). It can be inferred from these facts that the Brittons' construction business was carried on as a single enterprise by BIC, in effect as a successor to Britton Construction.

In his capacity a key employee of BIC, responsible for regulatory compliance, Mr. Britton's actions on the site must also be imputed to BIC. Although the construction itself took place after the initial filling, and BIC was not shown to have direct responsibility over the site, the housing project depended on the filling activity begun on the site by Mr. Ballard, and continued by Raymond Britton at Mr. Hammond's direction. BIC as the general contractor, was in effect a full partner in development of the site and in benefiting from the project. BIC is therefore also liable for the violation of filling a wetland without a permit.

- Respondents' Defenses in the Nature of Estoppel

Respondents' basic contention is that it was unfair for the EPA to begin its enforcement action against Respondents at the eleventh hour, at a point near the conclusion of a lengthy enforcement and attempted mitigation process between the Corps and Respondents. While EPA's assumption of lead enforcement agency status certainly appears dilatory in this case, its actions do not constitute an estoppel that could preclude enforcement action by a federal agency. Nevertheless, the circumstances of the enforcement history of this proceeding raise issues of fairness toward Respondents that are properly considered in determining the appropriate amount for a civil penalty. The penalty factors will be discussed below, following a consideration of Respondents' estoppel claims.

In order for a claim of estoppel to be upheld against a private party, the claimant must show that it relied to its detriment on an affirmative misrepresentation or misconduct by the other party. *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 59 (1984). A claim of estoppel against the federal government requires the additional showing of egregious misconduct at the policy-making level. (*Id.* at 61).

In this case, the picture that emerges is one of dilatory dual enforcement that caused Respondents' understandable confusion, but not affirmative misconduct that resulted in Respondents' detrimental reliance. The Corps never promised Respondents that the successful completion of the mitigation plan would preclude any further enforcement seeking a civil penalty by either the Corps or EPA. The EPA intervened here before final successful completion of the mitigation plan. The May 13, 1993 letter from the Corps to Respondents (Ex. 13) expresses satisfactory progress with some "completed restoration and mitigation actions," but contemplates further monitoring and possible plantings. In fact, there was a setback due to the introduction of new fill in February 1994 that shortly preceded the Region's initial notices of violation.

Even if the Respondents did reasonably believe that continued compliance with the Corps directives should preclude further enforcement by the EPA, Respondents have not shown they relied on such a belief to their detriment. The EPA took over the lead in enforcing this matter in 1994, but Respondents essentially continued their attempted compliance with the preexisting mitigation plan worked out with the Corps, until its completion in September 1995. (Ex. 31). Respondents did not do anything with respect to the site that they would not otherwise have done, due to the EPA's intervention. Due to the lack of affirmative misrepresentation by either government agency, and the Respondents' lack of detrimental reliance, Respondents' claim of estoppel is repudiated.

Similarly, Respondents' claims of res judicata and lack of due process are also not persuasive. At the time of EPA's intervention, there had been no final adjudication or formal settlement that would be a prerequisite for a claim of res judicata. The mitigation plan was progressing, but was not yet successfully fully completed.

The fact that a second federal agency intervened and assumed lead agency status in an enforcement action that had been begun by another does not deprive Respondents of due process. The Corps and EPA did recognize that their enforcement programs should be coordinated, and therefore promulgated the "Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning Federal Enforcement for the Section 404 Program of the Clean Water Act" ("MOA," Ex. 28). The MOA is only intended to provide procedural guidance and is not binding as a statute or duly promulgated rule or regulation.

The applicable statute, the enforcement provision of the CWA, actually contemplates the possibility of dual enforcement by the EPA and Corps. The CWA §309(g)(6)(A), 33 U.S.C. §1319(g)(6)(A), states that the authority of the Administrator (of the EPA) or the Secretary (of the Army) is not limited by any action taken by the other, except where there has been a final administrative order assessing a penalty. That had not occurred in this case at the time of EPA's intervention. A mitigation plan was in progress, but the Corps did not assess a penalty. The MOA itself provides that the EPA may request lead enforcement agency status by specific request. The EPA did so in this proceeding. (FF #17). The timing and circumstances of EPA's request will be considered below as relevant to the civil penalty factors. There was, however, no violation of Respondents' due process rights that would require dismissal of the charges.

