UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6

In the Matter of:	*	
	*	
Mr. Henry R. Stevenson, Jr.	*	Docket No. CWA-06-2011-2709
and Parkwood Land Co.,	*	
	*	
Respondents.	*	

ACCELERATED DECISION

In this Class I penalty action under Clean Water Act (CWA) Section 309(g), Complainant files a Motion for Accelerated Determination as to Both Liability and Penalty (Motion) pursuant to 40 C.F.R. §22.51. Respondents file a Response to the Motion (Response), claiming a hearing is required for introduction of evidence required to determine whether the wetlands to which it discharged fill without a permit are subject to CWA regulation.

Undisputed Facts

The facts in this matter are reflected by documents the parties exchanged in anticipation of hearing and, with one exception, neither party suggests there are disputed facts in this matter. In addition, the parties stipulate to certain facts.[1] According to undisputed documentary evidence and stipulations:

On September 19, 2006, Respondent Parkwood Land Co. (Parkwood) purchased the area at issue in this matter, a tract of approximately 79 acres bounded on two sides by the Neches River and on one by a former meander or "oxbow" of that river. *See* Complainant's Ex. 3. A

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[1] No independent pleading memorializes those stipulations, but Complainant identifies them at page 5 of the Motion and Respondents do not disavow them in the Response, which itself "stipulate[s] that the Neches River flows adjacent to the site..." Response, ¶9. The parties are represented by counsel and I presume they in fact reached the stipulations the Motion identifies.

levee constructed in the distant past separates the tract from the river. "[T]here is no direct hydrological connection [between river and tract] or breaks [sic] in the levee." Respondents' Ex. A. The interior of the tract largely consists primarily of forested wetlands. *See, e.g.*, Complainant's Ex.41. In the vicinity of the tract and downstream to the Texas coast, the Neches is a navigable-in-fact water subject to the ebb and flow of the tide. Stipulation B; Complainant's Ex. 32, p. 5, n.5.

On October 11, 2006, shortly after its purchase of the tract, Parkwood requested that the Galveston District Corps of Engineers (Corps) verify a wetland delineation performed by its consultant, GTI Environmental, Inc.(GTI), for the purpose of determining CWA jurisdiction over the tract. Complainant's Ex. 32, p.1. After discussion with the Corps, GTI submitted a revised delineation on December 6, 2006. *Id.* On January 19, 2007, the Corps preliminarily concurred with the revised GTI delineation, stating the tract "has approximately 71.2 acres of forested wetlands immediately adjacent to the Neches River, a navigable water of the United States and subject to Section 404 of the Clean Water Act." Complainant's Exhibit 31, p. 11.

Meanwhile, on December 11, 2006, the Corps received a Parkwood request for authorization to perform maintenance on the levee separating the tract's wetlands from the River. Complainant's Ex. 31, p. 14.[2] On April 17, 2007, the Corps responded to that request, finding Nationwide Permit 3 authorized repairs to the levee "provided the activity complies with the enclosed three-sheet project plans..." *Id.* Those project plans showed fill would be added to the

[2] Respondents apparently desired to repair the levee to support a claim the tract had been incorrectly classified as flood prone, a factor affecting its potential development under local land use requirements and flood insurance rates. Respondents' Ex. i, p. 5. The jurisdictional determination Respondents sought was likely associated with their future development plans.

levee itself in three places, but none would be added to the wetlands enclosed by the levee. Complainant's Ex. 31, pp. 17 – 19.

The next day, April 18, 2007, Parkwood attempted to appeal the Corps' January 19 preliminary jurisdictional determination, but was informed such determinations were not appealable. At Parkwood's request, however, the Corps issued an approved jurisdictional determination on July 5, 2007, which Parkwood appealed to the Corps Division office on July 23, 2007. Complainant's Ex. 32, pp. 1 – 2. On December 17, 2007, the Corps found the appeal lacked merit. *See* Complainant's Exhibit 32, p. 5.

In response to a citizen complaint, the Corps inspected the tract on September 3, 2009. It found fill had been discharged to wetlands not covered by the Nationwide Permit authorization in two areas. Respondents had used that fill material to construct a "truck turnaround" on the eastern side of the tract and a "makeshift ramp" near its northeast corner. Complainant's Ex. 33. Photographs show fill used for reconstruction of the levee largely consisted of tree stumps, and the sort of debris commonly associated with demolition projects, but better quality fill was used for the turnaround and ramp. *See, e.g,* Complainant's Ex. 41, pp. 11 – 15, 17 –20, 22 – 25, 61 – 67. In a meeting on September 10, 2009, the Corps informed Mr. Stevenson those discharges were not authorized by Nationwide Permit 3 and suggested he remove the fill and apply for a permit. *See* Complainant's Ex. 34.

