**UNITED STATES**
**ENVIRONMENTAL PROTECTION AGENCY**
**REGION 6**



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| In the Matter of: | § | |
| | § | |
| Mr. Henry R. Stevenson, Jr. | § | |
| Parkwood Land Co. | § | Docket No. CWA-06-2011-2709 |
| | § | |
| Respondents | § | |

## COMPLAINANT'S MOTION FOR ACCELERATED DECISION AS TO BOTH LIABILITY AND PENALTY

COMES NOW, the Complainant, the Acting Director of the Water Quality Protection Division, through his attorney, in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("the Consolidated Rules"), 40 C.F.R. § 22.1 *et seq.*, hereby moves the Court to enter into an accelerated decision pursuant to 40 C.F.R. § 22.20 granting full judgment in favor of the Complainant as to both liability for violations of the Clean Water Act ("CWA"), 33 U.S.C § 1251 *et seq.*, for discharges of pollutants to waters of the United States, and as to the penalty assessed for these violations. In particular, it is alleged that Respondents discharged pollutants to waters of the United States between August 9, 2007 and August 3, 2010. In support of its Motion for Accelerated Decision, Complainant states the following.

## I. JURISDICTION

1. This is a proceeding to assess a Class I Civil Penalty under Section 309(g) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g) and is governed by Subpart I of the Consolidated Rules, 40 C.F.R. Part 22. In accordance with 40 C.F.R. § 22.51, the United States Environmental Protection Agency's ("EPA") Motion for Accelerated Decision shall be ruled upon by the Regional Judicial Officer ("RJO").

## II. STANDARD OF REVIEW

2. An accelerated decision may be rendered as to "any or all parts of a proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as [the Presiding Officer] may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." 40 C.F.R. § 22.20(a). Although the Federal Rules of Civil Procedure do not apply, the summary judgment standard in Rule 56(c) provides guidance for accelerated decisions. *In Re: Consumers Scrap Recycling, Inc.*, 11 E.A.D. 269, 285 (EAB 2004); *P.R. Aqueduct and Sewer Auth. v. U.S. EPA*, 35 F.3d 600, 607 (1st Cir. 1994).

3. Under Rule 56(c), the movant has the initial burden of showing that there exists no genuine issue of material fact by identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on files, together with the affidavits, if any, show[ing] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Rule 56(c)). An issue of fact is "material" if it "might affect the outcome of the suit under governing law." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986). An issue of fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Id.* Evidence that is "merely colorable" or not "significantly probative" is incapable of overcoming the standard for denying summary judgment. *Id.* at 249-50. Once the moving party meets its burden, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The nonmoving party must come forward with "specific facts showing that there is

a genuine issue for trial." *Id.* at 587. If the nonmoving party is unable to prove its burden, the moving party is entitled to a judgment of an accelerated decision as a matter of law.

## III. ADMINISTRATIVE PROCEDURES TO DATE

4. Complainant issued an Administrative Order on January 31, 2011, ordering Respondents to cease any discharge of dredged and fill material to waters of the United States and to submit a plan to EPA for restoration of 1.26 acres of impacted wetlands. (Complainant's Exhibit 2, Administrative Order, Docket No. CWA-06-2010-2708) (hereinafter "AO").

5. Complainant issued an Administrative Complaint pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), on July 18, 2011. (Complainant's Exhibit 1, Administrative Complaint, Docket No. CWA-06-2011-2709) (hereinafter "Complaint").

6. Respondents filed their Answer on August 23, 2011, and requested a hearing. (Complainant's Exhibit 4, Respondents' Answer to Administrative Complaint).

7. The Presiding Officer issued a Scheduling Order on November 22, 2011.

## IV. DESCRIPTION OF VIOLATIONS AND RELEVANT PROPERTY

8. Respondents own a tract consisting of approximately 79 acres, located northeast of the Interstate Highway 10 and the Neches River intersection, west of Exit 856, near Rose City, Orange County, Texas ("the property"). (Complainant's Exhibit 3, Warranty Deed); (Complainant's Exhibit 2). A containment levee constructed prior to 1940 surrounds the jurisdictional wetlands relevant to the Complaint. (Respondents' Exhibit i, Expert report of Mr. Scott Skinner, 3.0 History, p. 3); (Complainant's Exhibit 31, Corps Background Information, p. 12-17). In April 2007, Respondents received authorization from the U.S. Army Corps of

Engineers ("Corps") pursuant to Nationwide Permit 3 to repair a portion of the containment levee. (Complainant's Exhibit 31, p. 14-16).