- Amount of Civil Penalty

The Complainant here seeks assessment of a civil penalty of $125,000 against Respondents, the maximum for a class II civil penalty for a violation of the Clean Water Act pursuant to the CWA §309(g)(2)(B), 33 U.S.C. §1319(g)(2)(B). A class II penalty "may not exceed $10,000 per day for each day during which the violation continues," up to a maximum amount of $125,000. The statute provides as follows with respect to determining the amount of the penalty:

In determining the amount of any penalty assessed under this subsection, the Administrator or the Secretary, as the case may be, shall take into account the nature, 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 such other matters as justice may require. 33 U.S.C. §1319(g)(3).

The Region's witness on the civil penalty amount, William Hoffman, testified to the Region's consideration of these factors in calculating the proposed penalty. The Region also regarded the violation as continuing since the initial Corps inspection in 1990. At $10,000 per day, the maximum amount of $125,000 is easily reached. (Tr. 251-252). However, as contended by the Respondents, a consideration of the record as a whole in terms of the statutory penalty factors militates toward a drastic reduction in the amount of any civil penalty.

-- Circumstances of Violation

The chief circumstance in this case that drives consideration of all penalty factors is that Respondents did, in fact, successfully complete the mitigation plan in accord with the original agreement reached with the Army Corps of Engineers, the initial lead enforcement agency. The EPA did not intervene until 1994, at a point when the mitigation plan was well under way, with only one final season of planting and monitoring to be completed. The additional fill observed at the February 1994 inspection, preceding the EPA's orders, was only a small, casual backwash that was easily remedied. (FF #16). Respondents were understandably confused by the late intervention of EPA after four years of dealing only with the Corps.

The record does not support the Complainant's assertion that the Respondents did not get serious about completing mitigation until the EPA intervened. Mr. Britton, on behalf of Respondents, had continuously been in contact with Mr. Tracy of the Corps with respect to the progress of the plan. (Exs. 8, 12, 13). The final planting that completed the mitigation site was expressly contemplated by the May 13, 1993 letter from the Corps to Respondents. (Ex. 13). Although Mr. Tracy did testify that the plan seemed to be progressing rather slowly, the record does not indicate any undue delay by Respondents. Mr. Britton began the necessary excavation work in 1991 as soon as the plan was agreed upon. (FF #13). As testified by Respondent's witness, Bernard Goode, the monitoring of a wetland mitigation project normally requires at least several growing seasons in order to provide sufficient time to determine the success of the revegetation. (Tr. 434-435). After the EPA's intervention, Mr. Tracy of the Corps remained the lead on-site government representative who continued to work with Mr. Britton to monitor and complete the mitigation plan. (Exs. 10, 14, 40). The Complainant's own witness, Mr. Hoffman, testified that the successful completion of the mitigation plan should reduce the gravity of the violation. (Tr. 247-248).

The intervention of the EPA did not deprive Respondents of any due process rights, but it did not materially promote resolution of this matter. While the CWA does not prohibit dual enforcement by the Corps and EPA, the intent of the MOA between those two agencies is to prevent overlapping enforcement. The most logical overview of the history of this proceeding supports the conclusion of Respondent's expert witness, Bernard Goode, a former chief of the Corps' national regulatory program. He testified that, under the MOA, the enforcement action, with the Corps as lead agency, was completed by the agreement of August 29, 1991 (Ex. 8), subject only to future monitoring and possible

modifications if needed. The letter embodying that agreement stated that the Corps reserved the right to seek further enforcement in federal court, indicating it considered itself the lead enforcing agency at that point. The late assumption of lead agency status by the EPA can be explained by that agency's apparent position that the mitigation was proceeding too slowly and that civil penalties should be imposed. The mitigation plan was successfully completed by 1995. (Ex. 31). The amount of any civil penalty in these circumstances, should, however, be greatly reduced from the maximum amount sought.

The Region's allegation that Respondents did not produce a written mitigation plan does not constitute an aggravating factor. Mr. Britton did respond to EPA in writing several times with descriptions of the mitigation plan, including photographs and two hand-drawn maps. (Ex. 13, 23, 25, 29, 39). While this may not have satisfied the Region's desire for a more detailed cross-section, the record does not indicate that this deficiency was ever effectively communicated to Respondents. Considering that the major work on the mitigation plan had already been completed by the time EPA intervened, the Respondents' responses were adequate. In any event, the Complaint charges Respondents only with filling a wetland without a permit, not with failing to file a written mitigation plan.

