

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6

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REGIONAL HEARING CLERK
EPA REGION VI

In the Matter of:

**Mr. Henry R. Stevenson, Jr.,
and Parkwood Land Co.,**

Respondents

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Docket No. CWA-06-2011-2709

ORDER

On September 6, 2012, I issued an Order on Motions explaining that a hearing was necessary in this matter because there was insufficient evidence in the record to resolve the issue of whether Respondents' discharges of fill material were authorized by Nationwide Permit 3 and because Complainant's evidence of Respondents' prior contacts with the Corps lacked sufficient specificity. That Order indicated the time and place of hearing would be set after conference with counsel for the parties.

On September 19, 2012, that conference occurred by telephone. Among the issues discussed was the potential need for evidence of Regional Conditions for Nationwide Permit 3 and more particularly the probability that those conditions would include a requirement for pre-construction notification for discharge of fill to a bald cypress-tupelo swamp. The potential need for botanical testimony that the wetlands to which Respondents discharged fill is such a swamp was also discussed. The parties were directed to agree on a mutually agreeable date for a hearing in Galveston, Texas.

Following notification that the parties had agreed on a date and confirmation of that agreement, I issued a scheduling order on October 18, 2012 (but misdated November 18, 2012), setting the hearing for November 14 and 15, 2012. The order also required the parties to

supplement their pre-hearing exchanges no later than November 1, 2012. Respondents filed no timely objection to that schedule.

On October 31, 2012, Complainant supplemented its pre-hearing exchange with documents totalling 235 pages, many of which are contained in Complainant's Exhibit 46, background documentation of Respondent Stevenson's prior interactions with the Corps. A four page summary of those contacts was also included as Complainant's Exhibit 44.

The pre-hearing exchange also indicates one witness, Mr. John Davidson, who was identified as a fact witness in a previous pre-hearing exchange, will also testify as an expert that "the relevant wetlands qualify as bald cypress - tupelo swamps." The pre-hearing exchange states that Mr. Davidson has been employed by the Corps' Regulatory Branch for 21 years, that he is responsible for performing wetland delineations, and that he performed wetland delineations in this matter. It also generally describes the methodology he applied in performing those delineations.

Respondents did not supplement their pre-hearing exchange. On November 1, 2012, however, Respondents filed a motion styled "Respondent's [sic] Objection to Complainant's Supplemental Prehearing Exchange, Request for Expert Report and Request for Continuance." Therein, Respondents contend Complainant should be ordered to provide it a report setting forth the methodology and findings of Mr. Davidson. Respondents also claim the voluminous nature of the pre-hearing exchange as well as their lack of familiarity with Mr. Davidson's credentials and findings renders this matter a "trial by ambush." Counsel for Respondents has been unavailable for discussion of his Motion today and will not be available for such a discussion until Wednesday, November 7, 2012.

The nature and extent of Respondent Stevenson's prior contacts with the Corps should be well known to Mr. Stevenson and to his counsel. Counsel has previously argued that those same contacts show Mr. Stevenson has consistently attempted to comply with the Clean Water Act. Moreover, Counsel has been aware that evidence of those contacts might be introduced since my order of September 6, 2012. Given the span of time over which those contacts occurred (1991 - 2010), Counsel should also have expected this documentation would be extensive, yet did not previously object to the relatively short time my order provided between the pre-hearing exchange and hearing.

Although it did not identify Mr. Davidson's academic qualifications, if any, Complainant's pre-hearing exchange sufficiently described Mr. Davidson's experiential qualifications to show he is likely an expert on wetland plant communities. Moreover, that pre-hearing exchange provides information on the methodology he employed, as does documentation contained in a prior pre-hearing exchange.

It is ordered that Complainant's Motion be and same is hereby denied. The hearing will commence as scheduled. A conference call will be scheduled for Wednesday, November 8, 2012, at which the evidentiary need for Complainant's Exhibit 46 will be further discussed.

November 2, 2012

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Pat Rankin
Regional Judicial Officer

CERTIFICATE OF SERVICE

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

Charles M. Kibler, Jr.
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CERTIFIED MAIL

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HAND DELIVERED



Lorena S. Vaughn
Regional Hearing Clerk

11/5/12
Date _____