9. On multiple dates between August 9, 2007 and August 3, 2010, Respondents discharged dredged material and/or fill material, as defined by Section 502 of the CWA, 33 U.S.C. § 1362, and 40 C.F.R. § 232.2, from point sources, including heavy equipment, into approximately 1.26 acres of wetlands within the property adjacent to the permitted repair of the levee surrounding the wetlands. (Complainant's Exhibit 2, p. 4). The Complaint pertains solely to discharges unrelated to the maintenance of the levee, which were not authorized by Nationwide Permit 3. The levee surrounds a part of the 1.26 acres of the wetlands within the property, which would otherwise abut a navigable-in-fact body of water, the Neches River. *See* (Complainant's Exhibit 31, p. 12-17); *See also* (Respondents' Exhibit i, p. 3).

## V. ADMINISTRATIVE ENFORCEMENT HISTORY

10. During site visits on September 3, 2009, and July 22, 2010, Corps representatives witnessed evidence of the unauthorized mechanized land clearing and filling of the wetlands. (Complainant's Exhibit 33, Kristin Shivers' Memorandum for File and Supporting Photographs from September 3, 2009 site visit, p. 3-7); (Complainant's Exhibit 35, Kristin Shivers' Memorandum for File and Supporting Photographs from July 22, 2010 site visit, p. 7-26). Further evidence of the unauthorized land clearing and filling of wetlands was witnessed during a subsequent December 9, 2010 inspection by both Corps and EPA representatives. (Complainant's Exhibit 5, Barbara Aldridge's Trip Report/Memo to the File following December 9, 2010 Inspection); (Complainant's Exhibit 6, Barbara Aldridge's Wetlands Field Inspection Report Form and Map of Property).

11. Complainant issued its AO on January 31, 2011, ordering Respondents to cease any discharge of dredged and fill material to waters of the United States and to submit a plan to EPA for restoration of 1.26 acres of impacted wetlands. (Complainant's Exhibit 2).

12. On July 18, 2011, Complainant issued its Administrative Complaint alleging unauthorized discharges between August 9, 2007 and August 3, 2010. (Complainant's Exhibit 1, p. 4).

## VI. STIPULATED FACTS

13. Counsel for the Respondents and Complainant had a phone call on January 25, 2012, in which both sides agreed to stipulate the following facts:

A. Respondents are "persons" for purposes of the CWA.

B. The Neches River is a navigable-in-fact waterway.

C. Respondents filled and/or directed others to place the fill relevant to the dispute.

D. Mechanized land-clearing equipment (a bulldozer) was used to place the fill relevant to the dispute.

## VII. ARGUMENT

### A. COMPLAINANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE RESPONDENTS ARE PERSONS THAT HAVE DISCHARGED POLLUTANTS FROM A POINT SOURCE INTO WATERS OF THE UNITED STATES IN VIOLATION OF THE CWA.

14. Under Section 301 of the CWA, 33 U.S.C. § 1311, it is unlawful for any person to discharge any pollutant from a point source into a water of the United States, unless it is authorized by a permit issued under the CWA. 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. Respondents did not at any relevant time possess a permit issued by the Corps authorizing the discharges alleged in the Complaint. Complainant alleged in the Complaint that Respondents discharged pollutants to waters of the United States on multiple dates between August 9, 2007 and August 3, 2010. (Complainant's Exhibit 1, p. 4). Specifically, Respondents discharged "dredged material" and "fill material," as defined by 40 C.F.R. § 232.2, by means of mechanized equipment (e.g., earth-moving equipment) in, on and into approximately 1.26 acres of wetlands located within an approximately 79-acre tract of land located northeast of the Interstate Highway 10 and the Neches River in Orange County, Texas. (*Id.*, p. 4-5).

