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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
841 CHESTNUT BUILDING
PHILADELPHIA, PENNSYLVANIA 19107

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IN THE MATTER OF:	:	
	:	DOCKET NO. CWA-III-089
Antoinette Bozievich Buxton	:	
Shrewsbury Township,	:	Proceeding to Assess Class I
York County, Pennsylvania	:	Civil Penalty Under
	:	Subsection 309(g) of the Clean
RESPONDENT	:	Water Act, 33 U.S.C. § 1319(g)

DECISION AND ORDER OF THE REGIONAL ADMINISTRATOR

This is a proceeding for the assessment of a Class I administrative penalty under subsection 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g). The proceeding is governed by the United States Environmental Protection Agency's (EPA) Proposed 40 C.F.R. Part 28--CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CLASS I CIVIL PENALTIES UNDER THE CLEAN WATER ACT, THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT, AND THE EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT, AND THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES UNDER PART C OF THE SAFE DRINKING WATER ACT, 56 Fed. Reg. 29,996 (July 1, 1991), issued October 29, 1991 as superseding procedural guidance for Class I administrative penalty proceedings under subsection 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g) ("Consolidated Rules"). This is the Decision and Order of the Regional Administrator under § 28.28 of the Consolidated Rules.

APPEARANCES

The Complainant was represented by Douglas J. Snyder, Assistant Regional Counsel, U.S. Environmental Protection Agency, Region III, Philadelphia, Pennsylvania. Respondent initially represented herself; Richard S. O'Connor of Rockville, Maryland represented the Respondent from the prehearing conference through the conclusion of the proceeding.

STATUTORY BACKGROUND

The objective of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Subsection 101(a) of the Clean Water Act, 33 U.S.C. § 1251(a). One key provision of the Act is the prohibition on unauthorized discharges of pollutants: "Except as in compliance with this section and sections 1312, 1316, 1317, 1318, 1342 and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." Subsection 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a).

Section 309 of the Clean Water Act, 33 U.S.C. § 1319, provides for administrative, civil and criminal enforcement actions against person who have violated the prohibition of Subsection 301(a). Administrative penalties may be assessed under subsection 309(g) of the Act, 33 U.S.C. § 1319(g): "Whenever on the basis of any information available-(A) the Administrator finds that any person has violated section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title...the Administrator...may, after consultation with the

State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection." Before assessing a Class I civil penalty, the Administrator must give the person to be assessed such penalty written notice of the proposed penalty and the opportunity to request, "within 30 days of the date the notice is received by such person," a hearing. Subsection 309(g)(2)(A) of the Clean Water Act, 33 U.S.C. § 1319(g)(2)(A). Before issuing an order assessing a civil penalty under this subsection the Administrator must provide public notice of and a reasonable opportunity to comment on the penalty assessment. Subsection 309(g)(4) of the Clean Water Act, 33 U.S.C. § 1319(g)(4).

PROCEDURAL BACKGROUND

The Environmental Services Division Director of Region III of EPA (Complainant) initiated this action on November 15, 1993, issuing to Antoinette Bozievich Buxton (Respondent) an administrative complaint under § 28.16(a) of the Consolidated Rules. The administrative complaint alleged that Respondent violated Section 301 of the Clean Water Act, 33 U.S.C. § 1311, when persons acting on behalf of Respondent used earthmoving equipment to discharge fill material into wetlands on her farm in York County, Pennsylvania, without a permit from the Secretary of the Army, in 1990. The administrative complaint made reference to pertinent provisions of the Clean Water Act and provided notice of a proposed penalty of $5,000. The administrative complaint also

provided notice that failure to respond to the administrative complaint within thirty days would result in the entry of a default order and informed Respondent of her opportunity to request a hearing. Complainant transmitted a copy of the Consolidated Rules with the administrative complaint.

On November 6, 1993, in accordance with subsection 309(g)(1) of the Clean Water Act, 33 U.S.C. § 1319(g)(1), and § 28.19 of the Consolidated Rules, Complainant afforded the Commonwealth of Pennsylvania an opportunity to confer with EPA regarding the proposed penalty assessment.

