UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF RODNEY O. CORR,	)	
	)	DOCKET NO. CWA-04-2008-5508
RESPONDENT	)	

MOTION FOR ACCELERATED DECISION

COMES NOW the Complainant, the Water Protection Division Director, United States Environmental Protection Agency (EPA), Region 4, and, upon the accompanying brief of Wilda W. Cobb and Philip G. Mancusi-Ungaro, Associate Regional Counsels for EPA Region 4, hereby move the Court, pursuant to 40 C.F.R. §§ Sections 22.16(a) and 22.20(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits ("The Rules of Practice"), 40 C.F.R. §§ 22.16 and 22.17 for an Order granting the Complainant an accelerated decision for the violations alleged in the Administrative Complaint and the proposed penalty sought in the Complaint.

The grounds for this motion are that there exists no genuine issue of material fact with respect to liability and Complainant is entitled to a judgment as a matter of law. And Complainant has provided evidence and justification that the proposed civil penalty was properly determined in accordance with Section 309(g) of the Clean Water.

Complainant now moves for an accelerated decision finding that the violations occurred as set forth in the Complaint, and that the maximum civil penalty of $157,500

Respectfully submitted this 16th day of October 2009

Wilda W. Cobb
Atlanta Federal Center
61 Forsyth Street, S.W.
Atlanta, Georgia 30303
404-562-9530

Philip G. Mancusi-Ungaro
Atlanta Federal Center
61 Forsyth Street, S.W.
Atlanta, Georgia 30303
404-562-9519

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IN THE MATTER OF RODNEY O. CORR,	)	
	)	DOCKET NO. CWA-04-2008-5508
RESPONDENT	)	

COMPLAINANT'S BRIEF IN SUPPORT OF MOTION FOR ACCELERATED DECISION

The Complainant, the Water Protection Division Director, United States Environmental Protection Agency (EPA), Region 4, hereby submits this brief in support of its Motion for Accelerated Decision (Motion) brought pursuant to 40 C.F.R. §§ 22.16(a) and 22.20(a). As discussed in detail below, Complainant is seeking an Accelerated Decision against the Respondent on liability, and for the full assessment of the proposed administrative penalty. Respondent failed to admit, deny, or explain the majority of the specific allegations in the Complaint as required by 40 C.F.R. § 22.15. Therefore, these allegations, as a matter of law, should be deemed admitted. And as to the allegations Respondent did attempt to address, Respondent failed to clearly admit, deny, or explain these allegations as required by 40 CFR § 22.15, and no evidence or other information was provided in Respondent's Prehearing Exchange, refuting the allegations. Therefore these allegations should also be deemed admitted. Complainant has demonstrated through its pleadings and evidence that it has met the burden of showing that no genuine issue of material fact exists as to Respondent's liability and that Complainant should be awarded the proposed penalty.

Accordingly, Complainant's Motion for an Accelerated Decision on both liability and penalty should be granted. Alternatively, if Complainant's Motion for Accelerated Decision is denied with respect to the issue of the penalty or the amount of the penalty, Complainant requests that its Motion for Accelerated Decision be granted solely with respect to the issue of liability, and that a partial accelerated decision be rendered finding that Respondent violated Section 301 of the CWA, 33 U.S.C. § 1311(a).

I. FACTS

This case involves the unauthorized land clearing and filling of wetlands by or at the direction of the Respondent for the proposed construction of Cameron Bay Estates (the Site). The Site is located adjacent to Highway 603 and Farve Lane, north of Waveland, Hancock County, Mississippi. After receiving complaints from the Mississippi Department of Environmental Quality (MDEQ) (Complainant's Prehearing Exchange (PHE) Exhibit 35) the Army Corps of Engineers' Mobile District (the COE) conducted site inspections on May 26 and June 4, 2004, and discovered that the Respondent had mechanically cleared and filled approximately 12 to 14 acres of wetlands. (Complainant's PHE, Exhibit 8). The COE determined that the impacted wetlands were contiguous to the headwaters of Bayou Edwards, a tidal waterway and were federally jurisdictional wetlands as defined by 33 C.F.R. § 328.3(a)(7). (Complainant's PHE Exhibit 3). On July 6, 2004, the COE issued a Cease and Desist Order to Respondent ordering it to cease from further filling and land clearing activities on the Site. (Complainant's PHE Exhibit 3).

