UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6

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

INITIAL DECISION

On April 17, 2012, I granted a Motion for Accelerated Determination as to liability in this Class I Penalty Action under Clean Water Act (CWA) Section 309(g). That decision concluded Respondents discharged fill material on at least two occasions to wetlands adjacent to the Neches River, a navigable water of the United States, without an authorizing permit. I denied the motion as to penalty assessment due to lack of evidence on amounts Complainant attributed to factors relevant to such an assessment.

Complainant subsequently filed a Supplemental Motion for Accelerated Determination on penalty. In responding to that Motion, Respondents raised a new issue on liability, contending their discharges were authorized by Nationwide Permit (NWP) 3, which I deemed a motion for reconsideration of my accelerated determination on liability. On September 6, 2012, I denied Complainant's Motion and delayed decision on Respondents' pending an evidentiary hearing.

That hearing occurred on November 14, 2012, in the offices of the Galveston District Corps of Engineers in Galveston, Texas. As witnesses, Complainant called two Corps Compli-ance Officers, Mr John Davidson and Ms. Kristin Shivers, as well as EPA Compliance Officer Ms. Barbara Aldridge. Respondent Henry "Sonny" Stevenson testified for Respondents.

PERMIT COVERAGE

As noted in my September 6 Decision on Motions, Nationwide Permit (NWP) 3 required 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. *See* Ex C- 40. According to the testimony of Corps compliance officer Mr. Thomas Davidson, 1.26 acres of the area to which fill was added by or on behalf of Respondents is part of such a swamp. *See* TR 26. Neither Mr. Davidson nor Ms. Shivers ran transects or attempted to delineate the whole swamp, relying on an earlier delineation performed on behalf of Respondents in 2006 and confirmed by the Corps in 2007. *See* TR 19, 47, 62 - 64, 112, 129, 131; Ex R-4. Mr. Davidson recognized vegetation near the fill area as typical of a Bald Cypress - Tupelo Swamp, consisting largely of bald cypress and tupelo gum trees and Ms. Shivers observed bald cypress and tupelo gum trees on the site. *See* TR 26 - 27, 98. 124, 127 -128. Preconstruction notification was thus required to obtain authorization for discharges of fill to the swamp under NWP 3.

Respondents attempted to obtain coverage under NWP 3 by submitting a preconstruction notification prepared by GTI Environmental, a consulting firm, on December 27, 2006. After explaining the levee was eroding badly on the Neches River side, that preconstruction notification described the work Respondents desired to perform:

> Reconstruction of the levee will take place similar to how historical data depicts how the original levee was constructed. The Permittee proposes to locate the new levee approximately 10 feet behind the new OHWM [i.e., ordinary high water mark] by pulling the remaining portions of the existing levee back away from the shoreline. This method will require less dirt and prevent having to reclaim Section 10 waters. By allowing 10' of natural ground between the levee and Section 10 waters, a protective shelf will be

> recreated, thereby reducing erosion and better protecting the levee from spontaneous flood events.
>
> Board mats will be placed to allow a track hoe to operate from the inside of the levee while minimizing temporary construction impacts. A minimum number of board mats will be used. Enough mats will be placed to allow the track hoe to operated on top of them with enough spare mats to provide a new pad site for the track hoe to position for the next operating site. Existing vegetation will be laid down in-line with the new levee and buried in the new levee to minimize impacts to waters and wetlands.
>
> Levee construction will be as depicted in Appendix B, Levee Design Drawings. Dirt will be excavated from inside the path required by the track hoe and placed outside the same path, but inside the existing levee....The fill activity described above...would result in the loss of 1.41-acre of potentially jurisdictional wetlands.
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> Ex R-5, pp. 4-5.

The "Levee Design Drawing" referenced in that description include depictions of two cross-sections of the levee as it was to be reconstructed. Each showed the "protective shelf" that would be created by reconstructing the levee further from the River and the interior borrow area from which Respondents intended to obtain fill. *See* Respondents' Ex 5, Appendix A.

On April 17, 2007, the Corps notified GTI by letter, with a copy to Respondents, that the proposed levee repairs were authorized by NWP 3. In relevant part, that letter stated:

> Based on our review of the project, we have concluded you may proceed with the repair of the existing levee as proposed in your December 11, 2006, letter sent on behalf of Parkland Land Company provided the activity complies with the enclosed three-sheet project plans.....[T]he levee is considered to be previously-authorized and can be repaired pursuant to NWP 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. Ex R-2.

Complainant's allegations of liability are based on the cross-section engineering drawings that were apparently part of the "enclosed three sheet project plans" attached to the Corps' authorizing letter. Those drawings, which are otherwise consistent (even as to the "protective shelf") with the cross-section drawings in the December 11 preconstruction notification, are dated "02/23" and depict "New Fill Material" on the river side of the levee. Ex C-31. Neither Complainant nor Respondents offered other evidence that the preconstruction notification was amended and the circumstances under which the new cross-section drawings were prepared are thus not reflected in the record.[1] Complainant contends, however, that the drawings restricted Respondents' NWP 3 authorization to discharge of fill to the river side of the levee, despite its depiction of the borrow area on the interior side and protective shelf on the exterior side.

