



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TEXAS 75202-2733

FILED

2012 JUN -6 PM 12: 23

REGIONAL HEARING CLERK
EPA REGION VI

June 6, 2012

Regional Judicial Officer Patrick Rankin
U.S. Environmental Protection Agency, Region 6
1445 Ross Avenue, Dallas, Suite 1200
Texas 75202-2733

Re: Complainant's Motion for Accelerated Decision as to Penalty: CWA-06-2011-2709
In the Matter of: Mr. Henry R. Stevenson, Jr. & Parkwood Land Co.

Dear Judge Rankin:

Enclosed is Complainant's Motion for Accelerated Decision as to Penalty (Motion). Also enclosed are two documents in support of Complainant's Motion. First, Complainant has attached a Penalty Calculation Worksheet in which it applies the statutory penalty factors of the Clean Water Act to the alleged violations. Second, Complainant has also attached the signed Declaration of Ms. Barbara J. Aldridge further indicating how Complainant came to the assigned penalty figure.

If you have any questions regarding this matter, please contact Mr. Russell Murdock, at (214) 665-3189.

Sincerely,

A handwritten signature in blue ink, appearing to read "Russell Murdock", written over a horizontal line.

Russell Murdock, Attorney
U.S. EPA, Region 6
Complainant

Enclosure

cc: Mr. Charles (Chuck) Kibler, Jr. via certified mail (7010 2780 0002 4356 5365)
The Kibler Law Firm
765 N. 5th Street
Silsbee, Texas 77656

FILED
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REGIONAL HEARING OFFICE
EPA REGION VI

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6**

In the Matter of: §
§
Mr. Henry R. Stevenson, Jr. §
Parkwood Land Co. § Docket No. CWA-06-2011-2709
§
Respondents §

COMPLAINANT’S MOTION FOR ACCELERATED DECISION AS TO PENALTY

COMES NOW, the Complainant, the Acting Director of the Water Quality Protection Division, the United States Environmental Protection Agency (“EPA”), Region 6, through his attorney, in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“the Consolidated Rules”), 40 C.F.R. § 22.1 *et seq.*, hereby moves the Court to enter into an accelerated decision pursuant to 40 C.F.R. § 22.20 granting full judgment in favor of the Complainant as to the penalty assessed for violations of the Clean Water Act (“CWA”), 33 U.S.C § 1251 *et seq.*, for discharges of pollutants to waters of the United States. The Court previously granted Complainant’s Motion for Accelerated Decision as to liability. Said Motion was denied without prejudice as to penalty. Pursuant to subsequent communications with the Court and Respondents, Complainant now issues the following Motion for Accelerated Decision as to Penalty.

I. JURISDICTION

1. This is a proceeding to assess a Class I Civil Penalty under Section 309(g) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(g) and is governed by Subpart I of the Consolidated Rules, 40 C.F.R. Part 22. In accordance with 40 C.F.R. § 22.51, the EPA’s Motion for Accelerated Decision shall be ruled upon by the Regional Judicial Officer (“RJO”).

II. STANDARD OF REVIEW

2. An 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 judgment as a matter of law.” 40 C.F.R. § 22.20(a). Although the Federal Rules of Civil Procedure do not apply, the summary judgment standard in Rule 56(c) provides guidance for accelerated decisions. *In Re: Consumers Scrap Recycling, Inc.*, 11 E.A.D. 269, 285 (EAB 2004); *P.R. Aqueduct and Sewer Auth. v. U.S. EPA*, 35 F.3d 600, 607 (1st Cir. 1994).

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) (quoting Rule 56(c)). An issue of fact is “material” if it “might affect the outcome of the suit under governing law.” *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986). An issue of fact is “genuine” if “the evidence is such that a reasonable jury could return a verdict for the non-moving party.” *Id.* Evidence that is “merely colorable” or not “significantly probative” is incapable of overcoming the standard for denying summary judgment. *Id.* at 249-50. Once the moving party meets its burden, the nonmoving party “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The nonmoving party must come forward with “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.

III. ADMINISTRATIVE PROCEDURES TO DATE

4. Complainant issued an Administrative Order on January 31, 2011, ordering Respondents to cease any discharge of dredged and fill material to waters of the United States and to submit a plan to EPA for restoration of 1.26 acres of impacted wetlands. (Complainant’s Exhibit 2, Administrative Order, Docket No. CWA-06-2010-2708) (hereinafter “AO”).

