

The actions in Bates County placed unauthorized fill in over 125 acres of wetlands in four areas at this property. The wetlands are immediately adjacent to the Osage River which is a perennial stream. Only 2 of the areas affected in Bates County were included in the complaint.

The numbering used below corresponds to the numbering used in the Prehearing Order.

1. - NAME OF EXPERT/WITNESS INTENDED TO BE CALLED AT HEARING

Mel B. Stanford
Regulatory Project Manager
Department of the Army
Kansas City District, Corps of Engineers
Regulatory Branch - Truman Regulatory Satellite Office
15837 Truman Road
Warsaw, Missouri 65355
660-438-6697

Mr. Stanford is a Regulatory Project Manager in the Truman Regulatory Satellite Office of the U.S. Army Corps of Engineers ("Corps"), Kansas City District. Mr. Stanford has been employed by the Corps for over 23 years. Among his duties as a Project Manager is the review of cases to determine what, if any, response actions should be taken by the United States based on allegations of potential violations of the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387. More specifically Mr. Stanford's duties include investigation of potential violations of Section 301 and 404 of the CWA, 33 U.S.C. §§ 1311 and 1344 which address dredge or fill material placed in waters of the United States.

Mr. Stanford will testify regarding his communications with Mr. Gepford and his efforts to bring Mr. Gepford into compliance with section 404 of the Clean Water Act. He will also testify regarding the jurisdictional determination he made of the site and his estimates that Respondent's activities placed unauthorized fill into over 110 acres of wetlands at two sites and affected over 3,000 feet of stream. He will testify that the tributary of Little Osage River in Vernon County, Missouri flowed through to the Little Osage River on the occasions he was at the Vernon County site. He will also testify that the wetlands at the Vernon County site are adjacent to the Little Osage River and the wetlands at the Bates County site are adjacent to the Osage River.

Mr. David A. Howard
Wetlands Emphasis Team Leader
U. S. Department of Agriculture
Natural Resource Conservation Service
Wetland Office
727E PCA Road
Warrensburg, Missouri 64093
660-747-8200 Ext. 5

Mr. Howard is a soil scientist/wetland team leader. He has been employed by the Natural Resource Conservation Service (NRCS) of the U.S. Department of Agriculture for 32 years. Among his duties is the performance of wetlands delineations to determine what areas are characterized as wetlands.

Mr. Howard will testify to his review of the material and evidence concerning the two properties operated by the Respondent. Mr. Howard will testify that he performed wetlands delineations for the two properties operated by the Respondent and discuss the results of his wetlands delineations. His testimony will indicate that many of the areas where Respondent performed unauthorized work were wetlands. He will also testify that the wetlands at the Vernon County site are adjacent to the Little Osage River and the wetlands at the Bates County site are adjacent to the Osage River.

Mr. Thomas Taylor
Wetland Protection Program Coordinator – State of Missouri
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency, Region VII
901 North 5th Street
Kansas City, Kansas 66101
913-551-7226

Mr. Taylor is a Life Scientist in the Wetlands program for the U.S. Environmental Protection Agency, Region VII (EPA). He has been employed by the EPA for 19 years. Among his duties is the review of cases to determine the harm to wetlands and the actions necessary to restore wetland functions. Mr. Taylor has visited both sites on several occasions. Mr. Taylor will testify to the value of the wetlands that are the subject of this litigation and more specifically to the loss of value as a result of the activities conducted by the Respondent.

Mr. Raju Kakarlapudi
Case Review Officer
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency, Region VII
901 North 5th Street
Kansas City, Kansas 66101
913-551-7320

Mr. Kakarlapudi is an Environmental Scientist in the Water Enforcement program of EPA, Region VII. He has been employed by EPA for over 8 years. Mr. Kakarlapudi's duties include case review of evidence regarding possible violations of Section 301 and 404 of the CWA and the calculation of penalties for civil administrative and civil judicial cases under Section 404 of the CWA. Mr. Kakarlapudi has visited both sites on several occasions and has reviewed aerial photography of the sites. Mr. Kakarlapudi will testify regarding the factual basis for EPA's determination that Respondent was in violation of Section 301 and 404 of the CWA. Mr. Kakarlapudi will testify regarding the extent of fill material placed in the wetlands at the two sites and the general disturbance of the area

caused by the unauthorized construction activities. Mr. Kakarlapudi will also testify as to his review of the evidence in this matter as applied to the statutory factors in determining an appropriate penalty amount as presented in Count I of the complaint. Mr. Kakarlapudi will testify that the tributary to the Little Osage River flowed through to the Little Osage River on the occasions he visited the site and that the wetlands at the Vernon County site are adjacent to and have a surface hydrological connection to the Little Osage River and the wetlands at the Bates County site are adjacent to and have a surface hydrological connection to the Osage River.