By ORDER OF ASSIGNMENT dated November 19, 1993, the Acting Regional Administrator designated the Presiding Officer in this proceeding pursuant to § 28.16(h) of the Consolidated Rules.

On December 16, 1993, Respondent wrote to counsel for Complainant, answering the allegations of the administrative complaint to the best of her ability and requesting a hearing. Counsel treated this letter as an answer to the administrative complaint and filed the answer with the Regional Hearing Clerk and the Presiding Officer.

On January 12, 1994, the Presiding Officer held a prehearing conference with the parties. Respondent expressed a desire to retain counsel, and the conference was continued until February 9, 1994. After concluding the prehearing conference on February 9, the Presiding Officer issued the prehearing order, setting deadlines for the amendment of pleadings, for the prehearing

exchange of information, and setting a date for hearing. Also on February 9, 1994, Complainant published public notice of the proposed penalty assessment in The York Dispatch/York Sunday News and York Daily Record, providing an opportunity for interested persons to comment on the proposed penalty assessment. No comments were received.

Complainant chose not to amend the administrative complaint, but counsel for Respondent did file and serve an amended answer on March 14, 1994. An amended prehearing order was issued on April 1, 1994. The prehearing exchange took place in September, 1994.

The hearing began on October 12 and concluded on November 10, 1994. Complainant's post-hearing submission was filed on January 17, 1995, and Respondent's post-hearing submission was filed on February 16, 1995.

FACTUAL SETTING

The Respondent is the sole owner of Chopmist Farm, a 142-acre farm in Shrewsbury Township, York County, Pennsylvania, purchased in April of 1989. Chopmist Farm is primarily a horse-raising and -training farm, with substantial acreage leased for crop growing. The farm has a house, a barn and at least one other building, overlooking a swale that is bisected by an access road leading from the southern fields to the farm buildings. The upper portion of the swale, to the east of the access road and south-southeast of the barn, is the only part of Chopmist Farm directly involved in this case.

When Respondent purchased the farm in 1989, the vegetation in this area was severely overgrown. The access road into the farm from Holley Road, the barnyard and much of the swale had to be cleared of this overgrowth, and there were also a number of dilapidated buildings, rusty fences, stone structures, abandoned vehicles and appliances, and several trash piles that had to be removed before the swale could safely be used as a turnout area or pasture for Respondent's horses. One or more pigpens were found in the bottom of the swale, and they had to be dismantled and mucked out also. Apparently no animals had been kept on the farm for years, although some of the farm's agricultural fields had been growing crops.

Sometime in mid-1990, Respondent contracted with George Phillips to complete the cleanup of the Farm, to install a riding ring and a "hot-walker" area, and to perform other work that required heavy earth-moving equipment like Mr. Phillips'. Mr. Phillips' crew began work in the summer of 1990. Complainant alleges that while working in the swale, Mr. Phillips' crew discharged fill material into wetlands within the jurisdiction of the Clean Water Act. As stated above, these allegations go only to activities east of the farm access road. The swale continues to the west of the road, and there were earth-moving activities in that lower segment of the swale, but Complainant made no allegations with regard to those activities.

Frank Plewa, an ecologist in the U.S. Army Corps of Engineers Baltimore District, visited Chopmist Farm on September 28, 1990, having learned of potential Clean Water Act violations from an employee of the York County Conservation District. Mr. Plewa examined the area that had been disturbed, confirming that the Clean Water Act had been violated in the course of the clearing and grubbing, drain tile installation and grading operations in the swale. He observed a small remnant wet patch in the disturbed area still covered with natural emergent wetland vegetation. Before leaving the Farm, Mr. Plewa informed Respondent's farm manager, Coy Thomas, and Mr. Phillips' employee, Ed Redmond, that he had detected Clean Water Act violations and advised them to avoid operations in the lower area of the swale. Mr. Plewa asked Mr. Thomas and Mr. Redmond to have their respective bosses contact him, so that he could arrange to return to determine the extent of the violations and begin developing an appropriate remedy. On October 1, 1990, Mr. Plewa informed Respondent by telephone that he had observed Clean Water Act violations at Chopmist Farm and advised her to make sure the work had stopped.