5. Complainant issued an Administrative Complaint pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), on July 18, 2011. (Complainant’s Exhibit 1, Administrative Complaint, Docket No. CWA-06-2011-2709) (hereinafter “Complaint”).

6. Respondents filed their Answer on August 23, 2011, and requested a hearing. (Complainant’s Exhibit 4, Respondents’ Answer to Administrative Complaint).

7. The Presiding Officer issued a Scheduling Order on November 22, 2011.

8. The Presiding Officer issued an Accelerated Decision regarding liability. The Presiding Officer denied Complainant’s Motion for Accelerated Decision regarding penalty without prejudice.

IV. DESCRIPTION OF VIOLATIONS AND RELEVANT PROPERTY

9. Respondents own a tract consisting of approximately 79 acres, located northeast of the Interstate Highway 10 and the Neches River intersection, west of Exit 856, near Rose City, Orange County, Texas (“the property”). (Complainant’s Exhibit 3, Warranty Deed); (Complainant’s Exhibit 2). A containment levee constructed prior to 1940 surrounds the jurisdictional wetlands relevant to the Complaint. (Respondents’ Exhibit i, Expert report of Mr.

Scott Skinner, 3.0 History, p. 3); (Complainant's Exhibit 31, Corps Background Information, p. 12-17). In April 2007, Respondents received authorization from the U.S. Army Corps of Engineers ("Corps") pursuant to Nationwide Permit 3 to repair a portion of the containment levee. (Complainant's Exhibit 31, p. 14-16).

10. On multiple dates between August 9, 2007 and August 3, 2010, Respondents discharged dredged material and/or fill material, as defined by Section 502 of the CWA, 33 U.S.C. § 1362, and 40 C.F.R. § 232.2, from point sources, including heavy equipment, into approximately 1.26 acres of wetlands within the property adjacent to the permitted repair of the levee surrounding the wetlands. (Complainant's Exhibit 2, p. 4). The Complaint pertains solely to discharges unrelated to the maintenance of the levee, which were not authorized by Nationwide Permit 3. The levee surrounds a part of the 1.26 acres of the wetlands within the property, which would otherwise abut a navigable-in-fact body of water, the Neches River. *See* (Complainant's Exhibit 31, p. 12-17); *See also* (Respondents' Exhibit i, p. 3).

V. ADMINISTRATIVE ENFORCEMENT HISTORY

11. During site visits on September 3, 2009, and July 22, 2010, Corps representatives witnessed evidence of the unauthorized mechanized land clearing and filling of the wetlands. (Complainant's Exhibit 33, Kristin Shivers' Memorandum for File and Supporting Photographs from September 3, 2009 site visit, p. 3-7); (Complainant's Exhibit 35, Kristin Shivers' Memorandum for File and Supporting Photographs from July 22, 2010 site visit, p. 7-26). Further evidence of the unauthorized land clearing and filling of wetlands was witnessed during a subsequent December 9, 2010 inspection by both Corps and EPA representatives. (Complainant's Exhibit 5, Barbara Aldridge's Trip Report/Memo to the File following December

9, 2010 Inspection); (Complainant's Exhibit 6, Barbara Aldridge's Wetlands Field Inspection Report Form and Map of Property).

12. Complainant issued its AO on January 31, 2011, ordering Respondents to cease any discharge of dredged and fill material to waters of the United States and to submit a plan to EPA for restoration of 1.26 acres of impacted wetlands. (Complainant's Exhibit 2).

13. On July 18, 2011, Complainant issued its Administrative Complaint alleging unauthorized discharges between August 9, 2007 and August 3, 2010. (Complainant's Exhibit 1, p. 4).

VI. ARGUMENT REGARDING APPROPRIATE CIVIL PENALTY

14. Under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), EPA has the authority to assess civil penalties to any person who, without authorization, discharges a pollutant to a navigable water, as those terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362. The CWA enumerates in Section 309(g)(3), 33 U.S.C. § 1319(g)(3), the factors that must be considered in the assessment of any civil penalty. Yet, the CWA itself does not provide a methodology for calculating a penalty. *In re Britton Construction Co., Big Investments, Inc. and William and Mary Hammond*, 8 E.A.D. 261, 278 (EAB 1999). Therefore, "highly discretionary calculations that take into account multiple factors are necessary" to assess penalties under the CWA. *Tull v. United States*, 481 U.S. 412, 426-27 (1987).