1. - COPIES OF DOCUMENTS AND EXHIBITS

The following are documents which Complainant may introduce at a hearing on this matter. The documents are briefly described here and are attached in full.

Complainant's Exhibit 1: Field Investigation Report dated March 27, 2003, prepared by Mel B. Stanford, which summarizes an inspection of property located in Vernon County, Missouri operated by the Respondent.

Complainant's Exhibit 2: Field Investigation Report dated April 14, 2003, prepared by Mel B. Stanford, which summarizes a site visit between Respondent and government officials at the property located in Vernon County, Missouri.

Complainant's Exhibit 3: Field Investigation Report dated May 16, 2003, prepared by Mel B. Stanford, which summarizes a site visit of the Vernon County property between Mr. Stanford and the equipment operator of the Respondent.

Complainant's Exhibit 4: Field Investigation Report dated May 28, 2004, prepared by Mel B. Stanford, which summarizes an inspection of property located in Bates County, Missouri operated by the Respondent.

Complainant's Exhibit 5: Letter dated March 26, 2002, from David A. Howard, U.S. Department of Agriculture, Natural Resource Conservation Service, to Mark Frazier, Kansas City District of the Corps including information on a wetlands delineation for the Vernon County property.

Complainant's Exhibit 6: Letter dated May 2, 2002, from Mark Frazier, Kansas City District of the Corps, to David A. Howard, U.S. Department of Agriculture, Natural Resource Conservation Service concurring with the wetland delineation findings as outlined in the March 26, 2002, letter from Howard to Frazier.

Complainant's Exhibit 7: Letter dated May 9, 2003, from David A. Howard, U.S. Department of Agriculture, Natural Resource Conservation Service, to Mark Frazier, Kansas City District of the Corps including information on a wetlands delineation for the Bates County property.

Complainant's Exhibit 8: Letter dated May 26, 2004, from Mel Stanford, Kansas City District of the Corps, to David A. Howard, U.S. Department of Agriculture, Natural Resource Conservation Service concurring with the wetland delineation findings as outlined in the May 9, 2004, letter from Howard to Mark Frazier.

Complainant's Exhibit 9: Tolling Agreement Between the United States Environmental Protection Agency, Region 7 and William Gepford, dated September 21, 2005.

Complainant's Exhibit 10: Conversation Record, dated December 2, 2002, between Mel Stanford and Bill Gepford.

Complainant's Exhibit 11: Conversation Record, dated February 6, 2003, between Mel Stanford and Bill Gepford.

Complainant's Exhibit 12: Conversation Record, dated March 14, 2003, between Mel Stanford and Bill Gepford.

Complainant's Exhibit 13: Conversation Record, dated March 26, 2003, between Mel Stanford and Vern Sword.

Complainant's Exhibit 14: Conversation Record, dated April 7, 2004, between Mel Stanford and Bill Gepford.

Complainant's Exhibit 15: Letter dated June 11, 2002, from Daryl Freeze, County Executive Director for the Bates County Farm Service Agency Office, U. S. Department of Agriculture to Bill H. Gepford identifying the date for a wetland appeal requested by the Respondent.

Complainant's Exhibit 16: Letter dated August 13, 2002, from Roger Hansen, State Conservationist, Natural Resource Conservation Service to Daryl Freeze, CED, USDA Farm Service Agency outlining information reviewed for wetland appeal of Bill and Shannon Gepford, Vernon County property.

Complainant's Exhibit 17: Letter dated September 6, 2002, from Daryl Freeze, County Executive Director for the Bates County Farm Service Agency Office, U. S. Department of Agriculture to Bill Gepford discussing the results of Mr. Gepford's wetland appeal.

Complainant's Exhibit 18: Letter dated July 29, 2004, from Des R. Goyal, Chief, Operations Division, Kansas City District of the Corps, to Bill Gepford directing Mr. Gepford to do no further unauthorized work at properties in Vernon and Bates County, Missouri and referring the case to EPA for enforcement action.

Complainant's Exhibit 19: Wetland Restoration Plan Shannon Gepford Farm, Vernon County, Missouri between the Respondent and NRCS, signed by Bill H. Gepford on August 25, 2003.

Complainant's Exhibit 20: Wetland Restoration Plan Bill Gepford Farm, Bates County, Missouri between the Respondent and NRCS, signed by Bill H. Gepford on September 16, 2003.

Complainant's Exhibit 21: Trip Report from Raju Kakarlapudi and Tom Taylor detailing site visit of May 2, 2006.

