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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of *
DR. MARSHALL C. SASSER, * Docket No. 404-89-102
Respondent *
*

1. Clean Water Act - Section 404 - Respondent found liable for violation of the dredge and fill section of the Act.
2. Clean Water Act - Section 404 - Analysis of Respondent's financial circumstances indicates ability to pay the proposed penalty which is assessed.

Appearances:

For Complainant: Edwin Schwartz, Esquire
Craig Higgason, Esquire
U.S. Environmental Protection
Agency - Region IV
Atlanta, Georgia

For Respondent: D. W. Green, Jr., Esq.
Phillip D. Sasser, Esq.
Newman Jack Smith, Esq.
Charleston, South Carolina

Before: Thomas B. Yost
Administrative Law Judge

PRO-17/FD
JAN 1 1991

INITIAL DECISION

Although continuation of the original trial was held and completed on July 17, 1991, there is before me a motion for an accelerated decision previously filed by the Complainant on September 17, 1990.¹ The Court deferred on ruling on this motion because at the time of its filing, the parties were still negotiating for a settlement of the case with fair expectations of success.

At the conclusion of the reconvened hearing, I advised the parties that I would first rule on the outstanding motion and then, depending upon my decision, I would either set up a post-hearing briefing schedule or advise them that such briefing would be unnecessary since the motion goes to both liability and penalty assessment.

The facts in this case are relatively simple and not in contention. The Respondent is a practicing physician, specializing in urology. His family and friends have owned several "plantations" adjacent to the Pee-Dee river in South Carolina. These holdings used to be used for rice cultivation and contained a complex network of dikes, channels and water control devices to control the height of the water in the areas impounded by the dikes. The cultivation of rice in the area ceased many years ago

¹ The Respondent filed a reply thereto which did not address the substance of the motion but merely stated that it was premature.

and as a consequence many of the dikes eroded; the control devices called "trunks" have either ceased to operate or have sunk into the muck and mire upon which they were constructed. For many years it has been the practice of the plantation owners to restore the dikes, refill the impounded areas with water and use them as hunting preserves for water fowl which frequent the area in great abundance. Apparently, the area is part of a major north-south flyway for migrating water birds.

Some of this re-diking was legally done pursuant to a national permit system which allows certain minor repairs to dikes which are essentially still structurally viable.

In Dr. Sasser's case, the dikes had deteriorated to the point where in the land formerly enclosed had reverted to a wetland state and functioned as such providing all the ecological benefits classically associated therewith.

Based upon his experience as a member of the Board of the South Carolina Wildlife Federation, Dr. Sasser knew that he needed a permit to repair his dikes, install the necessary water control devices and turn his land into a water bird refuge and thence into a hunting club. In furtherance of that intent, he filed for a Section 404 permit on February 12, 1981, with the Charleston District of the U.S. Army Corps of Engineers ("Corps"). After first determining that a nationwide permit would not cover the work Dr. Sasser intended to perform; the Corps began processing his application. Following public notice of the application, the Corps received opposition to the issuance of the permit from the U.S.

EPA, the U.S. Fish and Wildlife Service and the National Marine Fisheries service on the basis of significant adverse environmental effects.

In August, 1989, Dr. Sasser was informed that the application was "retired," inactivated and never issued by the Corps, because of the inability of Dr. Sasser to resolve a dispute with the State of South Carolina over the state's issuance of a coastal zone management consistency certification. It is not clear from this record whether the Corps would have issued the permit had Dr. Sasser resolved his problems with the State of South Carolina in view of the objections filed by the above-mentioned government agencies.

During an aerial surveillance flight performed by a Corps Inspector on April 21, 1987, it was discovered that Dr. Sasser had re-impounded approximately 75 acres of freshwater tidal wetland through the construction of a new eastern embankment along the interior perimeter of the old, deteriorated rice field embankment. (Testimony of Mr. Fred Veal). Creation of the new embankment involved the discharge of dredged or fill material. (Testimony of Mr. Fred Veal). This activity was conducted without the required individual Section 404 permit. (Testimony of Mr. Fred Veal). After a meeting with Dr. Sasser, during which he indicated that he would not voluntarily restore the impoundments to their pre-fill condition, the Corps referred the matter of EPA for enforcement action. (Testimony of Mr. Fred Veal).