15. The "appropriateness" of a CWA penalty for purposes of 40 C.F.R. § 22.24 is measured in accordance with the penalty factors in Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3). When determining an appropriate penalty, each of the statutory penalty factors must be considered and the recommended penalty must be supported by analyses of those factors. *In*

re Donald Cutler, 11 E.A.D. 622, 631 (EAB 2004). Therefore, for purposes of making a record of the agency action for judicial review, EPA must establish that in assessing a civil penalty for the Respondent or Respondents, the Agency used the statutory factors and applied these factors to the facts of the case. These statutory penalty factors include the following: “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).

16. In making his decision on the appropriateness of a penalty, the Presiding Officer must also use the statutory factors and apply them to the case. The Presiding Officer may accept either EPA’s or the Respondents’ interpretation of the statutory factors or he may develop his own interpretation of the statutory factors. Nevertheless, the Consolidated Rules require that “the Presiding Officer shall set forth the specific reasons for the increase or decrease” from the penalty proposed in the Complaint. 40 C.F.R. § 22.27(b). The Presiding Officer must also consider any civil penalty guidelines issued under the Act. 40 C.F.R. § 22.27(b). However, the well-established principle is that although the Presiding Officer must consider EPA penalty policies issued under the Act, he has the discretion to not apply or even follow the policies. *Cutler*, 11 E.A.D. at 645. *See also In re Robert Wallin*, 10 E.A.D. 18, 25 n.9 (EAB 2001); and *Britton*, 8 E.A.D. at 282 n.9.

17. Under the CWA, there is no statute-specific penalty policy. Some Presiding Officers have calculated penalties following the framework of EPA’s general civil penalty policies, known as *Policy on Civil Penalties* and *A Framework for Statute-Specific Approaches to Penalty*

Assessments, both issued on February 16, 1984. *Wallin*, 10 E.A.D. at 25 n.9. A more statute-specific policy that implements those general policies is the *Revised Interim Clean Water Act Settlement Penalty Policy* (Settlement Policy) issued February 28, 1995, which guides EPA when establishing appropriate penalties in the settlement of civil judicial and administrative actions. The EPA's *Clean Water Act Section 404 Settlement Penalty Policy* issued December 21, 2001, offers further guidance in cases under Section 404 of the CWA, such as the present one. (Complainant's Exhibit 40). "Although settlement policies as a general rule should not be used outside the settlement context,...there is nothing to prevent our looking to relevant portions thereof when logic and common sense so indicate." *Britton*, 8 E.A.D. at 287 n.16. Although the Presiding Officer may find the Settlement Policy helpful, the primary focus must be on the statutory factors and he must make a "good faith effort to evaluate" these factors when assessing the penalty. *Id.*

18. The factors Complainant primarily considered were the need for deterrence, Respondents' prior history of violations, and Respondents' degree of culpability. In the attached Declaration of Barbara Aldridge ("Aldridge Declaration"), Ms. Aldridge walks through EPA's process in reviewing each of the statutory factors. Numeric values are assigned to each statutory factor in the attached Penalty Calculation for 404 Violation ("Penalty Calculation").

19. For the nature, circumstances, extent and gravity of the violations, Complainant considered the seriousness of the violations and the actual or potential harm resulting from the violations, including environmental harm. Complainant also looked to the duration of the violations.

20. The nature of the violations is such that Respondents discharged pollutants, specifically fill material, to waters of the United States on multiple dates between August 9, 2007 and August 3, 2010. The gravity of the violations includes the actual and potential harm resulting from the unauthorized discharges, especially the risk of environmental harm. The unauthorized fill activity circumvented Section 404 of the CWA permitting process and resulted in avoidable impacts to approximately 1.26 acres of jurisdictional forested wetlands. Specifically, the applicant has precluded the environmental protection process afforded by the EPA's *404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material* (40 C.F.R. Part 230) which require that the least environmentally damaging practicable alternative be permitted and that all practicable measures to avoid, minimize, and mitigate impacts have been identified. Prior to the unauthorized activity, the wetlands impacted by this project provided quality habitat for wildlife, performed valuable water quality maintenance functions by removing excess nutrients and pollutants from the water, and provided floodwater storage. The wetland loss in this case contributed to the cumulative amount of acreage of wetlands that have been negatively impacted and detracts from the national and state mandate of achieving a "no net loss" of wetlands in Texas. The composition of the fill material used indicates the possibility of substances in the debris fill material which could further adversely impact the wetlands.