It would have been impossible for Respondents to "proceed with the repair of the existing levee as proposed in your December 11, 2006, letter" while complying "with the enclosed three-sheet project plans" showing fill on the river side of the levee. The Corps's authorizing letter is thus substantially ambiguous. Had Respondents discharged fill in compliance with the description of the proposed work in their December 11 preconstruction notification, a "fair notice" issue might thus have arisen in this matter. *See generally In Re: Advanced Electronics, Inc.*, 10 E.A.D. 385, 403 (EAB 2002).

In the event, however, Respondents deviated from that description. According to Mr. Stevenson's testimony, a contractor working on nearby Interstate 10 needed a place to dispose of

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[1] Perhaps nobody familiar with the course of the preconstruction notification proceedings was available to testify. The Corps staff member who worked on it, Mr. David Hoth, may no longer be employed by the Corps. *See* TR 241. GTI Environmental, Inc., the consulting firm that represented Respondents in that matter "went broke." TR 226.

concrete it was removing from the road and Respondents needed fill for the levee work. Thinking "the good Lord was smiling on me," Mr. Stevenson directed the highway contractor to deposit the concrete rubble on uplands at the southwest end of the levee. TR 227; *See also* TR 249, 258.

After using some of the rubble to build an access ramp, Respondents used their own trucks to haul additional concrete down the crown of the levee and dump it where it would come to rest along the levee's inner base. *See* TR 214 - 215. When enough concrete had been deposited in this manner, Respondents used their track hoe to remove soil from the borrow area, per its original preconstruction notification, and place it over the concrete construction debris that now formed a stabilizing base for the levee repairs. This worked well for a while; Mr. Stevenson testified, "... I'd dig it all out [of the upland staging area at the south end of the levee], they'd bring me some more. So that's what we were doing." TR 227, 229.

Things went awry, however, when Mr. Stevenson was hospitalized for about a year due to injuries sustained in an auto accident and unavailable to use the concrete as it was delivered to the site. *See* TR 228. In his absence, the stockpile of concrete apparently grew until it "rolled over into the marsh," encroaching on wetlands adjacent to the upland area at the southern end of the levee. TR 19. That encroachment, frequently referenced in the record as a "truck ramp" or a "staging area" accounts for .78 acre of the unauthorized fill from which this matter arises. *See* TR 18 - 19, 55; Ex C-47.

Using dump trucks to deposit the concrete fill from the levee's crown resulted in another deviation from Respondents' preconstruction notification. Where in good repair, the crown of the levee was 15' wide, insufficient for a dump truck to turn around. The trucks discharging the

concrete fill thus had to egress in reverse gear, a somewhat dangerous maneuver.[2] To minimize that danger, Respondents constructed a truck turnaround part way down the levee, thus reducing the distance the dump trucks had to back up. That turnaround, which encroached on .48 acre of the wetlands on the interior of the levee, also constitutes unauthorized fill. *See* TR 23; Ex C-35B, 47.

Although 1.26 acres of wetlands were filled in a manner not contemplated by their pre-construction notification or the Corps' authorizing letter, Respondents argue construction of the truck ramp/staging area and truck turnaround were "[m]inor deviations due to changes in construction techniques, materials, or the like...authorized" by NWP 3 and the Corps' April 17, 2007 letter. In context, however, "minor deviations" references the levee's original construction, not the work proposed in the preconstruction notification. Even allowing for the ambiguity of that letter, I conclude the discharges of fill associated with the staging area/truck ramp and the truck turnaround, totaling 1.26 acres, were not authorized by NWP 3 and thus violated CWA §301(a).

These are not, however, particularly serious violations. Mr. Davidson testified the Corps would likely have authorized the fill discharges associated with the truck ramp/staging area and truck turnaround under NWP 33 had Respondents' consultant identified them in the preconstruction notification and specifically requested coverage under that NWP. *See* TR 24, 70 - 71. That Respondents' consultant apparently did not request such coverage nevertheless deprived the

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[2] On one occasion, a dump truck driven by Mr. Stevenson's son went over the side while backing up, ending up perilously close to or partially in the River. Mr. Stevenson extracted truck and son with a bulldozer, but it was apparently a close call. *See* TR 216 - 217. This incident may have led to the Corp' September 3, 2009 site inspection in response to an anonymous complaint that Respondents were "burying a dump truck,." *See* TR 69; Ex C-33.

government of opportunity to obtain compensatory mitigation, an issue that might have been resolved by directing them to apply for after-the- fact coverage under NWP 3 and NWP 33. That option became unavailable, however, once enforcement action was commenced. *See* 33 C.F.R. §326.3(e)(1)(ii).

