UNTIED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6

In the Matter of

Mr. Henry R. Stevenson, Jr.
Parkwood Land Company

Docket No. CWA-06-2011-2709

Respondents

RESPONDENT'S MOTION FOR RECONSIDERATION

Henry R. Stevenson, Jr., Individually and as Owner of Parkwood Land Co. (hereinafter, "Non-Movant," "Stevenson" or "PLC"), files this Motion for Reconsideration and would respectfully show the following:

1. On or about August 12, 2012, Respondent received a Supplemental Response from Complainant regarding the Accelerated Decision as to Penalty in this matter. As normal practice allows, counsel for Respondent calendared another supplemental response for thirty (30) days thereafter. Respondent submits his Second Supplemental Response in accordance with the normal practice of allowing thirty (30) days to respond to such motions.

2. Upon inquiry with the Clerk, Respondent was provided a copy of an Order indicating that Respondent's Second Supplemental Response was due on August 27, 2012. A review of counsel's files, both paper and electronic, provides no copy of this Order.

3. Therefore, Respondent respectfully requests the Region Judicial Officer review Respondent's Supplemental Response to Complainant's Motion for Accelerated Decision as to Penalty and take action as appropriate given the additional information.

Respectfully Submitted,

THE KIBLER LAW FIRM

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(409) 373-4313
Fax (888)720-1177
Attorney for Respondents

CERTIFICATE OF SERVICE

I certify that on September 12, 2012 a true and correct copy of Respondent's Second Supplemental Response to Movant's Motion for Accelerated Decision as to Penalty was served to each person listed below by the method indicated.

Charles M. Kibler, Jr.

Russell Murdock
U.S. Environmental Protection Agency
1445 Ross Avenue
Dallas Texas 75202

Lorena S. Vaughn ***Via Certified Mail RRR #7009 0080 0001 1577 1860***
Regional Hearing Clerk
U.S. Environmental Protection Agency
1445 Ross Avenue
Dallas, Texas 75202

UNTIED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6

In the Matter of

Mr. Henry R. Stevenson, Jr.
Parkwood Land Company

Docket No. CWA-06-2011-2709

Respondents

RESPONDENT'S SECOND SUPPLEMENTAL RESPONSE TO COMPLAINTANT'S MOTION FOR ACCELERATED DECISION AS TO PENALTY

Henry R. Stevenson, Jr., Individually and as Owner of Parkwood Land Co. (hereinafter, "Non-Movant," "Stevenson" or "PLC"), files this Second Supplemental Response to Complainant's Motion for Accelerated Decision as to Penalty and would respectfully show the following:

I. Jurisdiction

1. Although the Court has previously granted full judgment in favor of the Complainant under its Accelerated Decision, Respondent still contends a lack of jurisdiction on part of the Environmental Protection Agency (hereinafter "EPA" or "Complainant") as previously argued and no portion of this Supplemental Response should be construed as Respondent's subjugation to jurisdiction.

II. Standard of Review

2. Respondent agrees with the Standard of Review offered in Complainant's Motion for Accelerated Decision as to Penalty. Specifically, "[a]n accelerated decision may be rendered as to 'any or all parts of a proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as [the Presiding Officer] may require, if no genuine issue of material fact exists and a party is entitled to a judgment as a matter of law." 40 C.F.R. §22.20(a).

3. Under Rule 56(c), the movant has the initial burden of showing that there exists no genuine issue of material fact by identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on files, together with the affidavits, if any, show[ing] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)(outlining the Court's interpretation of Rule 56(c)). An issue of fact is "material" if it may affect the outcome of the suit under governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The nonmovant is tasked with providing "specific facts showing that there is a genuine issue for trial." *Id.* at 587. If the nonmoving party is unable to prove its burden, the moving party is entitled to a judgment of an accelerated decision as a matter of law. *Id.*

III. Administrative Procedures to Date

4. Respondent agrees with the Administrative Procedures outlined in Complainant's Motion for Accelerated Decision as to Penalty.

