



UNITED STATES  
 ENVIRONMENTAL PROTECTION AGENCY  
 REGION 3  
 PHILADELPHIA, PENNSYLVANIA



IN THE MATTER OF:	)	
	)	
John & Myra Crowe	)	
	)	
	)	DOCKET NO. CWA-III-046
	)	
	)	
RESPONDENTS	)	

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DECISION AND FINAL 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) "GUIDANCE ON CLASS I ADMINISTRATIVE PENALTY PROCEDURES," issued July 27, 1987 (GUIDANCE). This is the DECISION AND FINAL ORDER of the Regional Administrator under 126.111 of the GUIDANCE.

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 Act, 33 U.S.C. 319(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 proposed 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 January 31, 1991, issuing to John and Myra Crowe (Respondents) an administrative complaint containing findings of violation, notice of proposed assessment of a civil penalty and notice of opportunity to request a hearing thereon. Complainant proposed a penalty of \$7,500 in the administrative complaint, based upon alleged Clean Water Act violations (allegedly unauthorized wetlands filling) at property owned or controlled by Respondents adjacent to Deep Cove Creek in Anne Arundel County, Maryland. The notice of opportunity to request a hearing gave very explicit instructions on procedures for filing a hearing request and made explicit reference to the GUIDANCE, a copy of which was transmitted with the administrative complaint.

Complainant forwarded a copy of the administrative complaint to the Water Resources Administration in the Maryland Department of Natural Resources, providing the State with an opportunity to consult with EPA in accordance with subsection 309 (g) (1) of the Clean Water Act , 33 U.S.C. 1319 (g) (1) , and 126.102 (b) of the GUIDANCE. In accordance with subsection 309 (g) (4) of the Act, 33 U.S.C. 1319(g) (4), and 126.102(b) of the GUIDANCE, Complainant also issued a public notice of the proposed penalty assessment, which was published in The Capital (Annapolis, Maryland) on February 14, 1991. Although no one responded to the published public notice, one interested person did submit a letter to EPA, apparently reacting to a news article that appeared in The Sunday Capital on February 17, 1991. A copy of the news article was attached to the letter. Since this letter was received within the time allowed for public comment, it has been treated as a comment and it is included in the administrative record under 126.102(c) of the GUIDANCE.

Respondents requested a hearing by letter to EPA Assistant

Regional Counsel Janet Williams, counsel for Complainant, dated March 11, 1991. This letter did not specify the factual and legal issues which were in dispute or the specific factual and legal grounds for Respondents' defense.

By Order of Assignment dated April 5, 1991, I designated the Presiding officer in this proceeding.

By letter dated April 10, 1991, the Presiding Officer determined that Respondents' March 11, 1991 letter contained no specification of the factual and legal issues in dispute and failed to specify the factual and legal grounds of Respondents' defense, as required by 126.104(a) of the GUIDANCE. The Presiding Officer also noted that Respondents' March 11 letter was addressed to EPA Assistant Regional Counsel Williams, rather than to the Regional Hearing Clerk, as required by 126.104(b) of the GUIDANCE. The Presiding officer directed Respondents to submit a written statement specifying the factual and legal issues in dispute and the factual and legal grounds of their defense, together with a written explanation of why these matters were not included in Respondents' March 11 request for hearing, by May 3, 1991. The Presiding Officer directed Respondents to file the original of this submission with the Regional Hearing Clerk, and to serve copies of the submission upon counsel for Complainant and the Presiding Officer.

Respondents failed to file their submission as directed. Instead, Respondents called the Presiding Officer's office on May 28, 1991, and stated their intention to make the submission by Friday, May 31, 1991. On Thursday, May 30, 1991, the Presiding Officer received a telefacsimile captioned "ADMINISTRATIVE COMPLAINT-ANSWERS TO FINDINGS OF VIOLATION." This document contained no explanation of the Respondents' failure to specify the factual and legal issues in dispute and the factual and legal grounds of their defense, the original was not filed with the Regional Hearing Clerk, and Respondents did not provide a copy to Complainant's counsel. The Presiding Officer hand delivered a copy to Complainant's counsel.