PENALTY

In assessing a penalty, CWA §309(g) 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." Such guidelines represent EPA's view on how the statutory criteria should be applied in penalty calculation to ensure a degree of consistency while allowing sufficient flexibility to accommodate individual circumstances. The regulation thus requires that an administrative decision assessing a penalty explain how the penalty corresponds to the criteria of applicable penalty guidelines and, when the assessed penalty differs from the penalty proposed under the same guidelines, why. *See generally In Re: Chem Lab Products, Inc.*, 10 E.A.D. 714, 725 (EAB 2002).

The specific civil penalty guideline Complainant considered in proposing a penalty herein was "Clean Water Act Section 404 Settlement Penalty Policy" (Penalty Policy) issued by EPA's Office of Enforcement and Compliance Assurance on December 2, 2001. Calculating a penalty under the Penalty Policy begins with determining the economic benefit a violator sustains from its violation, an absolute minimum that must be recovered in a penalty action. Next, the Penalty

Policy requires calculation of a "preliminary gravity factor" amount by assigning values ranging from 1 to 20 to subfactors representing "environmental significance" (damage to human health and welfare, extent of aquatic environment impacted, severity of impacts to aquatic environment, uniqueness/sensitivity of the affected resource, secondary or offsite impacts, and duration of violation) and "compliance significance" (degree of culpability of violator, compliance history of violator, need for deterrence), then multiplying the sum of the assigned values by a multiplier ($500, 1,500, or 5,000 to 10,000). The resulting preliminary gravity factor amount may then be adjusted up or down for various reasons, including recalcitrance, ability to pay, quick settlement, other factors as justice may require, and litigation considerations to derive a "bottom line" penalty.

As indicated by "litigation considerations," "quick settlement,"and its very title, the Penalty Policy includes elements intended for deriving appropriate settlement amounts. Except for reductive factors intended to enable amicable resolution, however, the provisions of the Penalty Policy may be considered in assessing a penalty. *See In re: Britton Construction Co., et als,* 8 E.A.D. 261, 287, n. 16 (EAB 1999); *In Re: Donald Cutler,* 11 E.A.D. 622 (EAB 2004). Indeed, when Complainant bases its proposed penalty on such a settlement policy, compliance with 40 C.F.R. §22.47 requires such consideration. *See In Re: Chem Lab Products, supra; In Re: Donald Cutler,* 11 E.A.D. 622, 644 - 647 (EAB 2004).

Economic Benefit

Complainant does not allege Respondents derived an economic benefit from their violations and the record suggests none. In matters arising from unauthorized discharges, economic benefit frequently results from savings associated with foregoing permit actions, but

there is no evidence of such economic benefit in the record. Respondents instead incurred a cost of $10,000.00 for consulting services in obtaining coverage for levee repairs under NWP 3. *See* TR 206 – 207. As it turned out, they were unable to depend on that coverage, but the record contains no evidence it would have cost them more to obtain coverage under NWP 33 as well as NWP 3. Accordingly, no portion of the penalty I assess today is based on economic benefit.

Environmental Significance

Human Health or Welfare.. Complainant assigned a value of "0 or 1" to this subfactor, with a notation "ask Corps re: culverts & hydro connection." Ex C-50. It is unclear why, under the circumstances of this case, a hydrologic connection between the swamp and adjacent river might have made a difference in evaluating this subfactor, but Complainant demonstrated no such hydrologic connection in any event. As explained in the Accelerated Determination as to liability of April 17, 2012, geographic jurisdiction over the swamp is based solely on its physical adjacency to the Neches River, a navigable water of the United States. Complainants demonstrated no site-specific "significant nexus" between swamp and river.

At most, it might be argued human welfare was affected because Respondent's use of concrete rubble as fill affected the aesthetic enjoyment motorists on Interstate 10 gained from seeing the levee and swamp as they drove by. Any such loss of aesthetic enjoyment, however, would have been primarily associated with rubble placed on uplands on the inner side of the levee, an activity not subject to CWA regulation. The truck turnaround was mostly faced with dredged material from the borrow area and would have been only faintly, if at all, visible from the highway. *See* Ex C-35A (bottom view), C-35B (top view). The truck ramp/staging area was located adjacent to and partially on an upland area in which similar rubble had accumulated since

1947. *See* TR 229. The effect, if any, on the aesthetic enjoyment of passing motorists was negligible. The alternative value of zero Complainant assigned this subfactor was reasonable.

Extent of Aquatic Environment Impact. The value of two Complainant assigned this subfactor was, consistent with the Penalty Policy, based on the geographic extent of the fill. Under the circumstances of this matter, that approach to the subfactor was reasonable and I see no reason to alter the value Complainant assigned it.

Severity of Impacts to Aquatic Environment. Other than photographs, the record includes no evidence on which the severity of site-specific impacts might be judged and Complainant assigned a value of zero to this subfactor. *A fortiori*, however, the swamp's natural functions were diminished to the extent it was replaced by fill and *some* value should be assigned this subfactor to reflect that inherent impact, despite the lack of testimony on the issue. *See In Re: Smith Farm Enterprises, LLC*, ___ E.A.D. ____, 2011 WL 946993 (EAB 2011); *In Re: Vico Construction Co.*, 12 E.A.D. 298, 342 (EAB 2005). Lack of relevant testimony from three experienced government compliance officers who'd inspected the site and Complainant's assignment of a value of zero, however, suggest the impacts were very slight in this matter. I thus assign a value of one to this subfactor.

