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

In re:	)
	)
Henry Stevenson and	)
Parkwood Land Co.	)
	)
Docket No. CWA-06-2011-2709	)

COMPLAINANT'S RESPONSE BRIEF

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COMPLAINANT'S RESPONSE BRIEF

Complainant, the Director of the Water Quality Protection Division, United States Environmental Protection Agency, Region 6, by and through its attorney, submits this brief responding to the appeal brief filed by Henry R. Stevenson and Parkwood Land Company ("Respondents") on March 13, 2013. This matter involves an Initial Decision by Regional Judicial Officer Pat Rankin ("RJO") that Respondents violated Section 301 of the Clean Water Act ("the Act" or "CWA"), 33 U.S.C. § 1311, by discharging pollutants (specifically, dredged and fill material) from a point source to waters of the United States without a permit required under Section 404 of the Act, 33 U.S.C. § 1344.

Summary of Argument

RJO Rankin correctly held that the wetlands relevant to this dispute qualify as "navigable waters" for purposes of the CWA. In making this determination, the RJO properly relied on precedent from the Environmental Appeals Board holding that CWA jurisdiction could be determined under either the Justice Kennedy or Justice Scalia tests found in *Rapanos v. United States*, 547 U.S. 715 (2006)("*Rapanos*"). The record demonstrates that the filled wetlands on Respondents' property were adjacent to a navigable-in-fact waterbody, the Neches River. As a result, the wetlands are jurisdictional under the *Rapanos* standard set out in Justice Kennedy's concurring opinion.

The record likewise supports RJO Rankin's determination that Respondents' discharges were not authorized by Nationwide Permit 3. The RJO weighed the extensive record and testimony given him at

hearing and correctly determined that Respondents discharged fill that was not in accord with the pre-construction notification, thus disqualifying Respondents from the shield of Nationwide Permit 3. Respondents likewise erred in claiming their 1.26 acres of unauthorized fill qualified as an allowable "minor deviation" under the nationwide permit. Testimony by the experienced United States Army Corps of Engineers ("Corps") field personnel established that Respondents' discharge of fill unrelated to the direct maintenance of the levee was a violation of the CWA and outside the parameters of Respondents' Nationwide Permit 3 coverage.

For the reasons set forth herein, RJO Rankin's Accelerated Decision issued April 17, 2012, should be affirmed. Additionally, RJO Rankin's February 11, 2013, Initial Decision should be affirmed with regard to its findings regarding the inapplicability of Nationwide Permit 3.

Standard of Review

Appeals from administrative enforcement decisions are governed primarily by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, codified at 40 C.F.R. Part 22. In enforcement proceedings, the Board generally reviews both the factual and legal conclusions of the presiding officer, in this case the RJO, *de novo*. *See* 40 C.F.R. § 22.30(f); *See also In re Smith Farm Enterprises, LLC*, 15 E.A.D. ___ (EAB 2011). In reviewing *de novo* an initial decision in an administrative penalty proceeding, the Board applies the "preponderance of the evidence" standard established by 40 C.F.R. § 22.24(b). *Id*. The EPA Region bears the burden of demonstrating that the alleged violation occurred. 40 C.F.R. § 22.24(a).

Although findings of fact are reviewed *de novo*, the Board generally defers to a Presiding Officer's factual findings when those findings rely on witness testimony and when the credibility of the witnesses is a factor in the presiding officer's decision making. *Smith Farm*, 15 E.A.D. ___; *See also In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998). "This approach recognizes that the [presiding officer] observes first-hand a witness' demeanor during testimony and therefore is best suited

to evaluate his or her credibility." *Id*. When a presiding officer's credibility determinations are unsupported by the record, however, the Board will not defer to the presiding officer and is not bound by any findings of fact derivatively made. *Id*.; *See also In re Bricks, Inc*., 11 E.A.D. 224, 233, 236-39 (EAB 2003).

Argument

I. The Relevant 1.26 Acres of Filled Wetlands Qualify as Jurisdictional Waters of the United States Under the Clean Water Act

On April 17, 2012, the RJO issued an Accelerated Decision in which he held that the wetlands on Respondents' tract relevant to this dispute were "navigable waters" subject to CWA regulation. In making this determination, the RJO properly relied on case law both from various federal circuits and from the Environmental Appeals Board in determining that jurisdiction can be found based on the standard set out by Justice Kennedy's concurring opinion in the *Rapanos* case. Following the Kennedy standard, the RJO found that because the wetlands on Respondents' site were adjacent to a navigable-in-fact water, they were thus subject to CWA jurisdiction without the need for a site-specific showing of significant nexus.