Complainant's Exhibit 22: Letter dated August 21, 2006 from Michael P. Comodeca, attorney for Respondent, to Raju Kakarlapudi, EPA, providing response to information request.

Complainant's Exhibit 23: USGS map showing Little Osage River as perennial stream.

Complainant's Exhibit 24: USGS map showing Osage River as perennial stream.

Complainant's Exhibit 25: Curriculum Vitae for Mel Stanford

Complainant's Exhibit 26: Curriculum Vitae for David Howard

Complainant's Exhibit 27: Curriculum Vitae for Raju Kakarlapudi

Complainant's Exhibit 28: Curriculum Vitae for Thomas Taylor

Complainant's Exhibit 29: 1999 Aerial Photo of Vernon County Property.

Complainant's Exhibit 30: 2000 Aerial Photo of Vernon County Property.

Complainant's Exhibit 31: 2001 Aerial Photo of Vernon County Property.

Complainant's Exhibit 32: 1999 Aerial Photo of Bates County Property.

Complainant's Exhibit 33: 2000 Aerial Photo of Bates County Property.

Complainant's Exhibit 34: 2001 Aerial Photo of Bates County Property.

Complainant's Exhibit 35: Economic Benefit Calculations

2. - STATEMENT AS TO HOW THE PROPOSED PENALTY WAS DETERMINED

The Complaint proposes the assessment of an administrative penalty in the amount of \$137,500 for the violation alleged in Count I of the Complaint. The Agency has never issued a penalty policy for use by Presiding Officers in determining penalties under the CWA.¹ Consequently, Presiding Officers rely on the wording of the statutory penalty factors set out in § 309(g)(3),² and Complainant's proposed penalty is based on the applicable § 309(g)(3) penalty factors.³ These are: the nature, circumstances, extent, and gravity of the violation, or violations, and, with respect to Respondent, 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. The penalty proposed in this case is consistent with other similar cases decided by administrative law judges.⁴

The nature, circumstances, extent and gravity of the violations in this case are major. The Respondent cleared and/or placed fill in over 110 acres of forested wetlands without a Section 404 permit. In addition, Respondent's activities either filled or impacted over 3,000 linear feet of stream. These actions affected a large amount of riparian habitat. Eighty-seven percent of Missouri's original 4.8 million acres of wetlands have been lost since pre-settlement. This loss is known to be the fourth highest in the nation.⁵ Forested wetlands in Missouri are characterized by a combination of high (plant) species diversity,

¹The Consolidated Rules of Procedure require that the Presiding Officer, in addition to considering the applicable statutory penalty factors, "shall consider any civil penalty guidelines issued under the Act." 40 C.F.R. § 22.27(b). Since the Agency has not issued any specific Clean Water Act penalty policy guidelines applicable to the present action, this section is inapplicable.

²33 U.S.C. § 1319(g)(3).

³See *In re Larry Richner*, 10 E.A.D. 617, 633 (EAB 2002) ("Because there are no CWA penalty guidelines, a CWA penalty must be calculated based upon the evidence in the record and the penalty criteria set forth in CWA § 309(g)." slip op. at 23); *In re Britton Construction*, 8 E.A.D. 261, 278 (EAB 1999) ("The statute requires EPA to take into account a number of factors in assessing penalties, such as the extent of the violations and the violator's culpability, but it prescribes no precise formula by which these factors must be computed." (citations omitted)).

⁴See, e.g., *In re C.W. Smith, Grady Smith & Smith's Lake Corp.*, Docket No. CWA-04-2001-1501 (ALJ Biro July 15, 2004) (\$137,500 penalty assessed for 1.5 acres of unpermitted fill of dry lake bed); *In re William H. Jarvis*, Docket No. CWA-04-2000-1509, 2002 WL 550952 (ALJ Moran April 5, 2002) (\$10,000 assessed for discharge of dredged spoils and rip rap into and along shores of lake without a 404 permit); *In re Lawrence John Crescio, III*, Docket No. 5-CWA-98-004, 2001 WL 537494 (ALJ Biro May 17, 2001) (\$31,500 award for installing drain pipe into wetlands without a permit, which resulted in discharge of 2,800 cubic yards of material into 0.3 acres of wetlands).

