

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6

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EPA REGION VI

In the Matter of:

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

Respondents

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Docket No. CWA-06-2011-2709

COMPLAINANT'S MOTION IN OPPOSITION TO RESPONDENTS'
SUPPLEMENTAL RESPONSE

COMES NOW, the Complainant, the Acting Director of the Water Quality Protection Division, the United States Environmental Protection Agency ("EPA"), Region 6, 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 reject Respondents' claims in its Supplemental Response and further enter into an accelerated decision pursuant to 40 C.F.R. § 22.20 granting full judgment in favor of the Complainant as to the penalty assessed 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. The Court previously granted Complainant's Motion for Accelerated Decision as to liability. Said Motion was denied without prejudice as to penalty. Pursuant to subsequent communications with the Court and Respondents, including Complainant's June 6, 2012 Motion for Accelerated Decision as to Penalty, Complainant now issues the following Motion in Opposition to Respondents' Supplemental Response.

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 EPA's Motion in Opposition to Respondents' Supplemental Response 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.

8. The Presiding Officer issued an Accelerated Decision regarding liability on April 17, 2012. The Presiding Officer denied Complainant’s Motion for Accelerated Decision regarding penalty without prejudice.

9. Complainant filed a Motion for Accelerated Decision as to Penalty on June 6, 2012. Respondents offered their Supplemental Response, dated June 26, 2012, which in addition to addressing the penalty asserted that the discharged fill in the present case was authorized under Nationwide Permit 3.

10. The Presiding Officer issued an Order on July 23, 2012 and interpreted a portion of Respondents' Supplemental Response as a Motion for Reconsideration of the Presiding Officer's April 17, 2012, Accelerated Decision regarding liability. The Presiding Officer ordered Complainant to respond to the portion of Respondents' Supplemental Response that asserts the alleged violations were authorized under Nationwide Permit 3.

IV. DESCRIPTION OF VIOLATIONS AND RELEVANT PROPERTY

11. 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 in accordance with the project plans Respondents submitted. (Complainant's Exhibit 31, p. 14-19).

12. 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

13. 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).

14. 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).

15. 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. ARGUMENT

RESPONDENTS' NATIONWIDE PERMIT COVERAGE FOR LEVEE MAINTENANCE EXEMPTS ONLY THE FILL PLACED ON THE RIVER-SIDE OF THE LEVEE THAT DIRECTLY RELATED TO LEVEE MAINTENANCE AND DOES NOT GENERALLY EXEMPT RESPONDENTS' PROPERTY FROM REGULATION UNDER THE CWA

16. 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). Respondents merely refine their earlier claim in their Supplemental Response by specifically invoking Nationwide Permit 3. 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.

17. 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)

18. 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.

19. In this case, Respondents attempt to shield themselves from liability relating to unrelated discharges with the defense of the Nationwide Permit 3. However, what Respondents neglect to address in their arguments is the strict limitation placed on their project by the Corps and Nationwide Permit 3, which is that all fill was to be placed on the river-side of the levee; no fill was authorized in or on the wetland-side of the levee. (Complainant's Exhibit 33, p. 1). This is demonstrated by the project plans submitted by Respondents' consultant, which later became Respondents' effective permit. (Complainant's Exhibit 31, p. 17-19). The Corps' authorization explicitly limited the scope of Respondents' Nationwide Permit coverage to the "three-sheet project plans and Nationwide Permit General/Regional Conditions." *Id.* at 14. Respondents' project plans do not include the truck turnaround or any other fill on the wetland-side of the levee. *See Id.* at 17-19. Yet Respondents' fill was not limited to the river-side of the levee. During inspections by the Corps, multiple areas of fill, including the "truck turnaround," were found to have been placed in the wetland-side of the levee. *Id.*; (Complainant's Exhibit 35, p. 2-3). Photographic evidence of the fill and the delineation of its location within jurisdictional wetlands were also documented by both the Corps and EPA staff. (Complainant's Exhibit 35, p. 7-27); *See also* (Complainant's Exhibit 33, p. 3-7); (Complainant's Exhibits 7-29, Photos of Site

from December 9, 2010 Inspection). Respondents' fill went beyond the project plans approved by the Corps and as a result was not authorized under Nationwide Permit 3.

20. Respondents' permit authorization is further limited in that only fill directly related to the maintenance of the pre-existing levee was authorized by Nationwide Permit 3. (Complainant's Exhibit 31, p. 14-15). Respondents correctly point out in their Supplemental Response that minor deviations due to changes in construction techniques or materials are authorized under Nationwide Permit 3. Wholesale changes and major deviations, however, are not. Inspections of the property found a "truck turnaround" on the eastern side of the tract, a "makeshift ramp", and other unauthorized fill that did not directly relate to the maintenance of the pre-existing levee. (Complainant's Exhibit 33); (Complainant's Exhibit 35); (Complainant's Exhibit 5). None of this fill cited in the Complaint was contained in the project plans approved by the Corps that the Respondents submitted through their consultants, GTI Environmental, Inc. (Complainant's Exhibit 31, p. 17-19). As these various areas of fill were neither related to the maintenance of the levee nor permissible minor deviations, they were unauthorized and not covered under Nationwide Permit 3.

21. Respondents' claim of coverage under Nationwide Permit 3 inaccurately applies the authorization to the facts of the case. Only Respondents' activities directly related to the maintenance of the levee and in the river-side 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 and into the wetland-side of the levee. Further, the fill relevant to this violation was not contained in the project plans that were

approved by the Corps under Nationwide Permit 3. As a result, the limited shield offered by Nationwide Permit 3 does not extend to cover the fill Respondents placed within the wetlands.

VII. CONCLUSION

For the reasons which have been set forth, Complainant requests that the Presiding Officer reject Respondents' constructive Motion for Reconsideration. Complainant requests a finding that there are no genuine issues of fact material to a determination of the inapplicability of Nationwide Permit 3 for the alleged violations.

Respectfully submitted,



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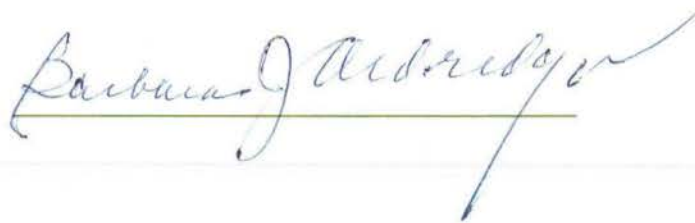
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CERTIFICATE OF SERVICE

I certify that the original of the foregoing COMPLAINANT'S MOTION IN OPPOSITION TO RESPONDENTS' SUPPLEMENTAL RESPONSE 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 10th day of August, 2012, in the following manner:

Via Certified Mail:

Mr. Charles (Chuck) Kibler, Jr.
The Kibler Law Firm
765 N. 5th Street
Silsbee, Texas 77656

A handwritten signature in cursive script, reading "Barbara J. Anderson", is written over a horizontal line. The signature is in dark ink and is positioned in the lower middle section of the page.