**1. RESPONDENTS ARE PERSONS WITHIN THE MEANING OF THE CWA.**

15. It is stipulated in Section VI that Respondents are "persons" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5). The term "person" is defined in Section 502(5) to include an "individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." Parkwood Land Co. is a Texas corporation and therefore considered a "person" as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5). Mr. Henry R. Stevenson, Jr. is also a "person" as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

**2. RESPONDENTS DISCHARGED DREDGED MATERIAL AND FILL MATERIAL WHICH ARE POLLUTANTS.**

16. Respondents discharged pollutants within the meaning of the CWA. Under Section 502(12) of the CWA, 33 U.S.C. § 1362(12), the "discharge of a pollutant" is defined to be "any addition of any pollutant to navigable waters from any point source."

17. Section 502(6), 33 U.S.C. § 1362(6) of the CWA, defines pollutant as:

> . . . dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

18. In this case, Respondents discharged dredged material and fill materials, as defined by 40 C.F.R. § 232.2, which consisted, in part, of dredged spoil, chunks of cement, and asphalt, which are all pollutants under Section 502(6) of the CWA, 33 U.S.C. § 1362(6). (Complainant's Exhibit 5, p. 1). Other site inspections found more discharged pollutants including pipes, bricks, road demolition material, and plywood. (Complainant's Exhibit 35, p. 2-3). Overwhelming photographic evidence of the fill's existence was documented during the three inspections. (Complainant's Exhibit 33, p. 3-7); (Complainant's Exhibit 35, p. 7-26); (Complainant's Exhibits 7-29, Photos of Site from December 9, 2010 Inspection). Therefore, the dredged material and fill material discharged by Respondents into the jurisdictional wetlands fit the statutory definition of "pollutant" under Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

### 3. RESPONDENTS' MECHANIZED EQUIPMENT USED TO CARRY OUT THE DISCHARGES ARE POINT SOURCES SUBJECT TO REGULATION UNDER THE CWA.

19. The CWA requires that any party that discharges pollutants from a point source into waters of the U.S. must have a permit unless the discharges fall into an exception. A point source is defined in Section 502(14) of the CWA, 33 U.S.C. § 1362(14) as:

> . . . any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

20. Additionally, the discharge of a pollutant, for which a NPDES permit is required, includes point sources that do not themselves generate pollutants; a point source need only convey the pollutant to navigable waters. *South Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004). Accordingly, discharges from mechanized equipment are not exempt from the CWA.

21. It is stipulated in Section VI that Respondents used mechanized land-clearing equipment (a bulldozer) to place the fill relevant to the dispute. Each piece of mechanized equipment used to carry out the discharges was a point source because the mechanized equipment was a "discernible, confined and discrete conveyance" of a pollutant. As such, a permit issued by the Corps is necessary for discharges from mechanized equipment.

22. Accordingly, each piece of mechanized or heavy equipment used to carry out Respondents' discharges fits the statutory definition of "point source" under Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

**4. RESPONDENTS DISCHARGED FILL**

23. Respondents discharged and/or caused the discharge of dredged material and fill material into 1.26 acres of jurisdictional wetlands located within the property. The discharges took place on multiple dates between August 9, 2007 and August 3, 2010. (Complainant's Exhibit 2, p. 5).

24. It is stipulated in Section VI that Respondents filled and/or directed others to place the fill relevant to the dispute. During site visits on September 3, 2009, and July 22, 2010, Corps representatives witnessed evidence of the unauthorized mechanized land clearing and filling of the wetlands. *Id.* p. 6; (Complainant's Exhibit 33, p. 1); (Complainant's Exhibit 35, p. 2-27). Two specific sites of fill included a truck turn-around and the northwest corner of the levee. (Complainant's Exhibit 33, p. 1). During a later site visit on December 9, 2010, Corps and EPA representatives witnessed and documented further evidence of the unauthorized filling of the wetlands. (Complainant's Exhibit 5); (Complainant's Exhibit 6); (Complainant's Exhibits 7-9, 12, 15-16, 27-29, Photos of Site from December 9, 2010 Inspection). Further, Respondents maintained control and ownership of the property at all relevant times. (Complainant's Exhibit 3).