In response to another citizen complaint, the Corps inspected the tract again on July 22, 2010. The previously observed fill was still in place and additional fill had been discharged to wetlands inside the levee. During the inspection, Respondent Stevenson, Parkwood's Chief

Executive Officer, told Corps personnel he'd discharged fill as recently as "a month ago." Complainant's Ex. 35.

On September 17, 2010, Mr. Stevenson asked to fill out a permit application to fill 10 acres of wetlands within the levee. When the Corps subsequently asked that he identify the ten acres he desired to fill, Mr. Stevenson indicated "he wished to hold off with this inquiry as he needed to resolve issues concerning the property with Orange County." Complainant's Ex. 37.

On October 26, 2010, the Corps referred the matter to EPA for enforcement. EPA in turn issued an Administrative Compliance Order requiring that Respondents submit a plan for restoring the filled wetlands. *See* Complainant's Ex. 2. Parkwood filed an appeal of that order to EPA's Environmental Appeals Board, which dismissed it for lack of jurisdiction. *See In re: Henry R. Stevenson, Jr. & Parkwood Land Co.*, ___ E.A.D. ____, CWA Appeal No. 11-02 (April 19, 2011). This Administrative Penalty action followed.

Liability

Respondents, both of whom are "persons," do not dispute they added fill material, i.e., a "pollutant," to wetlands inside the levee, using heavy machinery, i.e., "point sources," without an authorizing permit. *See* Stipulations A and D. They moreover admit Respondent Stevenson, Parkwood's Chief Executive Officer, personally performed or directed that work. *See* Stipulation C. Respondents do not claim the addition of the fill to the wetlands was authorized by permit, interposing but one defense – that Complainant fails to show the wetlands to which Respondents discharged fill material are "navigable waters" subject to CWA regulation.[3]

[3] Respondents previously contended the wetlands are not subject to CWA regulation because they are "grandfathered," but not in the Response. *See* Complainant's Ex. 31, p. 2; *In re: Henry R. Stevenson, Jr. & Parkwood Land Co., supra;* Respondent's Original Answer, ¶3.

Complainant and Respondents alike contend that issue is controlled by *Rapanos* v. *United States,* 547 U.S. 715 (2006)(*Rapanos).*

In *Rapanos,* the Supreme Court interpreted the CWA term "navigable waters," but no five Justices agreed on a single interpretation. Justice Scalia penned a plurality opinion in which Chief Justice Roberts and Justices Alito and Thomas joined. Justice Kennedy strongly disagreed in a separate opinion concurring only in the judgment. Justices Stevens, joined by Jusices Breyer, Souter, and Ginsburg, dissented, concluding CWA provides more expansive jurisdiction than recognized in either plurality or concurring opinions.

Lower courts since considering the extent of CWA geographic jurisdiction have reached different conclusions on which of the Court's opinions represents the law. Two Circuit Courts have held CWA jurisdiction may be established only under Justice Kennedy's concurring opinion, generally regarding it the "narrowest ground" under *Marks* v.*United States*, 430 U.S. 188 (1977). *See United States* v. *Robison,* 505 F.3d 1208 (11th Cir. 2007); *United States* v. *Gerke Excavating,* Inc., 464 F.3d 723 (7th Cir. 2006). Others have held jurisdiction may be established under either opinion, following the vote counting rationale of Justice Stevens' dissent. *See United States* v. *Johnston,* 467 F.3d 56 (1st Cir. 2007); *United States* v. *Bailey*, 571 F.3d 791 (8th Cir. 2009).

In *United States* v. *Lucas*, 516 F.3d 316 (5th Cir. 2008), the 5th Circuit discussed Justice Scalia's plurality and Justice Kennedy's concurring opinions, but found the wetlands at issue in that matter were subject to CWA regulation under both, leaving the issue unresolved in Texas. EPA's Environmental Appeals Board has opined that, in the absence of controlling judicial precedent, CWA jurisdiction may be established over waters that meet jurisdictional criteria set

forth in either the plurality or concurring opinions. *See In re: Smith Farm Enterprises*, __ E.A.D. ___, 1010 WL 4001418 (September 20, 2010).

Complainant does not rely on Justice Scalia's plurality opinion in this matter and Respondents claim the tract's wetlands, which lack a continuous surface connection to the Neches River, could not meet the jurisdictional tests set forth in that opinion. *See generally* 547 U.S. 742. An accelerated determination may thus be granted here only if undisputed facts show the tract's wetlands meet a jurisdictional criterion of Justice Kennedy's concurring opinion. Respondents contend no such showing has been established by undisputed fact because Complainant demonstrates no site-specific "significant nexus" between the tract and the physical, chemical, or biological characteristics of the navigable-in-fact Neches River. Respondents further contend there can be no such "significant nexus" absent a hydrologic connection between the river and adjacent wetlands.