Unique/Severity of Affected Resources. In coastal Texas, once abundant Bald Cypress - Tupelo Swamps are generally a dwindling resource, which is the reason regional conditions require preconstruction notification for discharges to remaining swamps in the Galveston District under NWP 3. *See* TR 28. Bald Cypress - Tupelo Swamps are thus entitled to an assigned value under the "unique severity of affected resources" subfactor. Notably, the environmental functions of the specific swamp to which Respondents' discharged fill were already impaired. The levee

Respondents were repairing has generally eliminated surface water interchange between swamp and River since its construction long ago. Fill discharged by an adjacent landowner, authorized by Corps permit, may now block the remainder of the swamp's natural drainage, rendering it permanently inundated. *See* TR 102 - 103. Thus, its cypress trees may be unable to regenerate and its habitat functions may be impaired. *See* TR 28, 32, TR 101.

Complainant assigned this subfactor a value of one, which in my opinion was too low. Permanent inundation of Bald Cypress - Tupelo swamps is likely common along the Gulf Coast due to hydrologic modifications judged necessary to the needs of commerce. The record suggests the levee separating the swamp at issue here from the Neches River was constructed long ago to contain dredged spoil from a navigation project. *See* Ex R-5, p. 1. Despite the impairments caused by such modifications or, more likely because of them, remaining Bald Cypress - Tupelo swamps are considered "rare," "unique" and "valuable" habitats in the Galveston District. TR 32. Given their rarity and value, a minimum value of three is appropriate for this subfactor..

Secondary or Offsite Impacts. As indicated in the discussion of the human health and welfare subfactor above, the record contains no evidence of secondary or offsite environmental effects. The value of zero Complainant assigned this subfactor was thus reasonable.

Duration of Violation. There is no support for Complainant's assignment of a value of four to the "duration of violation" subfactor, which it chose because the unauthorized fill had remained in place for 3 years at the time of Complainant's calculations, despite an EPA compliance order. *See* TR 163, 182. In evaluating this subfactor, the Penalty Policy directs that the "length of time that the discharge activity occurred" should be considered. Penalty Policy, p.

12. The overall levee reconstruction project took over a year, but the record does not reflect the length of time Respondents discharged the unauthorized fill constituting the "truck ramp" and "truck turnaround." Based on a small amount of fill discharged between the Corps' first and second inspections, it is apparent the violations occurred on at least two days, as found in my Accelerated Decision of April 17, 2012. Construction of the truck ramp and truck turnaround likely took longer, but there is no basis *in the record* for finding the unauthorized discharges associated with them occurred on more than two days.

The Penalty Policy also directs that "the longer dredged or fill material has remained in place *compared to other violations* in the same watershed, regionally or nationally, the higher the value that should be assigned to this factor." [Emphasis added.] Penalty Policy, p. 12. Complainant adduced little evidence with which such a comparative evaluation might be performed. The only evidence of somewhat similar violations relates to two alleged violations in which the Galveston District issued Respondent Stevenson or an entity in which he possessed an ownership interest an after-the-fact permit that allowed the fill to stay in place forever. *See* Ex C-45, R-3. Moreover, EPA's compliance order is not relevant to evaluating duration of the violation; the Penalty Policy renders such orders a matter for consideration as a "recalcitrance" adjustment to the preliminary gravity penalty amount. *See* Penalty Policy, p. 15.

Given only evidence that violations occurred on at least two days, Complainant's assigned value of four to this subfactor was unreasonable, particularly inasmuch as no particularly significant environmental harm was occasioned by the fill. I assign a value of one to the "duration of violation" subfactor.

Compliance Significance

Pursuant to the Penalty Policy, values (again ranging from 0 to 20) must be assigned three subfactors reflecting compliance significance, i.e., "degree of culpability,""compliance history of the violator," and "need for deterrence." In the Decision on Motions, I observed that alterations in the values Complainant had assigned some of these subfactors in its penalty calculations appeared intended to reduce the proposed penalty to the maximum amount within the jurisdiction of this forum. At the hearing, Ms. Aldridge testified that those alterations resulted from discussions with a more experienced compliance officer and Complainant's counsel. *See* TR 164. Whatever the motivation, however, the reduced values were somewhat more reasonable than those initially assigned. Evaluation of each follows.