25. Accordingly, this statutory requirement is met.

**5. THE RELEVANT 1.26 ACRES OF WETLANDS ON THE PROPERTY QUALIFY AS WATERS OF THE U.S. FOR PURPOSES OF THE CWA**

26. Respondents discharged pollutants into waters of the United States. The relevant property is a wetland, by definition, that is adjacent to the Neches River, which is considered a "navigable water" within the definition of Section 502(7) of the CWA, 33 U.S.C. § 1362(7). It is stipulated in Section VI that the Neches River is a navigable-in-fact waterway. Guidance regarding the definition of waters of the United States was codified on Nov. 13, 1986, at 33 C.F.R. Part 328. Title 33, sections 328.3(a)(1)-(8) defines the term waters of the United States as:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.

(8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

27. In this case, the wetlands in the relevant 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 subject to regulation thereunder.

28. Photographic evidence demonstrates conclusively that the relevant property is wet. (Complainant's Exhibits 10, 12-14, 20, 24, 26). Hydrophytic vegetation and plant-life also exists on the site to indicate it qualifies as a wetland. (Complainant's Ex. 10 and 35). In its

Jurisdictional Determination, the Corps determined that the site has approximately 71.2 acres of jurisdictional forested wetlands, including the wetlands relevant to this action. (Complainant's Exhibit 31, p. 12-13 and 35).

29. 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 v. United States,* the case on which Respondents' argument is based, Justice Kennedy's plurality 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*, 126 S. Ct 2208, 2248-2249 (2006)).

30. 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 factual issue of whether there is a significant nexus between the relevant wetlands and the Neches River.

31. Even if there was a need to turn to the factual issue of whether there is a significant nexus, the exhibits offered provide ample evidence of the nexus between the Neches River and the relevant wetlands. A review of the site found the relevant wetlands are located within the 100-year flood plain of the Neches River. (Complainant's Exhibit 31, p. 24, 29). This 100-year flood plain is an area that experiences a one percent (1%) annual anticipated frequency of flooding, which contributes to water exchange. *Id.* As a result, even if it were determined that a

significant nexus must be established, the water exchange between the relevant wetlands and the Neches River establishes a significant nexus or hydrological connection between the two water bodies.

32. Respondents cite a Corps memorandum as evidence that no hydrological connection exists and that that there is accordingly no significant nexus. However, Respondents misread the memorandum. In the memorandum, Dwayne Johnson, a Project Manager for the Corps states that "[t]he wetland is located within the 100-yr floodplain, but there is no *direct* hydrological connection or breaks in the levee." (Respondents' Exhibit ii, Memorandum drafted by Dwayne Johnson, Project Manager, U.S. Corps of Engineers, Galveston District dated July 5, 2007) (italics added for emphasis). Johnson's statement merely indicates that there is no break in the levee whereby the water and the wetlands have a direct surface connection. Instead, the hydrological connection which would meet the significant nexus requirement rests in the fact the wetlands are in the 100-year floodplain of the Neches River and that water is exchanged between the wetlands and the Neches River during those floods. Accordingly, the Johnson memorandum does not present a question of fact for review, but is instead a simple statement that due to the presence of the levee, there is no direct surface connection between the relevant wetlands and the Neches River. Instead, the relevant wetlands share a significant nexus with the Neches River due to their hydrological connection during the floods which occur within the floodplain.

33. Under the *Rapanos* standard set out by Justice Kennedy, the relevant wetlands qualify as waters of the United States because they are directly adjacent to a navigable-in-fact water. Therefore no significant nexus test need be done. However, no material question of fact would arise even were the Presiding Officer to determine that a case-specific significant nexus test was

necessary. As a result, the relevant wetlands are jurisdictional waters of the United States no matter which test is applied.