Both contentions are at odds with Justice Kennedy's opinion. First, reliance on a hydrologic connection is among Justice Kennedy's criticisms of the plurality opinion in *Rapanos:*

> In many cases, moreover, filling in wetlands separated from another water by a berm can mean that flood water, impurities, or runoff that would have been stored or contained in the wetlands will instead flow out to major waterways. With these concerns in mind, the Corps' definition of adjacency is a reasonable one, for it may be the absence of an interchange of waters prior to the dredge and fill activity that makes protection of the wetlands critical to the statutory scheme.

547 U.S. 775.

Nevertheless, the record in this matter contains no undisputed evidence the wetlands at issue serve such functions. Justice Kennedy opines such a showing is necessary to establish CWA jurisdiction over wetlands adjacent to *non-navigable tributaries* of navigable-in-fact waters, but also states:

> As applied to wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone. That is the holding of *Riverside Bayview*.

547 U.S. 780.

The "conclusive standard" to which Justice Kennedy referred is codified at 33 C.F.R. §328(a)7)(c), in pertinent part providing:

> The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent" wetlands.

Given that definition, the tract's wetlands are plainly "adjacent" to the Neches River, a navigable-in-fact water squarely within CWA's jurisdictional ambit under Justice Kennedy's concurring opinion. Hence, Complainant need submit no evidence of a site-specific significant nexus to here establish CWA geographic jurisdiction.

Several federal courts faced with the issue of jurisdiction over wetlands adjacent to navigable-in-fact waters have interpreted Justice Kennedy's opinion this way, concluding adjacency to a navigable-in-fact river demonstrates CWA jurisdiction without a site-specific showing of significant nexus. *See United States* v. *Fabian*, 522 F.2d Supp. 1078 (N.D. Ind. 2007)("If the Little Calumet River is navigable-in-fact, Justice Kennedy would find as a matter of law that jurisdiction exists."); *United States* v. *Bailey, supra,* 571 F.3d 799 ("Justice Kennedy's

opinion holds that when a wetland is adjacent to the navigable-in-fact waters, then a significant nexus exists as a matter of law."). Although it's yet had no occasion to rely solely on it, the District Court for the Southern District of Texas has also recognized Justice Kennedy's distinction between wetlands adjacent to navigable-in-fact waters and those adjacent to the non-navigable tributaries of such waters. *See United States* v. *Brink*, 795 F.Supp.2d 565, 579, n. 11 (S.D. Tex. 2011)(quoting *United States* v. *Bailey, supra.*). So too has EPA's Environmental Appeals Board in *In re: Smith Farm Enterprises*, *supra* ("Justice Kennedy explained that where wetlands are *adjacent* to navigable-in-fact waters...jurisdiction could be presumed.").

No jurisprudence Respondents cite supports their view that a site-specific significant nexus need be demonstrated to establish CWA jurisdiction over wetlands adjacent to a navigable-in-fact water.[4] Their Response, however, devotes substantial attention to Respondents' Exhibit B, a Corps policy memorandum, "Adjacent/Isolated Criteria, Galveston District Policy Number 01-001," issued by Fred L. Anthamatten, a section chief in the Corps' Galveston District on February 13, 2001 (Anthamatten Memo). As shown by its date and subject matter, that memorandum was Mr. Anthamatten's attempt to reconcile the Corps definition of "adjacency" at 33 C.F.R. §328(a)7)(c) with potential issues *Solid Waste Authority of Northern Cook County* v.*U.S. Army Corps of Engineers*, 531 U.S. 121 (2001)(*SWANCC)* then raised on CWA jurisdiction over isolated waters.

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[4] Respondents reference *Northern California River Watch v. City of Healdburg,* 496 F.3d 56 (993 (9th Cir. 2007), albeit for a broader proposition. That opinion was superceded by *Northern California River Watch* v. *City of Healdburg,* 457 F.3d 1023 (9th Cir. 2008), in which the 9th Circuit acknowledged that wetlands adjacent to a nvigable-in-fact water are subject to CWA jurisdiction.

