UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6

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

PENALTY ORDER ON REMAND

In earlier proceedings, I issued an initial decision in this matter assessing an administrative penalty of $7,500.00. The parties to those proceedings framed their arguments on penalty amount on "Clean Water Act 404 Settlement Penalty Policy" (Office of Enforcement and Compliance Assurance, December 2, 2001)(Settlement Policy) and my penalty assessment was based on application of that policy *sans* factors for compromise adjustments..

Respondents appealed the initial decision to EPA's Environmental Appeals Board, challenging my determinations that the receiving water was subject to the jurisdictional reach of the Clean Water Act (CWA) and that the discharges of fill from which the action arose were not authorized. Complainant cross-appealed, contending I had misapplied the Settlement Policy. The Board rejected both appeal and cross-appeal. It affirmed my conclusions that the receiving water was subject to CWA requirements and that Respondents' discharges were not authorized. It found Complainant's contentions on application of the Settlement Policy "miss the central point" because that policy "is intended primarily for settlement purposes," not for appli-cation in penalty assessment. *In re: Henry Stevenson and Parkwood Land Co.*, 16 EAD ___, CWA Appeal No. 13-01 (October 24, 2013)(Remand Opinion), p. 23. Consistent with that conclusion, the Board remanded the penalty assessment for "explicit consideration in light of the statutory

[penalty] factors, the Policy on Civil Penalties [EPA General Enforcement Policy #GM- 21 (February 16, 1984)(Policy)] and the Penalty Framework [i.e., A Framework for Statute-Specific Approaches to Penalty Assessments (EPA General Enforcement Policy #GM - 22 (February 16, 1984)(Framework)]." Remand Opinion, p. 34.

On remand, the parties submitted briefs supporting their respective positions on penalty amount. In addition, I have reviewed the record anew. After considering the Board's Remand Opinion, the evidence, and briefs of the parties, I issue this Penalty Order.

Analysis

Maximum Penalty Amount. Complainant contends the penalty it sought, $32,500.00, should be "reinstated." Complainant's Brief As To Penalty, pp. 1, 11; Complainant's Reply Brief as to Penalty, pp. 1, 3. The apparent basis for that contention is the length of time the unauthorized fill in this matter had remained in place (three years at the time of hearing); Complainant proved only that Respondent discharged fill on two days. Unauthorized discharges to the receiving waters may well have occurred on more than two days, but Complainant adduced no evidence, e.g., expert testimony on the time such construction would take, on which a finding of additional violations might be based.

Although the length of time the fill remained in place may be considered in assessing a penalty, the number of violations Complainant proved determines the maximum penalty that may be assessed. *See United States* v. *Rutherford Oil,* 756 F.Supp.2d 782, 790 - 792 (S.D. Tex. 2010). *See also In the Matter of Phoenix Construction Services, Inc.,* 11 E.A.D.379 (EAB 2004). Because Complainant proved only two violations, the maximum penalty I may assess here is $22,000.00. *See* 40 C.F.R. §19.4, Table 1.

Penalty Factors. In assessing a 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 Board found EPA has issued no program-specific penalty guidelines that apply to this matter, but ordered that I explicitly consider the Policy and Framework as well as the statutory criteria on remand.

The statutory criteria may be very broadly characterized as falling into two categories, i.e., facts relating to the violation and facts relating to the violator, but the Policy and Framework follow a different organizational structure. The Policy sets forth broad goals for penalty assessment, i.e., deterrence, fair and equitable treatment of the regulated community, swift resolution of environmental problems, providing incentives to settle and institute prompt remedial action, and providing disincentives to delaying compliance. *See* Policy, pp. 3-6.

The Framework fleshes out the Policy, specifying factors that should be considered in developing program-specific policies on penalty proposal, compromise, and assessment. The Framework advises that a "preliminary deterrence" penalty should be derived considering economic benefit the violator enjoyed from noncompliance and a "gravity component." Some subfactors for consideration in determining the preliminary deterrence penalty are specific to the violation, e.g., "actual or possible harm," but others are specific to the violator, e.g., "size of the violator." Framework, p. 3. The Framework then advises that the "preliminary deterrence penalty" should be adjusted on the basis of other factors to derive an "initial penalty target figure" prior to settlement negotiations and thereafter as "new information becomes available and

old evidence is re-evaluated in light of new evidence." Framework, p. 4. This adjusted figure is "a penalty amount which the government normally sets as a goal at the outset of settlement negotiations," "an internal settlement goal," and "[i]n administrative actions... generally is the penalty assessed in the complaint." Framework, p. 2.

Although the Framework is thus partly directed to settlement negotiations and proposing penalties, many factors it embraces are generally relevant to application of the statutory criteria, Others are relevant only in the context of settlement negotiations. As shown below in analyzing duration of the violation, differentiation between factors for consideration in assessing a penalty and factors relevant only to settlement negotiations is not always a bright line.

Nature and Circumstances of the Violations. This statutory criterion imposes a requirement that penalties be be assessed only after consideration of specific facts underlying specific violations. Without such consideration, neither aggravating nor mitigating factors relevant to the other statutory criteria may be fairly applied in assessing a penalty. In recognition of this truism, neither the Policy on Civil Penalties nor Penalty Framework suggests the nature and circumstances of a violation is a factor for independent consideration in assessing a penalty, instead relegating consideration of specific facts underlying violations to the other factors identified by those guidance documents.