Section 126.104(b) of the GUIDANCE provides:

The respondent shall be deemed to have waived the right to a hearing if the respondent does not submit the request to the Hearing Clerk designated. Respondent's request must be in writing and received by the Hearing Clerk no later than 30 days after respondent receives the proposed order. For good cause shown, the Presiding officer may grant a hearing if the respondent submits a late request.

The Presiding Officer issued an Order to Show Cause on May 31, 1991, requiring Respondents to file a written explanation of

their failures to follow the procedures of the GUIDANCE and the directives of the Presiding Officer within 15 days of their receipt of the Order. This explanation could have shown cause for granting a late request. Respondents did not file any such explanation.

On July 10, 1991, the Presiding Officer issued a Finding of Waiver of Right to Hearing in this proceeding, based upon Respondents' failure to request a hearing properly in accordance with the GUIDANCE and failure to show cause for the Presiding Officer to grant a late request. At the same time the Presiding Officer directed counsel for Complainant to report the status of settlement negotiations, which had been ongoing since commencement of the action.

Complainant's counsel reported that Complainant had sought information from the Respondents in order to evaluate penalty mitigation factors, and that Complainant's counsel anticipated settlement of the matter after evaluation. of this penalty information.

On May 5, 1992 the Presiding officer again directed counsel for Complainant to report the status of settlement negotiations. Counsel for Complainant reported that Respondents had failed to provide requested documentation necessary to evaluate whether any penalty mitigation is warranted, that without such documentation counsel for Complainant could not proceed with any discussions of settlement, and that settlement discussions had terminated without any agreement having been reached.

Under 126.111(e) of the GUIDANCE, if no hearing is held, a final order based on the entire record shall be issued, if appropriate. Prior to issuance of the order when no hearing is held, the Administrator or his delegatee (the Presiding Officer) may request additional information on specified issues from the participants, giving all participants a fair opportunity to respond. This additional information is to be included in the administrative record.

On May 15, 1992 the Presiding Officer requested the submission of additional information by Complainant and Respondents under 126.111(e) of the GUIDANCE. Both parties submitted information after the deadlines specified by the Presiding Officer. All information submitted has been included in the administrative record and taken into account in this DECISION AND ORDER.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Under 126.104(a) of the GUIDANCE, any and all allegations in the administrative complaint not responded to by Respondents are

to be deemed admitted.

1. John and Myra Crowe ("Respondents") own or control property situated adjacent to Deep Creek Cove, a tributary to the Chesapeake Bay, along Gwynne Avenue, Anne Arundel County, Maryland.

2. Prior to the Respondents' activity, the site identified in Paragraph 1 had on it a wetland as defined in 40 C.F.R. 122.2.

3. The wetland is a tributary adjacent to Deep Cove Creek, which is itself a navigable water, i.e. a water of the United States, within the definition set forth in Section 502(7) of the Clean Water Act, 33 U.S.C. 1362(7), and 40 C.F.R. 122.2.

4. The Respondents or persons acting on behalf of the Respondents, by the use of various machinery, discharged an unspecified amount of fill material, primarily dirt and rock, into the wetland at specific times best known to the Respondents commencing on or about August 17, 1989.

5. Respondents or persons acting on behalf of the Respondents ignored and violated an Anne Arundel County stop work order posted on the premises involved in this action in August of 1989, and ridiculed an interested neighbor who requested compliance with the stop work order.

6. Subsection 301(a) of the Clean Water Act, 33 U.S.C. 1311(a), prohibits the discharge of pollutants including rock, dirt, sand, and fill material into the waters of the United States except in compliance with Sections 301, 302, 306, 307, 318, 402 and 404 of the Act, 33 U.S.C. 1311, 1312, 1316, 1317, 1318, 1342 and 1344.

7. The Respondents are persons within the meaning of the definition set forth in subsection 502(5) of the Clean Water Act, 33 U.S.C. 1362(5).

8. The machinery referenced in Paragraph 4 constitute point sources as defined in subsection 502 (14) of the Clean Water Act, 33 U.S.C. 1362(14).

9. The discharged material referenced in Paragraph 4 constitutes pollutants as defined in subsection 502 (6) of the Clean Water Act, 33 U.S.C. 1362(6).

10. The placement of the material in waters of the United States by the Respondents constitutes a discharge of pollutants as defined in subsection 502(12) of the Clean Water Act, 33 U.S.C. 1362(12).