An EPA biologist visited Dr. Sasser's property on September

28, 1987. EPA determined that the impoundment activity performed by Dr. Sasser constituted the discharge of dredged or fill material in a wetland which required an individual Section 404 permit. (Testimony of Mr. Tom Welborn; Complainant's Exhibit 7). EPA, on November 13, 1987, issued an Administrative Order requiring Dr. Sasser to cease further filling and to submit a plan to restore the wetland area to its original condition. (Complainant's Exhibit 9). No such plan was received by EPA and on June 15, 1988, EPA issued another Administrative Order specifying a restoration plan. (Complainant's Exhibit 10). Dr. Sasser's refusal to comply with these Orders has prompted the initiation of this administrative proceeding. (Testimony of Mr. Tom Welborn).

As stated in the Complainant's Brief:

"The Respondent's filling activity has caused significant environmental damage. The impoundment of tidal wetlands destroys or severely reduces most natural wetland values, including providing habitat for a diversity of plant and animal life; providing necessary spawning and feeding grounds for fin and shellfish species; producing and exporting detrital matter which supports the food chain; providing water quality functions such as chemical filtration and purification, stormwater storage, sediment retention and coastal protection. (Testimony of Mr. Delbert Hicks; Testimony of Mr. Steven Gilbert)."

Clearly Dr. Sasser's actions violated Section 404 of the Clean Water Act ("the Act") since his activities constituted the deposition of dredged and fill materials into the waters of the United States. Such materials are defined as "pollutants" by both EPA and Corps. regulations. See 40 CFR §§ 2322(g) and 232.2(i); 33 CFR § 232.2(c) and (e).

Following the Corps refusal to issue him a Section 404 permit,

Dr. Sasser watched, in apparent frustration, as his neighboring plantation owners repaired their dikes and established hunting clubs. He purportedly queried these folks and was advised that, in many cases, they were taking such action pursuant to a nationwide permit. After seeking legal counsel from an attorney, who Dr. Sasser testified had no particular expertise in this field of law, he proceeded to repair his dikes, construct the necessary water control devices, turn his land into an impoundment and started a hunt club. He recruited friends as members and proceeded to build a club house.

At the original hearing, Dr. Sasser based his defense solely on the notion that his activities were authorized by the nationwide permit program promulgated by the Corps at 33 CFR § 330.5(a)(3), which states as follows:

(3) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure or fill, or of any currently serviceable structure or fill constructed prior to the requirement for authorization, provided such repair, rehabilitation, or replacement does not result in a deviation from the plans of the original structure or fill, and further provided that the structure or fill has not been put to uses differing from uses specified for it in any permit authorizing its original construction. Minor deviations due to changes in materials or construction techniques and which are necessary to make repair, rehabilitation, or replacement are permitted. Maintenance dredging and beach restoration are not authorized by this nationwide permit. (Sections 10 and 404)

Both the Corps and the EPA have consistently ruled that the term "currently serviceable" means "functional," ie capable of containing the water impounded therein but which may require some minor topping or other small repairs to insure their stability.

As indicated above, Dr. Sasser dikes were not functional since the land enclosed by them had reverted to the status of wetlands and contained several breaches which permitted the free flow of water into and out of the land involved. I see no reason to question the interpretations placed on this regulation by the agencies entrusted with its enforcement since such interpretations are generally given deference by the Courts Dow Chemical Co. v. EPA, 605 F.2d 673, 681 (3rd Cir. 1979); Bethlehem Steel Corp. v. EPA, 723 F.2d 1303, 1309 (7th Cir. 1983).

I, therefore, find that the defense offered by the Respondent to justify his actions must be rejected. Consequently, I also find that the Respondent violated the Act by polluting the waters of the U.S. in contravention of Section 404 thereof.