Briefly summarized, the facts from which the violations arose are:

Respondent Parkland Land Company holds title to about 330 acres of land and occasionally profits from leasing portions thereof to third parties. One of those properties is a 79 acre tract adjacent to the Neches River. A levee separating the tract from the River was initially constructed many years ago, prior to Parkland's ownership, in connection with the tract's use as a

dredged spoil disposal area. Subsequently, a bald cypress-tupelo swamp established itself inside the levee. That swamp occupied 71.2 acres of the 79 acre tract.

Respondent Henry "Sonny" Stevenson is Parkland's chief executive officer and sole shareholder. Upon is graduation from high school in 1963, Mr. Stevenson jointed the Navy and served in Viet Nam. He now receives disability payments from the Veterans Administration, apparently as a result of that service. Based on his testimony and demeanor at hearing, Mr. Stevenson possesses impaired cognitive abilities, but has achieved some degree of financial success due to prudent investments and substantial skill in operating heavy machinery.

From past experiences with the Corps of Engineers, including two violations, Mr. Stevenson was generally familiar with the CWA requirement that discharges of fill material to waters of the U.S. be authorized by permit and had concluded it prudent to retain a consultant to seek such authorizations. Respondents thus retained a consultant, GTI Environmental (GTI), to obtain authorization to discharge fill material for the purpose of repairing the deteriorating levee separating Parkwood's property from the Neches River. The preconstruction notification GTI submitted to the Corps proposed to reconstruct the levee by placing fill dredged from those wetlands with a track hoe to the inner side of the levee. Under that proposal, the levee's foot would have been extended up to 10 feet further into the tract's interior, but the only discharges of fill associated with that work was temporary fill to support heavy machinery transporting the dredged material to the levee.

While awaiting Corps action on the preconstruction notification, Parkwood obtained the use of free fill material from a nearby road construction project and Mr. Stevenson directed GTI to notify the Corps of proposed project changes accommodating use of that fill, but the record

sheds little light on communications between GTI and the the Corps. The Corps eventually authorized Parkwood to discharge fill under Nationwide Permit (NWP) 3 in accordance with its initial preconstruction notification, but conditioned that authorization on attached engineering drawings. Neither the initial notification or the drawings were consistent with use of the fill obtained from the highway project. The Corps essentially required that all fill be placed on the River side of the levee as shown on the drawings *and* in accordance with the preconstruction notification that proposed to discharge it to the swamp side. In addition, the letter stated "[m]inor deviations to changes in construction techniques, materials, or the like are authorized."

Mr. Stevenson interpreted that statement to mean minor deviations to the restrictions in the Corps' letter were authorized and proceeded to repair the levee by placing the construction debris on the inner side of the levee. Most of the fill placed there did not encroach on wetlands, but there were two areas in which it did. In constructing an area in which the trucks they used to discharge fill from the top of the levee to its base could turn around, Respondents discharged fill to .48 acres of wetlands. In addition, the highway construction contractors discharged fill to .78 acres of wetland in connection with its delivery to an adjacent upland staging area.[1]

While conducting the work, Mr. Stevenson reported to the Corps that he had "lost" a truck load of concrete in the River, a report the Corps followed up by sending an inspector to the site. The inspector, Ms. Christin Shivers, found no evidence of the lost concrete, but observed the work in progress, including the truck turnaround. After it received two inaccurate anonymous complaints that Respondents were clearing and filling the swamp, the Corps later

---

[1] Because Respondents used some of it for accessing the levee's crown, the record sometimes references that fill as a "truck ramp."

sent two inspectors, Mr. Bruce Davidson and Ms. Shivers to the site. The inspectors found no evidence of land clearing, but on the first of these inspections, Ms. Shivers observed that the truck turnaround was larger than on her prior inspection. Thereafter, the Corps sent a letter to Respondents alleging they were discharging fill material to wetlands without a permit and ordering them to cease and desist any further unauthorized activity. That order did not reference Respondents' prior authorization.

The Corps subsequently referred the matter to EPA Region 6 for enforcement action. The Region ordered that Respondents submit a restoration plan to EPA for approval and subsequent implementation. The order further stated that if no plan was submitted, EPA would issue a restoration plan that Respondents would be required to implement. While visiting the site, EPA's compliance officer told Mr. Stevenson that the Agency would seek penalties against him, even if he restored the area. Respondents, who believed the work had been authorized, did not submit a restoration plan to EPA. Nor did the Agency issue a restoration plan for Respondents' implementation. This penalty action followed.

Extent and Gravity of the Violations. These statutory criteria relate to the degree of harm occasioned by unauthorized discharges and, according to the Framework, encompass both harm to the environment and harm to the regulatory regime The Framework also identifies subfactors relevant to each type of harm.[2] *See* Framework, pp. 14 - 15.

---

[2] At page 15, the Framework indicates the gravity factor also includes the "size of violator" when a penalty based on harm "will otherwise have little impact on the violator." Respondents are not "large" violators. In addition, the Framework requires consideration of "availability of data from other sources" when a record keeping or reporting requirement is violated. Respondents violated no such requirement.

Subfactors the Framework suggests for consideration in assessing actual or potential harm to the environment include "sensitivity of the environment,"" amount of pollutant,""toxicity of the pollutant," and "the length of time a violation continues." Framework, pp. 14-15. The receiving water in the instant matter is a bald cypress-tupelo swamp, a type of wetland diminishing in the Galveston District. The particular swamp at issue is in decline due to permanent inundation that stresses or kills native trees and renders normal cypress regeneration unsuccessful. *See* TR 101. *See also Conservation, Protection, and Utilization of Louisiana's Coastal Wetland Forests – Final Report to the Governor of Louisiana from the Coastal Wetland Forest and Use Science Working Group* (April 30, 2005), pp. iv., 19, 26, 40.[3] Respondents attribute that permanent inundation to the Corps' issuance of a permit enabling a neighboring landowner to alter the swamp's natural drainage, an allegation Complainant did not dispute. TR 103 - 104.