IV. Arguments

5. Complainant's argue that Respondent's fill must be placed on the "river-side of the levee that directly relates to levee maintenance." This is an incorrect interpretation of Nationwide Permit 3 ("NWP 3") which provides:

> "This NWP also authorizes temporary structures, fills, and work necessary to conduct the maintenance activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills or dewatering of construction sites." (Nationwide Permit 3, pg. 1, Maintenance (c)).
>
> NWP 3 also states, "All dredged or excavated materials must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization. The placement of new or additional riprap must be the minimum necessary to protect the structure or to ensure the safety of the structure." (Nationwide Permit 3, pg. 1, Maintenance (b)).

6. Complainant's allegations of violations are two-fold: (1) fill placed on the inside portion of the levee near the entrance which widened the levee to an acceptable width to support mechanized repair machinery and (2) the construction of a truck turnaround further north along the levee which included fill on the inside portion of the levee.

Levee Entrance

7. With regards to the fill placed on the inside portion of the levee near the entrance which widened the levee to an acceptable width to support mechanized repair machinery – Respondent would point out that Respondent, if he had placed the fill on the "outside" portion of the levee would **not** be placing the fill into the Neches River as this portion of the property faces dry land. Unfortunately, Respondent does not own the property on that side of the levee or, at the least, the property line is close enough that Respondent did not wish to encroach or risk encroachment upon the neighboring property.

8. Further, "NWP 3 also authorizes temporary structures, fills, and work necessary to conduct the maintenance activity." As such, Respondent's placement of fill to widen and ensure the stability of the levee near the entrance was done under the provisions of NWP 3 as "temporary" and "necessary to conduct the maintenance activity."

9. Respondent's view or understanding of "waters of the United States" was interpreted at the time of the work, as most lay-persons would, that "waters of the United States" would be the Neches River. While Respondent does not believe that *Rapanos* provided the U.S. Corps of Engineers or the EPA with the expanded jurisdiction of including *all* property under the Clean Water Act which is "adjacent to a navigable waterway" under "waters of the United States," Respondent merely attempted to place fill in a place which would ensure stability of the long-existing levee to support the heavy equipment necessary to conduct periodic repairs.

10. Under Complainant's interpretation, Respondent should have placed his fill, temporary or not, into the Neches River. Because of the potential to hinder navigation upon a navigable waterway, the potential (or likelihood) that such fill would cast off into the Neches River, and other potential hazards which the Clean Water Act was specifically adopted to impede, Complainant's position seems ridiculous.

Truck Turnaround

11. "NWP 3 authorizes the repair of a previously-authorized currently-serviceable structure or fill provided the structure or fill is not put to a different use than that for which it was originally constructed. Minor deviations due to changes in construction techniques, materials or the like are authorized." *See* Resp.'s Exh. "A" from Resp.'s Suppl. Resp. to Comp.'s Mot. for Acc. Dec. as to Penalty. "This NWP also authorizes temporary structures, fills, and work necessary to conduct the maintenance activity." NWP 3 at 1. Respondent's inclusion of a truck turnaround was a temporary structure or fill which is provided for in NWP 3. Further, a truck turnaround would be included in the "minor deviations due to changes in construction techniques" which were also authorized. As noted in Respondent's previous supplemental response, this levee was built before the implementation of heavy earthmoving equipment and required the inclusion of the truck turnaround to enable maintenance activity.

12. In essence, Complainant seeks to have Respondent penalized for (1) seeking a NWP to repair his 100+ year old levee, (2) utilizing fill, dredged or not, to the inside portion of the levee to ensure stability, and (3) including a truck turnaround, temporary or permanent, which would enable Respondent to utilize heavy construction equipment to complete the maintenance. According to Complainant's position, Respondent should have (1) received an NWP to repair his 100+ year old levee, (2) placed any fill necessary onto the adjacent property owner's land or

dumped it into the Neches River or (3) conducted the maintenance activity with hand shovels as the existing levee, without the widened support for heavy machinery, cannot safely allow the conduct of the maintenance activity.

Respectfully Submitted,

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