THE PENALTY ISSUE

The Complaint in this matter proposes a civil penalty of \$125,000. Section 309(d) of the Act authorizes a per day penalty not to exceed \$25,000. The Act also requires that, in calculating a penalty, the Administrator must take into account the seriousness of the violation(s), the economic benefit (if any) resulting from the violation, any history of such violations, any good faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

The Agency, in arriving at the proposed penalty, determined that as to the seriousness of the violation in terms of the extent of gravity thereof that it must be rated as very serious given the

number of acres impounded (75) and the adverse effects the violation wreaked upon the fragile coastal ecosystem. I agree. As to culpability, the Agency argues that given the facts in this case, as set out above including Dr. Sasser's willful disregard for the Section 404 permitting process and the Agency orders a severe penalty is warranted, citing In the Matter of the Hoffman Group, Docket No. CWA-88-AO-24, wherein the Court assessed a penalty of \$50,000 for filling only five acres despite the Respondent's expenditure of over \$50,000 for good faith mitigation efforts. I agree with the Agency's arguments in this regard.

The record discloses no prior history of violations by Dr. Sasser.

The Agency argues that as to economic benefit arising from the violation Dr. Sasser has shown a profit on the operation of this hunting club. However, at the most recent hearing, the Respondent produced tax returns that show a net loss on all plantations involved and if he is forced to return the impoundments to their wetlands state, he will have to reimburse the club members for their \$15,000 per person contribution to build the club house and maintain the premises. This involves about \$45,000. So I find no economic benefit to the Respondent in this instance.

The sole remaining issue involves the Respondent's ability to pay the penalty proposed; the amount of which I find to be appropriate. As pointed out by the Complainant at \$25,000/day multiplied by the days of non-compliance at the time of the filing of the Complaint the resulting penalty would be \$43,000,000. So

\$125,000 seems very reasonable. It should also be noted that as of this date, the Respondent is still in violation thus adding the potential for several millions dollars more in penalties.

At any rate, the Respondent, like many doctors, is not an astute money manager. At one time, he and old friends owned several plantations worth a considerable sum. Upon the death of one of them, his niece brought a partition suit to divide the property. Dr. Sasser testified at the final hearing that he had put together a consortium of friends to buy out the other owners and his niece. At a Court House steps auction, the bid reached over one million dollars and Dr. Sasser's friends never showed. The property was sold and Dr. Sasser's share was over \$200,000. He used this money along with money borrowed from three lending institutions to buy three plantations, one of which is the subject of this action, known as Birdfield Plantation. He apparently bought two other plantations known as Squirrel Creek and Enfield. As best I can figure, based upon the numerous exhibits filed at the second hearing, the Respondent owes several banks and lending institutions about \$200,000. An analysis of his medical practice prepared by MI/Professional Management, shows that for the 12-month period ending March 31, 1990, Dr. Sasser grossed \$298,006. My analysis of this document shows that he paid himself \$107,678 and put \$5,000 into a profit sharing plan.

Dr. Sasser testified that he planned to retire in five years. So, despite his heavy mortgage burden, he has apparently saved enough to be able to retire at about age 60. The Respondent also

testified that if he is forced to restore the Birdfield Plantation to its original state as a wetland, it would have virtually no market value. Dr. Sasser is currently making regular payments on his above-mentioned debts, which he renews every year. He also was divorced in 1989 and his wife received a fair portion of his assets. He received personal property in the amount of \$50,351 and his wife got \$17,136 worth. Marital debts to be paid by the Respondent totalled \$655,188. As part of the divorce decree, in conjunction with a previously executed support and maintenance agreement, Dr. Sasser retained ownership of the three plantations, his office building and all equipment, and the marital home (worth \$470,000) and the afore-mentioned club house. So while encumbered with heavy debt, the Respondent is not without assets. He also retains all income from this medical practice.