By letter dated July 6, 2004, the COE, in accordance with the 1989 Memorandum of Agreement between the Department of the Army and the EPA concerning Federal Enforcement of the Section 404 Program of the Clean Water Act (CWA) (1989 MOA), referred this case to

determinations which demonstrates Respondent's extensive knowledge of the CWA, Section 404 permitting requirements. (Complainant's PHE Exhibit 20).

In October 2004, EPA conducted a site investigation and found discharges of dredged and/or fill material in approximately 13 acres of jurisdictional wetlands. EPA also discovered that Respondent had improperly implemented Best Management Practices (BMPs) that failed to contain sediment on the Site. (Complainant's PHE Exhibit 5 and Exhibit 6). In April 2005, EPA issued an Administrative Order (AO) pursuant to Section 309(a) of the CWA, 33 U.S.C §§ 1251 et seq., to Respondent ordering the Respondent to cease work in waters of the U.S. and to submit a restoration plan for the impacted wetlands. (Complainant's PHE Exhibit 1). Respondent advised EPA, by letter dated, May 9, 2005, from attorney Terese T. Wyly, that Respondent did not need to comply with the AO because the wetlands were not waters of the U.S. (Complainant's PHE Exhibit 2).

In August 2005, Hurricane Katrina battered the Gulf Coast and in September 2005, EPA conducted a follow up Site visit. EPA attempted to contact the Respondent following the Site visit and learned that Respondent had sold the Site and moved out of State. All communications EPA sent to Respondent, after the 2005 Site visit, were returned as undeliverable and, despite repeated attempts, EPA staff was unable to contact the Respondent.

In 2006, EPA learned that the Site had been purchased by Mr. Victory Planetta. (Complainant's PHE Exhibit 19). In September 2008, Mr. Planetta provided EPA with contact

information for Respondent and EPA immediately filed an Administrative Complaint pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), which was hand delivered, on September 19, 2008, to the Respondent in Granbury, Texas.

II. RELIEF SOUGHT BY COMPLAINANT

Complainant now moves for accelerated decision, pursuant to 40 C.F.R. §§ 22.16(a) and 22.20(a), for an Order:

(1) Granting EPA judgment as a matter of law as to liability, finding that Respondent is liable for the discharge of dredged or fill material into waters of the U.S. without complying with the permitting requirements of Sections 301(a) and 404(a) of the CWA, 33 U.S.C. §§ 1311(a) and 1344(a); and

(2) Finding that a penalty of $157,500 assessed against Respondent is appropriate for the violation of Sections 301(a) and 404(a) of the CWA, 33 U.S.C. §§ 1311(a) and 1344(a).

III. STANDARD FOR ACCELERATED DECISION

The proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22 (Rules of Practice). Section 22.20(a) of the Rules of Practice authorizes the Administrative Law Judge "to render an accelerated decision as to any or all parts of a proceeding...if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." The motion for accelerated decision is essentially equivalent to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.[1]

"Disputed issues must involve 'material facts' or those which have legal probative force as to the controlling issue. A 'material fact' is one that makes a difference in the litigation." In

[1] It is well established through a long line of decisions by the Office of Administrative Law Judges and the Environmental Appeals Board, that this procedure [motion for accelerated decision] is analogous to the motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. (*See e.g.*, In re CWN Chemical Service, Inc., 6 E.A.D. 1, 95 EPA App. (May 8 1995) and Harmon Electronics, Inc., RCRA No. VII-91-H0037 (August 17, 1993).

the Matter of Ensco, Inc., Docket No. TSCA-VI-532C, Orders, p. 19 (May 7, 1992). And, while the "[t]ribunal may look to the record as a whole in deciding upon a motion for accelerated decision the burden of coming forward with the evidence in support of their respective positions rests squarely upon the litigants." In the Matter of: Four Quarters Wholesale, Inc., FIFRA Docket No. 9-2007-2008 (2008 EPA ALJ LEXIS 21) (May 29, 2008).

