**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
**BEFORE THE ADMINISTRATOR**

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| IN THE MATTER OF: | ) | |
| | ) | |
| | ) | DOCKET NO.: CWA-04-2009-5592 |
| PAMELA L. LONG, | ) | |
| GULF BREEZE, FLORIDA, | ) | |
| | ) | |
| RESPONDENT. | ) | |
| | ) | |



**MOTION FOR DEFAULT JUDGMENT**

COMES NOW the Complainant, the United States Environmental Protection Agency (EPA), Region 4, and, upon the accompanying brief of Kevin B. Smith, Senior Attorney, hereby moves the Court, for a default judgment pursuant to 40 C.F.R. §§ Sections 22.16 and 22.17 of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits" (Rules of Practice), 40 C.F.R. §§ 22.16 and 22.17.

The grounds for this motion are Respondent's failure to timely and properly file its Answer as required by § 22.19 of the Rules of Practice. The Rules of Practice provide that "[a] party may be found to be in default: after motion, upon failure to file a timely answer to the complaint; ... ." 40 C.F.R. § 22.17(a). Respondent's default constitutes "an admission of all facts alleged in the [C]omplaint and a waiver of [R]espondent's right to contest such factual allegations." 40 C.F.R. § 22.17(a).

Complainant has established a *prima facie* case against Respondent through the complaint and brief submitted with this Motion. Complainant also has provided evidence and justification that the proposed civil penalty was properly determined in accordance with § 309(g) of the Clean Water Act (CWA), 33 U.S.C. §1319(g). Complainant is entitled to a judgment as a

matter of law. Specifically, Complainant moves for a default judgment granting EPA judgment as a matter of law as to liability, finding that Respondent is liable for the discharge of dredged or fill material into waters of the U.S. without complying with the permitting requirements of sections 301(a) and 404(a) of the CWA, 33 U.S.C. §§ 1311(a) and 1344(a); and finding that a penalty of $130,000 assessed against Respondent is appropriate for the violations of sections 301(a) and 404(a) of the CWA, 33 U.S.C. §§ 1311(a) and 1344(a).

Alternatively, although Complainant has provided a credible basis for finding Respondent in default, in the event that Complainant's Motion for Default is denied, Complainant requests that the Court, pursuant to 40 C.F.R. § 22.15(d), find that Respondent's failure to admit, deny or explain any of the material factual allegations contained in the Complaint is an admission of those allegations and a partial decision be rendered finding that Respondent violated § 301 of the CWA, 33 U.S.C. § 1311(a).

Respectfully submitted this 27 day of May 2010

Kevin B. Smith
Senior Counsel
U.S. Environmental Protection Agency, Region 4
Atlanta Federal Center
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404-562-9525

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
**BEFORE THE ADMINISTRATOR**

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| IN THE MATTER OF: | ) | |
| | ) | |
| | ) | DOCKET NO.: CWA-04-2009-5502 |
| PAMELA L. LONG, | ) | |
| GULF BREEZE, FLORIDA, | ) | |
| | ) | |
| RESPONDENT. | ) | |
| | ) | |

**COMPLAINANT'S BRIEF IN SUPPORT OF MOTION FOR DEFAULT**

The Complainant herein, the Water Protection Division Director, United States Environmental Protection Agency (EPA), Region 4, by and though the undersigned attorney, hereby submits this brief in support of its Motion for Default brought pursuant to 40 C.F.R. §§ 22.16 and 22.17.

## I. FACTS

This case involves the unauthorized land clearing and filling of wetlands by or at the direction of the Respondent associated with residential development on a tract of land located at the end of Wild Roost Road, just east of the National Park Service's Naval Live Oak Reservation, and adjacent to the Villa Venice Subdivision in Gulf Breeze, Florida (the Site). Respondent, Ms. Pamela L. Long, cleared and/or filled about one half acre of forested and herbaceous wetlands for a residential home site at the end of a forest road. The impacted footprint includes areas for a driveway, small parking area, and an approximately 5,200 $ft^2$ residence.

By letter dated October 24, 2005, the Jacksonville District Army Corps of Engineers (COE) referred the case to EPA, in accordance with the 1989 "Memorandum of Agreement

between the Department of the Army and the EPA concerning Federal Enforcement for the Section 404 Program of the Clean Water Act." The COE referred the case to EPA due to the repeat and "flagrant" nature of the violation, and Ms. Long's recalcitrance in addressing a previous COE enforcement action for violations of the same kind. (See, Complainant's Exhibit 1).

