UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
SLINGER DRAINAGE, INC.	)	DOCKET NO. 5-CWA-97-022
	)	
RESPONDENT	)	

INITIAL DECISION

The complaint in this case was issued to Slinger Drainage, Inc. (Respondent) on September 22, 1997. The action was initiated pursuant to section 309 (g) of the Clean Water Act (CWA), 33 U.S.C. § 1319 (g). The complaint alleges that Respondent violated CWA section 301 (a), 33 U.S.C. § 1311 (a) when it discharged pollutants into the waters of the United States without a permit. The Complainant requests assessment of a $90,000 penalty. Respondent answered the complaint on October 10, 1997. An oral evidentiary hearing was held in Madison, Wisconsin on May 14, 1998. (1)

FINDINGS OF FACT

The Respondent is the owner and operator of a field drainage contracting company with its place of business at N7265 Jones Road, Randolph, Wisconsin. Respondent has been a registered corporation in good standing in Wisconsin since July 7, 1971 and is a person under CWA section 502 (5), 33 U.S.C. § 1362 (5). The Agency provided notice of the commencement, and opportunity for consultation, about this action to Wisconsin. In July 1994, Respondent performed drainage construction on property owned by Dennis Shoup, consisting of more than 100 acres in the east one-half of Section 34, Township 12 North, Range 13 East, Westford Township, Dodge County, Wisconsin. It was Shoup's intention in hiring Respondent to drain water from the site and farm on it. The site is a wetland depression in a drumlin field, a geologically distinctive area which alternates ridges and depressions.

Respondent laid about 26,000 feet of drainage tile to form a drainage grid over approximately 50 acres of the northern portion of the site in July 1994. In order to place the drainage tiles in the wetland Respondent dug a thirteen inch wide, 4-6 feet deep, trench. The Respondent used a Hoes trenching machine and hand shovels to remove spoil and deposit it on the surface of the wetlands outside the trench. The trench was dug by a trenching arm on the Hoes trenching machine, as it ran across

the surface of the Shoup wetland. The trenching arm cast the dredged material to each side of the trench. As the Hoes machine dredged and deposited the soil on the sides of the trench, plastic drain tile was fed from a spool down into the trench. Next, concave shaped disks, at the back of the Hoes trench machine, knocked the soil back into the trench, covering the drain tile. Altogether, Respondent removed and deposited elsewhere on the site more than 2900 cubic yards of fill material, creating an excavated soil imprint of one-half acre. The remaining soil and organic materials were returned to the trench by a tractor with an attached blade. A portion of the removed soil and organic materials remained on the surface of the excavated area. The Respondent did not obtain, or have, pursuant to CWA section 404, 33 U.S.C. § 1344, a permit to fill wetlands from the Agency or the Army Corps of Engineers.

The Shoup wetland site is adjacent to a waterway known as the Town Ditch. The Town Ditch flows into the Beaver Dam River which flows into the Rock River and then into the Mississippi River. The site has historically been a wetland, as defined by 40 C.F.R. § 230.3 (t). The soil displaced at the site by the Hoes trenching machine was composed primarily of organic soils. Organic soils are indicative of soil conditions that are regularly saturated by water. Standing water and water saturation of the soil on the site has been observed. The site also contains plant species which grow in saturated soil conditions. [(2)] The site lies in a flyway for ducks migrating from Canada to the southern United States.

The Respondent, which has been in the business of providing field drainage services for at least 25 years, does not inquire whether a CWA section 404 permit has been obtained unless a property owner is receiving a federal or state farm subsidy. Charles Slinger, the sole owner of the Respondent, believes that the Clean Water Act is "generally ignored" and is treated as a "don't ask, don't tell" law. When he knows that a client is receiving farm subsidies, Slinger asks the the client if it has a permit to drain wetland because draining the wetland without a permit would result in the landowner losing its subsidy.

The area around, and including, the site has two special designations. The Wisconsin Department of Natural Resources in 1990 designated the Beaver Dam River watershed as a priority watershed for funding for non-point source pollution control. Referred to as the Beaver Dam River Priority Watershed Project, sites within the watershed are eligible for technical assistance to correct problems associated with delivery of excess sediments and nutrients to the waters comprising the watershed. Testimony of State of Wisconsin and Agency officials indicated that conversion of the site to agricultural use is likely to increase the flow of sediments to Beaver Dam Lake. Increased sediments in the lake can affect the turbidity of the water, which affects the depth at which plant communities can thrive. Plant communities in turn affect fish and waterfowl breeding. Upstream wetlands act as a filter to absorb and remove excess nutrients from the flow of water through a watershed. Excess nutrients are a chronic problem in Beaver Dam Lake and lower the water quality in the lake. The wetlands, which are the subject of this proceeding, support a large number of plants and wildlife that rely on wetlands for their habitat. In order to maintain the wetlands habitat, the Glacial Habitat Restoration Area (GHRA) was established. The GHRA area receives money from the state and federal governments in order to reverse the historic decline of wildlife habitat which has resulted from wetland drainage and the conversion of upland grasslands to agriculture.[(3)]