⁵Dahl, T.E. and C.E. Johnson. 1991. Status and Trends of Wetlands in the Conterminous United States, Mid-1970's to Mid-1980's. U.S. Dept. of the Interior, Fish and Wildlife Service, Washington, D.C. 28 pages.

density and high productivity.⁶ These areas also are known as floodplain, riparian, or bottomland wetland forests. The Missouri Department of Natural Resources rank bottomland forest communities in the subject area of Bates and Vernon counties as S3, Vulnerable, on a scale of S1, Critically Imperiled through S5, Secure.⁷ They are important and valued by society because they periodically detain flood waters, thereby reducing costly downstream flood damages. Forested wetlands support biological and chemical cycles that retain and break down pollutants and sediments, which help maintain water quality in nearby streams and lakes.^{8 9} They provide spawning, nesting, and other habitat for a variety of fish, bird and mammal life, which provides opportunities for varied recreational pursuits (e.g., fishing, hunting, nature observation). Among other functions, forested wetlands can provide a source of valuable firewood, commercial lumber (e.g., oak, ash), and a nut crop (e.g., pecans). It is both the relatively small number of remaining wetlands and their functions which make their wise management and protection a priority in Missouri.

Respondent is culpable and until recently was totally unresponsive. Respondent has been aware of the need to take actions to come into compliance with the Clean Water Act for several years and has taken no actions. After signing an agreement with the Natural Resource Conservation Service to perform mitigation activities at the Bates County property, the Respondent sold the property prior to performing any mitigation activities and still has not fulfilled his obligations under this agreement.

Respondent has no prior history of violations known to Complainant at this time. Respondent has enjoyed an economic benefit of \$21,800 as a result of his failure to comply with the Act. Complainant's Exhibit 35 details how the economic benefit was calculated. The economic benefit arises from the avoided cost of delineating the site prior to construction, the avoided cost of obtaining a permit and the increase in value of land as farmland. By removal of the forested wetland on the property in Bates County the Respondent was able to sell the land for a higher price because the land is more valuable as farmland.

Complainant presumes that Respondent is able to pay a penalty of \$137,500 based upon the current information available. The issue of ability-to-pay has been raised to Respondent on numerous occasions and Respondent has not indicated he lacks the necessary financial resources.

⁶ Epperson, Jane. 1992. Missouri Wetlands: A Vanishing Resource. Missouri Dept. of Natural Resources, Div. of Geology and Land Survey. 68 pages.

⁷ Nelson, Paul. 2005. The Terrestrial Natural Communities of Missouri. Revised edition. 550 pages.

⁸ Welsch, David, David Smart, James Boyer, Paul Minkin, Howard Smith, and Tamara McCandless. 1995. Forested Wetlands: Functions, Benefits and the Use of Best Management Practices. U.S. Dept. of Agriculture, Forest Service publication NA-PR-01-95. 63 pages

⁹ Missouri Dept of Conservation. Undated.. Trees, Forests, and Quality Water. Pamphlet. 2 pages.

4. - COMPLAINANT'S VIEWS REGARDING
APPROPRIATE PLACE OF HEARING AND TIME ESTIMATE

Complainant proposes as an appropriate place for the hearing the Kansas City area. Courtroom facilities with all support services which may be required for a hearing (e.g., copiers, facsimiles, computers, telephones, clerical) are readily available in Kansas City. Kansas City has an airport and Respondent's counsel is located in the Kansas City area as are some of Complainant's witnesses.

Absent lengthy cross-examination, Complainant estimates that it will require approximately one to one and one half days presenting its case in chief. The length of time required for rebuttal testimony and cross examination of Respondent's witnesses will depend on the numbers and substance of documents and witnesses disclosed in Respondent's Prehearing Exchange.

All of Complainant's witnesses and counsel are available for hearing on the following dates through January 2007: October 18-20, October 23-25, October 30-November 3, November 6-9, November 29-30, December 5-7, and December 12-14. One witness is not available the entire month of January.

RESERVATION OF RIGHTS

Complainant respectfully reserves the right to call all witnesses called by Respondent; to recall any of its witnesses in rebuttal; and to modify or supplement the names of witnesses and exhibits prior to the Adjudatory Hearing, pursuant to 40 C.F.R. Part 22, and upon adequate notice to Respondent and the Presiding Officer.

Respectfully submitted,
U.S. ENVIRONMENTAL PROTECTION AGENCY

BY: Steven R. Sanders
Steven L. Sanders
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency
Region VII

ATTORNEY FOR COMPLAINANT

CERTIFICATE OF SERVICE

I certify that on the date noted below I hand-delivered the original and one true copy of this Complainant's Prehearing Exchange to the Regional Hearing Clerk, U.S. Environmental Protection Agency, 901 North 5th Street, Kansas City, Kansas 66101.

I further certify that on the date below I sent a true and correct copy of this Complainant's Initial Prehearing Exchange, by first-class U.S. Mail to:

Michael P. Comodeca, Esq.
Spencer Fane Britt & Browne LLP
9401 Indian Creek Parkway, Suite 700
Overland Park, KS 66210-2005

and

The Honorable William B. Moran
Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
401 M Street, S.W.
Washington, D.C. 20460

8/28/06

Date

Joseph J. ...