Respondent is a real estate agent and residential developer in Gulf Breeze who has received a prior Notice of Violation (NOV) from the COE and has knowledge of the Clean Water Act (CWA) § 404 permitting requirements. The Jacksonville District COE has worked with Ms. Long for several years to try to bring her into compliance with the permit conditions applicable to her earlier violation; however, Ms. Long remains in noncompliance with the NOV. (See, reference in Complainant's Exhibit 1). It was during this time frame, that Ms. Long cleared and/or filled the Wild Roost parcel without a permit.

On September 12, 2005, EPA joined the COE in conducting a site inspection and confirmed that the Respondent had mechanically cleared and discharged dredged and/or fill material in approximately 0.53 acres of jurisdictional forested and herbaceous wetlands. The waters at issue are wetlands and tidal marsh which are adjacent to Santa Rosa Sound, Santa Rosa County, Florida. Santa Rosa Sound is a tidally influenced water of the United States. These waters and the impacted adjacent wetlands are jurisdictional by regulation and by a reading of the Supreme Court's opinion in Riverside Bayview Homes. United States v. Riverside Bayview Homes, 474 U.S. 121, 133-134, 106 S. Ct. 455, 88 L. Ed. 2d 419, 23 ERC 1561 (1985) (upheld the Corps' application of § 404 permit requirements to adjacent wetlands; "the landward limit of Federal jurisdiction under section 404 must include any adjacent wetlands that form the border or are in reasonable proximity to other waters of the United States.") Therefore, the EPA and the COE determined that the impacted wetlands are adjacent to Santa Rosa Sound, a traditional

navigable water of the United States. (See, attached map of the area as Complainant's Exhibit 2).

On November 17, 2005, EPA issued an Administrative Compliance Order (AO) pursuant to § 309(a) of the Federal Water Pollution Control Act, 33 U.S.C. § 1319(g), commonly known as the Clean Water Act (CWA), to Respondent ordering Respondent to cease work in waters of the U.S. and to submit a restoration plan for the impacted wetlands. (Complainant's Exhibit 3). Although EPA and the COE spoke with Ms. Long and her consultant on several occasions in an attempt to resolve the restoration issues, the three separate restoration plans submitted in response to the Order were each deemed unacceptable by EPA and the COE. Ms. Long is currently in violation of the Order. The jurisdictional determination in the AO was never questioned by the Respondent.

EPA made further efforts to resolve the enforcement case. On May 19, 2008, EPA sent Respondent a Show Cause meeting request. (Complainant's Exhibit 4). Ms. Long refused to attend the meeting or to even join via conference call. From this point on, despite repeated attempts, EPA staff have been unable to contact the Respondent.

## II. PROCEDURAL HISTORY

The Complainant originally initiated this action on March 6, 2009, by sending a copy of the Administrative Complaint to the Respondent. The Administrative Complaint charged Respondent with violating § 301(a) of the CWA, 33 U.S.C. § 1311(a) for discharging dredged and/or fill material into waters of the United States without a permit. (Complainant's Exhibit 5). Due to potential procedural concerns, Complainant refiled the Complaint on May 7, 2009, with the EPA Hearing Clerk and, pursuant to the authority vested in the Administrator of the EPA by § 309(g) of the CWA, 33 U.S.C. § 1319(g), and in compliance with 40 C.F.R. Part 22, the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and

the Revocation or Suspension of Permit" (the Rules of Practice or the Rules) re-served Ms. Long only to have the letter returned "unclaimed." Ultimately, on July 26, 2009, EPA successfully provided personal notice to her residence. (Complainant's Exhibits 6 and 7).

The Complaint explained that the proceedings in the case would be conducted in accordance with the Rules of Practice found in 40 C.F.R. §§ 22.1-32 and 22.38, and included a copy of the Rules of Practice as an attachment. The Complaint also advised Respondent of her right to have a hearing and offered an opportunity to participate in settlement negotiations.

Section 22.14(a) of the Rules of Practice sets forth what is to be included in the Complaint. The Complaint filed in this matter met all the requirements including: a statement on the sections of the CWA authorizing the issuance of the Complaint and a specific reference to each section of the CWA which respondent is alleged to have violated; a concise statement of the factual basis for each violation; notice of respondent's right to a request a hearing; and a copy of the Rules of Practice.