Before Respondent began excavating at the site, it received, on April 24, 1990, a letter from the District Engineer for the United States Army Corps of Engineers, St. Paul District. The letter was in reference to the drainage system that Respondent installed on the John Crescio farm. Respondent was informed that the discharge of dredged materials into wetlands adjacent to a tributary of Fox Lake without a Department of the Army permit violates CWA section 301.

Slinger represented that he and his employees have had no training in identifying wetlands. Although, when Slinger was questioned at the hearing about how to identify a wetland, he was able to identify the type of soil, water, plant and wildlife conditions that make up wetland areas. Slinger and his employees, he

represented, had not received any formal training in application procedures for CWA section 404 permits.

Respondent has not had a previously adjudicated violation against it. The Complainant reviewed the Dun & Bradstreet Corporation report on the Respondent. On December 30, 1996, when the Respondent was asked in a pre-complaint information request by the Agency's Director of the Water Division, Region 5, to provide information on the number of tiling projects in which it was involved, it refused to respond. When questioned at the hearing about the size of its tiling business, Slinger's answers were evasive and incomplete. Respondent, apparently, performed between 10 and 30 drain tile installation projects in each year in the last three or four years.

CONCLUSIONS

CWA section 309 (g) (1) (A) provides for a class II civil penalty for any person who violates CWA section 301 (a). Section 301 (a) makes it unlawful for any person to discharge any pollutant into navigable waters, except in compliance with section 404 of the CWA. Section 404 of the CWA permits the Secretary of the Army acting through the Chief of Engineers, U.S. Army Corps of Engineers to issue permits for the discharge of dredged or fill material into navigable waters. Discharge of pollutants is defined in section 502 (12), 33 U.S.C. § 1362 (12), as "any addition of any pollutant to navigable waters from any point source...." A point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch channel, tunnel, conduit [or] discrete fissure ... from which pollutants are or may be discharged." CWA § 502 (14). Pollutant is "dredged spoil, solid waste, ... biological materials, ... rock, sand [or] agricultural waste discharged into water." CWA § 502 (6). Navigable waters of the United States include wetlands, which are those areas that are "inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 40 C.F.R. § 230.3 (t).

The Respondent's actions come within the definitions and prohibitions of the foregoing statutory sections. Respondent operates a field drainage contracting company in Randolph, Wisconsin; it is a corporation registered under the laws of Wisconsin. In July 1994, Respondent installed drainage tile on approximately 50 acres of the 100 acres of wetland owned by Dennis Shoup in Dodge County, Wisconsin. Respondent operated a Hoes trenching machine, shovels and a tractor with a scraper blade to remove soils and organic materials from the site and deposit them in a location other than the location from which they were removed. The amount of soil and organic material removed was more than 2900 cubic yards, which formed a footprint of about one-half acre. The site on which the soil was removed and deposited by the Respondent is a "wetland" and is among the waters of the United States and a navigable waterway, pursuant to the statutory definitions. Hydrologically, the site drains into the Town Ditch which drains into the Beaver Dam River.

The soil and organic material, removed and deposited by Respondent at the site, are prohibited "pollutants" under CWA § 301. And Respondent's removal and redeposit of vegetation or other materials in the wetland is a discharge under the CWA. Rybachek v. EPA, 904 F2d 1276, 1285-86 (9th Cir. 1990); Avoyelles Sportsmen's League v. Marsh, 715 F2d 897, 923, 924 n. 43 (5th Cir. 1983); United States v. Sinclair Oil Co., 767 F. Supp. 200, 204 (D. Mont. 1990). The Hoes trenching machine, shovels and tractor driven scraper used by Respondent are point sources or conveyances from which pollutants were discharged. U.S. v. Tull, 615 F. Supp. 610, 622 (E.D. Va. 1983), aff'd, 769 F.2d 182 (4th Cir. 1985) rev'd on other grounds, 481 U. S. 412 (1987).

Respondent concedes that it did not possess a CWA § 404 permit which would have permitted removal and redeposit of soils and organic material in the Shoup wetland. Each discharge by Respondent of pollutants into navigable waters without the required permit issued pursuant to CWA § 404 constitutes a day of violation of section 301 (a). Moreover, each day the material discharged by Respondent remains

in the wetland without the required permit issued pursuant to CWA § 404 constitutes a day of violation of section 301. The fill material that Respondent discharged in July 1994, remains in place, although the drainage system constructed by the Respondent was disabled on October 1, 1995.