-- Nature and Extent of Violation

The nature and extent of this violation also indicate that any penalty should be far below the maximum permitted by the CWA. The area filled was approximately 25,000 square feet, or a bit more than half an acre. The site itself was not shown to be a pristine, highly valuable wetland. Rather, it was used mainly as a garbage dump until it was developed by Respondents. Although the Region is rightly concerned with the cumulative loss of wetlands on Chincoteague Island, is not fair to saddle these Respondents with the sins of others. The successful completion of the mitigation plan has now restored virtually all lost wetland functions and benefits on the site. The highest penalties should be reserved for violations that involve much larger disturbances of more valuable wetlands that cannot be so successfully mitigated.

-- Gravity of Violation

The discussion above concerning the nature, circumstances, and extent of the violation here all pertains to the gravity of the violation. In summary, the Respondents here filled a small area

of wetland, and, when notified of the violation, reasonably promptly completed a successful mitigation plan on the site and adjacent lots. The mitigation plan was being monitored by the Corps when the EPA assumed the status of lead enforcement agency and sought a $125,000 civil penalty. The gravity of the violation in consideration of these factors is relatively low.

-- Culpability of Respondents

Mr. Hammond and Mr. Britton both testified that they did not realize that the trash removal and grading by Mr. Ballard actually constituted filling a wetland, and required a permit. However, Mr. Britton, as a permanent resident of Chincoteague and employed in the construction business, was aware of the Section 404 permit program and should have been aware of the need to investigate sites for the existence of regulated wetlands. Mr. Britton was in the business of ensuring regulatory compliance for his clients. The wetlands on this site could have been discovered by reference to the publicly available maps and materials that resulted from the Advance Identification Study. Although Mr. Britton testified he was only vaguely aware of the study, he should have known that the Hammond site contained regulated wetlands.

However, the record does not establish whether Mr. Britton was physically present on the site before 1990, or had sufficient advance notice of Mr. Hammond's plans for the site to be potentially aware of its wetland character. The record only indicates that Mr. Britton introduced Mr. Ballard to Mr. Hammond as a heavy equipment operator who could remove the trash. (FF #6). Mr. Britton denied doing any work on the site until May 1990, although Mr. Hammond testified that Mr. Britton "arranged" to have trash removed from the site earlier. (Tr. 268, 334). Although Mr. Hammond also directed Mr. Ballard to clear the vegetation and level the site, Mr. Britton denied involvement with those activities. (Tr. 335). In these muddled circumstances, there is not a sufficient basis to impute different levels of culpability to the three Respondents, who were essentially jointly responsible for the violations, under Mr. Hammond's direction. In any event, the Respondents' overall culpability is reduced by their cooperation in completing the mitigation plan, once informed of the violation.

-- Economic Benefit and Ability to Pay

The Respondents all provided evidence indicating that they are people (or companies) of limited means, and could not pay the

penalty proposed by the Complaint. They also testified that the construction of the townhouses on the site did not yield any profit. This testimony and evidence must be viewed somewhat circumspectly. Although Britton Construction and BIC did not show profits after paying salaries and taking various deductions, they did generate substantial revenues (FF #25). The Hammonds, although they live on a limited fixed income, also have substantial real estate holdings on Chincoteague. (FF #26).

Nevertheless, the record does not provide substantial evidence to contradict Respondents' general position that they could not pay a penalty of the magnitude proposed in the Complaint. The EPA has not promulgated a penalty policy to guide the assessment of penalty policies under the CWA. However, the penalty policies under other environmental statutes[(3)] establish a general guideline for ability to pay as 4 percent of a company's average annual gross revenues. Under this guideline, the maximum penalty for BIC would be approximately $20,000, an order of magnitude less than the amount sought in the Complaint. The other two Respondents, Britton Construction and the Hammonds, have less ability to pay a penalty than BIC.

The record also provides no basis to contradict Respondent's evidence that the construction of the townhouses did not produce a significant profit. Mr. Hammond and Mr. Britton were able to account for all the indicated costs in their responses on cross-examination. (FF #23). The potential for future profits from future construction is, of course, speculative. Any future construction would take place on lots further removed from the area that was filled on lots 9 and 11.