Culpability. "The principal criteria for assessing culpability are the violator's previous experience with or knowledge of the Section 404 regulatory requirements, the degree of the violator's control over the illegal conduct, and the violator's motivation for undertaking the activity resulting in the violation." Penalty Policy, p. 13. Complainant assigned a value of 6 (reduced from 12) to this subfactor. The primary basis for that judgmental decision was the Corps' referral, which in pertinent part states:

> Mr Stevenson has been aware of the Section 404 permitting process. Based on a review of the Corps database, since 1991, Mr. Stevenson has obtained 4 Department of the Army permits from the Corps of Engineers, been party to 4 confirmed violaitons of Section 404 from unauthorized discharges (excluding the current violations) which resulted in 2 After-The-Fact permits, has had 3 withdrawn permit applications, and has requested 12 jurisdictional determinations. Complainant's Ex 38.

Complainant relied on this brief summary in seeking an accelerated decision on penalty, contending it showed Respondents knew full well a permit was required for their discharges, but

failed to obtain one. Respondents replied that summary instead showed a long history of attempted compliance. Resolving that dispute required additional evidence on the specific nature of prior contacts between Respondents and the Corps. *See* September 6, 2012 Decision on Motions, p. 4. The evidence and testimony adduced at the hearing supports Respondents' argument.

To provide additional information on Respondents' prior experiences with the Corps program, Mr. Davidson prepared a more detailed summary, admitted as Exhibit C–45.[3] Mr. Davidson and Mr. Stevenson also testified provided additional information on those contacts in their testimony. In addition, Mr. Stevenson's "capability to understand the Section 404 regulatory requirements," an issue of substantial importance in determining his culpability is now evident. Penalty Policy, p. 16.

Mr. Stevenson, the Chief Executive Officer and sole shareholder of Parkwood Land Co., is neither sophisticated nor well educated. Mr Stevenson joined the Navy following his high school graduation in 1963, served in Viet Nam, and currently receives disability payments from the Veterans Administration. *See* TR 210, 221. The nature of his disability is not reflected in the record, but several times during his testimony, Mr. Stevenson broke into tears for no apparent reason. *See* TR 210, 216. He occasionally wandered in his testimony and lacked independent

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[3] Complainant provided copies of the documents underlying Mr. Davidson's summary as a potential *en globo* exhibit to Counsel for Respondents in a Prehearing Exchange shortly in advance of the hearing, Respondents' Counsel filed an *in limine* objection to that exhibit, claiming it was too voluminous to enable effective preparation for the hearing. I reserved a ruling on that objection to time of hearing. As it turned out, Complainant did not seek to introduce the underlying documents and, with exceptions involving the number of prior violations and their attribution to him rather than ACR, Mr. Stevenson found no fault with Mr. Davidson's summary. *See* TR 224 – 225. Counsel for Respondents introduced one of the underlying documents, Ex R-3, as rebuttal evidence.

recollection of the content of documents in the record, although he readily agreed he'd probably read them if they bore his signature or were addressed to his accountant. *See, e.g.,* TR 224, 234 – 235, 238 – 239, 243, 261. His testimony was forthright, but somewhat disjointed.

In addition to Parkwood, Mr. Stevenson owns 25 per cent of a limited partnership identified as "ACR, LP," which leases land it owns, and an associated corporate entity named "Acre Land, Inc. or "Acreland Investment, Inc." *See* TR 193 - 195; Ex R–3. Based on his demeanor and testimony, however, it is apparent Mr. Stevenson is far more comfortable and adept at operating heavy machinery than poring over corporate or government documents. Although Mr. Davidson opined "it appears Mr. Stevenson has researched regulations and guidance concerning those [Rivers and Harbors and Clean Water] Acts," imagining him engaged in such research greatly strains belief; Mr. Stevenson's knowledge of the Clean Water Act has resulted entirely from his interactions with the Corps, including this matter. TR 18.

As documented by Complainant's Exhibit 45, the first of those interactions occurred in1991, when Mr. Stevenson requested authorization "to construct a sand pit and access road." The Corps informed him that no permit was required for the sand pit and that the access road was authorized by NWP 14. Then in 1999, Mr. Stevenson received a warning letter from the Corps, alleging he'd filled about 1.6 acres of wetlands without a permit. The matter was amicably resolved by issuance of an after-the-fact permit, which was subsequently amended to allow Mr. Stevenson to substitute mitigation bank credits for a conservation easement required by the original permit after no public entity agreed to hold the easement. *See* TR 201-203.

Mr. Stevenson's 1999 experience with the Corps made an impression; entities in which he possessed an interest began retaining consulting firms to handle communications with the

Corps. In October 1999, d.p. Consulting Engineer submitted a permit application on his behalf to fill .99 acres of wetlands, which the Corps granted. The same firm also submitted an application to fill 6.4 acres of wetlands on his behalf, but the application was withdrawn before a final permit decision.

In 2001, the Corps alleged ACR, LP and one of its lessees, Williams Brothers Construction Company, discharged fill to jurisdictional waters without authorization. To the extent it involved ACR, Acre Land Investments settled the alleged violation in 2004, paying a penalty of $20,000 and purchasing mitigation credits. Mr. Davidson's summary lists this as two actions, but as explained below, only one seems to have involved ACR, LP. That alleged violation occurred in wetlands adjacent to activities for which the Corps had issued the 1999 after-the-fact permit.