Respondent argues that the insertion of drainage tiles in a wetland is not a discharge and is, therefore, not prohibited by the CWA. It concedes that its purpose was to alter the wetland by draining it of water in order that Shoup might plant crops in the wetland. In addition, Respondent does not contest that in laying 26,000 feet of drainage tile it removed 2900 cubic yards of soil and organic material from trenches that were from 4 to 6 feet deep. Nor does it dispute that it operated a Hoes trenching machine, shovels and a tractor with a scraper blade to remove soils and organic materials from the site and deposit them in a location other than the location from which they were removed. However, it contends that its main purpose was not to move 2900 cubic yards of soil but to install the 26,000 feet of drainage tile. Respondent argues that the movement of the soil and organic material was not a discharge but only incidental to the laying of the tile. Respondent maintains that incidental discharges are not prohibited by the CWA because they do not amount to polluting discharge.

Respondent's argument is contrary to existing law. The redeposit of materials excavated from a wetland is the addition of pollutants under the CWA. United States v. Huebner, 752 F. 2d 1235, 1243 (7th Cir. 1985). The regulations of the Army Corps of Engineers explain that an addition of spoil from a wetland which results from dredging or the making of trenches, such as those dug by Respondent, is subject to the CWA permit requirements. The regulations define "dredged material" to mean "material that is excavated or dredged from waters of the United States." 33 C.F.R. § 323.2 (c). When the Corps of Engineers promulgated regulations defining dredging and the sidecasting of the dredged material, it stated that it sought to regulate the discharge of dredged material not the dredging. 51 Fed. Reg. 41206 (1986). But most significant in terms of Respondent's argument, the Corps explained that disposal of the dredged material involved is not incidental "[i]f this material [the material being dredged] is disposed of in a water of the United States, by sidecasting or by other means[.] [T]his disposal will be considered to be a 'discharge of dredged material' and will be subject to regulation under section 404." Id. at 41210. While the regulations have been amended, the Corps of Engineers has consistently interpreted the CWA to require a permit for the type of activity found in this case.

The Army Corps of Engineers interpretation is consistent with CWA section 404. Except for "non-prohibited" discharges of dredge or fill material -- all of which are enumerated -- section 404 (f) (2) states that "[a]ny discharge of dredged or fill material in the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit...."

Respondent dug 26,000 feet of trenches and removed and redistributed 2900 cubic yards of various layers of the wetland. Gregory Carlson, Environmental Protection Specialist at the Agency, found that the 2900 cubic yards of dredged material was sidecasted over an actual footprint of approximately one-half acre. The effect was to pollute and disrupt more than fifty of the one hundred acres of the Shoup wetland. The CWA defines dredge spoil and excavated soils as pollutants. [(4)]

Finally, Respondent argues that its excavation of the Shoup wetland is permitted by the injunction upheld in National Mining Assoc.v. U.S. Corps of Engineers, No. 97-5099, 1998 U.S. App LEXIS 13009 (D.C. App. 1998). There, the court upheld a District Court injunction of the Corps' rule which prohibited, without a permit, apparently any sidecasting in a waterway when dredged material was being removed from the site. That rule was not at issue in this proceeding. Moreover, there is no evidence that Respondent removed the dredged material from the site and intended to leave only that that fell back into the waterway. All of the spoil which Respondent dredged or excavated was redeposited in the waterway. It was intended to, and did,

change the use of the land from wetland to farmland.

PENALTY

Administrative penalties for violations of CWA § 301 (a) are determined in accordance with CWA § 309 (g). Section 309 (g) (2) (B) provides for class II civil penalties of up to $10,000 per day for each day a violation continues and a maximum penalty of $125,000. Section 309 (g) (3) directs that "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" are to be considered in determining the amount of any penalty to be assessed. In addition, Consolidated Rule of Practice 22.27(b) provides that "if the Presiding Officer decides to assess a penalty different in amount from the penalty proposed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease." 40 C.F.R. § 22.27(b). [(5)]

Complainant asserts that the facts of this case, when considered in light of the statutory penalty factors and the need for deterrence, warrant the imposition of a penalty of $90,000. Respondent maintains that the proposed penalty is unconscionable and inappropriate based on the facts of the case, but offers no argument in support of its contentions.