IV. NO GENUINE ISSUE OF MATERIAL FACT EXISTS

The Complaint filed on September 4, 2008, in this matter met all the requirements of 40 C.F.R. § 22.14(a) of the Rules of Practice including: a statement on the sections of the CWA authorizing the issuance of the complaint; a specific reference to each section of the CWA which respondent is alleged to have violated; a concise statement of the factual basis for each violation; notice of Respondent's right to a request a hearing; and a copy of the Rules of Practice.

An unpermitted discharge, as occurred in this case, is the archetypal CWA Section 404 violation, and subjects the discharger to strict liability. United States v. Pozsgai, 999 F.2d 719, 725 (3d Cir. 1993). To establish a *prima facie* case that Respondent violated Section 301(a) of the CWA, 33 U.S.C. § 1311(a), Complainant must show that:

(1) Respondent is a "person" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5);

(2) Respondent "discharged a pollutant" within the meaning of Sections 502(6) and 502(12) of the CWA, 33 U.S.C. §§ 1362(6) and 1362(12);

(3) Respondent's discharge of a pollutant was from a "point source" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14);

(4) Respondent's discharge of a pollutant was to "navigable waters" within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7); and

(5) Respondent did not have a permit issued pursuant to Section 404(a) of the CWA, 33 U.S.C. § 1344(a).

As discussed below, Complainant has clearly established the elements of a violation of the CWA and Respondent did not answer or refute the majority of the allegations. As to the other disputed allegations, Respondent did not identify or clearly articulate the circumstances or arguments which Respondent disputes, nor did Respondent allege facts to constitute the grounds for any defense.

A. RESPONDENT FAILED TO ADMIT, DENY, OR EXPLAIN EACH ALLEGATION

The Rules of Practice specifically address the contents of the answer that must be filed. 40 C.F.R. §22.15(b) requires:

> "The answer shall clearly and directly admit, deny or explain each of the factual allegations contained in the complaint with regard to which respondent has any knowledge. Where respondent has no knowledge of a particular factual allegation, and so states, the allegation is deemed denied. The answer shall also state: The circumstances or arguments which are alleged to constitute the grounds for any defense; the facts which respondent disputes; the basis for opposing any proposed relief; and whether a hearing is requested. (Emphasis added).

Respondent purportedly filed two separate answers to the Complaint. The first answer was filed with the Regional Hearing Clerk on December 23, 2008 (First Answer),[2] but was not served on the Complainant. The second answer was filed with the Regional Hearing Clerk on March 3, 2009 (Second Answer), (the First Answer and Second Answer are herein sometimes collectively referred to as the Answers). Accompanying the Second Answer was a cover letter

[2] The Respondent requested an extension of time from the Complainant to file the First Answer, but did not file that request with the Regional Hearing Clerk. Ultimately, Complainant provided that request to the Regional Hearing Clerk and the Regional Judicial Officer granted an extension. The First Answer was filed with the Regional Hearing Clerk but not served on Complainant.

stating: "[p]lease take this as an answer to this Administrative Complaint" and it was signed by the Respondent. Respondent did not seek permission from the Court to file the Second Answer as required by § 22.15(e) of the Rules of Practice.[3]

Neither the First Answer nor the Second Answer complied with 40 C.F.R. § 22.15 of the Rules of Practice. As noted above, 40 C.F.R. § 22.15(b) requires that "[t]he answer shall clearly and directly admit, deny or explain each of the factual allegations contained in the complaint with regard to which respondent has any knowledge." (Emphasis added). In addition, 40 C.F.R. § 22.15(d) states that "[f]ailure of respondent to admit, deny or explain any material factual allegation contained in the complaint constitutes an admission of the allegation." As discussed below, Respondent's Answers neither admit, deny or explain the majority of the allegations contained in the Complaint. And the limited number of allegations Respondent did attempt to deny or explain were not clearly identified. No facts were provided which would support any denial, and no circumstances or arguments were alleged that would explain the grounds for any defense.