In view of all of the above, I am of the opinion that Dr. Sasser has the ability to pay the proposed penalty of \$125,000. However, in light of the fact that much of Dr. Sasser's assets are non-liquid (i.e. real estate) he will be permitted to pay the assessed penalty in installments, over time. The terms of such installment payments shall be determined by the Complainant. If for any reason the Respondent defaults upon such payments, the remaining penalty shall become immediately due and payable.

ORDER²

1. Based upon the record in this matter it is determined that the Respondent violated the Act in the manner as set forth in the Complaint.

2. A penalty of \$125,000 is assessed against the Respondent for the violation herein found to be paid in the manner hereinabove specified.

3. The Respondent is further directed and ordered to:

A. immediately ceased participating in or causing any additional discharges into the discharge area of any "pollutant" as that term is defined by Section 502(6) of the Act (33 U.S.C. § 1362(6)).

B. within 20 days of the date of this Order, the Respondent shall submit to counsel for the Complainant a written plan and schedule for the restoration of the discharge area to its pre-violation condition.

C. after receiving EPA approval of a restoration plan, the Respondent shall complete implementation of the approved plan in accordance with a schedule approved by the Complainant.

4. Since this decision decides all issues before me, it

² In accordance with 40 CFR § 22.27(c), this Initial Decision will become the Final Order of the Administrator within 45 days after its service upon the parties unless (1) an appeal is taken by a party to the proceedings, or (2) the Administrator elects, sua sponte, to review the Initial Decision. 40 CFR § 22.30(a) provides that such appeal may be taken by filing a Notice of Appeal within **twenty (20)** days after service of this Decision.

constitutes an initial decision and the parties need not file any post-hearing briefs.

Dated:

7/30/91



Thomas B. Yost
Administrative Law Judge

CERTIFICATION OF SERVICE

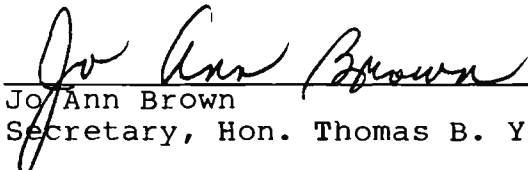
I hereby certify that, in accordance with 40 CFR § 22.27(a), I have this date hand delivered the Original of the foregoing **INITIAL DECISION** of Honorable Thomas B. Yost, Administrative Law Judge, to Ms. Julia Mooney, Regional Hearing Clerk, United States Environmental Protection Agency, Region IV, 345 Courtland Street, Atlanta, Georgia, and have referred said Regional Hearing Clerk to said Section which further provides that, after preparing and forwarding a copy of said **INITIAL DECISION** to all parties, she shall forward the original, along with the record of the proceeding to:

Hearing Clerk (A-110)
EPA Headquarters
Washington, D.C. 20460

who shall forward a copy of said **INITIAL DECISION** to the Administrator.

Dated: _____

7/30/91



Jo Ann Brown
Secretary, Hon. Thomas B. Yost

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing INITIAL DECISION in the matter of DR. MARSHALL C. SASSER, Docket No. 404-89-102, on each of the parties listed below in the manner indicated:

D. W. Green, Jr., Esquire (via Certified Mail - Return Receipt
Phillip D. Sasser, Esquire Requested)
Green and Sasser
207 Beatty Street
P. O. Box 1506
Conway, South Carolina 29526

Edwin Schwartz, Esquire (via Hand-Delivery)
Assistant Regional Counsel
U.S. Environmental Protection
Agency, Region IV
345 Courtland Street, N.E.
Atlanta, Georgia 30365

I hereby further certify that I have this day caused the original of the foregoing INITIAL DECISION together with the record of the proceeding in the matter of DR. MARSHALL C. SASSER, Docket No. 404-89-102, to be delivered to the Headquarters Hearing Clerk addressed as follows:

Bessie L. Hammel (via inter-agency pouch mail)
Headquarters Hearing Clerk
U.S. Environmental Protection
Agency (Mail Code A-110)
401 M Street, S.W.
Washington, D. C. 20460

Date: July 31, 1991

Julia P. Mooney
Julia P. Mooney
Regional Hearing Clerk
U.S. Environmental Protection
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