Nature and Circumstances of the Violation

Complainant's penalty witness Greg Carlson explained the nature and circumstances of Respondent's violation. Carlson testified, and Respondent did not dispute, that consequent to its installation of approximately 26,000 feet of drainage tile at the Shoup site, Respondent discharged 2900 cubic yards of dredged spoil into a wetland, which is a "water of the United States" as that term is defined in EPA and Corps of Engineers regulations. The dredged spoil was discharged without a permit issued by the Corps of Engineers pursuant to section 404 of the CWA and therefore constituted a discharge of pollutants into the waters of the United States in violation of CWA § 301 (a).

Extent of the Violation

The record establishes that the extent of Respondent's violation was significant. Respondent's discharge of at least 2900 cubic yards of dredged spoil in July of 1994 left a footprint of ½ acre over a 50 to 65 acre area of the Shoup wetland. The tile system installed by Respondent operated from approximately August 1, 1994, to October 1, 1995, which is approximately 15 months or 450 days, during which time the discharged material remained undisturbed. The period of violation therefore encompasses the full 15 months or 450 days. United States v. Cumberland Farms of Conn., Inc., 647 F. Supp. 1166, 1183 (D. Mass. 1986), aff'd, 826 F.2d 1151 (1st Cir. 1987) (period of violation includes not only the days on which the work was done, but each day discharged material remained in place). As Complainant points out, assessing the per day maximum penalty of $10,000 would yield a penalty far in excess of the statutory cap of $125,000.

Gravity of the Violation

Testimony presented at the hearing establishes the gravity of Respondent's violation as very serious. As Carlson testified, wetlands like the Shoup wetland perform three critical environmental functions, they provide a unique and fertile habitat for wildlife; they provide a "sponge" to moderate the flow of surface water through the watershed, thereby lessening the risk and extent of flooding; and they act as a "filter" by slowing the passage of water and allowing some of the contaminants to drop out and be contained in the wetland substrata. Respondent's actions compromised the Shoup wetland's ability to perform all three of these critical environmental functions.

In addition, the wetland at issue is located within two areas specially designated

by the State of Wisconsin, the GHRA and the Beaver Dam River Priority Watershed Project. The GHRA seeks to recover and restore wetland and grassland habitat for wildlife populations that have declined as wetland areas have disappeared. The Beaver Dam River project seeks to identify and limit sources of nutrient and sediment pollution within the river's watershed, of which the Shoup site is a part. Carlson testified that unauthorized conversion of the Shoup wetland would exacerbate the problems that these programs seek to remedy.

Finally, the testimony of Lynn Hanson and Mark Sesing of the Wisconsin Department of Natural Resources detailed the impact of unauthorized conversion of the Shoup site on wildlife and Beaver Dam Lake. Hanson testified that the glacial habitat represents the traditional core habitat of duck and pheasant populations in the area. He stated that approximately 50% of the wetlands in the area have been lost, primarily to agriculture. Sesing testified that wetlands play a critical role in maintaining water quality in the lake and that conversion of the Shoup site would result in increased turbidity in Beaver Dam Lake. Increased turbidity in the lake affects the depth at which aquatic plants can grow and leads to algal blooms, both of which have a negative impact on the lake as a habitat for fish and wildfowl.

Respondent's Ability to Pay

Carlson testified that based on his review of joint exhibit 1, a financial information report from Dun and Bradstreet Corporation, Respondent is financially healthy and able to pay the proposed fine. The report indicated that in 1996 Respondent had annual sales of approximately $1 million and paid its bills in a timely fashion. While Respondent stated that it does not provide information to Dun and Bradstreet, Respondent did not offer any testimony contradicting Complainant's assertion of its ability to pay.

History of Prior Violations

Mr. Carlson testified that his review of Agency files revealed that Respondent had no prior adjudicated violations of the CWA.

Culpability

The hearing record reflects a high degree of culpability on the part of Respondent. Respondent has been in the drainage business for more than thirty years; activities affecting wetlands have been regulated since 1975. As Slinger admitted, customers engage his company when they have wet property that they want drained. Although his answers were vague and evasive, Slinger testified that Respondent performed somewhere between ten and thirty tile installations in each of the last several years. As an experienced, long time operator in a highly regulated activity, Respondent should have been aware of the need to seek a permit for the work done on the Shoup property.

