**UNTIED STATES**
**ENVIRONMENTAL PROTECTION AGENCY**
**REGION 6**

In the Matter of

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

Docket No. CWA-06-2011-2709

Respondents

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**RESPONDENT'S RESPONSE TO COMPLAINTANT'S MOTION FOR ACCELERATED DECISION AS TO BOTH LIABILITY AND PENALTY**

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

## I. Standard of Review

1. 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)(emphasis added). 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).

2. 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 "genuine" if "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

## II. Rules

3. Congress passed the Clean Water Act (hereinafter "CWA") in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251. To that end, the CWA prohibits the discharge of pollutants into navigable waters. *See id.*; §§1311(a), 1362(12)(A). The CWA defines navigable waters as "the waters of the United States, including the territorial seas." 33 U.S.C. §1362 (7). Although the U.S. Corps of Engineers (hereinafter "the Corps") initially construed this definition to cover only waters navigable in fact, "in 1975 the waters of the United States' to include not only actually navigable waters but also tributaries of such waters" and "freshwater wetlands that were adjacent to other covered waters." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123-24 (1985).

4. In *Riverside Bayview Homes*, the U.S. Supreme Court upheld the Corps' determination that it had jurisdiction over wetlands adjacent to navigable waters. *Id* at 139. Even though the plain language of the statute did not compel this conclusion, the Court explained that by including a broad definition of "navigable waters" in the CWA, Congress "evidently intended to...exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classic understanding of that term." *Id* at 133. It was further reasoned by the Court that the Corps' decision to include wetlands within its jurisdiction was a reasonable one, given wetlands' critical importance to the health of adjacent waters. *Id* at 133-34.

5. The Supreme Court again interpreted the CWA term "navigable waters" in *Solid Waste Agency of Northern Cook County v. United States Corps of Engineers*, 531 U.S. 159 (2001) (hereinafter "*SWANCC*"). In *SWANCC*, the Court considered whether "isolated ponds, some only seasonal, wholly located within two Illinois counties, fell under [the CWA's] definition of 'navigable waters' because they served[d] as habitat for migratory birds." *Id* at 171-72. The Court held that these waters were simply too far removed from any navigable waters to be included within that term. *Id.* To distinguish these isolated ponds from the wetlands it considered in *Riverside Bayview Homes*, the Court explained, "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*." *Id* at 167.

6. Five years later, in *Rapanos v. U.S.*, the Supreme Court revisited the issue of the Corps' jurisdiction over adjacent wetlands. 547 U.S. 715 (2006). Although continuing to recognize the validity of the *Riverside Bayview Homes* decision, the Court was unable to provide a clear, blue-line decision regarding jurisdiction. Instead, a fractured Court proposed two different ways to limit the reach of its earlier ruling so as not to allow jurisdiction over wetlands which were remote or lacked a connection to "navigable waters."

7. The *Rapanos* plurality suggested that wetlands should only fall within CWA jurisdiction when they (1) are adjacent to a "relatively permanent body of water connected to traditional interstate navigable waters," and (2) have a "continuous surface connection with that water." *Id* at 742 (hereinafter "Plurality Opinion"). Justice Kennedy, concurring, found this test too limiting. Instead, he borrowed language from *SWANCC* to establish an alternative new test for jurisdiction over adjacent wetlands. *See id* at 779, 782. The dissent, which drew four votes, found both of these tests too stringent. In the words of the Chief Justice, "[i]t is unfortunate that

no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the CWA. Lower courts and regulated entities will have to feel their way on a case-by-case basis." *Id* at 758.

8. In its short life, *Rapanos* has indeed satisfied any "bafflement" requirement. The first court to decide what opinion was controlling decided to ignore all of them and instead opted for earlier circuit precedent which it felt was clearer and more readily applied. *United States v. Chevron Pipe Line Co.*, 437 F.Supp.2d 605, 613 (N.D. Tex. 2006). The Courts of Appeal have similarly been perplexed and scattered in opinion. The Ninth Circuit has stated that Justice Kennedy's test apples in most instances, *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993, 1000 (9th Cir. 2007), while the Eleventh Circuit has held that the CWA's coverage may be established *only* under this test. *United States v. Robinson*, 505 F.3d 1208, 1219-22 (11th Cir. 2007). By contrast, the First and Seventh Circuits, though differing somewhat in their analyses, have followed Justice Stevens' (the dissent) advice and held that the CWA confers jurisdiction whenever *either* Justice Kennedy's or the Plurality Opinion's test is met. *United States v. Johnson*, (467 F.3d 56, 60-66 (1st Cir. 2006); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006). Unfortunately, the Fifth Circuit, which provides jurisdiction over the site, has not addressed which test, the Plurality Opinion or the Significant Nexus Test, to apply since the issuance of *Rapanos*.