Specifically, allegations which were clearly neither admitted, denied, or explained in Respondent's Answers and Complainant's basis for the allegation are as follows:

1. Complaint Paragraph 9 – "Respondent, at all times relevant to this Complaint, was the owner and operator of the Site." Respondent purchased the property in 2002 and owned the property during the period it was cleared and filled (Complainant's PHE Exhibits 10, 19, 20, 37 and 38);

[3] As discussed in during the July 15, 2009 conference call with Judge Gunning, Respondent did not always serve all documents on all parties. Complainant is providing the Court with two lists of the documents filed by Respondent with EPA Region 4, and the Regional Hearing Clerk to clarify which documents were served on which parties. See Attachments 1 and 2 to this Motion.

2. Complaint Paragraph 10 - "Respondent is a person within the definition set forth under Section 502(5) of the CWA, 33 U.S.C. § 1362(5)." Section 502(5) of the CWA defines person to include an "individual." Respondent is clearly an individual and is a person as defined by the CWA;

3. Complaint Paragraph 13 - "The discharged dredged and/or fill material, including earthen material deposited at the Site, are "pollutants" as defined under the CWA § 502(6)." The definition of "pollutant" at Section 502(6) of the CWA, 33 U.S.C. § 1362(6) includes, among other materials, "dredged spoil, biological materials, rock, sand, [and] cellar dirt." Respondent land cleared, graded and filled the Site with soil and rock thereby discharging pollutants. (Complainant's PHE Exhibits 7, Attachments Q and R, 17, and 19);

4. Complaint Paragraph 15 - "The earth moving machinery employed by the Respondent to deposit the dredged and/or fill material at the Site are "point sources" as defined under the CWA § 502(14)." Respondent cleared and filled the Site with earthen materials using equipment including a bulldozer. (Complainant's PHE 9 and 13). There is ample case law that establishes that equipment and machinery such as bulldozers qualify as "point sources." *See, e.g.,* U.S. V. Tull, 615 F.Supp. 610 (E.D.Va. 1983) aff'd, 769 F2d 183 (4th Cir.);

5. Complaint Paragraph 16 - "Respondent's placement of the dredged and/or fill material at the Site constitutes a "discharge of pollutants" as defined under the CWA § 502(12)." Discharge of a pollutant is defined as any addition of any pollutant to navigable waters. The filling of the wetlands with earthen materials therefore is a "discharge of a pollutant" within the meaning of Sections 502(6) and 502(12) of the CWA, 33 U.S.C. §§ 1362(6) and 1362(12);

6. Complaint Paragraph 17 – "At no time during the discharge of dredged and/or fill material at the Site did the Respondent possess a permit under Section 404 of the CWA,

33 U.S.C. § 1314 authorizing the activities performed by Respondent." Under Section 404, a permit is a legal prerequisite to discharges of the type described above. Respondent admits that he did not obtain a Section 404 permit before initiating work in the discharge area. (Complaint's PHE Exhibit 2);

7. Complaint Paragraph 18 - "Each day the material discharged by the Respondent remains in waters of the United States without the required permit under Section 404 of the CWA, 33 U.S.C. § 1344, constitutes a day of violation of Section 301 of the CWA, 33 U.S.C. § 1311." *See* Sasser v. Administrator, EPA, 990 F2d 127, 129 (4th Cir. 1993) finding that for purposes of calculation of penalties, every day unauthorized fill remains in place is a separate day of violation.

Each allegation in the Complaint that was neither admitted, denied, or explained is automatically deemed admitted under the Rules of Practice, which thereby constitutes an admission of liability in this case.

B. ALLEGATIONS THAT MAY BE DEEMED DENIED OR EXPLAINED

The Rules of Practice 40 C.F.R. § 22.15(b) provides that, "[t]he answer shall also state: The circumstances or arguments which are alleged to constitute the grounds for any defense." Defendant did not specifically identify any defenses in his answers, nor clearly deny any of the allegations. However read in a light most favorable to Defendant, three of the allegations may be deemed denied or explained. While general assertions were made by Respondent in the Answers, no facts or explanations were provided as support. The allegations which could be deemed denied or explained and Complainant's response are as follows:

1. Complaint Paragraph 11- "Commencing on or about May 26, 2004, Respondent, or those acting on behalf of the Respondent, discharged dredged and/or fill material into wetlands

on the Site using earth moving machinery, during unauthorized activities associated with the clearing and filling of wetlands for commercial development." Respondent's First Answer provides contradictory responses to this allegation. Respondent first states that the Site was cleared and filled prior to his purchase of the property. (First Answer at paragraph 1). Later in the same Answer, Respondent states: "[m]y activities on the site during the complaint period included only grading and filling a previously cleared and filled site devoid of any significant vegetation or hydric accumulations." (First Answer at paragraph 3). Respondent appears to argue that because the area was already filled, his addition of fill material is not a violation of the CWA. However, illegal fill does not render subsequent unauthorized fills legal nor does it change the status of Waters if U.S. to non-Waters of the U.S. Such an argument would stand the Section 404 permit requirements on their head. It is a violation to place any fill in waters of the U.S. unless authorized under Section 301(a) of the CWA, which prohibits the discharge of dredged spoil or fill material into "navigable waters," except in accordance with a permit issued by the Secretary of the Army, acting through the COE, under Section 404(a) of the CWA.

Although Respondent provides no evidence to support his claim that the Site was filled before his purchase, aerial photographs included in the Complainant's record show that there was some limited clearing near the entrance of the property between, February 4, 1998, and February 2, 2003. (See February 4, 1998, and February 2, 2003, Aerial Photographs, Complainant's PHE Exhibit 15). However a later photograph clearly shows that between February 2, 2003, and October 1, 2004, the Site was completely cleared and filled. (See October 1, 2004 Aerial Photograph, Complainant's PHE Exhibit 15). Respondent purchased the property in May 2002. (Complainant's PHE Exhibit 37). Therefore, while there may have been some limited clearing

and filling prior to Respondent's ownership, the majority of the clearing and filling activities were conducted while Respondent was the landowner.

Even if the limited portion of the Site had already been filled prior to Respondent's ownership, as previously stated the Site remained a jurisdictional wetland. Respondent admitted that he placed additional fill on top of unpermitted fill, and the aerial photographic evidence proves he cleared and filled a majority of the property, thus Respondent's assertions should be deemed an admission that he discharged dredged and/or fill material on the Site.

2. Complaint Paragraph 12- "Respondent impacted approximately 14 acres of wetlands that are adjacent to Edwards Bayou, which is tributary to the Jourdan River, a navigable water of the United States." And, Paragraph 14 -"Prior to Respondent's activity described above, the Discharge Area was a "water of the United States" within the meaning of Section 502(7) of the CWA, 33 U.S.C. Section 1362 (7) and associated regulations." Respondent appears to deny both of these allegations as they relate to jurisdictional waters through a general statement, that there were no jurisdictional wetlands impacted on the Site.[4] The only support provided for this assertion is a reference in the Second Answer to In Re Needham, 354 F.3D 340 (5th Cir. 2003). Respondent provides no analysis or explanation of how the Needham case applies to the matter at hand.

However, even if Needham is given consideration by the Court, it is factually distinct from the instant case. Needham is an Oil Pollution Act (OPA) case and did not involve Section 404 of the CWA or wetlands.[5] Moreover, Needham was decided before the recent Supreme

[4] Respondent does not admit, deny or explain the allegation that there were 14 acres of fill, so this portion of the allegation should also be deemed admitted.
[5] OPA, and all other statutes that involve jurisdictional waters of the US use the same definition of waters of the U.S.

Court decision on the scope of CWA jurisdiction, Rapanos v. United States, 547 US 715, 126 S. CT. 2208, 165 l ED 2d 159 (2006). Needham involved a discharge of oil "from a containment basin into an adjacent drainage ditch.... the drainage ditch ultimately leaked into Bayou Cutoff, the flow of Bayou Cutoff is diverted to Bayou Folse by a dam, and Bayou Folse flows into Company Canal...the flow from Company Canal eventually flows into the Gulf of Mexico. The facility itself is some 60 miles from the shoreline." Id. at 342 . The court in Needham, focusing on the relationship of the discharge area to navigable Gulf of Mexico, found "that the connection between the actual oil spill and navigable waters is too tenuous to find that the OPA applies." Id at 343. In the instant case Respondent impacted wetlands that are adjacent to the headwaters of Edwards Bayou. The headwaters of Edwards Bayou at the Site, are a non-navigable, relatively permanent water body, which less than one mile below the Site, becomes a tidally influenced traditional navigable water (TNW).