## B. DISCHARGES BEHIND A LEVEE SYSTEM ARE NEITHER "GRANDFATHERED" NOR EXEMPT FROM REGULATION UNDER THE CWA

### 1. THE EXISTENCE OF A LEVEE DOES NOT DISRUPT JURISDICTION UNDER THE CWA BY MAKING A WETLAND NO LONGER ADJACENT TO WATERS OF THE UNITED STATES

34. In Respondents' Answer to Complainant's Complaint, Respondents asserted that Complainant lacked jurisdiction over Respondents' property due to the existence of a levee separating the wetland from any jurisdictional waters. (Complainant's Ex. 4, Respondents' Original Answer, p. 1). Respondents' rejection of Complainant's jurisdiction likely stems from Respondents' disagreement that the wetlands contained in the Respondents' relevant property are "navigable waters" within the definition of Section 502(7) of the CWA, 33 U.S.C. § 1362(7), discussed *supra*.

35. In this case, the relevant 1.26 acres of wetlands in the property are adjacent to the Neches River, a traditionally navigable water subject to the ebb and flow of the tide, which qualifies the wetlands as jurisdictional waters of the United States under 33 C.F.R. § 328.3(a)(7). (Complainant's Exhibit 31, p. 12-16); (Complainant's Exhibit 35, p. 2). Respondents claim the man-made levee separating the wetland from the Neches River shields Respondents' property from jurisdiction. Title 33, sections 328.3(c) of the Code of Federal Regulations offers more insight on the meaning of adjacency and sheds light on the current case. The section reads as follows:

> 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).

36. 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. As a result, the relevant 1.26 acres of wetlands in the property are jurisdictional for purposes of the CWA.

**2. RESPONDENTS' NATIONWIDE PERMIT COVERAGE FOR LEVEE MAINTENANCE EXEMPTS ONLY THOSE ACTIVITIES DIRECTLY RELATED TO LEVEE MAINTENANCE AND DOES NOT GENERALLY EXEMPT RESPONDENTS' PROPERTY FROM REGULATION UNDER THE CWA**

37. In their Answer, Respondents claim that the work performed by Respondents is "grandfathered" because the levee system pre-dates the inception of the CWA. (Complainant's Exhibit 4, p. 1). The property contains a levee constructed prior to 1940. (Respondents' Exhibit i, p. 3); (Complainant's Exhibit 31, p. 14-16). On April 17, 2007, the Corps Galveston District authorized Respondents to perform repairs on a portion of the existing levee under Nationwide Permit 3. (Complainant's Exhibit 31, p. 14-19); (Respondents' Exhibit iii, Letter from Bruce H. Bennett). Per the permitted plans, all fill was to be placed on the river-side of the levee; no fill was authorized in or on the wetlands side of the levee. *Id.*; (Complainant's Exhibit 33, p. 1). Respondents wrongly use the limited Nationwide Permit as a shield for discharges that were unrelated to the maintenance of the levee.

38. The Corps of Engineers Regulatory Program Regulations, codified at 33 C.F.R. § 330.3, addresses what activities are grandfathered under a Nationwide Permit and which do not require further permitting. 33 C.F.R. § 330.3 reads:

> The following activities were permitted by NWPs issued on July 19, 1977, and, unless the activities are modified, they do not require further permitting:
>
> (a) Discharges of dredged or fill material into waters of the United States outside the limits of navigable waters of the United States that occurred before the phase-in dates which extended Section 404 jurisdiction to all waters of the United States. The phase-in dates were: After July 25, 1975, discharges into navigable waters of the United States and adjacent wetlands; after September 1, 1976, discharges into navigable waters of the United States and their primary tributaries, including adjacent wetlands, and into natural lakes, greater than 5 acres in surface area; and after July 1, 1977, discharges into all waters of the United States, including wetlands. (Section 404)

39. The Corps regulation provides that discharges of dredged or fill material into areas identified as waters of the United States prior to the phase-in dates are considered an authorized activity. The regulation does not authorize an individual to discharge dredge or fill material into jurisdictional waters of the United States after the phase-in dates without a permit issued by the Corps.