Although Complainant offered little evidence on impairment of any natural function the swamp served, it is reasonable to conclude some aquatic habitat was replaced by fill. *See* TR 28. The areal extent of that loss, roughly corresponding to "amount of pollutant" in the Framework, was 1.26 acres. The pollutant itself was construction debris, mostly broken concrete, and the record contains no indication it was toxic.

The "length of time a violation continues" is a more contentious issue in this matter. Complainant proved only two days of violation, but contends the much longer period of time the fill has remained in place warrants a higher penalty because it represents continuing environmental harm. As noted at page 15 of the Framework. [i]n most circumstances, the longer a

---

[3] This scientific report was not introduced in evidence, but is well known to the Region 6 wetlands protection program. The report is generally available at http://www.coastalforestswg.lsu.edu/THEFinalReport.pdf

violation continues uncorrected, the greater is the risk of harm." [Emphasis added.] In many circumstances, that statement seems self evident; the longer pollutants are discharged in violation of an National Pollutant Discharge Elimination System permit, for instance, the greater the risk to water quality. Depending on site-specific circumstances, however, removal of unauthorized fill from wetlands may occasion more harm than good. Determining whether and how unauthorized fill should be removed is thus a a matter generally determined in an after-the-fact permit issued by the Corps or an administrative order issued by EPA. Less than 5 acres of fill left in place after compliance with an EPA Compliance Order on Consent, for instance, may now be authorized by Nationwide Permit 32. *See* 77 Fed. Reg. 10184, 10277 - 10278 (February 21, 2012).

At pages 19 - 20, the Framework moreover suggests a violator's prompt correction of environmental problems is a penalty reduction factor that should be considered in settling or proposing a penalty to provide an incentive for such correction. Such reductions may be substantial, generally equating to 50% of a compromised penalty or 25% of a proposed penalty and in some cases even more. Nevertheless, continuing adverse effects of a violation may generally be considered in penalty assessment. *See United States* v. *Rutherford Oil, supra.* Under the specific facts of this matter, no such consideration is appropriate.

Complainant proffered no evidence or argument on how Respondents might lawfully have removed the unauthorized fill in this matter. Given its location and nature, however, removal of that fill would likely have required the use of heavy equipment working from

additional temporary fill discharged to the wetlands on the inner side of the levee,[4] but Respondents reasonably viewed the Corps' cease and desist order as requiring that they perform no more work. Likewise, EPA's 309(a) order made it clear that Respondents were to restore the site only in compliance with an EPA-approved or EPA-issued restoration plan and EPA neither approved nor issued such a plan. Had EPA issued a restoration plan in this matter with which Respondent failed to comply, a higher penalty might be assessed on the basis of additional harm occurring thereafter.[5] Having effectively ordered that the fill be left in place pending further EPA action, however, Complainant cannot now fairly or reasonably contend Respondents' failure to remove it has caused continued harm for which a greater penalty should be assessed. In this case, such a penalty increase would work a manifest injustice, thus falling into the statutory penalty criterion of "such other matters as justice may require."

The Framework advises harm to the program should be considered in view of importance to the regulatory scheme, stating at page 14:

> Inportance to the regulatory scheme: This factor focuses on the importance of the requirement to achieving the goal of the statute or regulation. For example, if labeling is the only method used to prevent dangerous exposure to a chemical, then failure to label should result in a relatively high penalty. By contrast, a warning sign that was visibly posted but was smaller than the required sign would not normally be considered as serious.

---

[4] Parkwood's preconstruction notification proposed to use a track hoe operating on temporary fill to reconstruct the levee using fill borrowed from the interior wetland. *See* Ex R-5. Had the Corps' cease and desist order referenced the preconstruction notification, Respondents might arguably have employed such temporary fill in compliance with that order. The order, however, did not reference or otherwise acknowledge the existence of Respondent's authorization and Mr. Stevenson thus stopped working on the levee. *See* Ex R-36.

[5] Further complicating this matter, the County issued Parkwood a "Floodway Prevention Order" Mr. Stevenson interpreted as requiring that he stop all construction work. *See* TR 251 - 252. The record contains no copy of that county order.

The most important requirements of the Section 404 program are that dischargers of dredged or fill material obtain a permit prior to the discharge and that permit holders comply with the requirements of those permits. Unlike most cases in which EPA assesses a penalty,[6] this matter is in some respects more like a permit violation because Respondents sought and obtained authorization to discharge fill under Nationwide Permit 3, but failed to comply with the mutually exclusive conditions the Corps imposed on the discharges. Although it is difficult to discern the scope of the Corps' authorization, it clearly did not authorize the discharges of the fill associated with the staging area and truck turnaround.

As noted in my earlier Initial Decision, the primary harm to the program arising from Respondents' violations was depriving the Corps of opportunity to impose mitigation conditions.[7] Corps staff testified that a temporary fill authorization for the truck turnaround would have been forthcoming had Respondents applied for coverage under NWP 33 as well as NWP 3. *See* TR 24, 71. The turnaround could, however, have been authorized as temporary fill under NWP 3 and in fact would have been so authorized had not the Corps imposed contrary conditions in its authorizing letter. *See* 73 Fed. Reg. 11092, 11181 (March 12, 2007). That it did not authorize the turnaround may reflect a GTI failure to communicate proposed project changes to

---

[6] Generally, EPA assesses administrative penalties for failures to obtain a CWA §404 permit pursuant to CWA §309(g)(1)(A) and the Corps assesses penalties for violations of such permits pursuant to CWA §309(g)(1)(B). Under the somewhat unusual circumstances of this case in which the *only* relationship the permit bore to the discharges was purpose, i.e., repair of an existing levee, the government reasonably chose to seek penalties for discharges without a permit.