By 2002, ACR, LP had retained Northrup Associates to deal with the Corps. From 2002 through 2005, Northrup requested four jurisdictional delineations or determinations on ACR's behalf. In one of those cases, the Corps affirmed Northrup's delineation and subsequently granted a permit to ACR. The Corps found CWA did not apply to the other three sites.

In 2005 - 2006, Mr. Stevenson, on behalf of Parkwood Land Co., requested jurisdictional delineations/determinations on various portions of a 162 acre tract. The Corps identified only 3 acres of jurisdictional waters on the tract and Parkwood apparently found its plans for the tract did not require a permit. In at least one of these instances, as in the current matter, GTI Environmental had performed an initial delineation for which Parkwood requested Corps confirmation.

The summary Mr. Davidson prepared is consistent with Mr. Stevenson's testimony on what he'd learned from his prior interactions with the Corps, i.e., that it was best to engage a

professional engineering firm to deal with the Corps on jurisdictional delineations and permit applications. *See* TR 212. Mr. Stevenson summarized his view at TR 226:

> ...we hire engineers so we stay out of trouble...we've been led to believe that's the best way to get it done the quickest and accepted. It's very costly. I don't know if I'm supposed to, but we did it. I think the Corps is supposed to do it.

Respondents followed that course of action in the instant matter. They retained GTI, a consulting firm, to delineate wetlands on the property and the Corps confirmed that delineation. *See* Ex R-4; C -31; C-44; TR 206 - 207. Respondents instructed GTI to seek authorization for the levee repair work and that consulting firm prepared a preconstruction notification in accordance with NWP 3 and its regional conditions, which Mr. Stevenson submitted to the Corps. *See* Ex R-5; TR 207-208; TR 206 - 207, 241, 260, 268. During the Corps' evaluation of that notification, Mr. Stevenson instructed GTI truck turnarounds would be required for the work and GTI assured him it would convey that information to the Corps. *See* TR 217 - 219. There is no evidence that it did, but when Mr. Stevenson received the Corps' ambiguous approval letter, he thought the fill for which he'd requested authorization was now authorized and he proceeded with it, including construction of a truck turnaround he considered a "minor deviation." *See* TR 214. 219, 230 - 231.

Although the "minor deviations" referenced in the Corps' approval letter relate to deviations from the levee's original construction, that was not clear to Mr. Stevenson. Nor does it seem Mr. Stevenson was alone in his confusion. Mr. Davidson testified that minor deviations in construction materials, equipment, and dimensions were sometimes allowed, but opined the

access ramp and truck turnaround were not minor deviations.[4] *See* TR 24 - 25. Ms. Shivers testified discharging fill to the interior of the levee might be a minor deviation authorized by NWP 3, but it would "depend on the extent of the fill." TR 146 – 147.

A more sophisticated person than Mr. Stevenson might have carefully reviewed the Corps letter, noted its ambiguities, and initiated inquiries to the Corps or GTI. It is unlikely Mr. Stevenson read the letter closely or that he understood its nuances if he did. He testified:

> I thought I was to fix the levee... And according to that letter, I haven't done nothing wrong. And that hasn't changed. I was following the letter and the instructions of my engineers and they put it to me, and I was doing the best I could. Nobody gave me no meetings, showed me how to do nothing. Nobody showed me how to interpret that letter. TR 230.

I conclude Respondents' discharges of fill material associated with construction of the "truck turnaround" were negligent, but not wilful. Their conduct in connection with the "truck ramp/staging area" violation was somewhat less negligent. GTI had flagged the wetland/non-wetland boundary and Mr. Stevenson had instructed the road contractor delivering concrete fill to the staging area to place it on the upland side of the flags. *See* TR 206, 214 - 215, 228. Nevertheless, the concrete fill deliveries continued during Mr. Stevenson's long hospital stay and the accumulated concrete rubble encroached on wetlands beyond the flags. Under such circumstances, it is difficult to see what more Mr. Stevenson could have done to avoid that, but Respondents are nevertheless legally responsible for violating CWA's strict liability provisions, having directed the delivery of the concrete fill to the site for their own benefit.

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[4] Mr. Davidson later described the correct distinction, however, and his earlier statements may have related to the Corps' exercise of enforcement discretion. *See* TR 44.

In sum, Mr. Stevenson's testimony provided a different picture of Respondents' culpability than the Corps referral on which Complainant based the penalty it proposed. In view of his background and education, Mr. Stevenson had very reasonably concluded the best way to approach CWA compliance was to retain a consulting firm with greater expertise than he possessed. His negligence in failing to question the permit coverage received, coupled with some hard luck in the case of the truck ramp/staging area fill, resulted in violations, but not the flagrant violations the record suggested before hearing. Indeed, in closing argument, Complainant's counsel stated, "[w]e understand that--no one here is trying to say--I don't think Mr. Stevenson purposely set out to violate the Clean Water Act." TR 282. In view of the current record, a culpability subfactor value of four, not the six Complainant assigned, is reasonable.

