UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF	)	
	)	
PHOENIX CONSTRUCTION	)	
SERVICES, INC.	)	Docket No. CWA-04-2000-1504
	)	
Respondent.	)	
	)	
	)	

ACCELERATED DECISION ON LIABILITY

This is a proceeding under Section 309(g)(1)(A) of the Clean Water Act ("CWA" or "the Act"), as amended, 33 U.S.C. § 1319(g). The proceeding is governed by the United States Environmental Protection Agency's ("EPA") Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, ("Consolidated Rules of Practice" or "CROP"), and specifically Subpart I of the Consolidated Rules of Practice, published at 64 Fed. Reg. 40137 (July 23, 1999).

PROCEDURAL BACKGROUND

The Water Management Division Director of Region 4 of EPA ("Complainant") initiated this action on December 8, 1999, issuing to Phoenix Construction Services, Inc. ("Respondent" or "Phoenix") an administrative complaint pursuant to section 309(g) of the CWA, 33 U.S.C. § 1319(g), and Subpart I of the Consolidated Rules. The Complaint alleged that Respondent violated Section 301(a) of the Act, 33 U.S.C. § 1311(a), by discharging fill material into waters of the United States without a permit issued by the U.S. Army Corps of Engineers ("COE"), pursuant to § 404 of the

Act, 33 U.S.C. § 1344. The Complaint more specifically alleged that Respondent "or agents acting on behalf of Respondent" owned and/or operated a bulldozer, excavator, and other mechanized equipment ("mechanized equipment") which was used to impact approximately 3.5 acres of jurisdictional wetlands located in Bay County, Florida from February to August 1999. On January 6, 2000, Respondent filed an Answer to the Complaint. A prehearing telephone conference was held on February 24, 2000, after which the parties were provided additional time to engage in settlement discussions. However, the parties were unable to reach informal resolution to the matter. Thereafter, on April 17, 2000, pursuant to 40 C.F.R. §§ 22.16 and 22.20, Complainant moved for an accelerated decision seeking a finding that 1) the violation occurred as set forth in the Complaint; 2) no genuine issue of material fact exists; 3) Complainant is entitled to judgment as a matter of law; and 4) the maximum Class 1 civil penalty of $27,500 is appropriate. Complainant sought, in the alternative, that in the event the Motion for Accelerated Decision is denied with respect to the issue of the penalty amount, that a partial accelerated decision be rendered in Complainant's favor on the issue of liability. Complainant's Motion was supported by a Brief and accompanying exhibits.

Thereafter, on or about June 21, 2000, Respondent filed a Response to Motion for Accelerated Decision. In accordance with the Consolidated Rules of Practice, 40 C.F.R. § 22.16, Respondent was to have responded to Complainant's motion no later than 15 days from receipt. On June 22, 2000, Complainant filed a Reply to the Respondent's Response, requesting that, in the absence of an extension of time having been requested and granted for the late filing of the Response, the undersigned should not consider the Response. However, Complainant addressed the arguments contained in the Response if, in the alternative, the merits of the Response were considered.

While recognizing the importance of closely adhering to the administrative requirements established in the Part 22 proceedings, and the need to ensure the integrity of that process, in the absence of any prejudice to Complainant as a result of the late filing of the Response, the interests of justice are best served by thorough consideration of the merits of the Response. Therefore, Complainant's request that the Response not be considered is hereby denied.

STATUTORY BACKGROUND

Section 22.20 of the "Consolidated rules of Practice" provides that

> "...The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law..."

Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of a pollutant, including fill material, into "wetlands" which are waters of the United Stated, except in accordance with the terms of a permit issued by the COE pursuant to Section 404(a) of the Act. 33 U.S.C. § 1344(a).

The elements of liability in this case for which Complainant has the burden of presentation and persuasion, are that 1) respondent is a "person" as defined by the Act; 2) the property contained a "wetland"; 3) the wetland constitutes "waters of the United States"; 4) respondent's activities at the site resulted in a "discharge of a pollutant"; 5) from a "point source," into the wetland; and 6) Respondent did not have a permit for this discharge activity.

FACTUAL BACKGROUND

The following summarizes the facts alleged by Complainant and set forth in Complainant's Brief. By letter dated June 29, 1998, a representative of St. Joe Corporation, the previous owner of

the parcel of land that is the subject of this action, contacted the COE requesting a site visit to review the extent of jurisdictional wetlands on approximately 50 acres located in Panama City Beach, Bay County, Florida. A COE Environmental Protection Specialist inspected the site and confirmed that the delineation as flagged by the St. Joe Corporation, was correct, but made this confirmation subject to submission of a property survey showing the location of the flagged line.

Covering this same parcel of land, in January of 1999, the City of Panama Beach, applied for a Section 404 permit from the COE and a Florida Department of Environmental Protection ("FDEP") permit for filling 3.526 acres of wetland. The purpose was to expand the Frank Brown Park. Along with the permit application, was the aforementioned delineation survey reflecting the jurisdictional wetlands flagged and confirmed as accurate by the COE. At the time of the permit application, the City of Panama City Beach was the owner of the property. Thereafter, on February 8, 1999, the City of Panama Beach withdrew the application for the purpose of drawing up a mitigation plan. Upon completion of the plan, the City requested that the COE reinstate the permit application.