Further, there is a more recent case in the 5th Circuit that has similar facts to the case at hand, and clearly supports Complaint's jurisdictional assertion. United States v. Robert J. Lucas, 516 F.3D 316 (5th Cir. 2008), petition for cert. denied, 129, S. Ct. 116, L.Ed. 2d 36 (October 15, 2008). The Lucas case involved Defendants who subdivided property into housing lots and designed septic systems in wetlands. The Defendants represented that the lots were dry land that could be developed without COE permits. The wetlands at issue in Lucas were similarly situated to the wetlands in the case at hand. In Lucas the water from the wetlands on the property drained directly into several tributaries exiting the property and eventually flowing into either Bayou Costapia, the Tchoutacabouffa River, the Back Bay of Biloxi, Old Fort Bayou, or the Pascagoula

River, all TNWs. The Appellate Court in Lucas found that the wetlands were jurisdictional under either of the "Kennedy" or "Scalia" tests established by the Supreme Court in Rapanos.[6]

The waters at issue in this case are wetlands abutting the non-navigable, relatively permanent headwaters of Edwards Bayou. Less than 1 mile from the Site, Edwards Bayou becomes a TNW. Therefore, the waters meet the "Scalia Test" as set forth in Rapanos. The "Kennedy Test" is also met as the waters have a significant nexus to Edwards Bayou because of their important ecological, physical and biological functions that support the chemical, physical and biological integrity of Edwards Bayou. These functions include; floodwater storage, storm water, nutrient and sediment retention, and maintenance of base flows to Edwards Bayou. The wetlands also provided a habitat for indigenous flora and fauna that populate the length of Edwards Bayou." (Complainant's PHE Exhibit 7). A Jurisdictional Assessment, included in Complainant's Exhibits was prepared by Region 4's wetlands expert Michael M. Wylie and includes a full and complete analysis of the hydrology, soils and vegetation at the Site, clearly demonstrating that the waters at the Site are jurisdictional under the CWA. (Complainant's PHE Exhibit 7). Mr. Wylie's curriculum vitae is also included in Complainant's Prehearing Exchange. (Complainant's PHE Exhibit 31).

Given Respondent's failure to properly admit, deny, or explain the allegation concerning jurisdiction in either of his Answers, these allegations should be deemed admitted. Further,

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[6] Following the decision in Rapanos the COE and EPA issued the "Joint Memorandum Concerning Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States." (Joint Memorandum) (Complainant's PHE Exhibit 7 Attachment J). This Joint Memorandum identifies those waters over which the agencies will assert jurisdiction. The Joint Memorandum adopts the two tests set out by the Court in Rapanos for asserting jurisdiction over waters of the US.. Jurisdiction is established by meeting either of the standards. The first standard referred to as the "Scalia Test" is based on the plurality opinion in the decision, and the second standard is based on the concurring opinion of Justice Anthony Kennedy, and is called the "Kennedy Test." The tests are explained in detail in the Joint Memorandum and are applied to wetlands in this case in Mr. Wylie's Jurisdictional Assessment. (Complainant's PHE Exhibit 7).

Respondent has not provided a valid defense to any of the allegations set forth in the Complaint. The general assertions made by Respondent are not supported by any facts or explanations. It is unequivocally clear that Respondent has not provided any evidence that a genuine issue of a material fact exists, and therefore Complainant is entitled to judgment on Respondent's liability.