[7] Mitigation would likely have been required had the Corps allowed Respondents to proceed in accordance with their initial preconstruction notification or with the project modifications Respondents communicated to GTI. The record reveals little about the preconstruction negotiations between GTI, but the Corps-imposed requirement that all fill be placed on the river side of the levee was possibly an effort to implement 40 C.F.R. §230.10(a).

the Corps during the preconstruction notification proceedings. Such a GTI failure (which would be attributable to Respondnets) may have contributed to depriving the Corps of its opportunity to require mitigation, but was not its proximate cause.

The proximate cause of that deprivation was Respondents' misinterpretation of the Corps authorizing letter. Had they understood the authorization did not in fact allow the work they wished to perform, Respondents would presumably have tried to work it out with the Corps permit staff. As the Board suggests at page 25 of its Remand Opinion, Mr. Stevenson's misinterpretation effectively resulted in the substitution of his own judgment for the Corps.' A penalty is thus warranted for attendant damage to the program and to deter others from similar errors.

If "activities are typically visible to other members of the local community, the perception that an individual is getting away with it and openly flaunting environmental requirements may set a poor example for the community and encourage other similar violations in the future and/or lead to the acceptance of such violations as commonplace, minor infractions not worthy of attention." *In Re Phoenix Construction Co.*, 11 E.A.D. 379, 399 (EAB 2004). Hence, Complainant argues a high penalty is warranted because the unauthorized fill was "visible to members of the local community." Complainant references testimony of EPA's compliance officer:

> ...[T]his was visible to the community. We noted that it came in as a citizen, an anonymous citizen, complaint. So, obviously, somebody out there in the community, this was visible to them.
>
> And just the location of the property there right on the river and across from Beaumont there was some visibility there. TR 163-164.

The citizen complaints show someone observed dump trucks working across the river, but not the nature of that work. One anonymous complaint inaccurately claimed Respondents were "clearing trees and dumping [them] in the Neches River" and that a dump truck had been "buried" or was otherwise "involved in the River."[8] Complainant's Prehearing Exchange, Ex 30, p. 4, Ex 33; TR 69. The other complaint was similarly inaccurate, claiming Respondents were using the site's interior wetlands "as a dumping ground for thousands of truckloads of trash, old tile + concrete sewer pipes and broken cement" and were cutting down and burying cypress trees. Complainant's Prehearing Exchange, Ex 30, p. 5. Had either complaint been accurate, a higher penalty might well be warranted. In view of the actual nature of the violations, however, the penalty I assess today is sufficient to show they are "worthy of attention" and to discourage "other similar violations in the future."

Ability to Pay. At page 23, the Framework provides EPA's view on statutes including an "ability to pay" penalty criterion:

> The Agency will generally not request penalties that are clearly beyond the means of the violator. Therefore EPA should consider the ability to pay a penalty in arriving at a specific final penalty assessment. At the same time, it is important that the regulated community not see the violation environmental requirements as a way of aiding a financially troubled business. EPA reserves the option, in appropriate circumstances, of seeking a penalty that might put a company out of business.

---

[8] Cutting trees is not a discharge of dredged or fill material, but some types of land clearing involve such discharges. *Compare Save Our Wetlands* v. *Sands*, 711 F.2d 634, 647 (5th Cir. 1983) *with Avoyelles Sportsman's League* v. *Marsh,* 715 F.2d 897 (5th Cir. 1983). Mr. Stevenson cut trees on the site, but the Corps found no evidence of land clearing. *See* Complainant's Prehearing Exchange, Ex 33. The anonymous complainant may have thought trees were being dumped in the river because some were sloughing off the levee due to erosion. *See* TR 240, 242; R-5, p. 2. An incident in which Respondents almost lost a dump truck in the River may have led to similar confusion over the "buried" truck. *See* TR 216-217..

In *In Re Donald Cutler,* 11 E.A.D. 622, 632 (E.A.D. 2004), the Board summarized its decisions on ability to pay:

> If ability to pay is contested, a complainant must establish a prima facie case that a proposed penalty is nonetheless "appropriate" by presenting, as just mentioned, "some evidence to show that it considered the respondent's ability to pay a penalty. *New Waterbury,* 5 E.A.D. at 542; *accord Britton,* 8 EAD at 290. The complainant need not present any *specific* evidence to show that the respondent *can pay* or obtain funds to pay the assessed penalty, but can simply rely on some *general* financial information regarding the respondent's financial status [that] can support the *inference* that hte penalty assessment need not be reduced. *New Waterbury,* 5 E.A.D. at 543; *accord Wallin,* 10 E.A.D.,. at 36; *Spitzer,* 9 E.A.D. at 320; 40 C.F.R. § 22.24(a). The complainant bears the ultimate burden of persuasion as to penalty appropriateness, so, if the respondent satisfies its burden of production, that burden shifts back to the complainant again, in this instance to "rebut [the] respondent's contentions through rigorous cross-examinatin or through the introduction of additional information." *Chempeace,* 9 E.A.D., at 133; *accord CDT Landfill,* 11 E.A.D., at 121-122; *Wallin,* 10 E.A.D.,at 543.