21. Given that one of the main goals in assessing a penalty against a violator is to deter noncompliance and help protect the environment from future violations, Complainant gave great consideration to Respondents' prior history of violations and degree of culpability. Over the past several years, Respondents have had extensive interactions with the Corps. (Complainant's Exhibit 39, U.S. Army Corps of Engineers, Galveston District, Database results for regulatory

history of Respondent). The Corps has documented an extensive compliance history with the Respondents since April of 1991, including four confirmed unauthorized activities (excluding the current violation), two after-the-fact issued permits, four issued permits, three withdrawn permit applications and 12 jurisdictional determination requests. *Id.*; (Complainant's Exhibit 32, Administrative Appeal Decision from the U.S. Corps of Engineers, Galveston District, dated December 17, 2007); (Aldridge Declaration). Respondents had several interactions with the Corps in the present case prior to the Corps' referral of the case to Complainant. (Complainant's Exhibit 38, Kristin Shivers' Memorandum for File regarding the site's Regulatory History). Respondents failed to take action to remediate the harm caused by their discharges following their extensive communications with the Corps and later the Complainant's Administrative Order. As discussed above, Respondents discharged pollutants, specifically fill material, to waters of the United States on multiple dates between August 9, 2007 and August 3, 2010. Because of Respondents' actions in failing to achieve compliance and Respondents' experience with matters regarding jurisdictional wetlands, Respondents must have known or suspected that their fill activities would result in additional CWA violations. As a result, the degree of culpability was significant. Therefore, based on the application of these statutory factors to the case, Complainant believes that the assessed civil penalty is appropriate.

VII. CONCLUSION

For the reasons which have been set forth, Complainant requests that an initial decision be issued in this matter, on an accelerated basis, as provided for in 40 C.F.R. § 22.20. Complainant requests a finding that there are no genuine issues of fact material to a determination of an appropriate penalty for the violations. Complainant would further request

that a finding be made in the initial decision that Respondents are liable for all violations alleged, and that based on an analysis of the evidence in this case, in consideration of the statutory factors, the appropriate dollar amount of the recommended civil penalty to be assessed is \$32,500.

Respectfully submitted,



Russell Murdock
Assistant Regional Counsel (6RC-EW)
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Dallas, Texas 75202-2733
Murdock.Russell@epa.gov
Tel: (214) 665-3189
Fax: (214) 665-3177




Date

CERTIFICATE OF SERVICE

I certify that the original of the foregoing COMPLAINANT'S MOTION FOR ACCELERATED DECISION AS TO BOTH LIABILITY AND PENALTY was hand-delivered to and filed with the **Regional Hearing Clerk**, U.S. Environmental Protection Agency, Region 6, 1445 Ross Avenue, Dallas, Texas 75202-2733, and a true and correct copy was sent to the following on this 6th day of June, 2012, in the following manner:

Via Certified Mail:

Mr. Charles (Chuck) Kibler, Jr.
The Kibler Law Firm
765 N. 5th Street
Silsbee, Texas 77656



PENALTY CALCULATION FOR 404 VIOLATION

| STEP | No Action | Notes/Assumptions | Restored | Notes/Assumptions |
|--|-----------|-------------------|-------------------|----------------------------------|
| ECONOMIC BENEFIT | | | | |
| 1. Use BEN to calculate econ. benefit = | | | <i>Settlement</i> | <i>summary of impact</i> |
| GRAVITY | | | | |
| Set Multiplier (500/1,500/3k - 10k) | | | 1,500/3k | |
| A Factors (Scale 0-20) | | | | |
| Harm to Human Health or Welfare | | | 0.01 | <i>not relevant</i> |
| Extent of Aquatic Env Impact | | | 2 | |
| Severity of Impacts to Aquatic Env | | | 0 | |
| Unique/Severity of Affected Resource | | | 1 | |
| Secondary or Off-Site Impacts | | | 1 | |
| Duration of Violation | | | 4 | <i>Significant</i> |
| B Factors (0-20) | | | | |
| Degree of Culpability | | | 15 | <i>negligence</i> |
| Compliance History of the Violator | | | 6 | <i>compliance with all rules</i> |
| Need for Deterrence | | | 10 | <i>state of development</i> |
| 2. Preliminary Gravity (A + B) x M | | | 28 x 1500 | <i>42,000</i> |
| ADJUSTMENTS TO GRAVITY | | | | |
| a. Recalcitrance (+ 0 - 200%) | | | | |
| b. Quick Settlement (-10%) | -10% | -10% | -10% | -10% |
| c. Other Factors As Justice May Require | | | | |
| 3 d. FINAL ADJUSTMENTS (3a+3b+3c) | | | | <i>-3,750</i> |
| 4. PRELIMINARY PENALTY (1-2+3d) | | | 38,250 | |
| Litigation Considerations (-10%) | | | 3,375 | |
| Inability to Pay | | | 0 | |
| Penalty Settlement Bottom-Line | | | 30,375 | |
| Proposed Penalty (To start negotiations) | | | 32,500 | |