Respondents offer no evidence nor offer any controlling precedent indicating that CWA jurisdiction cannot be found under Justice Kennedy's concurring opinion in *Rapanos*. Likewise, Respondents fail to rebut the evidence proffered by Complainant that Respondents' wetlands were adjacent to the navigable-in-fact Neches River. Thus, the relevant 1.26 acres of filled wetlands on Respondents' site are subject to jurisdiction under the CWA.

a. The RJO properly used the Kennedy standard to determine jurisdiction under *Rapanos*

The CWA prohibits the unauthorized discharge of pollutants from a point source to "navigable waters." 33 U.S.C. §§ 1311(a) & 1362(12). The CWA defines "navigable waters" as "waters of the United States." *Id*.; 33 U.S.C. § 1362(7). Although the CWA does not define "waters of the United States," federal regulations promulgated under the authority of the CWA contain detailed definitions of the term. *See* 40 C.F.R. §§ 122.2, 232.2; *See also* 33 C.F.R. § 328.3(a) (promulgated by the Corps). These

regulations define "waters of the United States" as encompassing not only navigable-in-fact waters, but also other waters, including wetlands adjacent to covered waters. *See Id*.

Rapanos is the most recent Supreme Court decision to construe the term "navigable waters" and "waters of the United States" as used in the CWA. Unfortunately, no five justices agreed on a single interpretation. Justice Scalia wrote an opinion outlining one standard in which Chief Justice Roberts and Justices Alito and Thomas joined. Justice Kennedy wrote a separate opinion outlining a different standard, but nonetheless concurred in the judgment of Justice Scalia's opinion. Justices Stevens, Breyer, Souter, and Ginsburg dissented.

Lower courts have reached different conclusions on which of the Supreme Court's opinions should be applied in subsequent jurisdictional determinations. Two Circuit Courts have held CWA jurisdiction may be established only under Justice Kennedy's standard. *See United States v. Robinson*, 505 F.3d 1208 (11th Cir. 2007); *United States v. Gerke Excavating, Inc*., 464 F.3d 723 (7th Cir. 2006). Others have held that jurisdiction may be established using either Justice Scalia's test or Justice Kennedy's test. *See United States v. Johnston*, 467 F.3d 56 (1st Cir. 2007); *United States v. Bailey*, 571 F.3d 791 (8th Cir. 2009). Although the Fifth Circuit, which holds jurisdiction over the site, discussed Justice Scalia's plurality and Justice Kennedy's concurring opinions in *United States v. Lucas*, it found the wetlands at issue were subject to CWA regulation under either, leaving the issue unresolved in Texas. *See Lucas*, 516 F.3d 316 (5th Cir. 2008). The Environmental Appeals Board has held that EPA may assert jurisdiction over wetlands if either Justice Scalia's test or Justice Kennedy's test is met. *Smith Farm,* 15 E.A.D. ___ (2011).

In his accelerated decision, the RJO properly found that jurisdiction was established under Justice Kennedy's *Rapanos* standard. Every Circuit that has ruled on the issue, as well as the Environmental Appeals Board itself, has held that CWA jurisdiction can be established under Justice Kennedy's standard. Respondents fail to cite any rule or case law stating otherwise. As a result, the RJO properly

established jurisdiction in his accelerated decision by applying Justice Kennedy's standard to the facts in this dispute.

b. The 1.26 Acres of Wetlands Filled by Respondents Meet the Kennedy Standard under *Rapanos* for "Jurisdictional Waters"

The filled wetlands in Respondents' property are adjacent to the Neches River, a navigable-in-fact body of water that qualifies as a water of the United States under 33 C.F.R. § 328.3(a)(1). Because wetlands adjacent to waters of the United States are themselves considered jurisdictional under 33 C.F.R. § 328.3(a)(7), and the relevant wetlands are adjacent to the Neches River, the relevant wetlands are considered "navigable waters" for purposes of the CWA and are subject to regulation thereunder.

Respondents argue that the relevant wetlands are not subject to regulation under the CWA because there is no significant nexus between the relevant wetlands and the navigable-in-fact Neches River. Respondents fail to properly apply the law. In *Rapanos*, Justice Kennedy's opinion states:

> "When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction. Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable waters." (*Rapanos*, 547 U.S. 715, 759, 779-782).