Compounding Respondent's culpability, the record establishes that Respondent was aware of the wetland regulatory scheme and its possible application to his drainage construction activities but chose to ignore it. A letter from the Corps of Engineers to Respondent in April of 1990 (JX-4) concerning another tiling project put Respondent on notice that his drainage construction activities constituted discharges of dredged materials into wetlands and required a permit from the Corps, and could violate section 301 of the CWA. In spite of such notice Respondent proceeded to install the drainage tile on the Shoup site without seeking a permit from the Corps of Engineers. Slinger testified that it was his practice to inquire about permits only when the farmer he was installing tiling for was receiving a state or federal farm subsidy because "they cannot receive farm subsidies if they are draining a wetland . . . ." Tr.-213. Finally, Slinger's letter to Congressman Scott Klug (JX-5), in which he describes the CWA's wetlands program as "generally ignored" and treated as "a don't ask, don't tell" arrangement, reinforces the conclusion that Respondent knew it was illegally discharging pollutants into the Shoup wetland.

Economic Benefit

According to Complainant, the economic benefit accruing to Respondent in this case is negligible.

Other Factors as Justice May Require

In asserting that the proposed penalty is inappropriate and unconscionable based on the facts of the case, Respondent appears to be arguing that if any penalty is to be assessed, justice requires that it be lower than the proposed amount. Respondent, however, presents no argument in favor of such a reduction.

To the contrary, the record indicates that Respondent's actions have either been taken into account in fashioning the proposed penalty or militate against any reduction in the proposed penalty for "other factors as justice may require." On one hand, Carlson testified that Respondent's restoration of the site, a factor that can result in a lower gravity assessment, was taken into consideration in assessing the gravity of Respondent's violation. On the other hand, Carlson testified that Respondent was uncooperative and evasive in response to Complainant's CWA § 308 (a) information request in January of 1996. Specifically, Respondent refused to provide a list of other tiling projects it had undertaken in the ten years prior to the request. Carlson further testified that a renewal of the request again met with no response. Slinger's hearing testimony on this question, as already detailed, was equivocal.

Based on the foregoing it is determined that Complainant has demonstrated, pursuant to CWA § 309 (g) (3), that the proposed penalty of $90,000 is appropriate and supported by the record.

ACCORDINGLY, IT IS ORDERED that Respondent IS ASSESSED a penalty of $90,000 for violating CWA § 301 (a) by discharging pollutants into the waters of the United States without a permit.

Payment of the full amount of the civil penalty assessed must be made within sixty (60) days of the service date of the final order by submitting a certified check or cashier's check payable to Treasurer, United States of America, and mailed to:

U. S. EPA, Region V
(Regional Hearing Clerk)
The First National Bank of Chicago
P.O. Box 70753
Chicago, Illinois 60673

A transmittal letter identifying the subject case and the EPA docket number, plus Respondent's name and address must accompany the check.

Failure by Respondent to pay the penalty within the prescribed statutory time frame after entry of the final order may result in the assessment of interest on the civil penalty. 31 U.S.C. § 3717; 4 C.F.R. § 102.13.

Pursuant to 40 C.F.R. § 22.27 (c), this initial decision will become the final order of the Environmental Appeals Board within forty-five (45) days after its service upon the parties and without further proceeding unless (1) an appeal to the Environmental Appeals Board is taken from it by a party to this proceeding or (2) the Environmental Appeals Board elects, sua sponte, to review this initial decision. If an appeal is taken, it must comply with § 22.30. A notice of appeal and an accompanying brief must be filed with the Environmental Appeals Board and all other parties within twenty (20) days after this decision is served upon the parties.

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Edward J. Kuhlmann
Administrative Law Judge

September 14, 1998
Washington, D. C.

1. Complainant is represented by Robert S. Guenther, Esq. and Eva Hahn, Esq. and Respondent is represented by Gary R. Leistico.

2. Wetlands, such as the Shoup wetland, are a habitat for important animal and plant species, provide water retention for flood control and filtration of surface waters and ground waters, including drinking water aquifers. 33 C.F.R. § 320.4 (b).

3. The testimony indicates that the destruction of the wetland in this case resulted in the destruction of wildlife habitat, increased risk to downstream landowners of increased flood heights or peak flood heights, destroyed the ability of the wetland to properly filtrate pollution and increased erosion.

4. The reason behind the statutory requirements is illustrated by the record. The wetland drained by the Respondent was located in a depression area in the glaciated landscape where the uplands, or drumlins, are farmed. The sponge of the wetland filters out pollutants, such as sediments and any associated contaminants that flow off the upland farming areas. According to Carlson, it is probable that the layers of the filter removed by the Respondent contain the contaminants of farming which have now been brought to the surface and introduced into the surface water.

5. Consolidated Rule 22.27(b) also directs that the presiding officer consider, in addition to the factors enumerated in the statute, any civil penalty guidelines issued under the statute. The Agency has not issued any civil penalty guidelines for assessment of penalties for violations of CWA § 404. Accordingly, the statutory penalty factors alone will guide assessment of the penalty in this case.