C. RESPONDENT'S PREHEARING EXCHANGE FAILS TO REBUT THE ALLEGATIONS

On March 4, 2009, Judge Gunning issued a staggered Prehearing Order directing the parties to strictly comply with the Rules of Practice and to prepare for hearing. By providing a staggered schedule, Respondent had the opportunity to review Complainant's Prehearing Exchange, and in addition to meeting the requirements identified below, had the opportunity to rebut EPA's case. Respondent did not take advantage of that opportunity. The March 4, 2009 Order directed that each party to submit *inter alia*:

> 1) the names of expert or other witnesses it intends to call at the hearing, together with a brief narrative summary of each witness' expected testimony, or a statement that no witnesses will be called;
>
> 2) copies of all documents and exhibits which each party intends to introduce into evidence at the hearing. The exhibits should include curriculum vitae or resume for each proposed expert witness. If photographs are submitted, the photographs and must be actual unretouched photographs.
>
> 3) a statement expressing its view as to the place for the hearing and estimated amount of time needed to present its direct case.

On April 21, 2009, the Complainant timely filed its initial Prehearing Exchange. Complainant submitted the names of witnesses along with statements regarding the witnesses' expected testimony. Complainant also provided copies of expert witness's curriculum vitae or

resume. Complainant also provided documents and exhibits relevant to the action and that it proposed to submit as evidence at hearing proving every element of its case and proving all allegations set forth in the complaint.

Respondent's Prehearing Exchange was due on May 21, 2009. On May 27, 2009, Judge Gunning issued an "Order to Show Cause" directing the Respondent to show cause, on or before June 12, 2009, why Respondent failed to meet the May 21, 2009, filing deadline for the Prehearing Exchange. On June 23, 2009, Respondent filed "Respondent's Order to Show Cause for Extension of Time for Prehearing Exchange for Administrative Order." On July 15, 2009, Judge Gunning issued an Order granting an extension of time for Respondent's Initial Prehearing Exchange. Respondent was given until August 21, 2009, to file its Prehearing Exchange. On August 21, 2009, Respondent filed its Initial Prehearing Exchange.

Despite the extensions granted to Respondent, and the July 15, 2009 conference call with Judge Gunning, the Prehearing Exchange Respondent filed on August 21, 2009, was still incomplete. It does not comply with the March 4, 2009 Prehearing Order issued by Judge Gunning nor with 40 C.F.R. § 22.19 of the Rules of Practice. The narrative summary of the witness' testimony provided is so vague that Complainant cannot determine what the testimony will be or if it is a fact or an expert witness. Additionally, in the March 4, 2009 Prehearing Order, the parties were instructed to provide curriculum vitae or resume for each proposed expert witness. No curricula vitae or resumes were provided by Respondent for any of the named witnesses.

The evidence submitted by the Respondent in his Prehearing Exchange provides no support or explanation for his assertion that the Site property is not jurisdictional nor did it rebut the allegation that Respondent contributed to the discharge of dredged or fill material on the Site.

It appears that no expert witnesses are named, and 49 of the 107 exhibits provided were documents referring to other violations at different properties which are irrelevant and immaterial to this action, under 40 C.F.R. § 22.22(a) of the Rules of Practice.

In sum, Respondent produced no evidence or expert testimony to support the assertion the wetlands are not jurisdictional nor is Respondent's reliance on the Needham relevant or appropriate. The Respondent failed to provide any relevant evidence to rebut the alleged violations in the Complaint, and even if Respondent's vague and broad statements made in the Answers could be treated as a general denial, the mere assertion of a factual dispute will not defeat a properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 US 242, 256 (1986).

V. PENALTY

On June 16, 2009, consistent with the March 4, 2009, "Prehearing Order," and 40 C.F.R. § 22.19(a)(3), Complainant filed its penalty calculation specifying a proposed penalty of $157,500 with an explanation as to how the penalty was determined based on the statutory factors set out in CWA Section 309(g)(3), 33 U.S.C. § 1319(g)(3), and EPA policy and guidelines. Under 40 C.F.R. § 22.19(a)(3), Respondent was required to "explain in its prehearing information exchange why the proposed penalty should be reduced or eliminated." Respondent did not address the specific basis for the penalty as required, therefore the basis for the penalty, or the amount of the penalty, is not in dispute.

When a complaint is issued, a respondent's ability to pay the proposed penalty may be presumed until the respondent raises in its answer the issue of ability to pay and if the respondent does not raise the claim in its answer or fails to produce evidence in support of its claim then it may be concluded that any objection to the penalty based on ability to pay has been waived

under the Rules. *See* In the Matter of: City of St. Charles, Docket No. CAA-05-2008-0003 (2008 EPA ALJ LEXIS 25) (June 30, 2008).