40. In this case, Respondents attempt to shield themselves from liability relating to unrelated discharges with the defense of the Nationwide Permit 3. This misapplication of the above "grandfather" regulation misapplies the law to the facts of the case. Only Respondents' activities directly related to the maintenance of the levee were authorized by the Nationwide Permit. The discharge of dredged and fill material into the relevant 1.26 acres of wetlands in the property was unrelated to the maintenance of the levee. *See* (Complainant's Exhibit 33, p. 1). As a result, the claim that Respondents' dredged and fill activities are "grandfathered" is without merit.

## VIII. APPROPRIATE CIVIL PENALTY

41. Under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), EPA has the authority to assess civil penalties to any person who, without authorization, discharges a pollutant to a navigable water, as those terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362. The CWA enumerates in Section 309(g)(3), 33 U.S.C. § 1319(g)(3), the factors that must be considered in the assessment of any civil penalty. Yet, the CWA itself does not provide a methodology for calculating a penalty. *In re Britton Construction Co., Big Investments, Inc. and William and Mary Hammond*, 8 E.A.D. 261, 278 (EAB 1999). Therefore, "highly discretionary calculations that take into account multiple factors are necessary" to assess penalties under the CWA. *Tull v. United States*, 481 U.S. 412, 426-27 (1987).

42. The "appropriateness" of a CWA penalty for purposes of 40 C.F.R. § 22.24 is measured in accordance with the penalty factors in Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3). When determining an appropriate penalty, each of the statutory penalty factors must be considered and the recommended penalty must be supported by analyses of those factors. *In re Donald Cutler*, 11 E.A.D. 622, 631 (EAB 2004). Therefore, for purposes of making a record of the agency action for judicial review, EPA must establish that in assessing a civil penalty for the Respondent or Respondents, the Agency used the statutory factors and applied these factors to the facts of the case. These statutory penalty factors include the following: "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." 33 U.S.C. § 1319(g)(3).

43. In making his decision on the appropriateness of a penalty, the Presiding Officer must also use the statutory factors and apply them to the case. The Presiding Officer may accept either EPA's or the Respondents' interpretation of the statutory factors or he may develop his own interpretation of the statutory factors. Nevertheless, the Consolidated Rules require that "the Presiding Officer shall set forth the specific reasons for the increase or decrease" from the penalty proposed in the Complaint. 40 C.F.R. § 22.27(b). The Presiding Officer must also consider any civil penalty guidelines issued under the Act. 40 C.F.R. § 22.27(b). However, the well-established principle is that although the Presiding Officer must consider EPA penalty policies issued under the Act, he has the discretion to not apply or even follow the policies. *Cutler*, 11 E.A.D. at 645. *See also In re Robert Wallin*, 10 E.A.D. 18, 25 n.9 (EAB 2001); *and Britton*, 8 E.A.D. at 282 n.9.

44. Under the CWA, there is no statute-specific penalty policy. Some Presiding Officers have calculated penalties following the framework of EPA's general civil penalty policies, known as *Policy on Civil Penalties* and *A Framework for Statute-Specific Approaches to Penalty Assessments*, both issued on February 16, 1984. *Wallin*, 10 E.A.D. at 25 n.9. A more statute-specific policy that implements those general policies is the *Revised Interim Clean Water Act Settlement Penalty Policy* (Settlement Policy) issued February 28, 1995, which guides EPA when establishing appropriate penalties in the settlement of civil judicial and administrative actions. The EPA's *Clean Water Act Section 404 Settlement Penalty Policy* issued December 21, 2001, offers further guidance in cases under Section 404 of the CWA, such as the present one. (Complainant's Exhibit 40). "Although settlement policies as a general rule should not be used outside the settlement context,...there is nothing to prevent our looking to relevant portions

thereof when logic and common sense so indicate." *Britton*, 8 E.A.D. at 287 n.16. Although the Presiding Officer may find the Settlement Policy helpful, the primary focus must be on the statutory factors and he must make a "good faith effort to evaluate" these factors when assessing the penalty. *Id.*

45. The factors Complainant primarily considered were the need for deterrence, Respondents' prior history of violations, and Respondents' degree of culpability.

46. For the nature, circumstances, extent and gravity of the violations, Complainant considered the seriousness of the violations and the actual or potential harm resulting from the violations, including environmental harm. Complainant also looked to the duration of the violations.