## III. Arguments

### a. *Rapanos* – Plurality Test

9. Following the Plurality Opinion in *Rapanos* requires the EPA to exhibit that the site property (1) is adjacent to a "relatively permanent body of water connected to traditional interstate navigable waters," ***and*** (2) has a "continuous surface connection with that water." PLC

will stipulate that the Neches River flows adjacent to the site; however, the site and the Neches River, as previously noted, are separated by a thirteen-foot-high levee. The Corps, in a Memorandum for File dated July 5, 2007, authored by Dwayne Johnson, Project Manager, U.S. Corps of Engineers, Galveston District, states, that "there is no hydrological connection or breaks in the levee." *See* Exhibit "A."

10. In its Motion for Accelerated Decision, the EPA argues that "Johnson's statement merely indicates that there is no break in the levee whereby the water and the wetlands have a direct surface connection." (Mov.'s Mot. for Acc. Dec. at 12.) This statement overlooks the plain English of Mr. Johnson's Memorandum – specifically the use of the word "or."

11. Mr. Johnson stated that there was no hydrological connection ***OR*** breaks in the levee. Movant's interpretation of the use of the work "or" would have greater credence if Mr. Johnson had used the word "and" rather than "or."

12. Further, in another Memorandum for All Personnel (hereinafter "Policy Memorandum"), dated February 13, 2001, hydrological connections are discussed in detail for use in characterizing a parcel as adjacent or isolated. *See* Exhibit "B." This memorandum is signed by Mr. Fred L. Anthamatten, Chief, Policy Analysis Section and Mr. Johnson's direct supervisor. In a meeting with Non-Movant prior to these administrative proceedings, Mr. Johnson stated that *he was the author* of the Policy Memorandum.

13. The Policy Memorandum states, "[r]elationships between navigable water, or a surface tributary system, **must** exist to be considered adjacent. Otherwise, the wetland is considered to be isolated." *See* Exh. B at 2. The Policy Memorandum further states, "[e]xamples of hydrologic connections include surface tributary systems, surface water connections such as a stream, continuous wetland system, ditch, or watercourse that carries water from a water body to

a navigable waters, or waters that are a part of a surface tributary system, during normal expected flows or predictable flood events." *See* Exh. B at 2.

14. It is inconceivable that Mr. Johnson's use of the term "hydrological connection" was so limited given the Policy Memorandum was (1) authored by him; (2) signed by his direct supervisor, and (3) provided the very guidance that he was to use on a daily basis in the conduct of his job duties.

15. While there is no dispute regarding the Neches River and requirement #1 above, there is no "continuous surface connection with that water" as required by the Plurality Opinion in *Rapanos*. *See Rapanos*, 547 U.S at 742. At the least, there exists significant evidence that there is a genuine issue of material fact, thus Movant's Motion for Accelerated Decision should be denied. *See* 40 C.F.R. §22.20(a); *see also 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).

**b. *Rapanos* – Kennedy's Significant Nexus Test**

16. While Justice Kennedy provides learned insight into his reasons for concurrence, reasons why the Plurality Opinion is too restrictive, and the dissent's opinion is too broad, Justice Kennedy provides little of substance regarding a clear, blue-line test. At its best, this nexus exists "if the wetlands either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable." *Id* at 755. Neither the Corps nor the Movant has provided any evidence that the site (separated by a thirteen foot levee around the entire site from the Neches River) "significantly affects the chemical, physical, and biological integrity" of the Neches River upon which they may confer jurisdiction. *See id.*

17. Reviewing Justice Kennedy's "significant nexus" test, Movant notes, "[w]hen the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction. *Id* at 782. However, Justice Kennedy also states, "[i]ndeed, in many cases, wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the CWA's scope in *SWANCC*." *Id* 781-82. What ***is*** apparent is that Justice Kennedy did not intend, nor did he ever hold, that property which is separated from a navigable-in-fact waterway by a substantial barrier provides this "significant nexus" in order to confer jurisdiction. *See id.* Further, Justice Kennedy, relying on the Court's opinion in *Riverside Harborview* provides that "the Corps has concluded that wetlands may serve to filter and purify water draining into adjacent bodies of water and to slow the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion..." *Id* at 775. In this instance, however, the Corps has specifically stated that "there is no hydrological connection" with the adjacent waterway (Exhibit "A") and thus could not possibly confer any of these attributes sought by the Corps or the Movant. *See id* at 775.

18. If Movant successfully persuades this body to utilize Justice Kennedy's Significant Nexis Test, it has failed to provide any evidence in its Motion for Accelerated Decision to show that, absent a hydrological connection, how PLC's property "serve[s] to filter and purify water draining into adjacent bodies of water" or "slow the flow of surface runoff into lakes, rivers, and straems and thus prevent flooding and erosion." *See id* at 775. In the least, Movant has failed to show that there exists no genuine issue of material fact, and thus Movant's Motion for Accelerated Decision should be denied. *See* 40 C.F.R. §22.20(a); *see also 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).

19. Because Movant has failed to show that there exists no genuine issue of material fact or has failed to provide any evidence at all regarding a "significant nexus", Non-Movant requests that Movant's Motion for Accelerated Decision be denied, and that this cause be set for hearing.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I certify that on March 1, 2012 a true and correct copy of Respondent's Response to Movant's Motion for Accelerated Decision was served to each person listed below by the method indicated.

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