The Framework, at page 23, suggests EPA enforcement staff should affirmatively seek information on an alleged violator's ability to pay in proposing or reconsidering a penalty, but in this case EPA enforcement staff didn't ask and Mr. Stevenson didn't tell. *See* TR 168 - 169, 223 Regardless of shifting procedural burdens, however, the hearing record contains some "general financial information" sufficient to support an inference Respondents may pay a penalty. Mr. Stevenson testified Parkwood possessed no cash flow and was "broke," except for money he occasionally transferred to its bank account from his personal account upon receiving disability checks from the Veterans Administration. TR 220. He also testified, however, that Parkwood owned about 330 acres of land, including the tract on which the violations occurred and two others of undisclosed acreage, but that he did not know the market value of any of that land. *See*

TR 196, 220 – 223. Were it the only Respondent, it is possible the maximum penalty I might assess here might put Parkwood out of business by requiring that it sell all or a substantial portion of its land, but the lack of evidence on the value of Parkwood's holdings permits no such conclusion.

Moreover, Parkwood is not the only Respondent in this matter. As a potential response to corporate financial problems, the Framework suggests joinder of shareholders "if legally possible and justified under the circumstances." Framework, p. 24. Mr. Stevenson's joinder as a Respondent in this matter is lawful and justified; he personally discharged the fill from which the truck turnaround was constructed. Because he also personally arranged for delivery of the fill that encroached on wetlands adjacent to the upland staging area, he is also vicariously liable for the discharge associated with that delivery. Mr. Stevenson's financial situation is thus also potentially relevant to penalty amount.

In addition to his ownership of all shares of Parkwood and receipt of disability payments from the Veterans Administration, Mr. Stevenson is one of four partners in ACR, LP with corresponding shares in its subsidiary Acre Land, Inc., businesses holding land on which they harvest timber harvest and lease for other purposes. TR 193 - 194. ACR, LP paid a civil penalty of $20,000 in an earlier enforcement matter, but the record contains no evidence on the value of Mr. Stevenson's interests in those entities or of the income Mr. Stevenson receives from them. Without such evidence, I cannot conclude Respondents are unable to pay a penalty herein or that their financial situation warrants a lesser penalty than assessed today.

Prior History of Such Violations. Initially, Complainant contended three prior violations included in Exhibit C-45, a summary of contacts between the Corps and Mr. Steven-

son (including entities in which he had an interest), show a high penalty is warranted because "it suggests that the violator has not been deterred by the prior enforcement actions." Complainant's Brief as to Penalty, p. 7.

One of the violations Exhibit C-45 attributes to Mr. Stevenson was in fact a violation by Williams Brothers Construction Company, which had leased property owned by ACR, LP for use as a hot mix asphalt plant. In the course of preparing the site for that use, Williams Brothers filled 11.60 acres of wetland without a permit. That Williams Brothers' violation occurred about the same time and on the same property as an independent violation (discussed below) by ACR, LP. The temporal and spacial coincidence of that violation may have led to confusion on the part of the Corps Compliance Officer who prepared Exhibit C-45, along with his erroneous view that a lessor is responsible for its lessee's violations. *See* TR 78 - 79. When Respondents disputed the summary's attribution of the Williams Brothers' violation to them. I recessed the hearing to allow the compliance officer to retrieve Corps file documents, but he found none suggesting ACR, L.P. was responsibile for the Williams Brothers violation. *See* TR 83 - 89. I find there were but two prior violations to consider in this matter.

That prior violations occurred does not, standing alone, show that prior enforcement actions have not deterred a violator. The statutory term "such" suggests the circumstances of prior violations is of substantial importance to such a determination. The Framework reinforces that view, equating "such" with "similar," stating in relevant part at pages 21 - 22:

> Where a party has violated a *similar* environmental requirement before, this is usually clear evidence that the party was not deterred by the Agency's previous enforcement response....[A] violation should generally be considered *similar* if the Agency's previous enforcement response should have alerted the party to a *particular type of compliance problem.* Some facts that indicate a "*similar violation*" was committed are as follows:

- The same permit was violated.
- The same substance was involved.
- The same process points were the source of the violation.
- The same statutory or regulatory provision was violated.
- A *similar act or omission*, e.g., a failure to properly store chemicals, was the basis of the violation. [Emphasis added.]

In the instant matter, the same general substance, i.e., fill, was involved. Likewise, the same statutory provision, CWA §301(a), was, as in *all* successful CWA enforcement actions, violated. Issues remain, however, on whether Respondents' acts and omissions from which the current violations arose were "similar to the past violations with which they were involved and whether the prior enforcement responses alerted Respondents of the "particular type of compliance problem" at issue here. The acts and omissions from which noncompliance in this matter arose are (1) failing to supervise the delivery of fill material, resulting in the discharges associated with the staging area and (2) Mr. Stevenson's misinterpretation of the Corps' authorizing letter, resulting in the discharges associated with the truck turnaround.

The first previous violation occurred in 1999, when Mr. Stevenson allegedly filled wetlands north of Tiger Creek and its intersection with Interstate Highway 10 without a permit. *See* Ex. C-45. That wetland had been previously cleared, rendering it difficult to identify, and the Corps and Mr. Stevenson amicably resolved the matter with an after-the-fact permit. *See* TR 200 - 201. The record shows that 1999 violation deterred Mr. Stevenson from making assumptions about the potential existence of wetlands on a work site. Mr. Stevenson (or entities in which he had an interest) thereafter requested verification of wetland delineations or jurisdictional determi-

nations no less than eight times (including a jurisdictional determination in the instant matter). *See* Ex C-45. Notably, the Corps found there were no jurisdictional waters at issue in five of those instances, suggesting Mr. Stevenson was being particularly careful to avoid the identification problems he encountered in 1999.