2007 06 30 final

If no settlement, penalty is 32,500

CC I requires

108-408

*2007
V. permit or conditions. Does it require mitigation? what*

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6**

In re:

Henry R. Stevenson, Jr. &
Parkwood Land Co.

Respondents

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Docket No. CWA-06-2011-2709

DECLARATION OF BARBARA J. ALDRIDGE

Pursuant to the Regional Judicial Officer's Partial Accelerated Decision issued on April 17, 2012, and subsequent communications, the Complainant, Environmental Protection Agency ("EPA") Region 6, hereby supplements the record with the following Declaration from Barbara J. Aldridge, EPA Region 6 Environmental Protection Specialist, with regard to the penalty calculated in this matter.

I, Barbara J. Aldridge, declare as follows:

1. I am employed as an Environmental Protection Specialist and credentialed Wetlands Inspector in the Marine & Coastal Section of the Ecosystems Protection Branch, Water Quality Protection Division, EPA Region 6, Dallas, Texas.

2. I have 24 years of federal service. I have been employed with EPA since 1990. From 1995 to 2010, I was an enforcement officer in the EPA Region 6 Superfund Division. As an enforcement officer, I developed Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") enforcement cases by gathering, analyzing, and managing evidence to support cleanup and cost recovery actions related to CERCLA "Superfund" Sites. I performed litigation development and support activities in partnership with the Department of Justice in referred cases.

3. In February of 2010, I was assigned to the Wetlands Section of the Water Quality Protection Division. I perform wetland inspections, document evidence for case development and enforcement actions, and manage enforcement data for Clean Water Act (“the Act” or “CWA”) compliance and enforcement actions.

4. I have a current credential as a duly commissioned enforcement officer, authorized to conduct official investigations and inspections pursuant to all federal laws administered by the EPA.

5. As the EPA representative responsible for calculating the proposed penalty in this matter, I have personal knowledge of the matters set forth in this Declaration.

6. On July 18, 2011, the Complainant filed an Administrative Complaint under 309(g) of the Act, alleging that the Respondents violated Section 301(a) of the Act by discharging pollutants from a point source into waters of the United States without an authorized permit issued by the U.S. Army Corps of Engineers (“Corps of Engineers”). The complaint proposes a Class I penalty of \$32,500.00.

7. A Public Notice of the proposed penalty was published on July 21, 2011. On July 20, 2011, EPA notified the State of Texas of the proposed penalty. The EPA received no comments on the proposed penalty.

8. In calculating a penalty, Section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3), requires that EPA take into account (1) the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, (2) ability to pay, (3) any prior history of violations, (4) the degree of culpability, (5) economic benefit or savings (if any) resulting from the violation, and (6) such other matters as justice may require.

9. The proposed penalty in this matter is consistent with these statutory factors.

A discussion of the application of each of the Act's statutory factors in this manner follows.

10. I followed the guidance as noted in the document, "Issuance of Revised CWA Section 404 Settlement Penalty Policy," issued December 21, 2001, in the penalty calculation process.

11. As to the statutory factor (1) the nature, circumstances, extent and gravity of the violation: the Respondents discharged dredged and fill material, including dirt, wire, chunks of cement, rebar and other debris, into approximately 1.26 acres of waters of the United States, specifically jurisdictional wetlands, without a permit. The impacted area is forested wetlands immediately adjacent to and within the 100-year floodplain of the Neches River, a navigable water of the United States. I considered this violation to be serious, for the reasons outlined below.

