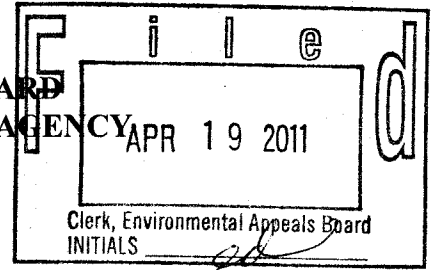


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:)
Henry R. Stevenson, Jr. &)
Parkwood Land Co.)
Docket No. CWA-06-2010-2708)

CWA Appeal No. 11-02

ORDER DISMISSING APPEAL FOR LACK OF JURISDICTION

On February 6, 2011, the Environmental Appeals Board (“Board”) received a Notice of Appeal and accompanying Appeal Brief from Mr. Henry R. Stevenson, Jr., individually and as owner of the Parkwood Land Company (collectively “PLC”), seeking “review of a decision of Administrative Law Judge Miguel I. Flores, issued January 31, 2011,” for violations of the Clean Water Act (“CWA” or “Act”).¹ The “decision” referenced in the appeal is in fact an Administrative Order issued on January 31, 2011, by Mr. Flores.

PLC owns a 79-acre property located northeast of the Interstate Highway 10 and the Neches River intersection, near Rose City, Orange County, Texas. Administrative Order at 1-2. In April 2007, PLC received authorization from the U.S. Army Corps of Engineers (“USACE”) pursuant to Nationwide Permit 3 to repair a portion of a containment levy surrounding the entirety of the property.² See Letter from Bruce H. Bennett, Leader, North Evaluation Unit,

¹ Miguel I. Flores is the Director of the Water Quality Protection Division for Region 6 (“Region”) of the U.S. Environmental Protection Agency (“EPA”). See Administrative Order at 5. He is not an Administrative Law Judge, as stated in PLC’s Notice of Appeal.

² Nationwide Permit 3 (“NWP 3”) “authorizes the repair of a previously-authorized currently-serviceable structure or fill provided the structure or fill is not put to a different use than that for which it was originally constructed. Minor deviations due to changes in construction techniques, materials, or the like are authorized.” See Letter from Bruce H. Bennett, Leader, North Evaluation Unit, Galveston District, USACE, to James G. White, GTI Environmental Inc. (Apr. 17, 2007) (“USACE Letter”). The USACE Letter, verifying that PLC

Galveston District, USACE, to James G. White, GTI Environmental Inc. (Apr. 17, 2007) (“USACE Letter”).

The Administrative Order concerns dredge and fill activities conducted on 1.26 acres of wetlands located on PLC’s 79-acre property and observed on multiple dates between August 2007 and August 2010. Administrative Order at 2. The order states that PLC “discharged dredged material” and/or “discharged fill material” as defined in CWA § 502, 33 U.S.C. § 1362, and 40 C.F.R. § 232.2, from point sources “in, on and into 1.26 acres of wetlands within the subject property adjacent to the permitted repair of a levee surrounding the wetlands.” *Id.* at 2. The order further states that PLC discharged the materials without obtaining a permit from the USACE required pursuant to CWA § 404, 33 U.S.C. § 1344, and that as such, each unauthorized discharge on PLC’s property was a violation of CWA § 301(a), 33 U.S.C. 1311(a), which prohibits the discharge of any pollutant from a point source into waters of the United States without a permit. *See id.* at 3. The Region did not propose a penalty in the order, although it required PLC to submit a plan within thirty days of receipt of the order to restore the 1.26 acres of impacted wetlands. *Id.* at 3-4. The Region did, however, expressly reserve the right to undertake an administrative action or a judicial civil or criminal action to seek penalties, fines, or other relief under the CWA for the violations alleged within the order. *Id.* at 4.

could repair the existing levee pursuant to NWP 3, further states that, “[r]eview of a 1947 survey showed that the property was originally used for dredge-material disposal and is surrounded by a containment levee. According to your project description, this levee is eroding and requires repairs. Since the levee was built prior to the inception of Section 404 of the Clean Water Act (CWA), and Section 10 of the Rivers and Harbors Act of 1899[,] plus the fact [that] jurisdictional activities that have occurred prior to July 19, 1977, are authorized (grandfathered) by the NWP[,] the levee is considered to be previously-authorized and can be repaired pursuant to NWP 3.” *Id.*

PLC's appeal asserts that the USACE and EPA lack jurisdiction over the subject property because based on the Supreme Court's decision in *Rapanos v. U.S.*, 547 U.S. 715 (2006), PLC's land is not a wetland within the jurisdiction of the CWA. Appeal Brief at 9-11. PLC further asserts that its activities on the subject property are grandfathered under NWP 3, and that the disagreement between the parties is based on whether PLC exceeded the limits of the grandfathered activities. *Id.* at 11-12.

