

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

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HEARING CLERK

COMPLAINANT'S PENALTY CALCULATION

By Order of Administrative Law Judge Barbara A. Gunning, dated March 4, 2009, Prehearing Order, Complainant, the United States Environmental Protection Agency (EPA), respectfully submits this document specifying a proposed penalty with an explanation as to how the penalty was determined based on the Clean Water Act (CWA) and Agency policy and guidelines.

For each violation of Sections 301 and 404 of the CWA, 33 U.S.C. §§ 1311 and 1344, which occurred after January 30, 1997, Under Section 309(g)(2) of the CWA, 33 U.S.C. § 1319(g)(2), the Administrator may assess a civil penalty of up to \$11,000 per violation per day, not to exceed a maximum of \$137,500, for violations of Section 301(a) and 404 of the CWA, 33 U.S.C. § 1311(a) and 1344. Consistent with the Civil Monetary Penalty Inflation Adjustment Rule, the upper limit of such penalties has been increased to \$157,500 for violations occurring after March 15, 2004. 69 Fed. Reg. 7121 (Feb. 13, 2004). Based upon the facts alleged in the Administrative Complaint, and as described below, EPA Region 4 hereby proposes that Respondent pay the maximum penalty amount of \$157,500 for the violations stated in the Complaint.

In this case, Respondent mechanically cleared and filled approximately 12 to 14 acres of wetlands without a U.S. Army Corps of Engineer (COE) CWA, Section 404 permit. The COE investigated the case and issued a cease and desist order to Mr. Corr on July 6, 2004. By letter dated July 6, 2004, the COE, in accordance with the Memorandum of Agreement between the Department of the Army and the Environmental Protection Agency concerning Federal Enforcement for the Section 404 Program of the Clean Water Act, transferred the Corr enforcement case to EPA because Mr. Corr was deemed a flagrant and repeat violator

In October 2004, EPA investigated the Site and found discharges of dredged and/or fill material in approximately 13 acres of jurisdictional wetlands and poorly implemented best management practices (BMPs) that failed to contain sediment on the Site. EPA issued an Administrative Order in April 2005, ordering Respondent to cease work in waters of the U.S. and to submit a restoration plan for the impacted wetland acreage. Respondent responded to the Order, stating that he disagreed with the findings of violation and that the waters were not jurisdictional and refused to comply.

Respondent has developed many properties along the Mississippi gulf coast; obtained numerous COE permits and clearly has extensive knowledge of the CWA, section 404 permitting requirements. The impacted wetlands in this case are abutting wetlands to the perennial headwaters of Edwards Bayou, a navigable water of the United States. Therefore, the forested wetlands are waters of the United States in accordance with the joint Corps/EPA Rapanos guidance issued on June 5, 2007, and revised on December 2, 2008. The forested wetlands on the Site also 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, stormwater, 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. The wetlands also transferred carbon and nutrients to Edwards Bayou through particulate and dissolved matter that supports the life cycles of Edwards Bayou's aquatic flora and fauna. (See Complainant's Prehearing Exchange Statement Exhibit 7)

EPA believes a significant penalty is appropriate because the violation was willful and is significant in terms of adverse environmental effects and economic benefit to Respondent; and the statutory factors outlined below justify the assessment of a maximum penalty of \$157,500.

In assessing a penalty, EPA takes into account the factors identified in section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), including the nature, circumstances, extent and gravity of the violation, the ability of Respondent to pay a penalty, the prior history of Respondent regarding such violations, the degree of culpability of Respondent, the economic benefit or savings accrued by Respondent as a result of the violation, and such other matters as justice may require. Following is a discussion of these factors.

A. The nature, circumstances, extent, and gravity of the violations

Respondent conducted unauthorized discharges of pollutants from a point source into navigable waters by mechanical clearing and discharging one to three feet of dredged and/or fill material into forested wetlands contiguous to Edwards Bayou. In addition, Respondent failed to install or maintain proper Best Management Practices on-site such as silt fencing prior to clearing and grubbing. As a result, a substantial amount of sediment was allowed to wash into Edwards Bayou.

The impacted wetlands contiguous to Edwards Bayou provided important water quality functions to the Bayou, including: 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. The wetlands transported carbon and nutrients to Edwards Bayou through particulate and dissolved matter that is imperative for the support of the life cycles of Edwards Bayou's aquatic flora and fauna. These critical wetland functions have been lost at the Site as a result of the Respondent's activities.

The area of the violation is considered to be sensitive because it is located in a coastal area that, at the time of the violation, was experiencing rapid urban and casino development. The loss of Respondent's thirteen forested acres is made more significant by the fact that wetland acreage is a diminishing resource in the increasingly urban environment along the Mississippi gulf coast. Because of the continued loss of wetlands along the coast, regulatory agencies are less willing to allow permits without a rigorous review, particularly applications for such a large impact.

Given the size, location and duration of the violation, EPA considers this factor to be of MAJOR environmental significance.

B. Prior History of Such Violations

Respondent has had at least two previous section 404 violations with the COE including; the Ireland Street and St. Joseph Street properties. Further, the expected testimony of Mr. Jamie Bean, the owner of Bean Excavating and Dirt Work, will show that Respondent made a regular

practice of filling wetlands, and had developed a method of concealing his activities to avoid detection by local regulatory officials.