Thus, while the major factors in reducing the penalty are the nature and circumstances discussed above, the Respondents' limited ability to pay a penalty is a buttressing additional consideration that militates toward assessment of a relatively small penalty.

-- Prior History of Violations

Of the three Respondents, only Britton Construction Company had any record of past possible violations. The record only shows one possible violation, however, in 1982. (FF #27). The Complainant disregarded the Respondents' prior compliance history as a factor in its proposed penalty calculation. Hence, it is not considered in this decision.

- Conclusion on Penalty Determination

The CWA §309(g)(3) also requires consideration of "such other factors as justice may require" in determining an appropriate civil penalty for a violation. As already discussed above as the "circumstances" of the violation, the overriding factor in the enforcement history in this matter is the dilatory intervention of the EPA. The EPA received a copy of the Corps' original cease-and-desist letter to Respondents back in 1990; yet took no action until 1994. Even at that late date, it could still have been appropriate for the EPA to act upon its concern that the mitigation plan was not progressing satisfactorily. The action should, however, be commensurate with the harm. In addition to ensuring completion of the mitigation plan, a small penalty could have been sought. Instead, the Region acted in apparent disregard of the progress that had been made, and sought to impose the maximum penalty on Respondents under the CWA, $125,000.

I find a penalty of this magnitude completely unjustifiable under all the applicable statutory penalty factors. This was a small area of trash-strewn wetlands on a private lot zoned for commercial or residential development. The record does not show prior knowledge or a high degree of culpability for this violation. The wetland loss has been fully mitigated under the original plan developed cooperatively by the Respondents and the Corps. The parties were not shown to have benefitted economically from the violation, and none of the Respondents have the ability to pay a large civil penalty.

In recognition of the fact that Respondents did commit the violation of filling this wetland without a permit, and the Corps was not apparently seeking any civil penalty, the EPA could reasonably have sought assessment of a nominal penalty, in addition to ensuring completion of the mitigation plan. A small penalty, combined with mitigation, would sufficiently serve the purpose of deterring similar violations in Chincoteague.

For these reasons, I find such a nominal civil penalty should be imposed in this case. The parties will be ordered, jointly and severally, to pay a civil penalty in the amount of $2000.

Summary Conclusions of Law

1. Respondents are jointly and severally liable for discharging pollutants into the waters of the United States without a permit required by the Clean Water Act §404, 33 U.S.C. §1344, constituting a violation of the CWA §301(a), 33 U.S.C. §1311(a).

2. Pursuant to the CWA §309(g)(3), an appropriate civil penalty for this violation is $2000.

Order

1. Respondents are jointly and severally assessed a total civil penalty of $2000.

2. Payment of the full amount of this civil penalty shall be made within 60 days of the service date of this order by submitting a certified or cashier's check in the amount of $2000, payable to the Treasurer, United States of America, and mailed to:

EPA - Region 3

P.O. Box 360515

Pittsburgh, PA 15251-6515

3. A transmittal letter identifying the subject case and the EPA docket number, and Respondents' names and addresses, must accompany the check.

4. If Respondents fail to pay the penalty within the prescribed statutory time period, after entry of the final order, then interest on the civil penalty may be assessed.

5. Pursuant to 40 CFR §22.27(c) this Initial Decision shall become the final order of the Agency, unless an appeal is taken pursuant to 40 CFR §22.30 or the Environmental Appeals Board elects, sua sponte, to review this decision.

Andrew S. Pearlstein

Administrative Law Judge

Dated: May 21, 1997

Washington, D.C.

1. "Ex." means hearing exhibit, and "Tr." refers to the stenographic transcript of the hearing. Citations to the record are representative only and are not intended to be complete or exhaustive.

2. The record variously refers to this party as "BIC Investments, Inc.," "BIC, Inc.," or "BIC Construction, Inc." (See, e.g., Exs 14, 43, 45, 48; Tr. 365). It is also not clear whether there is more than one BIC corporate entity. In any event, Complainant has not moved to amend the Complaint to change the name of this Respondent. The parties stipulated to the fact that BIC Investments, Inc. constructed the townhouse units on the site. Thus, the party to this proceeding will remain as named in the Complaint for the purposes of this Initial Decision.

3. See, e.g. the Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), July 2, 1990, p. 23.