12. One reason to consider this violation serious is that it involves a discharge without a permit. Unpermitted discharges present major challenges to the federal government's responsibility under the Act for regulating discharges to waters of the United States. The Corps of Engineers has the responsibility under the Clean Water Act to evaluate a proposed discharge of dredged or fill material to waters of the United States and the opportunity to allow it, to prohibit it, or to allow it with conditions. The permitting process also allows for public and agency input, including EPA review of proposed discharge permits. When a discharger fails to apply for a permit, the opportunity to protect the nation's waters through permit denial or permit condition is lost.

13. The unauthorized activity circumvented the permitting process under Section 404 of the Act and resulted in avoidable impacts to tidal waters of the United States, in this instant

case, segment 0601, Neches River Tidal, as identified by the Texas Commission on Environmental Quality, 2004. Specifically, the applicant has precluded the environmental protection process afforded by the EPA's *404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material (40 CFR Part 230)*, regulations which require that a less environmentally damaging practicable alternative be permitted and that all practicable measures to avoid, minimize, and mitigate impacts have been identified.

14. Another reason to consider this violation serious is the extent of impact to the aquatic environment. Wetlands provide beneficial functions to the human environment, including fish and wildlife habitat, flood protection and floodwater storage, water filtration and water quality improvement, carbon sequestration, aesthetics, recreational and educational benefits and biological productivity. According to the Fish and Wildlife Service's Report, "Status and Trends of Wetlands in the Conterminous United States, 2004-2009," forested wetlands sustained their largest losses since the 1974 to 1985 time period. An estimated 392,600 acres (158,950 ha) of forested wetland area was lost between 2004 and 2009. The loss of the forested wetlands in this case adds to the direct, indirect, and cumulative impacts to wetlands.

15. The duration of the violation is another consideration that I gave to calculating the penalty. The violation occurred from 2007 to 2010. I considered the need for deterrence and the Respondent's lack of cooperation. The Corps of Engineers included information in the case file which reported the violation by an anonymous informant. The violation is visible to the developer community in the area. Accordingly, the EPA's goal with this penalty action is to send a message of deterrence to the regulated community that these types of activities require authorization under a CWA Section 404 permit. The EPA therefore considered deterrence as a factor for increasing the penalty. On January 31, 2011, the EPA issued an Administrative

Order ("Order") for injunctive relief to the Respondents requiring them to submit a plan for the restoration of the unauthorized fill. The Respondents refused to comply with the Order. I also considered the Respondents' lack of compliance and cooperation with the Order in increasing the penalty.

16. As to the statutory factor (2) ability to pay: Respondents have not indicated an issue of inability to pay the penalty, and therefore EPA did not reduce the penalty based upon this statutory factor.

17. As to the statutory factor (3), prior history of violations: Respondents have a long history of involvement with the Corps of Engineers and the Act's Section 404 application process. The Corps has documented an extensive compliance history with the Respondents since April of 1991, including four confirmed unauthorized activities (excluding the current violation), two after-the-fact issued permits, four issued permits, three withdrawn permit applications and 12 jurisdictional determination requests.

18. As to the statutory factor (4), degree of culpability: Respondents have a long history of involvement with the Corps of Engineers and the Act's Section 404 application process. The Corps has documented an extensive history with the Respondents since April of 1991, including four confirmed unauthorized activities (excluding the current violation), two after-the-fact issued permits, four issued permits, three withdrawn permit applications and 12 jurisdictional determination requests. The Respondents cannot claim ignorance of permitting requirements.

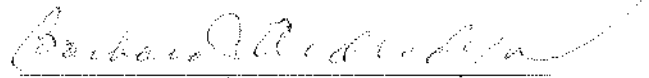
19. As to the statutory factor (5), economic benefit or savings resulting from the violation, none was estimated.

20. As to statutory factor (6), such other matters as justice may require, EPA is unaware of any such matters and did not make any adjustments to the proposed penalty based on this statutory factor.

21. The facts related to the statutory factors discussed in paragraphs above support the proposed penalty of \$32,500.00 for the discharge of pollutants from a point source into waters of the United States without an authorized permit issued by the U.S. Army Corps of Engineers.

22. I declare the foregoing to be true and correct to the best of my knowledge, information and belief under penalty of perjury.

Dated: August 1, 2012



Barbara J. Aldridge
U.S. EPA, Region 6