The second prior violation occurred in 2001 when Mr. Stevenson allegedly used a bulldozer to fill 1.21 acres of wetlands in Tiger Creek's floodplain near the area covered by the after-the-fact permit he obtained to resolve the 1999 violation. *See* Ex. C-45; R-3; TR 97. Mr. Stevenson's account of the underlying circumstances is less than clear, but may suggest he claims Williams Brothers was solely responsible for this violation, perhaps because its lease required it to obtain all necessary permits. *See* TR 197 - 198. Because "[w]e hadn't done nothing wrong," ACR, LP retained a well known Houston law firm to defend it in in that matter, but made a business decision to settle the case for $20,000 and mitigation credit because legal fees for that defense "[l]ike to have bankrupted us." TR 199.

Superficially, at least, this second prior violation is somewhat similar to the violation from which the instant matter arose; ACR, LP had obtained a permit from the Corps, but allegedly discharged fill material to a nearby area not covered by that permit authorization. The record does not reflect that permit misinterpretation played a role in the 2001 violation. Perhaps, however, that violation might have put a reasonable man on notice that Corps' authorizations should be closely scrutinized before performing work under them. Mr. Stevenson in fact scrutinized, but failed to understand, the authorization he received from the Corps in this matter. I do not conclude his lack of understanding arose from a deterrence failure, however, as explained in the following analysis of Respondents' culpability.

Degree of Culpability. Determining the degree of Respondents' culpability is the most challenging issue in this matter. In relevant part, the Framework at pages 17 - 18 advises:

> Although most of the statutes [including the Clean Water Act] which EPA administers are strict liability statutes, this does not render the violator's willfulness and/or negligence irrelevant. Knowing or willful violations can give rise to criminal liability, and the lack of any culpability may, depending upon the particular program, indicate that no penalty action appropriate. Between these two extremes, the willfulness and/or negligence the violator should be reflected in the amount of the penalty.
>
> In assessing the degree of willfulness and/or negligence, all of the following points should be considered in most cases:
>
> - How much control the violator had over the events constituting the violation,
> - The forseeability of the events constituting the violation.
> - Whether the violator took reasonable precautions against the events constituting the violation.
> - Whether the violator knew or should have known of the hazards associated with the conduct.
> - The level of sophistication within the industry in dealing with compliance issues and/or the accessibility of appropriate control technology (if this, information is readily available).
> - This should be balanced against the technology forcing nature of the statute, where applicable.
> - Whether the violator in fact knew of the legal requirement which was violated.

Application of those considerations to Respondents' violations requires separate examination of the causes of discharges associated with the staging area and truck turnaround. I begin with the staging area discharge.

Mr. Stevenson in fact knew a permit was required for discharges of fill to wetlands, did not interpret his permit as authorizing discharges to the wetlands adjacent to the staging area, and foresaw that deliveries to the relatively small upland area between those wetlands and Parkwood's property at the southern end of the levee might be problematic. Mr. Stevenson thus directed the highway contractors to place the fill outside the wetlands, the boundary of which GTI had marked with flags. *See* TR 214 - 215. Those reasonable precautions avoided discharge of fill to the wetlands as long as Mr. Stevenson was onsite to supervise deliveries and place the fill material on the levee as it arrived. In Mr. Stevenson's words, "... I'd dig it all out [of the upland staging area], they'd bring me some more. So that's what we were doing." TR 227, 229.

"The best laid plans o' mice an' men/ Aft go agley." Burns, *To a Mouse* (1785). Respondents' reasonable precautions went agley when Mr. Stevenson was hospitalized for about a year due to injuries sustained in an auto accident and was thus unavailable to supervise deliveries or use the fill as it was delivered to the site. *See* TR 228. In his absence, the stockpile of concrete fill apparently grew until, as a Corps compliance officer testified, it "rolled over into the marsh," accounting for .78 acre of the unauthorized fill from which this matter arises. TR 19. *See* TR 18 - 19, 55; Ex C-47. The lack of control by Parkwood and its "one man show" Mr. Stevenson suggests the degree of Respondents' culpability with regard to the staging area fill discharge was not particularly great.

There was no similar lack of control over the fill discharged in constructing the truck turnaround; Mr. Stevenson personally discharged that fill. Respondents contend, however, they lack culpability for that violation because the Corps "entrapped" them by failing to explain "an

additional permit [i.e., coverage under Nationwide Permit 33] would be required to conduct the work outlined in the preconstruction notification documentation." Respondent's Reply Brief as to Penalty, p. 7. Corps witnesses testified that the truck turnaround could have been permitted under NWP 33, but that Respondents had not requested such coverage. As explained above, however, the truck turnaround could and would have been authorized under NWP 3 as "temporary structures, fills, and work necessary to conduct the maintenance activity" but for the restrictions the Corps imposed in its authorizing letter.

Regardless of which Nationwide Permit might have authorized the truck turnaround, however, the written preconstruction notification did not indicate Respondents contemplated a truck turnaround. If any entity had an obligation to educate Respondents on available options for obtaining needed authorizations or on the limits of the authorization it obtained, it was GTI rather than the Corps and GTI's failings are vicariously attributable to Respondents, not the Corps. The alleged "entrapment" has no bearing on the degree of Respondents' culpability.