Mr. Plewa returned to Chopmist Farm on October 19, 1990, to study the soil of the swale more closely in order further to confirm his jurisdictional determination. Both the Corps of Engineers and later EPA issued written orders to the Respondent to restore the disturbed area. Mr. Plewa returned several times during 1991 in an effort to resolve the matter administratively by

voluntary site restoration, but when these efforts proved less than fully successful, Mr. Plewa arranged to have the Corps of Engineers refer the case to EPA. Restoration efforts continued even after EPA filed the administrative complaint in this action. By August of 1994 restoration was complete, but in the course of the work dredged material or fill material was placed in a previously unfilled wetland area. This material had not been removed at the time of the hearing. The parties agree that removal was completed in April, 1995.

DISPUTED LIABILITY ISSUES

In her amended answer the Respondent denied that the swale contains wetlands. At hearing Respondent also disputed the asserted adjacency of the swale to a tributary of waters of the United States. Respondent thus disputes the Government's assertions of Clean Water Act jurisdiction over the swale in the pasture south-southeast of the barn.

In her amended answer and at hearing the Respondent denied that persons acting on her behalf discharged fill material into wetlands in the swale on Chopmist Farm in 1990.

In her amended answer Respondent denied that she had violated the Clean Water Act and that she is liable for the administrative assessment of civil penalties.

DISCUSSION

1. Wetlands: The evidence at the hearing showed that the swale contains wetlands. Complainant presented factual and expert

testimony on the presence of wetlands vegetation, wetland hydrology and wetland soils, based upon personal observation, field sampling and interpretation of historical aerial photography. The testimony of Frank Plewa, Lee Irwin and Peter Stokely regarding the wetlands in the swale went unanswered at the hearing. Indeed, Respondent presented no evidence on this issue. Respondent did not even argue the point in her post-hearing submission. Accordingly, the preponderance of the evidence in the record establishes the presence of wetlands at the site in question.

2. Waters of the United States: Wetlands adjacent to tributaries of interstate waters are "waters of the United States" subject to regulatory jurisdiction under the Clean Water Act. 40 C.F.R. § 230.3(s)(7). Complainant presented testimony of two witnesses to establish Clean Water Act jurisdiction over the wetlands, and Respondent presented none. Frank Plewa testified that his field observation of stream bed and banks on the west side of the Farm access road (downstream from the site in question) and his reading of U.S.G.S. topographical maps and interpretation of aerial photography of the area satisfied him that the wetlands drained into an tributary of Centerville Creek. Centerville Creek flows into the south branch of Cordurus Creek, which flows into Cordurus Creek, the lower portion of which is navigable in fact. Cordurus Creek flows into the Susquehanna River, an interstate water that flows into the Chesapeake Bay. Peter McDonald traced the drainage of the wetlands to a ponded area shown on aerial photographs, and

that pond is clearly connected to Centreville Creek. On cross-examination of Mr. McDonald, counsel for Respondent was able to show that the surface connection between the wetlands and the pond was not clear, but Mr. McDonald would not accept the possibility that the drainage actually stopped short of the pond. He rejected counsel's suggestion that the wetland system was a bog, an isolated kind of water system that does not drain to other waters. Bogs usually result from glacial action, and Mr. McDonald testified that there had not been such action in this part of Pennsylvania. Mr. McDonald was adamant that the wetland in question was a water of the United States. Respondent introduced no evidence to the contrary, so the preponderance of the evidence in the record shows that the wetlands on Chopmist Farm are waters of the United States subject to Clean Water Act jurisdiction.

3. Discharge of Fill Material: Dredged spoil is the first-named pollutant in the Clean Water Act's definition of the term "pollutant." Section 502(6) of the Clean Water Act, 33 U.S.C. § 1362(6). Fill material is defined as any pollutant which replaces portions of the waters of the United States with dry land or which changes the bottom elevation of a water body for any purpose. 40 C.F.R. § 232.2(i). Dredged material is material which is excavated or dredged from waters of the United States. 40 C.F.R. § 232.2(g). Fill material and dredged material are both pollutants. U.S. v Cumberland Farms of Connecticut, Inc., 647 F. Supp. 1166 (D. Mass. 1986), 826 F. 2d 1151 (1st Cir. 1987).