In the present case, the relevant wetlands are adjacent to the Neches River, a navigable-in-fact water. Therefore, under Justice Kennedy's opinion, the Corps may establish jurisdiction based on this adjacency without turning to a case-by-case review to establish a significant nexus between the wetlands and the navigable-in-fact body of water. As a result, there is no need to turn to the issue of whether there is a significant nexus between the relevant wetlands and the Neches River.

Respondents make two arguments to challenge the RJO's determination that the relevant wetlands were adjacent to the Neches River. Respondents first construct a hypothetical in which, they argue, artificial property lines could be manipulated to remove adjacency. Respondents' Appeal Brief at 13. The hypothetical is neither persuasive nor correct as adjacency is determined by the physical

proximity of a wetland to another waterway. Artificial property lines cannot be used to disrupt jurisdiction under the CWA.

Respondents further argue that the existence of a levee severs the hydrological connection between the Neches River and the wetlands and thus, makes the wetlands no longer adjacent to the river. As explained above, under the Kennedy *Rapanos* standard, no case by case review of the significant nexus between the wetlands and the navigable-in-fact waterway was necessary because the two waters were adjacent under the CWA. Further, the existence of a man-made levee does not disrupt adjacency. Title 33, section 328.3(c), of the Code of Federal Regulations offers a definition for the term "adjacent."

> The term adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands." 33 C.F.R. § 328.3(c).

In this case, the levee is a man-made barrier, which does not prevent the wetland from being considered adjacent, and as a result, subject to regulation under the CWA. Accordingly, the wetlands on Respondents' property are considered adjacent to the Neches River despite the existence of the levee.

The RJO thus correctly held that the wetlands relevant to this dispute qualify as "navigable waters" for purposes of the CWA. Following the *Rapanos* test set out by Justice Kennedy, which may itself be used to establish jurisdiction for the reasons outlined above, the RJO properly found the relevant wetlands were adjacent to the Neches River and thus jurisdictional. There was no need to turn to the issue of whether a significant nexus existed between the relevant wetlands and the Neches River.

II. Respondents' Discharge of Fill into the Jurisdictional Wetlands was not Authorized by Nationwide Permit 3

On February 11, 2013, the RJO issued an Initial Decision in which he held that the discharge of fill totaling 1.26 acres of wetlands was not authorized by Nationwide Permit 3 and thus violated the CWA. Contrary to Respondents' assertions, the fill was neither authorized by Nationwide Permit 3 nor did it constitute a "minor deviation" from the permitted plans.

a. Sufficient Evidence was Presented to Demonstrate that the Discharged Fill was not in Accord with the Pre-construction Notification

The CWA prohibits the discharge of pollutants from a point source into a water of the United States except with the authorization of a permit issued under the CWA. 33 U.S.C. § 1311(a). Section 404 of the CWA, 33 U.S.C. § 1344, authorizes the Secretary of the Army, acting through the Chief of Engineers for the Corps, to issue permits for the discharge of dredged or fill material into waters of the United States. In the present case, Respondents argue they received such permit coverage by way of Nationwide Permit 3, and that, as a result, their discharges were not a violation of the CWA.

As the RJO noted in his decision, Nationwide Permit 3 requires preconstruction notification only under some circumstances, one of which is a discharge of fill to Bald Cypress-Tupelo Swamps in the Galveston District pursuant to a regional condition. RJO Initial Decision at 2. Two witnesses from the Corps, one of which who qualified as an expert on the subject matter, testified that the 1.26 acres of filled wetlands relevant to this case qualified as a Bald-Cypress Tupelo Swamp. Transcript at 26-27, 98, 124, 127-128. The RJO found their testimony persuasive and held that preconstruction notification was thus required to obtain authorization for discharges of fill to the swamp under Nationwide Permit 3. RJO Initial Decision at 2. As a result, only fill previously submitted and approved by the Corps in the form of a preconstruction notification would be protected by the shield of Nationwide Permit 3.

Respondents did, in fact, submit a form of preconstruction notification to the Corps, which contemplated repairing the levee on the Neches River side. RJO Initial Decision at 2-3; Ex R-5, pp. 4-5. The Corps authorized the proposed levee repairs, referencing the "enclosed three sheet project plans" attached to its letter. RJO Initial Decision at 3-4; Ex R-2. The unauthorized discharges of fill for which Complainant sought an administrative penalty were those discharges into wetlands that were not contained in the three sheet project plans approved by the Corps.

The RJO determined that Respondents deviated from the project plans by discharging fill into a total of 1.26 acres of wetlands not authorized by Nationwide Permit 3. RJO Initial Decision at 5-6. Mr.

John Davidson from the Corps offered testimony confirming that the fill was not authorized by Nationwide Permit 3.