**Respondent Failed to File a Proper Answer**

40 C.F.R. § 22.15(a) of the Rules of Practice requires that a respondent file an original and one copy of a written answer to the complaint with the Clerk within 30 days after service of the complaint. At this time, more than 12 months from the service of the Complaint, the Respondent has yet to file an answer or to respond in any way to the Complaint.

**Relief Sought by Complainant**

Complainant now moves for a default judgment, pursuant to 40 C.F.R. §§ 22.15(d) and 22.17(a), for an Order:

(1) Granting EPA judgment as a matter of law as to liability, finding that Respondent is liable for the discharge of dredged or fill material into waters of the U.S. without complying with the permitting requirements of Sections 301(a) and 404(a) of the CWA, 33 U.S.C. §§ 1311(a) and 1344(a); and

(2) Finding that a penalty of $130,000 assessed against Respondent is appropriate for the violations of Sections 301(a) and 404(a) of the CWA, 33 U.S.C. §§ 1311(a) and 1344(a).

## III. LEGAL ANALYSIS

Respondent has failed to comply with the procedures governing this Class II civil penalty action and should be found in default. Respondent was provided with a copy of the Rules by Complainant and yet still failed to comply with the Rules. Section 22.17(a) of the Rules of Practice explains:

> A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint ... . Default by respondent constitutes, ... an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations.

Further, under 40 C.F.R. § 22.17(b):

> A motion for default may seek resolution of all or part of the proceeding. Where the motion requests the assessment of a penalty or the imposition of other relief against a defaulting party, the movant must specify the penalty or other relief sought and state the legal and factual ground for the relief requested.

An Administrative Law Judge/Judicial Officer has broad discretion in ruling upon a motion for default and, at times, may find such a ruling unwarranted for mere minor violations of the Rules of Practice; however this is no such case. Here Respondent's failure to comply with the Rules of Practice is clear. Complainant has clearly given Respondent more than enough time to file an Answer and comply with the Consolidated Rules, yet Respondent has failed to do so. According to 40 C.F.R. § 22.15(d), Respondent's failure to admit, deny or explain the allegations of the Complaint constitutes an admission of the allegations.

Accordingly, for the foregoing reasons, Complainant respectfully requests that the Judge issue a default order finding all material facts in the Complaint deemed admitted and that Respondent has waived the right to a hearing. Further, given the nature and extent of the violations and Respondent's failure to comply with the Rules of Practice, pursuant to 40 C.F.R.

§ 22.17(b), Complainant also requests that the Judge find that a penalty of $130,000 is appropriate for the violation of sections 301(a) and 404(a) of the CWA, 33 U.S.C. §§ 1311(a) and 1344(a).

As stated above, when Complainant seeks a penalty in a motion for default, 40 C.F.R. § 22.17(b) requires the movant to "state the legal and factual ground for the relief requested." Clearly, as noted in the Complaint, and further explained below, the statutory elements required to establish a *prima facie* case that Respondent violated § 301(a) of the CWA, 33 U.S.C. § 1311(a) have been met.

An unpermitted discharge is the archetypal Clean Water Act violation, and subjects the discharger to strict liability. United States v. Pozsgai, 999 F.2d 719, 725 (3d Cir. 1993). To establish a *prima facie* case that Respondent violated § 301(a) of the CWA, 33 U.S.C. § 1311(a), Complainant must show that:

(1) Respondent is a "person" within the meaning of § 502(5) of the CWA, 33 U.S.C. § 1362(5);

(2) Respondent "discharged a pollutant" within the meaning of Sections 502(6) and 502(12) of the CWA, 33 U.S.C. §§ 1362(6) and 1362(12);

(3) Respondent's discharge of a pollutant was from a "point source" within the meaning of § 502(14) of the CWA, 33 U.S.C. § 1362(14);

(4) Respondent's discharge of a pollutant was to "navigable waters" within the meaning of § 502(7) of the CWA, 33 U.S.C. § 1362(7); and

(5) Respondent did not have a permit issued pursuant to § 404(a) of the CWA, 33 U.S.C. § 1344(a).

**1. Respondent is a Person**

The definition of a "person" at § 502(5) of the CWA, 33 U.S.C. § 1362(5) includes an individual. Respondent is an individual and a person as defined by the CWA.