Prior Violations. The Penalty Policy instructs that "[t]he greater the number of past violations and the more significant the violations were, the higher the value that should be assigned to this factor." Penalty Policy, p. 14. Complainant assigned a value of six to this subfactor, based on the Corps referral alleging three prior violations.

Respondents generally admit Mr. Stevenson was involved in the first of those violations, which occurred in 1991. He then performed work in a previously cleared oil well pipeline right-of-way in the vicinity of a cypress swamp. See TR 28, 200; Ex C-45. The site was not vegetated and the Corps apparently asserted jurisdiction on the basis of secondary attributes, including an inconclusive soil analysis. *See* TR 201. Mr. Stevenson chose not to contest the Corps' view and the matter was resolved without an enforcement action through issuance of an after-the-fact permit. *See* TR 201; Complainant's Ex 45. Nothing in the record suggests this first violation was particularly significant, either in terms of environmental harm or compliance significance.

The second and third violations Exhibit C-45 alleges occurred in 2001 on land owned by ACR, LP that it had leased to Williams Brothers Construction Company for construction and operation of a hot mix asphalt plant. Liability under CWA is premised on (1) performing a discharge or (2) directing the performance of a discharge. *See United States v. Board of Trustees of Florida Keys Community College,* 531 F.Supp. 267, 274 (S.D. Fla. 1981); *United States* v. *Sargent County Water Resource District,* 876 F.Supp. 1081, 1088(D. N.D. 1992).[5] Mr. Stevenson testified the Corps erroneously sought to penalize ACR for its lessee's discharges and ACR eventually settled the matter to avoid incurring additional attorney fees. *See* TR 197 - 200. Mr. Davidson provided some support for that assertion, testifying that ACR was liable for the unauthorized fill in the Williams Brothers matter because "the Corps of Engineers holds the property owner responsible." TR 78.

Mr. Davidson also testified, however that "Mr. Stevenson was on a bulldozer on that property pushing dirt around." TR 78. One of the two alleged violations in the Williams Brothers incident was adjacent to work for which ACR had obtained a permit and the settlement agreement under which ACR's potential liability was resolved referenced only that violation, which involved alleged unauthorized discharge of fill to 1.21 acres of wetlands. *See* Ex C-45; R-3. I conclude Mr. Stevenson was, at most, partially responsible for two prior violations, neither one of which was particularly significant. Based on the record, a value of four for the "prior violations" subfactor is reasonable.

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[5] In the instant matter, for instance,, Respondents discharged the fill associated with the truck turnaround and directed (albeit without great effect) the discharge of fill associated with the truck ramp/staging area.

Need for deterrence. A value assigned this subfactor should be based on "the extent to which the violator appears likely to repeat the types of violations at issue and the prevalence of this type of violation in the regulated community." Penalty Policy, p. 14. Complainant based the value of five (reduced from ten) it assigned this subfactor on neither of those criteria, instead claiming it was justified because the violation was visible to the general public, including local developers, from Interstate 10. *See* TR 164; EX C-50.

Any need for deterring Respondents from further violations was largely accomplished in the past. Mr. Stevenson indeed believed, albeit incorrectly, that the discharges from which this matter arose were authorized by NWP 3. He likely continues to believe the best way to comply with CWA is to retain a consulting firm to handle permit applications with the Corps. Given Mr. Stevenson's lack of sophistication, that is an eminently rational way to approach compliance. As shown by this matter, which apparently arose from a lack of meaningful communication between GTI and Respondents, reliance on a consultant is no panacea. Given his experience in the current action, however, Mr. Stevenson will likely be more careful about reading future communications from the Corps and, if something seems even faintly amiss, seek further advice from Corps, consultant, or attorney. No further penalty is required to deter Respondents from careless assumptions about documents they don't understand.

Nor does their appear any reason to deter other land developers in Orange County or elsewhere from similar violations. No evidence was adduced indicating there were *any* similar negligent violations by other members of the regulated community. That developers could observe the levee repair work from which Respondents' violations arose signifies nothing; those with knowledge of the program would likely have assumed the work was authorized under NWP

3 and NWP 33. Had they made inquiries of Mr. Stevenson, he would have informed them he'd obtained a permit and that it cost him $10,000.00 in consulting fees. The "need for deterrence" subfactor warrants a value of zero in this case.

Multiplier. Pursuant to the Penalty Policy, the total of appropriate values for the various gravity subfactors (totaling fifteen here) must be multiplied by a dollar amount to reach a preliminary gravity amount. The choice of multiplier is described at page 10 of the Penalty Policy:

> M (Multiplier) = $500 for minor violations with low overall environmental and compliance significance, $1500 for violations with moderate overall environmental and compliance significance, and $3,000 - $10,000 for major violations with a high degree of either environmental or compliance significance.