> Q: But Mr. Stevenson and Parkwood Land Company did, as we demonstrated, alert you of their plans to maintain the levee. Why was that insufficient?
>
> A: In their plans, they did not plan or propose to fill any Tupelo-Cypress Swamp. What they proposed, as is indicated on the plans, is they proposed to maintain the levee, the levee itself. There was no fill on the inside of the levee. All the fill was on the outside of the levee, the river side. Transcript at 29.

Contrary to Respondents' statements otherwise, Complainant brought forth significant evidence both in the form of documentation and testimony to support its position that Respondents' discharge of fill was not in accord with the pre-construction notification submitted by Respondents.

b. Respondents' Filling of 1.26 Acres of Jurisdictional Wetlands did not Qualify as a "Minor Deviation"

Respondents argue that if their fill was not directly authorized by Nationwide Permit 3, then to the extent their fill differs from the permitted plans, the difference constitutes a permissible "minor deviation" under Nationwide Permit 3. The RJO correctly rejected this argument, stating that the permissible "'minor deviations' references the levee's original construction, not the work proposed in the preconstruction notification." RJO Initial Decision at 6. As the record indicates, the 1.26 acres of fill Respondents discharged into jurisdictional wetlands was not a "minor deviation" from the levee's original construction, but instead a significant change from the submitted plans.

The 1.26 acres of unauthorized fill discharged by Respondents into the jurisdictional wetlands occurred primarily at two locations. The first site of unauthorized fill consisted of a stockpile of concrete that encroached on wetlands adjacent to the upland area at the southern end of the levee. Transcript at 19. This area of fill accounted for .78 acre of the unauthorized fill. *See* Transcript at 18-19; RJO Initial Decision at 5. The second site of unauthorized fill consisted of a so-called "truck turnaround" that

accounted for .48 acre of additional fill. Transcript at 19, 23. When questioned, Mr. Davidson from the Corps confirmed that such discharges were not covered under Nationwide Permit 3.

> Q: If I put in a truck turnaround for safety purposes on a temporary basis, is that covered under Nationwide No. 3?
>
> A: No, sir.
>
> Q: Why not?
>
> A: Because the Nationwide Permit 3 is to maintain the levee. If Mr. Stevenson needed a temporary road or a temporary access to that, then there's another Nationwide Permit for that, Nationwide Permit 33 that he could apply for and obtain to get access to do his construction. The truck turnaround is not part of the maintenance levee. Transcript at 70-71.

Mr. Davidson, from the Corps, likewise testified that the unauthorized fill would not qualify as a minor deviation. Instead, Mr. Davidson explained that minor deviations consist mainly of changes with regard to construction techniques or construction materials. Transcript at 25. He stated that a .48 truck turnaround would not qualify as a minor deviation. *Id*. He indicated, instead, that a minor deviation must result in a minor impact to the wetland, such as the expansion of the levee from being 15-feet wide to 17-feet wide. *Id*.

The discharge of dredged and fill material into 1.26 acres of jurisdictional wetlands is not a "minor deviation" nor do such changes result in a minor impact to the environment. After weighing the evidence provided at the hearing, the RJO correctly held that Respondents' discharge of fill material into 1.26 acres of wetlands did not qualify as minor deviation and was instead a violation of the CWA.

Conclusion

The evidence establishes that Respondents discharged fill into 1.26 acres of jurisdictional wetlands without permit coverage. RJO Rankin correctly held that Complainant could establish

jurisdiction under Justice Kennedy's *Rapanos* standard. The RJO also correctly applied that standard to determine that Respondents' discharges were into jurisdictional wetlands. Further, the preponderance of the evidence demonstrates that Respondents' discharges did not fall under the shield of Nationwide Permit 3 and were not mere "minor deviations" from the submitted plans. For the reasons set forth herein, Complainant respectfully requests that the Board affirm RJO Rankin's Accelerated Decision issued April 17, 2012. Additionally, Complainant respectfully requests that the Board affirm RJO Rankin's February 11, 2013 Initial Decision with regard to its findings regarding the inapplicability of Nationwide Permit 3.

Respectfully submitted,

/s/ Russell Murdock_____

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Date: March 28, 2013

CERTIFICATE OF SERVICE

I certify that the original of the foregoing Complainant's Response Brief in *In re Henry R. Stevenson, Jr. and Parkwood Land Company* was electronically filed to the Clerk of the Board and a true and correct copy was sent to the following on this 28th day of March, 2013, in the following manner:

BY HAND DELIVERY:

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