C. Degree of Culpability

The degree of culpability is extremely high in this case. Respondent is a developer in coastal Mississippi and has made over 42 permitting requests from the COE since July 2000. During a site inspection on October 18, 2004, by EPA's Mike Wylie, Respondent stated to Mr. Wylie that he knew the Site contained wetlands but that they were not jurisdictional because of the 5th Circuit's Needham case. This demonstrates a detailed knowledge of the section 404 permitting process and the law, and proves that Respondent made a conscious decision to forego application for a COE permit on the Cameron Bay Estates property.

Respondent sold the property prior to resolving EPA's enforcement action. Respondent failed to disclose the details of the violation to the purchaser. Respondent removed the cease-and-desist posting from the property prior to the purchaser's site inspection to further conceal the matter.

Respondent's extensive knowledge and understanding of the section 404 permitting process, his efforts to conceal his actions, and his failure to disclose an ongoing enforcement matter from a prospective buyer, demonstrates a flagrant disregard for Respondent's known legal responsibilities. EPA considers this factor to be of MAJOR compliance significance.

D. Economic Benefits or Savings

EPA has not yet been able to calculate an exact monetary amount for the economic benefit realized by Respondent as a result of the violation, as all information has not yet been made available. However, it is indisputable that a substantial benefit was realized. The primary

benefit was realized by avoiding the cost and delay of permitting and mitigation. A thirteen acre wetland impact would have exceeded the acreage limits for a COE nationwide 404 permit, so Respondent would have been required to conduct the more rigorous and costly environmental assessment required by an individual permit application. A COE permit would have required efforts towards avoidance and minimization of wetland impacts, therefore by avoiding the permitting process, Respondent was able to maximize the developable area by filling the entire Site.

Respondent sold the property to Mr. Victory Planetta as a fully filled and developable tract. This means that Mr. Planetta bought the property at a price commensurate with the assurance that the entire tract was buildable and that no permits or mitigation were required. Mr. Planetta is expected to testify to the details of the purchase of the property, including the purchase price. Mr. Planetta will also testify as to the cost of the permitting and mitigation he was required to do because of Respondent's illegal filling of the Site.

As stated above, prior to 2005, coastal Mississippi was experiencing aggressive development with the influx of casinos and the rising demand for housing. Had Respondent's violation not been detected, Respondent stood to realize a significant profit in the development and sale of Cameron Bay Estates. Wetlands are valued considerably lower than uplands in a real estate market because of their limited development potential. Purchasing land at a reduced cost, then filling the property, and selling it at upland values would net a substantial gain, compared to those in the regulated community who follow the law and pay more for land that doesn't require permitting or pay the costs associated with permitting and mitigation for wetland fill.

Because of the economic benefit that Respondent stood to gain through the alleged violation, EPA considers this factor to be of MAJOR compliance significance.

E. Ability to Pay

Respondent has suggested that he has an inability to pay a penalty, however the Agency has not yet seen documentation to support this assertion. Respondent is an established developer and owns many properties in the southeast. As recently as July 2008, Respondent's name was associated with two properties in Granbury, Texas, one of which was listed for sale at \$865,000.

Given the lack of information regarding Respondent's inability to pay a penalty, Respondent's failure to provide the documentation as required by the Rules and Judge Gunning's Order EPA does not consider this a substantive factor in any assessed penalty.

F. Such Other Matters as Justice Requires

The evidence in this case will show that the Respondent conducted excavation and fill activities with knowledge of the legal requirements and the illegal nature of his conduct. The nature, circumstances, extent and gravity of the violation, and Respondent's prior history of such violations was of major significance in the determination of a penalty amount. Moreover, the degree of culpability and the economic benefit resulting from the violation were both of major significance in determining an appropriate penalty. A sizeable penalty would have a deterrent effect for both Respondent and the rest of the development community.

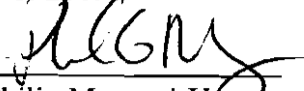
As stated above, EPA proposes that Respondent pay the maximum penalty amount of \$157,500 for the violations stated in the Agency's Administrative Complaint. Respondent has not presented any information to EPA that would warrant any reduction in the penalty and, barring the submission by Respondent of information relevant to the statutory penalty factors,

EPA believes that the existing record supports an imposition of the statutory maximum penalty of \$157,500.

Respectfully submitted, this 16th day of June 2009.



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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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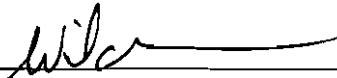
Rodney O. Corr)

RESPONDENT)
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) Docket No.: CWA-04-2008-5508
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CERTIFICATE OF SERVICE

I certify that the foregoing Penalty Calculation dated June 16, 2009, was sent this day in the following manner to the addresses listed below.



Wilda Cobb
Attorney

Original and one Copy hand delivered to:

Patricia Bullock
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US EPA/ Region 4
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Copy sent Regular Mail to:

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Copy sent by Regular Mail to:

The Honorable Barbara A. Gunning
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