The values Complainant assigned the various gravity subfactors suggest it generally considered the environmental significance of Respondent's violations minor based on Ms. Adrridge's personal observation, but their compliance significance moderate based on the Corps' referral, which described Respondents as "repeat and flagrant" violators. Given that understanding, Complainant's choice of a $1500 multiplier likely seemed reasonable. As evidence and testimony now show, however, Respondents were less culpable and had fewer violations than Complainant understood in choosing a multiplier. Nor is there a deterrence need. Because both environmental and compliance significance in this matter are "minor," a multiplier of $500 is appropriate, yielding a preliminary gravity amount of $7,500.

Additional Adjustments to Gravity.

As explained earlier, the preliminary gravity amount of a penalty may be adjusted for recalcitrance, inability to pay, and such other matters as justice may require.

Recalcitrance. In pertinent part, the Penalty Policy provides at page 15:

> The recalcitrance adjustment factor may be used to increase the penalty based on a violator's bad faith, or unjustified delay in preventing, mitigating, or remedying the violation in question... [R]ecalcitrance under this policy relates to the violator's delay or refusal to comply with the law, to cease violating, to correct violations, or to otherwise cooperate with regulators once specific notice has been given and/or a violation has occurred....If the defendant has violated either an Army Corps of Engineers' cease and desist order or an EPA administrative order, or failed to respond to an EPA Section 308 information request, staff may account for this violation by using this factor.

Complainant did not apply a recalcitrance adjustment in its penalty calculation. As noted earlier, however, it erroneously calculated "duration of violation" from the date it issued an administrative compliance order. Hence, it is appropriate to consider whether Respondents' response to that order was recalcitrant, justifying an increase to the preliminary gravity penalty figure.[6] In pertinent part, the compliance order (Ex C-2) states:

> EPA Orders Respondents to...within thirty (30) days of receipt of this Order, submit a plan to the EPA for the restoration of the 1.26 acres of impacted wetlands....Respondents shall commence implementation of the plan within 15 days following EPA's approval of the plan. If Respondents fail to submit a plan or fail to successfully implement a plan upon approval, a restoration plan will be developed by the EPA, which Respondents will implement within fifteen (15) days of receipt of the plan...

The order thus provided Respondents a choice – either develop a restoration plan and implement it after EPA approval or EPA will develop a plan you must implement. Respondents developed no restoration plan; they instead attempted to appeal the Order administratively. *See*

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[6] The Corps also issued Respondents a cease and desist order. *See* Ex R-36. Upon receipt of that order, Respondents ceased work. *See* TR 204-205.

In re: Henry R. Stevenson, Jr. & Parkwood Land Co., ___ EAD ____, 2011 WL 1543300 (April 19, 2011). Nor is there evidence suggesting EPA developed a restoration plan for Respondents to implement. Respondents failure to implement a non-existent restoration plan that EPA threatened and/or promised to provide them did not violate the Agency's order and provides no basis for an adjustment to the preliminary gravity amount.

Ability to Pay. "A respondent's ability to pay may be presumed until it is put at issue by the respondent." *In Re: Donald Cutler, supra* at 632. Respondents' Answer did not specifically put their ability to pay at issue and Mr. Stevenson's testimony on ability to pay was brief and inconclusive. He essentially testified Parkwood possessed no cash flow and was "broke," except for money he occasionally transferred to its bank account from his personal account. TR 220. He indicated Parkwood owned about 330 acres of land, including the tract on which the violations occurred, but did not know its market value. *See* TR 222 – 223. His testimony warrants no penalty reduction for inability to pay.

Such Other Matters As Justice May Require. This statutory criterion 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) . No manifest injustice is evident here.

Penalty Assessment Calculation

In view of my findings and conclusions, application of the Penalty Policy's calculation method yields a penalty of $7,500.00, i.e., 2 (extent of impacts to aquatic environment) + 1 (severity of impacts to aquatic environment) + 3 (unique/severity of affected resources) + 1

(duration of violation) + 4 (culpability) + 4 (prior violations) = 15 x $500.00 (multiplier) = $7,5000.00.

ORDER

To the extent it requested reconsideration of the April 17, 2012, Accelerated Determination as to liability, Respondents' Supplemental Response to Complainant's Motion for Accelerated Determination as to Penalty is denied. An administrative penalty in the amount of Seven Thousand Five Hundred Dollars ($7,500.00) 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:

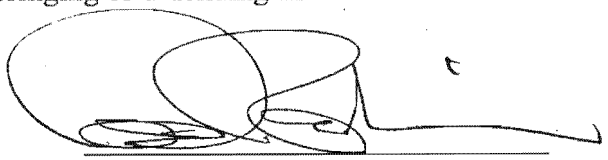
U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board (MC 1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington DC 20460–0001.

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 11th day of February, 2013.



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 Initial Decision for Docket CWA 06-2011-2709 was provided to the following persons on the date and in the manner stated below:

Charles M. Kibler — CERTIFIED MAIL
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Russell Murdock — HAND DELIVERED
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Clerk of the Board
Environmental Appeals Board (MC 1103B)
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Lorena S. Vaughn
Regional Hearing Clerk

2-11-13
Date