The Anthamatten Memo is more than a trifle ambiguous, but is arguably subject to an interpretation that a wetland lacking a hydrologic connection to adjacent open water should be regarded "isolated" and thus non-jurisdictional under *SWANCC*. Respondents' view of the Anthamatten Memo's relevance to these proceedings is, however, less than clear. Perhaps they rely on it as substantive support for an argument that the absence of a hydrologic connection renders the wetlands on the tract "isolated,[5]" but do not claim Mr. Anthamatten's earlier views should be accorded greater weight than Justice Kennedy's. *See* Response, ¶13. Perhaps they claim the Galveston District is required to apply the Anthamatten Memo in rendering jurisdictional determinations. *See* Response, ¶14. Alternatively, they may rely on it in connection with an immaterial dispute between counsel on interpretation of the Corps jurisdictional determination of July 5, 2007. *See* Motion, ¶¶ 31 - 33; Response, ¶¶10 - 15.[6]

Any authority the Anthamatten Memo may formerly have possessed terminated on January 15, 2003, when EPA and the Corps issued a joint national memorandum superceding "all prior guidance" on issues raised by *SWANCC*. 68 Fed.Reg. 1995 (January 15, 2003). After the Court decided *Rapanos,* that 2003 guidance was itself superceded by a joint guidance memorandum on June 5, 2007 (with notice of availability published at 72 Fed. Reg. 31824 (June 8, 2007)),[7]

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[5] The Corps rejected such an assertion in Respondents' administrative appeal of the jurisdictional determination. *See* Complainant's Ex. 32, pp. 15, 16.

[6] Complainant argues an infrequent hydrologic connection that may exist during 100-year flood events constitutes a significant nexus. Motion ¶¶31, 32. The factual and legal issues associated with that argument are here irrelevant; I presume the Corps jurisdictional determination meant exactly what it said, i.e. that there "is no direct hydrological connection or breaks [sic] in the levee" separating the wetlands from the Neches River. [Emphasis added.]

[7] The 2007 guidance was in turn revised on December 6, 2008. Such guidance memoranda establish no law, but represent the government's interpretation of law. Today's

which was in effect at the time of the Corps' July 5, 2007 jurisdictional determination. Indeed, that jurisdictional determination itself references that "new Rapanos guidance." The Anthamatten Memo is of no discernible relevance to this matter.

I conclude the wetlands on the tract are "navigable waters" subject to CWA regulation because they are adjacent to the Neches River, a navigable-in-fact river and a navigable water of the United States subject to the ebb and flow of the tide. Because no material facts are disputed in this matter, there is no need for an evidentiary hearing on liability. Respondents violated CWA §301(a) on at least two occasions.

Penalty

In assessing an administrative penalty, CWA §309(g)(3) requires consideration of:

> ...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.

In addition, 40 C.F.R §22.47 requires consideration of "any civil penalty guidelines issued under the Act." The Motion identifies various civil penalty guidelines and proffers Complainant's view on factors for consideration in this matter. Complainant also submits a copy of "Revised CWA Section 404 Settlement Penalty Policy," an EPA guidance memorandum issued on December 21, 2001. *See* Complainant's Ex. 40. Complainant identifies specific factors it considered and identifies facts in the record supporting its views on the weight it accorded them in proposing a penalty of $32,500. The elements it considered are consistent with that policy guidance as well as CWA §309(g)(3). *See* Motion ¶¶45 – 48.

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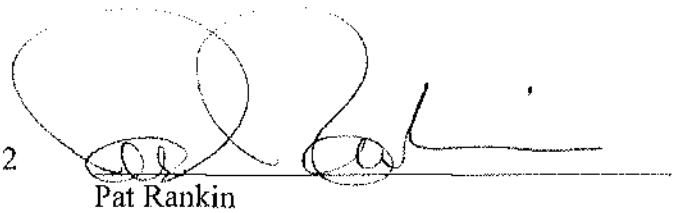
decision is consistent with both 2007 and 2008 guidance memoranda, but *relies* on federal jurisprudence, most notably Justice Kennedy's concurring opinion in *Rapanos*.

Complainant submits no evidence or argument, e.g., a penalty calculation worksheet or declaration, showing specific amounts it attributes to the factors identified in the statute, guidelines, or Motion. That poses a dilemma. 40 C.F.R. §22.27 requires that presiding officers exercise independent judgment in assessing penalties, but also requires that their initial decisions "set forth the specific reasons for the increase or decrease" if the assessed penalty differs from the proposed penalty. As a practical matter, I cannot comply with both obligations without knowing penalty amounts Complainant attributes to relevant factors. I thus deny the Motion without prejudice to the extent it seeks a penalty assessment. A status conference will be scheduled to discuss the way forward with counsel for Complainant and Respondents.

ORDER

For the foregoing reasons, Complainant's Motion for Accelerated Decision as to Both Liability and Penalty is granted as to liability. Said Motion is denied without prejudice as to penalty.

So ordered this 17th day of April 2012



Pat Rankin
Regional Judicial Officer

CERTIFICATE OF SERVICE

I, Lorena S. Vaughn, hereby certify that service of the foregoing documents, was served upon the parties on the date and in the manner set forth below:

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DATE: April 17, 2012

Lorena S. Vaughn
Regional Hearing Clerk