Inasmuch as the relocation of dredged material within waters of the United States adds such material to one place within the waters as surely as it removes it from another place, such unpermitted relocation of dredged material is in violation of the Clean Water Act.

Complainant presented substantial evidence that fill material had been discharged into the wetlands in the swale at Chopmist Farm during the course of earth-moving activities there. Frank Plewa testified that when he examined soil boring profiles taken within the swale he observed soil colors matching those in an upland pit excavated for burning of grubbed-up vegetation and disposal of concrete and other rubbish. He also testified that he observed gravel that had been discharged into the wetlands. Photographic evidence in the record shows that upland-hued soils were placed in the wetland, and also shows earth-moving equipment working the soils within the swale. Some of the photograhs show the gravel in the wetlands. Respondent's witnesses testified that the earth-moving activities involved only regrading and relocation of soils within the swale and that no fill material from outside the swale were discharged into it. When asked where the soil excavated from the burn pit was deposited, Respondent's witness Coy Thomas testified that it all had been returned to the pit. He also testified that concrete and other demolition rubble had been placed in the pit. Respondent presented no evidence to counter the testimony that gravel had been placed in the wetlands during the

work on the drain tiles. The preponderence of the evidence shows that dredged material from within the swale and upland soil excavated from the burn pit and graded from other locations on the Farm, was discharged into the swale by Respondent's contractor George Phillips and his crew as they cleared and graded the pasture area south-southeast of the barn, and that they also discharged gravel into the wetlands.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO LIABILITY

Under § 28.20(d) of the Consolidated Rules allegations as to liability included in the administrative complaint are deemed admitted by the Respondent's failure to deny them. Certain allegations were not affirmatively denied in the Respondent's amended answer and hence are deemed admitted. These admitted allegations, and the disputed allegations discussed above, are hereby adopted as findings of fact and conclusions of law:

1. Respondent is a "person" within the meaning of subsection 502(5) of the Act, 33 U.S.C. § 1362(5). (Administrative complaint § II.1; Amended answer § 1; Transcript p. 589).

2. Respondent's property known as Chopmist Farm, located adjacent to an unnamed tributary of Centerville Creek, along Holley Road in Shrewsbury Township, York County, Pennsylvania, contains wetlands which are "waters of the United States" within the meaning of Section 502(7) of the Act, 33 U.S.C. § 1362 (7); 33 C.F.R.

§ 323.2(a); 40 C.F.R. § 122.2. (Administrative complaint § II.2; April 28, 1989 Deed attached to Respondent's December 16, 1993 letter to Counsel for Complainant; Complainant's Prehearing Exhibits 27A, 27B, 29, 32, 46, 54, 56, 57, 58; Transcript pp. 70, 104, 115, 118-132, 137-141, 213, 214, 260-261, 418-422, 427, 430, 434-436, 439, 589, 648).

3. On October 19, 1990, a representative of the Corps inspected the site and observed fill which had been placed into the wetlands on site. (Administrative complaint § II.3; Amended answer § 3; Transcript p. 112 ff.).

4. On October 22, 1990, the Corps sent Cease and Desist letters to the Respondent and to the contractor who performed the work, directing the parties to cease all work in wetlands. (Administrative complaint § II.4; Amended answer § 4; Complainant's Prehearing Exhibit # 2; Transcript p. 492).

5. On January 10, 1991, representatives from the Corps, the Pennsylvania Department of Environmental Resources, EPA and the York County Conservation District met with Respondent on site and described the work necessary to correct the violations. (Administrative Complaint § II.5; Amended answer § 5; Transcript p. 170 ff, p. 646 ff.).

6. On June 24, 1992, EPA issued an Administrative Order directing Respondent to complete restoration of wetlands at the site within thirty days. (Administrative complaint § II.6.; Amended answer § 6; Respondent's Prehearing Exhibit 8; Transcript p. 723).