11. The discharge of pollutants from point sources to waters of the United States by the Respondents was carried out without a permit issued under Section 404 of the Clean Water Act, 33 U.S.C. 1344, and therefore said discharges constitute violations of subsection 301(a) of the Clean Water Act, 33 U.S.C. 1311(a).

12. Each day the material remained in the waters of the United States without the required permit issued pursuant to Section 404 of the Clean Water Act, 33 U.S.C. 1344, constituted a separate day of violation of subsection 301(a) of the Clean Water Act, 33 U.S.C. 1311(a).

13. On September 29, 1989 an inspection by members of the Army Corps of Engineers ("COE") revealed that Respondents were filling in the wetland without a permit in violation of subsection 301(a) of the Clean Water Act, 33 U.S.C. 1311(a).

14. Under subsection 309(g)(2)(A) of the Clean Water Act, 33 U.S.C. 1319(g)(2)(A), Respondents are 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.

15. As required by subsection 309(g)(1) of the Clean Water Act, 33 U.S.C. 1319(g)(1), Complainant has consulted with the State of Maryland regarding this penalty assessment by mailing a copy of the administrative complaint to an appropriate State official and offering an opportunity for the State to confer with EPA on this penalty assessment.

16. As required by subsection 309(g)(4) of the Clean Water 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.

#### DETERMINATION OF REMEDY

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 section of the statute:

In determining the amount of any penalty assessed under this subsection, the Administrator or the Secretary, as the case may be, 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).

Without assigning specific dollar amounts to individual factors, Complainant proposed in the administrative complaint a civil penalty of \$7,500, after taking into account "the nature, circumstances, extent and gravity of the violation, environmental damage to the waters of the United States and the Respondents prior compliance history, degree of culpability for the cited violations, any economic benefit or savings to the Respondents because of the violations and the Respondents ability to pay the proposed penalty..."

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

**Nature:** This is a case of unauthorized discharges to waters of the United States. Respondents were seeking a permit under Section 404 of the Clean Water Act, 33 U.S.C. 1344, when they decided to commence grading their site and filling wetlands they knew to be regulated with earth, stone and gravel for residential development. The administrative record contains some indication that Respondents eventually obtained the permit they had sought.

**Circumstances:** Respondents were under pressure to commence construction due to commitments they apparently made prematurely. In response to the Presiding Officer's May 15, 1992 Request for Additional Information counsel for Complainant stated that Respondents had contracted with a purchaser whose attorney apparently implied that a suit would be filed if construction did not begin in August of 1989. Respondents' frustration with the time required to obtain proper authorizations from various levels of government cannot excuse the violation of federal law.

Respondents' employees continued working on the site after the County posted stop work orders on the site. A neighbors repeated requests for compliance with the law were ignored.

**Extent:** The surface area is approximately 6,390 square feet. The administrative record does not include any estimate of the depth of the fill or of the quantity of fill discharged.

**Gravity:** Unpermitted discharges are considered to be very serious violations of the Clean Water Act. Persons who knowingly violate the Clean Water Act may be prosecuted criminally under section 309(c) of the Act, 33 U.S.C. 1319(c). The prohibition of unpermitted discharges is not new, having been enacted in 1972. (Oct. 18, 1972, Pub. L. 92-500, 2, 86 Stat. 844).

There is no indication in the administrative record that the pollutants discharged were toxic, although the commenter suggested that property development would cause runoff and sediment to ruin the adjacent creek. The fill material consisted primarily of dirt and rock. Apparently the site contained no

endangered species and did not provide critical habitat for any species, and the administrative record is devoid of any indication of the rate of wetland loss in the area of the violations. According to counsel for Complainant's Submission of Additional Information, on June 7, 1990 EPA issued an administrative compliance order requiring site restoration and measures to mitigate the harm caused by Respondent's violations. Respondents performed this restoration and mitigation work and EPA confirmed its satisfactory completion on or about February 11, 1992. Thus it appears that the harm was not permanent.