47. The nature of the violations is such that Respondents discharged pollutants, specifically fill material, to waters of the United States on multiple dates between August 9, 2007 and August 3, 2010. The gravity of the violations includes the actual and potential harm resulting from the unauthorized discharges, especially the risk of environmental harm. The unauthorized fill activity circumvented Section 404 of the CWA permitting process and resulted in avoidable impacts to approximately 1.26 acres of jurisdictional forested wetlands. Specifically, the applicant has precluded the environmental protection process afforded by the EPA's *404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material* (40 C.F.R. Part 230) which require that the least environmentally damaging practicable alternative be permitted and that all practicable measures to avoid, minimize, and mitigate impacts have been identified. Prior to the unauthorized activity, the wetlands impacted by this project provided quality habitat for wildlife, performed valuable water quality maintenance functions by removing

excess nutrients and pollutants from the water, and provided floodwater storage. The wetland loss in this case contributed to the cumulative amount of acreage of wetlands that have been negatively impacted and detracts from the national and state mandate of achieving a "no net loss" of wetlands in Texas. The composition of the fill material used indicates the possibility of substances in the debris fill material which could further adversely impact the wetlands.

48. Given that one of the main goals in assessing a penalty against a violator is to deter noncompliance and help protect the environment from future violations, Complainant gave great consideration to Respondents' prior history of violations and degree of culpability. Over the past several years, Complainant has had extensive interactions with the Corps. (Complainant's Exhibit 39, U.S. Army Corps of Engineers, Galveston District, Database results for regulatory history of Respondent). Since 1991, the Corps has taken twenty-four (24) actions concerning Respondents at various sites, including the confirmation of unauthorized actions taken by one or both of the Respondents in 1999, 2001, 2007, and 2008. *Id.*; (Complainant's Exhibit 32, Administrative Appeal Decision from the U.S. Corps of Engineers, Galveston District, dated December 17, 2007). Respondents had several interactions with the Corps in the present case prior to the Corps' referral of the case to Complainant. (Complainant's Exhibit 38, Kristin Shivers' Memorandum for File regarding the site's Regulatory History). Respondents failed to take action to remediate the harm caused by their discharges following their extensive communications with the Corps and later the Complainant's Administrative Order. As discussed above, Respondents discharged pollutants, specifically fill material, to waters of the United States on multiple dates between August 9, 2007 and August 3, 2010. Because of Respondents' actions in failing to achieve compliance and Respondents' experience with matters regarding

jurisdictional wetlands, Respondents must have known or suspected that their fill activities would result in additional CWA violations. As a result, the degree of culpability was significant. Therefore, based on the application of these statutory factors to the case, Complainant believes that the assessed civil penalty is appropriate.

## IX. CONCLUSION

For the reasons which have been set forth, Complainant requests that an initial decision be issued in this matter, on an accelerated basis, as provided for in 40 C.F.R. § 22.20. Complainant requests a finding that there are no genuine issues of fact material to Respondents' liability for the violations alleged in the Complaint, specifically the discharge of pollutants into waters of the United States on multiple dates between August 9, 2007 and August 3, 2010, and that there are no genuine issues of fact material to a determination of an appropriate penalty for the violations. Complainant would further request that a finding be made in the initial decision that Respondents are liable for all violations alleged, and that based on an analysis of the evidence in this case, in consideration of the statutory factors, the appropriate dollar amount of the recommended civil penalty to be assessed is $32,500.

Respectfully submitted,

2/1/12

Date

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**CERTIFICATE OF SERVICE**

I certify that the original of the foregoing COMPLAINANT'S MOTION FOR ACCELERATED DECISION AS TO BOTH LIABILITY AND PENALTY was hand-delivered to and filed with the **Regional Hearing Clerk**, U.S. Environmental Protection Agency, Region 6, 1445 Ross Avenue, Dallas, Texas 75202-2733, and a true and correct copy was sent to the following on this 1st day of February, 2012, in the following manner:

Via Certified Mail:

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Barbara J. Audrey