7. On August 31, 1992, EPA sent a letter to Respondent requesting information regarding the status of the restoration work at the site. (Administrative complaint § II.7; Amended answer § 7; Complainant's Hearing Exhibit H-1; Transcript p. 724).

8. In the summer and fall of 1990, acting on behalf of Respondent, George Phillips and his crew operated earth-moving equipment which discharged fill material into wetlands within the swale located to the south-southeast of the barn on Chopmist Farm. (Administrative complaint § II.8; Complainant's Prehearing Exhibits 26A, 27B, 36, 42, 43, 45, 46, 51, 52, 54, 56, 57; Transcript pp. 68, 139, 335).

9. Fill material is a "pollutant" within the meaning of Section 502(6) of the Act, 33 U.S.C. § 1362(64) and 40 C.F.R. § 232.2. (Administrative complaint § II.9; Amended answer § 9).

10. Earth-moving equipment discharging fill material to waters of the United States is a "point source" within the meaning of Section 502(14) of the Act, 33 U.S.C. 1362(14). (Administrative complaint § II.10; Amended answer § 10).

11. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants from point sources to waters of the United States except in compliance with specified sections of the Act, including Section 404 of the Act, 33 U.S.C. § 1344. (Administrative complaint § II.11; Amended answer § 11).

12. At no time during the discharges of pollutants to waters of the United States described in Paragraph 8 did Respondent have

a permit from the Secretary of the Army issued under Section 404 of the Act, 33 U.S.C. § 1344. (Administrative complaint § II.12; Amended answer § 12; Transcript pp. 96, 97).

13. Respondent has violated Section 301(a) of the Act, 33 U.S.C. § 1311(a), by discharging pollutants from point sources to waters of the United States without authorization. (Administrative complaint § II.13; Amended answer § 13).

14. Under subsection 309(g)(2)(A) of the Act, 33 U.S.C. § 1319(g)(2)(A), Respondent is liable for the administrative assessment of a civil penalty in an amount not to exceed $10,000 per day for each day the violation continues, up to a maximum of $25,000. (Administrative complaint SS II.14; Amended answer § 14)

15. As required by subsection 309(g)(1) of the Act, 33 U.S.C. § 1319(g)(1), Complainant has consulted with the Commonwealth of Pennsylvania by mailing a copy of the administrative complaint to an appropriate State official and offering the State an opportunity to confer with EPA on this penalty assessment. (Administrative complaint § II.15; Amended answer § 15; Complainant's letter of November 15, 1993 to Ken Reisinger, Chief, Bureau of Dams, Waterways and Wetlands, Pennsylvania Department of Environmental Resources, filed with the administrative complaint on November 16, 1993).

11. As required by subsection 309(g)(4) of the Act, 33 U.S.C. § 1319(g)(4), Complainant has provided the public with notice of and a reasonable opportunity to comment on this penalty assessment.

(Administrative complaint, § II.11; Amended answer § 11; Proof of Publication in The York Dispatch/York Sunday News and York Daily Record on February 9, 1994, filed by Counsel for Complainant on October 3, 1994).

PENALTY ASSESSMENT

Subsection 309(g)(3) of the Clean Water Act, 33 U.S.C. § 1319(g)(3), specifies the factors to be considered in determining the amount of a penalty assessed under that subsection of the statute:

> In determining the amount of any penalty assessed under this subsection, the Administrator ... shall take into account 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...** (emphasis added).

Complainant has submitted a written argument regarding the assessment of an appropriate civil penalty, addressing the nature, circumstances, extent and gravity of the violation and, with respect to Respondent, ability to pay, prior history of such violations, the degree of culpability, the economic benefit or savings Respondent enjoyed resulting from the violation, and specific deterrence. Complainant also addressed the issue of general deterrence in its penalty argument. Complainant did not associate specific dollar amounts with the statutory factors in the administrative complaint or in its written penalty argument. Respondent has also submitted argument with respect to penalty,

emphasizing her post-violation efforts to restore the wetlands, her confusion and frustration in trying to coordinate those efforts with Government representatives.