In the absence of a specific reference to a jurisdictional basis for the Board's review, PLC's reference to an "administrative law judge" in its Notice of Appeal suggests that PLC is attempting to assert jurisdiction based on the Consolidated Rules of Practice contained in 40 C.F.R. part 22. The Board is a body of limited jurisdiction, and in this instance, the Board lacks jurisdiction under the Consolidated Rules of Practice, sections 22.4(a), .29-.30,³ to hear PLC's appeal of the Region's order issued pursuant to the CWA. The Administrative Order at issue here is not an initial decision or interlocutory ruling or order of an administrative law judge or regional judicial officer.⁴ Accordingly, PLC's appeal is hereby dismissed.

So ordered.⁵

ENVIRONMENTAL APPEALS BOARD

Dated: *April 19, 2011*

By: *Charles J. Sheehan*
Charles J. Sheehan
Environmental Appeals Judge

³ Section 22.4(a) states in part that "[t]he Environmental Appeals Board rules on appeals from the initial decisions, rulings and orders of a Presiding Officer in proceedings under these Consolidated Rules of Practice." 40 C.F.R. § 22.4(a). Section 22.29 provides for appeals from interlocutory orders or rulings other than an initial decision of a presiding officer. 40 C.F.R. § 22.29(a). Section 22.30 provides for appeals to the Board from initial decisions of a presiding officer. 40 C.F.R. § 22.30; *see also* 40 C.F.R. § 22.2 (stating that the presiding officer shall be an administrative law judge except for specific instances where the Consolidated Rules allow a regional judicial officer to serve as presiding officer).

⁴ The Board also notes that despite the requirements set forth in 40 C.F.R. §§ 22.5(a)(3) and 22.5(b), which state that each document filed shall be served on each party and shall be accompanied by a certificate of service, PLC's Notice of Appeal and Appeal Brief do not have a certificate of service attached. Further, given that the Board never received a response from the Region regarding PLC's appeal, it is unclear whether the Region ever received a copy of PLC's appeal as required by the Consolidated Rules of Practice.

⁵ The three-member panel deciding this matter is comprised of Environmental Appeals Judges Charles J. Sheehan, Edward E. Reich, and Kathie A. Stein. 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Dismissing Appeal for Lack of Jurisdiction in the matter of Henry J. Stevenson, Jr. & Parkwood Land Co., CWA Appeal No. 11-02, were sent to the following persons in the manner indicated:

By Facsimile and First Class U.S. Mail:

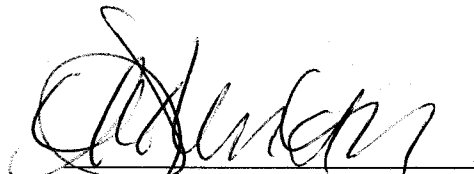
Charles M. Kibler, Jr.
765 N. 5th Street
Silsbee, TX 77656
Phone: (409) 373-4313
Facsimile: (888) 720-1177

By Facsimile and EPA Pouch Mail:

Miguel I. Flores
Director, Water Quality Protection Division
U.S. Environmental Protection Agency - Region 6 (6WQ)
1445 Ross Avenue
Suite 1200
Dallas, TX 75202-2733
Phone: (214) 665-7101
Facsimile: (214) 665-7373

Russell Murdock
Office of Regional Counsel
U.S. Environmental Protection Agency - Region 6 (6RC)
1445 Ross Avenue
Suite 1200
Dallas, TX 75202-2733
Phone: (214) 665-3189
Facsimile: (214) 665-2182

Dated: APR 19 2011


Annette Duncan
Secretary