**2. Respondent Discharged Pollutants**

The CWA defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." Section 502(12) of the CWA, 33 U.S.C. § 1362(12). The definition of "pollutant is broad and includes "dredged spoil, biological materials, rock, sand, [and] cellar dirt[.]" Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

Many courts have recognized that the bulldozing, scraping, filling and leveling of areas that results in placement of dirt, sand, gravel or other materials into navigable waters constitute the "discharge of a pollutant" for purposes of the Act. See e.g., United States v. Pozsgai, 999 F.2d 719, 725, and United States v. Tull, 615 F. Supp. 610, 622 (E.D. Va. 1983), aff'd, 769 F.2d 182 (4th Cir. 1985), rev'd on other grounds, 107 S. Ct. 1831 (1987) (fill material is a pollutant); Avoyelles Sportsmen's League, Inc., v. Marsh, 715 F.2d 897, 923 (5th Cir. 1983) (Avoyelles III); United States v. Huebner, 752 F.2d 1235, 1243 (7th Cir. 1985) (use of bulldozer to move and spread dirt is discharge of a pollutant); United States v. Brace, 41 F.3d 117, 127-28 (3rd Cir. 1994) (clearing, leveling, and redistributing surface materials to fill wetland areas is discharge of a pollutant).

Commencing on or about April 5, 2005, Respondent, or those acting on her behalf, discharged dredged and/or fill material into wetlands on the Site using earth moving machinery (bulldozers) associated with the clearing and filing of wetlands for residential development. (See, Complainant's Exhibit 8 – Letter from Respondent to the COE dated June 17, 2005). Respondent has never contested this claim.

Soil, rock and fill material moved by Respondent constitute "pollutants" as defined in § 502(6) of the CWA, 33 U.S.C. § 1362(6). Respondent's movement of soil, rock and fill material into, out of and around the Site constituted the "discharge of a pollutant" within the meaning of § 502(12) of the CWA, 33 U.S.C. §1362(12).

**3. Respondent's Discharge of Pollutants Was From a Point Source**

The CWA defined "point source" as including "any discernable, confined and discrete conveyance, . . . from which pollutants are or may be discharged." Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

Courts have consistently found that earth-moving equipment such as dump trucks, trailer trucks, bulldozers, and earth graders qualify as discrete conveyances and are therefore "point sources" for purposes of the CWA. See United States v. Banks, 873 F.Supp. 650, 657 (S.D. Fla. 1995), aff'd, 115 F.3d 916, 9231 (11th Cir. 1997), cert. denied, 522 U.S. 1075 (1998); Avoyelles III, 715 F.2d 897, 922 (5th Cir. 1983) (bulldozers and backhoes are point sources); Tull, 615 F. Supp. at 622 (bulldozers and dump trucks are point sources); United States v. Weisman, 489 F. Supp. 1331, 1337 (M.D. Fla. 1980) (bulldozers and dump trucks are point sources).

The earth moving equipment (bulldozers) used by Respondent were "point sources" as defined in § 502(14) of the CWA, 33 U.S.C. § 1362(14).

**4. Respondent's Discharge of Pollutants Was to Navigable Waters**

Respondent's discharge of a pollutant was to "navigable waters" as defined in § 502(7) of the CWA, 33 U.S.C. § 1362(7) and 40 C.F.R. 122.2. Navigable waters are waters that are subject to jurisdiction under the CWA. Any issue regarding CWA jurisdictional waters must consider the applicability of the June 2006, Supreme Court decision in the consolidated Sixth Circuit wetland cases of Rapanos v. United States and Carabell v. United States Army Corps of Engineers, 547 U.S. 715 (2006). In the consolidated cases, hereafter referred to as Rapanos, the Supreme Court issued a split 4-1-4 decision interpreting the phrase "waters of the United States."

Following the decision in Rapanos the COE and EPA issued the "Joint Memorandum Concerning Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States." (Joint Memorandum) (Complainant's

Exhibit 9). This Joint Memorandum identifies those waters over which the agencies will assert jurisdiction (1) categorically and (2) on a case-by-case basis, based on the reasoning of the Rapanos opinions. Important to this matter, the Joint Memorandum directs the agencies to continue asserting jurisdiction over traditional navigable waters (TNWs) and all wetlands adjacent to TNWs. The Joint Memorandum adopts the two tests set out by the Court in Rapanos for asserting jurisdiction over waters that are not TNWs.