Respondents' ability to pay: In response to the Presiding Officer's May 15, 1992 Request for Additional Information, counsel for Complainant stated that Respondents had alleged an inability to pay but had not provided sufficient information to make a determination on this issue. Respondents' response to the Presiding Officer's Request for Additional Information contained no information to support a claim of inability to pay, nor did they raise the issue in any other submission in the record of this proceeding. Apparently, counsel for Complainant's reference to Respondents' allegation of inability to pay was based on settlement-related discussions between the parties, which are usually excluded from the record of an adversary proceeding such as this. In any event, the record does not show that Respondents are unable to pay a civil penalty, and since the burden of proof on this issue is properly theirs, they will be assumed to be able to pay a civil penalty.

Prior history of such violations: There is no indication in the administrative record that the Respondents have any history of Clean Water Act violation.

Degree of culpability: It is clear from the record that Respondents were aware of the unlawful nature of their actions in commencing site development work without the necessary Clean Water Act permit. It is also clear that Respondents' workers ignored Anne Arundel County stop work orders posted on the site after the illegal work had begun. These facts indicate a relatively high degree of culpability.

Economic benefit or savings resulting from the violations: Counsel for Complainant stated in her Submission of Additional Information that "EPA has no information from which to make an accurate estimate of economic benefit, if any." Apparently, Complainant considers the costs Respondents incurred in compliance with EPA's June 5, 1990 administrative compliance order as offsetting any economic benefit resulting from the violation. Hence, counsel argues that any economic benefit to the Respondents must have been temporary. Without adopting this line of reasoning, I must agree that the administrative record does not contain any information indicating the extent of

economic benefit or savings the Respondents enjoyed because of the violations. The record does not show, for example, what savings, if any, Respondents enjoyed by avoiding the litigation allegedly threatened by the purchaser of the lot where the violations occurred. It was apparently this pressure that induced the Respondents to violate the Clean Water Act.

Such other matters as justice may require: Enforcement of the Clean Water Act by penalty assessment, whether administrative, civil or criminal, serves as a specific deterrent against future violations for those directly involved in the case and as a general deterrent against persons who may find themselves facing the temptation to violated the Act for economic gain or any other reason. In the particular circumstances in which Respondents found themselves in August of 1989, caught between the business pressure of a real estate contract and the frustration of dealing with multiple layers of regulatory control, they chose to start work. Those circumstances are probably not unique to the Respondents. Therefore, as a deterrent to all developers who might think they may simply apply for a permit and proceed with a project before obtaining that permit, justice requires that Respondents be assessed a civil penalty.

Accordingly, based upon the administrative record and the applicable law, I determine a civil penalty of \$ 7,500 is appropriate in this case.

#### **ORDER**

On the basis of the administrative record and applicable law, including 126.111 of the GUIDANCE, Respondents are hereby ORDERED to comply with all of the terms of this ORDER:

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A. Respondents are hereby assessed a civil penalty in the amount of \$ 7,500 and ORDERED to pay the civil penalty as directed in this ORDER.

B. Pursuant to 126.113 of the GUIDANCE, this ORDER shall become effective 30 days following its date of issuance unless an appeal is taken pursuant to subsection 309 (g) (8) of the Clean Water Act, 33 U.S.C. 1319(g)(8), or a timely petition is filed by a commenter under subsection 309(g)(4)(C) of the Act, 33 U.S.C. 1319(g)(4)(C) and 126.112 of the GUIDANCE.

C. Respondents 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 \$ 7,500. Respondents shall mail the check by certified mail, return receipt requested, to:

P.O. Box 360515

Pittsburgh, PA 15251-6515

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

Regional Hearing Clerk (3RC00)  
Protection Agency      Region III  
Philadelphia, PA 19107

United States Environmental  
841 Chestnut Building

D. In the event of failure by Respondents 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

Respondents and the commenter have 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), Respondents 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 District of Maryland by filing a notice of appeal in such court within the 30-day period beginning on the date this ORDER is issued and by simultaneously sending a copy of such notice by certified mail to the Administrator and to the Attorney General.

Also under subsection 309(g)(8) of the Act, 33 U.S.C. 1319(g)(8), if a commenter's petitions to the Administrator to set aside the ORDER and to provide a hearing on the penalty has been denied, the commenter 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 District of Maryland by filing a notice of appeal in such court within the 30-day period beginning on the date this ORDER is issued 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: August 20, 1992

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Prepared by: Benjamin Kalkstein, Presiding Officer.