Based upon the administrative record, I have taken into account the following matters in considering the statutory factors before determining an appropriate civil penalty:

Nature: This is a case of unauthorized discharges of pollutants to waters of the United States. Respondent, through her contractor, cleared the vegetative layer from a wetland swale adjacent to a tributary of a water of the United States, excavated and graded the swale, and discharged fill material, upland soil and gravel, into the swale.

Circumstances: Respondent's objective in having her contractor work in the swale was to prepare the field of which the swale was a part for the pasturing of valuable horses. The vegetation, dilapidated buildings, fences and wall, the derelect vehicles and farm implements present in and near the swale when Respondent purchased the farm, all would have posed physical danger to her livestock and therefore had to be removed before the field could be made suitable for her horses. According to Respondent's testimony, her horses would avoid deep mud and wet soil that might pose a danger to their health. Hence, perhaps Respondent might have left the wetlands in place without endangering the horses. On the other hand, reducing the size of the wetlands in the swale would have provided more dry pasture area. In any event, Respondent did

affirmatively decide to drain the swale by replacing a defunct drain tile system uncovered in the swale area while it was being cleared. This work entailed the discharge of pollutants to the wetlands.

Extent: The violations affected approximately .89 of an acre of freshwater emergent wetlands. The amount of fill material discharged is not specified in the administrative record, but it consisted of two components: upland soil excavated and graded from areas of the farm to the north of the swale and gravel brought into the swale for the drain tiles. In addition, an amount of dredged material from the swale itself, was also discharged during the work in the swale, as the contractor's equipment grubbed and graded the wetland. Portions of the fill were in place from the fall of 1990 until mid-1994, although Respondent's restoration efforts commenced in 1991.

Gravity: Unpermitted discharges are considered to be very serious violations of the Clean Water Act. The prohibition of unpermitted discharges is not new, having been enacted in 1972. (Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 844). The record contains no evidence that the wetlands involved in this case served any unique function, such as harboring an endangered species. Complainant's witnesses characterized the violation as "run of the mill."

Respondent's ability to pay: In a proceeding under the Consolidated Rules the respondent is to bear the burden of going

forward to present exculpatory statements as to liability and statements opposing the complainant's request for relief. See § 28.10(b)(1) of the Consolidated Rules. The complainant does not have the burden of persuading Agency decisionmakers on the respondent's inability to pay if the respondent has failed to come forward with such information by the applicable deadline. Accordingly, Complainant has made no affirmative showing of the Respondent's ability to pay, Respondent has never raised the issue, and the administrative record contains no evidence that the Respondent is unable to pay a penalty.

On this record I am satisfied that Respondent is able to pay a civil penalty.

Prior history of such violations: The administrative record shows that Respondent has no known prior violations of the Clean Water Act, or other environmental, or state permitting requirements. There is evidence in the record that Respondent was responsible for earthmoving and wetlands filling activities on the west side of theefarm access road, downstream from the area involved in this action, at about the same time as the activities in this case took place. The downstream area was restored to the satisfaction of the Corps before the Corps referred this case to EPA, and therefore Respondent's actions there are not part of these considerations.

Degree of culpability: Respondent professed ignorance of the Clean Water Act, and an inability to recognize wetlands of the kind found on Chopmist Farm. Respondent and her contractor testified that

they sought the advice of local authorities on whether any permits were required for the work they were undertaking and were told that no permits were needed. There is some evidence in the record that Respondent may have been told by others that a Clean Water Act permit would be required, but that evidence is less reliable than the testimony of witnesses at the hearing. There is no question of Respondent's degree of control over the violations: they occurred as a result of her directions to her contractor, who discussed all major aspects of the work with her, and she clearly assumed responsibility for the restoration work that has been performed. Respondent's post-violation efforts to cooperate with the Government tend to support her professions of ignorance and a relatively low level of culpability.

Economic benefit or savings resulting from the violations: Complainant has acknowledged that the costs of restoration have more than offset any economic benefit that Respondent might have derived from the violation. The record supports a determination of no economic benefit.