Although Respondent submitted tax returns that arguably could invoke an inability to pay claim, there was no analysis of the returns or explanation as to why the returns were included in Respondent's Prehearing Exchange. Respondent did not make an ability to pay claim or provide adequate support for such a claim in either his Prehearing Exchange or in his Answers.[7]

Therefore, as Respondent has not provided any information to EPA that would warrant any reduction in penalty EPA, believes that the existing record is uncontroverted in its support for imposition of the statutory maximum penalty of $157,500. Accordingly, Complainant contends that an accelerated decision with respect to the penalty amount is appropriate in this case.

IV. CONCLUSION

Reviewing the record as a whole it is clear that the violation occurred as set forth in the Complaint; that there are no genuine issues of material fact; and Complainant is entitled to judgment as a matter of law; and that the statutory maximum penalty of $157,500 is appropriate.

Accordingly, Complainant requests that this Motion for Accelerated Decision be granted. Alternatively, if Complainant's Motion for Accelerated Decision is denied with respect to the issue of the penalty or the amount of the penalty, Complainant requests that its Motion for Accelerated Decision be granted solely with respect to the issue of liability, and that a partial

[7] Respondent failed to complete the Ability to Pay questionnaire sent to him by Complainant. The questionnaire was sent certified mail, return receipt request. Complainant received the green card showing Respondent received the forms on August 26, 2009. A cover letter, sent with the forms requested that Respondent return the forms within two weeks. The letter advised Respondent if there were questions or concerns he should contact EPA and was provided a phone number for EPA's financial analyst. The forms have not been returned and Respondent has not contacted EPA.

accelerated decision be rendered finding that Respondent violated Section 301 of the CWA, 33 U.S.C. § 1311(a).

Respectfully submitted,

Wilda W. Cobb
Associate Regional Counsel
U. S. Environmental Protection Agency, Region 4

Philip Mancusi-Ungaro
Associate Regional Counsel
U. S. Environmental Protection Agency, Region 4

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and a copy of the foregoing Motion for Accelerated Decision, with the accompanying Complainant's Brief in Support of Motion for Accelerated Decision, were hand delivered to the Regional Hearing Clerk, and that a true and accurate copy was served via facsimile and U.S. Mail, Return Receipt Requested, to the Administrative Law Judge and to Respondent as follows:

Original by Hand-Delivery: Ms. Patricia Bullock
Regional Hearing Clerk
U.S. EPA, Region 4
61 Forsyth St.
Atlanta, GA 30303

Copy by fax and U.S. Mail: Honorable Barbara A. Gunning
Office of Administrative Law Judges
U.S. EPA
Mail Code 1900L
401 M Street, S.W.
Washington, DC 20460
Fax Number (202) 565-0044

Mr. Rodney Corr
5315 Mission Circle
Grandbury, TX 76049

Mr. John Milner, Esq.[8]
Brunini Gratham Et al
PO Box 119
Jackson, MS 39205
Phone 601-960-6842
Fax Number 601-960-6902

DATE: 10/14/09

Environmental Accountability Division
U.S. EPA Region 4

[8] Mr. Milner has contacted EPA and indicated that he is representing Mr. Corr in this matter.

ATTACHMENT 1

Documents Respondent Served on Complainant

November 10, 2008	Request for additional time to respond to Complaint
March 3, 2009	Answer to Administrative Complaint (Second Answer) (Note that the document served on Complainant is different than the document than that was filed with the Clerk)

Documents Respondent filed with the Regional Hearing Clerk

December 23, 2008	Letter Answer (First Answer)
March 3, 2009	Answer to Administrative Complaint (Second Answer) **(Attached to this filing was a cover letter sent to the Clerk stating "{p}lease take this as an answer to this Administrative Complaint.")**
June 16, 2009	"Respondents Order To Show Cause for Extension of Time For Prehearing Exchange For Administrative Order"
Jun 23, 2009	"Respondents Initial Preheating [sic] Exchange"