As unsatisfactorily as the preconstruction notification proceedings turned out for both the Corps (which was deprived of mitigation opportunity) and Respondents (who didn't get the authorization they sought), the truck turnaround violation arose directly from Mr. Stevenson's failure to correctly interpret the Corps' authorizing letter. The Framework subfactor most relevant to that cause is "[w]hether the violator knew or should have known of the hazards associated with the conduct."

In pertinent part, the Corps' authorizing letter to GTI stated:

> ****Based on our review of the project, we have determined that you may proceed with the repair of the existing levee as proposed in your December 11, 2006, letter sent on behalf of Parkwood Land Company provided the activity complies with the enclosed three sheet project plans and Nationwide Permit (NWP) General

> Regional Conditions. Our review of a 1947 survey showed the property was originally used for dredged 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 jurisdictional activities that shave occurred prior to July 19, 1977, are authorized (grandfathered by the NWP, the levee is considered to be previously authorized and can be reparied pursuant to NWP 3.
>
> NWP 3 authorizes the repair of previously-authorized currently serviceable structures or fill, provided that 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.****

The authorizing letter is not a model of clarity,[9]. Despite some evidence to the contrary,[10] a person of average cognitive abilities would not interpret "[m]inor deviations due to changes in construction techniques, materials or the like are authorized" as including "minor deviations" to the work set forth in the preconstruction notice and three sheet project plans. In context, that sentence applies to the original construction of the levee. Arguably, Respondents thus "should have known" the authorization was inconsistent with the construction techniques and materials they used to repair the levee.

Mr. Stevenson's testimony and demeanor at the hearing, however, show he possesses substantially less cognitive ability that an average person in interpreting documents like the

---

[9] The full letter is over two pages long and among its ambiguities is a statement that "the amount of required compensatory mitigation can be reevaluated based on that new [*Rapanos* jurisdictional] guidance when it is issued." That reason for that statement baffles me, but it did not apparently contribute to Mr. Stevenson's misinterpretation.

[10] The Corps compliance officers that testified did not link "minor deviations" to the levee's initial construction. At TR 25, Mr. Davidson testified that expanding the width of the levee might be allowable as a minor deviation, but the truck turnaround was not such a deviation because "it was not for levee repair." At TR 119, Ms. Shivers testified that the turnaround was not a "minor deviation" because it was not a change in construction materials and because its size exceeded the acreage that could be authorized under a NWP. NWP 12, 14, 18, 29, 32, 34, 39, 40, 42, 43, 44, and 46 are subject to acreage limitations, but NWP 3 is not.

Corps' authorizing letter. As one example, a page of the three sheet project plans enclosed in the Corps authorizing letter was an aerial view with boxes superimposed on the levee to show the location of cross-sectional inserts, i.e., the other two sheets of project plans. *See* Ex C-31. Mr. Stevenson testified he thought those "boxes" on the aerial view were the turnarounds for which he'd asked GTI to obtain authorization. *See* TR 217-219, 234. Such testimony from another person might be regarded incredible, but Mr. Stevenson delivered it earnestly and I find he actually interpreted the drawing that way, albeit incorrectly.

Nor was that testimony the only indication of Mr. Stevenson's cognitive impairment. He became confused while identifying and reading several exhibits he held in his hands. *See* TR 234 - 235, 238 - 239, 243. His attention span was limited, e.g., "I already done forgot the question." TR 261. During his testimony, Mr. Stevenson broke into tears for no apparent reason. *See* TR 216. Generally, Mr. Stevenson's testimony was forthright, but scattered.

Based on his testimony and observed demeanor, I find that Mr. Stevenson's cognitive abilities are impaired[11] to such a degree that he is far less likely than an average person to correctly interpret a document like the Corps' authorization letter. I do not imply that Mr. Stevenson lacks intelligence; he has generally coped with his impairment well, relying on a consulting firm and bookkeeper for complex business tasks. It is apparent, however, that interpretation of the Corps authorizing letter required more cognitive ability than he possesses..

---

[11] The record contains no medical testimony explaining the cause of that observed impairment. Possibly it is related to (1) a disability incurred in Mr. Stevenson's service in the Republic of Viet Nam for which he now receives payments from the Veterans Administration and/or (2) a medical condition reflected at TR 191.

Mr. Stevenson's lack of capacity is not a defense to the strict liability CWA imposes. It nevertheless explains how he could and did honestly believe the Corps had authorized construction of the truck turnaround that encroached on jurisdictional waters. That honest belief is further evidenced by the circumstances surrounding the Corps' first site inspection. In December 2009, Ms. Kristin Shivers, a Corps compliance officer, inspected the site as a result of "a self-reported alleged report of unauthorized activity from Mr. Stevenson stating that he may have dumped several dump truckloads into the Neches River." TR 110. During that inspection, Ms. Shivers observed the truck turnaround[12] and it is highly unlikely Mr. Stevenson would have invited such scrutiny had he not believed the turnaround was in fact authorized. Indeed, the Corps record of his report shows Mr. Stevenson affirmatively claimed the concrete may have fallen in the river "[w]hile conducting authorized repair of a levee." Complainant's Prehearing Exchange, Ex. 30, p. 6.

The Framework's use of "knew or should have known" standard for judging culpability suggests that, in most instances, degree of negligence should be determined under the "reasonable man" standard commonly used in tort law. Otherwise, a violator might be adjudged less culpable on the basis of unreasonable or unsupported claims of misunderstanding. When as here, however, a violator's demonstrated lack of cognitive ability shows *why* the violation occurred despite significant compliance efforts, it is a circumstance relevant to determining degree of culpability.