Such other matters as justice may require: Respondent argues that the Government's failure to provide clear, concise and definitive instructions on restoration was the primary cause in the delay in completing the restoration work, which was accomplished, in effect, in stages. There were, indeed, several gaps in the restoration effort, and each gap necessitated additional expenditures on Respondent's part to have Mr. Phillips and his equipment return to

the Farm for more work. Communication lapses occurred, restoration directions were misunderstood, and of course weather often interfered. Had restoration been completed in a timely manner, it is likely that the Corps would not have referred the case to EPA for formal enforcement. Respondent failed to recognize that the burden of moving forward to restore the wetlands was at all times on her, and not on the Corps. There is no basis for the position that she was entitled to wait for "clear, concise and definitive" direction from the Corps, as the record shows she did. While in most cases the Government will provide a measure of assistance to violators attempting to come into compliance, violators should know that they are at risk for formal enforcement for as long as their violation remains uncorrected.

It is also important to convey to all involved in land-clearing and earth-moving activities in proximity to rivers, streams, lakes, ponds and wet areas, the clear message regarding Clean Water Act compliance: It is unlawful for any person to discharge fill material or other pollutants to waters of the United States without a Clean Water Act permit! This penalty assessment is one way to convey that message.

Accordingly, based upon the administrative record and the applicable law, I determine a civil penalty of $ 5,000 is appropriate in this case.

ORDER

On the basis of the administrative record and applicable law, including § 28.28(a)(2)(ii) of the Consolidated Rules, Respondent is hereby ORDERED to comply with all of the terms of this ORDER:

A. Respondent is hereby assessed a civil penalty in the amount of $ 5,000 and ORDERED to pay the civil penalty as directed in this ORDER.

B. Pursuant to § 28.28(f) of the Consolidated Rules, this ORDER shall become effective 30 days following its date of issuance unless the Administrator suspends implementation of the ORDER pursuant to § 28.29 of the Consolidated Rules (relating to sua sponte review).

C. Respondent shall, within 30 days after this ORDER becomes effective, forward a cashier's check or certified check, payable to "Treasurer, United States of America," in the amount of $ 5,000. Respondent shall mail the check by certified mail, return receipt requested, to:

United States Environmental Protection Agency
Region III
P.O. Box 360515
Pittsburgh, PA 15251-6515

In addition, Respondent shall mail a copy of the check, by first class mail, to:

Regional Hearing Clerk (3RC00)
United States Environmental Protection Agency
Region III
841 Chestnut Building
Philadelphia, PA 19107

D. In the event of failure by Respondent to make payment within 30 days of the date this ORDER becomes effective, the matter may be referred to the United States Attorney for collection by appropriate action in the United States District Court pursuant to subsection 309(g)(9) of the Clean Water Act, 33 U.S.C.§ 1319(g)(9).

E. Pursuant to 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will therefor begin to accrue on the civil penalty if it is not paid as directed. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 4 C.F.R. § 102.13(c).

In addition, a penalty charge of 6 percent per year will be assessed on any portion of the debt which remains delinquent more than 90 days after payment is due. However, should assessment of the penalty charge on the debt be required, it will be assessed as of the first day payment is due under 4 C.F.R. § 102.13(e).

JUDICIAL REVIEW

Respondent has the right to judicial review of this ORDER. Under subsection 309(g)(8) of the Clean Water Act, 33 U.S.C. § 1319(g)(8), Respondent may obtain judicial review of this civil penalty assessment in the United States District Court for the District of Columbia or in the United States District Court for the Middle District of Pennsylvania by filing a notice of appeal in

such court within the 30-day period beginning on the date this ORDER is issued (5 days following the date of mailing under § 28.28(e) of the Consolidated Rules) and by simultaneously sending a copy of such notice by certified mail to the Administrator and to the Attorney General.

IT IS SO ORDERED.

Date: JUN 13 1995

STANLEY L. LASKOWSKI
Acting Regional Administrator

Prepared by: Benjamin Kalkstein, Presiding Officer.