In this case, there are no jurisdictional issues raised under the Rapanos decision because, per guidance, the Rapanos decision does not affect the scope of jurisdiction over wetlands that are adjacent to TNWs. Therefore, analysis under Rapanos is not relevant. Ms. Long impacted wetlands and a tidal marsh that are directly contiguous (i.e., adjacent) to Santa Rosa Sound (a TNW).

A TNW is defined as a body of water that is "currently used, [was] 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." (Emphasis added). 40 C.F.R. § 122.2. (See attached CWA jurisdictional map at Exhibit 2). Santa Rosa Sound is a tidal waterway and thus, by definition, a federally jurisdictional wetland (a TNW).

Given that Respondent's failure to admit, deny or explain EPA's allegation concerning jurisdiction, this allegation should be deemed admitted. Respondent's discharge of a pollutant was to "navigable waters" within the meaning of § 502(7) of the CWA, 33 U.S.C. § 1362(7).

**5. Respondent Did Not Have a Permit for the Discharge**

Sections 404(a) and (d) of the CWA, 33 U.S.C. §§ 1344(a) and (d), authorize the Secretary of the Army, acting through the Chief of Engineers, to issue permits for discharges of dredge or fill material into the navigable waters at specified disposal sites.

As provided in the October 24, 2005, letter by the Jacksonville, COE, Respondent does not and has not obtained a COE permit for the discharges. As explained above, Respondent's activities were subject to the jurisdiction of the COE because the Site property contained waters of the United States. As such, Respondent's activities required a permit, which it is undisputed that Respondent did not possess.

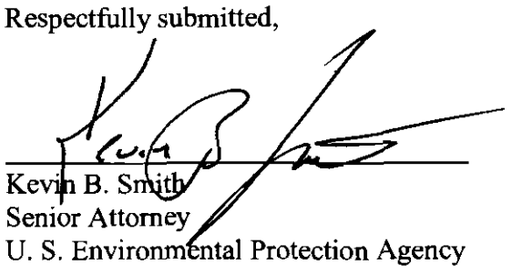
## IV. PENALTY

Pursuant to 40 C.F.R. § 22.17(b), Complainant has provided a penalty calculation specifying a proposed penalty of $130,000 with a showing of how the penalty was determined based on the statutory factors set out in CWA § 309(g)(3), 33 U.S.C. § 1319(g)(3), and EPA policy and guidelines. (See attached Exhibit 10). For each violation of sections 301 and 404 of the CWA, 33 U.S.C. §§ 1311 and 1344, which occurred after January 30, 1997, under § 309(g)(2) of the CWA, 33 U.S.C. § 1319(g)(2), the Administrator may assess a civil penalty of up to $11,000 per violation per day. Consistent with the *Civil Monetary Penalty Inflation Adjustment Rule*, the upper limit of such penalties has been increased to $177,500 for violations occurring after January 12, 2009. 73 Fed. Reg. 75340 (Dec. 11, 2008). Based upon the facts alleged in the Complaint, and as described in the Penalty Justification Memorandum, EPA Region 4 requests the court find the Respondent liable for a penalty of $130,000 for the violations stated in the Complaint. As Respondent has not provided any information to EPA that would warrant any reduction in penalty, EPA believes that the existing record is uncontroverted in its support for imposition of the requested penalty. Accordingly, Complainant contends that a default judgment with respect to the penalty amount is appropriate in this case.

case against Respondent, and has demonstrated that the proposed civil penalty was properly determined.

Accordingly, Complainant requests that this Motion for a Default Order be granted and a penalty of $130,000 be assessed against Respondent.

Respectfully submitted,



Kevin B. Smith
Senior Attorney
U. S. Environmental Protection Agency

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
**REGION 4**

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| **IN THE MATTER OF:** | ) | |
| | ) | MOTION FOR SUMMARY JUDGMENT |
| PAMELA L. LONG, | ) | FOR CLASS II PENALTY UNDER |
| GULF BREEZE, FLORIDA, | ) | SECTION 309(g) OF THE |
| | ) | CLEAN WATER ACT, |
| RESPONDENT. | ) | 33 U.S.C. § 1319(g) |
| | ) | |
| | ) | Docket No.: CWA-04-2009-5502 |
| | ) | |

**CERTIFICATE OF SERVICE**

I certify that on June 14, 2010, I served a true and correct copy of the attached MOTION FOR DEFAULT JUDGMENT in the above referenced matter to each of the persons listed below.

By hand-delivery:
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