---

[12] The truck turnaround was still under construction at the time of the 2009 inspection. Ms. Shivers testified that it had grown in size between that inspection and a July 2010 inspection. *See* TR 118. That size increase is the basis for finding Complainant proved two days of violation.

Economic Benefit or Savings. At page 3, the Policy describes the function of this statutory crterion:

> If a penalty is to achieve deterrence, both the violator and the general public must be convinced that the penalty places the violator in a worse position than those who have complied in a timely fashion. Neither the violator nor the general public is likely to believe this if the violator is able to retain an overall advantage from noncompliance. Moreover, allowing a violator to benefit from noncompliance punishes those who have complied by placing them at a competitive disadvantage. This creates a disincentive for compliance. For these reasons, it is Agency policy that penalties generally should, at a minimum, remove any significant economic benefits resulting from failure to comply with the law.

See also Framework, p. 6 -10, indicating " economic savings or benefit" includes benefits from delayed costs, avoided costs, and competitive advantage. Arguably, Respondents misinterpretation of the Corps authorization "avoided" costs of mitigation measures the Corps might have required for the .48 acres of wetlands the truck turnaround displaced. Complainant adduced no evidence on the nature or cost of such mitigation nor of any other economic benefit Respondents incurred as a result of their violations. The record instead indicates Respondents spent $10,000 in an effort to obtain authorization they thought sufficient. *See* TR 206-207. Hence, no portion of the penalty assessed today is based on recovery of economic benefit.

Such Other Matters as Justice May Require. Neither Policy nor Framework sheds light on this statutory criterion, but the Environmental Appeals Board has indicated it allows reduction of penalty amount under rare circumstances when application of the other criteria would work a manifest injustice. *See generally, e.g., In re: Phoenix Construction Services, Inc.*, 11 E.A.D. 379, 415 (EAB 2004) . As indicated above, it would have been manifestly unjust to assess some portion of today's penalty for Respondents' failure to remove the unauthorized fill

after the government ordered them to leave it in place pending further instructions it never issued. No portion of today's penalty is based on that failure.

Conclusion

Respondents incurred no economic benefit or savings from their violations. Those violations did not occasion severe environmental harm, but over an acre of aquatic habitat was replaced by unauthorized fill. Respondents culpability was not particularly great; they attempted to comply with Clean WaterAct requirements due to the deterrent value of two prior enforcement actions, but fell short due to Mr. Stevenson's absence from the work site while hospitalized and his inability to understand the Corps' authorizing letter. Respondents' error in interpreting that authorizing letter deprived the Corps of opportunity to seek mitigation and resulted in the effective substitution of their own judgment for the Corps.' Respondents errors are highly case -specific, but some penalty amount is warranted to deter similar violations by others. Respondents are capable of paying a penalty. After considering the statutory penalty factors in light of the guidance provided by the Policy and Framework, I conclude a Nine Thousand Dollar ($9,000.00) penalty is appropriate in this matter.

ORDER

An administrative penalty in the amount of Nine Thousand Dollars ($9,000.00) is hereby assessed against Respondents Parkwood Land Co., L.P. and Henry Stevenson.

This Order is an Initial Decision issued pursuant to 40 C.F.R. §22.27. This Initial Decision shall become a Final Order forty five (45) days after its service on a party and without further proceedings unless (1) a party moves to reopen the hearing (2) a party appeals this Initial Decision to the Environmental Appeals Board, or (3) the Environmental Appeals Board elects to

review this Initial Decision on its own initiative. Within thirty (30) days after this Initial Decision is served, any party may appeal any adverse order or ruling of the Regional Judicial Officer by filing an original and one copy of a Notice of Appeal and an accompanying appellate brief with the Environmental Appeals Board pursuant to 40 C.F.R. §22.27(a).

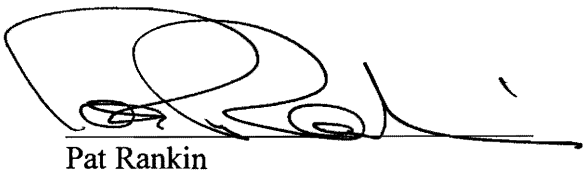
If a party intends to file a Notice of Appeal, it should be sent to:

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board (MC 1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington DC 20460–0001.

If Respondents fail to file an appeal with the Environmental Appeals Board pursuant to 40 C.F.R. §22.30 and this Initial Decision becomes a Final Order pursuant to 40 C.F.R. §22.27(c), ***Respondents shall have waived their right to Judicial Review.***

Each party shall bear its own costs in bringing or defending this action.

So ordered this 26th day of March, 2014.



Pat Rankin
Regional Judicial Officer
EPA Region 6

CERTIFICATE OF SERVICE

I, Lorena S. Vaughn, the Regional Hearing Clerk, certify that a true and correct copy of the foregoing Penalty Order on Remand for Docket CWA 06-2011-2709 was provided to the following persons on the date and in the manner stated below:

Charles M. Kibler, Esquire — CERTIFIED MAIL
The Kibler Law Firm
765 N. 5th Street
Silsbee, Texas 77656

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board (MC 1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Russell Murdock — HAND DELIVERED
U.S. Environmental Protection Agency
Office of Regional Counsel
1445 Ross Avenue
Dallas, Texas 75202-2733

Lorena S. Vaughn
Regional Hearing Clerk

3-26-14
Date