According to the Complainant, during a May 4, 1999 field inspection by the FDEP, it was discovered that approximately 2.7 acres of state jurisdictional wetlands had been filled in Frank Brown Park without the use of erosion control devices. During that visit, a representative of the FDEP witnessed Respondent filling this tract, and informed a Phoenix on-site manager to cease all activities "in jurisdictional wetlands" until a permit was obtained. A warning letter to both the City and the Respondent was issued at that time. A few days later, Complainant claims, representatives of the FDEP again observed employees of Respondent continuing illegal dredging and filling in wetlands. On May 11, 1999, the COE issued Cease and Desist Orders to both the Respondent and the City. On

May 6, 1999, one day after discovery of the violation, the City submitted a revised application for a Section 404 permit from the COE as well as a state permit from FDEP. Since this joint application was for work already performed it was seeking an "after-the-fact permit". The FDEP denied the permit due to insufficient mitigation and failure to take the necessary action to assure meeting water quality standards. Ultimately, on September 2, 1999, FDEP granted the after-the-fact permit.

On October 20, 1999, FDEP noted that approximately 150 feet of sediment fencing was missing from one corner of the illegally filled area, and that fill had been placed next to wetlands without erosion controls in place to prevent sedimentation of wetlands.

Respondent, on the other hand, characterizes the matter quite differently, contesting certain allegations and thereby claiming that genuine issues of material fact exist so that Complainant is not entitle to judgment as a matter of law. Respondent essentially claims that 1) the extent of wetlands is exaggerated and there is no way to confirm the extent to which wetlands have been filled without a survey performed by either the State or COE; 2) lack of erosion control alleged by Complainant could not have impacted wetlands as alleged because of the distance between the activity and the outer edge of the wetlands; 2) employees of the Respondent did not work in wetlands as specifically alleged by the FDEP inspectors; 4) Respondent justifiably relied upon notice that verbal agreements had been reached between the City and the two permitting agencies, FDEP and the COE, and 5) construction done by the Respondent was in compliance with the after-the-fact permit ultimately issued.

SUMMARY DETERMINATION STANDARDS

Complainant's position is that all the elements of a CWA violation are clearly established in that 1) Respondent, Phoenix Construction Services, Inc., is a person who 2) discharged dredged or fill

material during unauthorized mechanical land clearing activities from 3) a point source, a bulldozer, an excavator and two loaders, 4) pollutants, in the form of "over 28,000 cubic yards of fill dirt, into 5) wetlands adjacent to navigable waters, thus waters of the United States, 6) without a permit issued by the U.S. Army Corps of Engineers.

While summary judgment must be denied where facts in an action are in dispute, an opponent to such a motion may no longer defeat it simply by suggesting that facts are in controversy. Only **germane** facts that go to the heart of the parties' suit deserve consideration.
See Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 212 (1986).

All of the elements of liability for which Complainant, as previously noted, has the burden of persuasion are addressed below.

1. **Whether Respondent Phoenix Construction Services, Inc. is a person within the meaning of §505 of the Act, 33 U.S.C. §1362(5):**

The fact that Respondent is a person, within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5) is admitted in Respondent's Answer. However, whether Respondent is the "responsible" person, as a matter of law, is disputed. Respondent attempts to disclaim liability because it was neither the owner of the property nor the permittee, asserting in its Answer that, "As we are not the permittee for the subject project, we had no knowledge of the actual allegation that there was no permit in place." However, it is a clearly established principle, that liability is not predicated on ownership, but rather on either performance of the work, or responsibility for or control over performance of the work. U.S. v. Sargent County Water Resources Dist., 876 F. supp 1081 (1992), and U.S. Van Leuzen, 816

F. Supp. 1171 (S.D. Tex. 1993). Furthermore, U.S. v. Board of Trustee of Florida Keys Community College, 531 F. Supp. 267, specifically established that as a strict liability statute, the Clean Water Act does not impose an unreasonable burden on construction companies. The construction company Defendant in Florida Keys Community College, took the position that it should not be held liable for any unauthorized work because it relied on the property owner to obtain any necessary permits[1]. That construction company contended that it simply performed the work while believing the permits had been obtained. The Court responded by addressing the mandatory nature of the statute in protecting the nation's waters, stating, "Nor does the application of the statute impose an unreasonable burden on construction companies. The companies may protect themselves merely by requiring a copy of the necessary permits to be shown to them prior to commencement of the work", Id, p. 274. While Phoenix was not obligated to obtain its own permit, it could have protected itself by simply requesting a copy of the permit prior to commencing activity.

2. **Whether Respondent's activities at the site resulted in a "discharge of a pollutant":**

While Respondent, in paragraph 4 of its Answer disputes the fact that this was a jurisdictional wetland into which the discharge occurred, it does not deny that the discharge took place. Therefore, this allegation is deemed admitted.

3. **Whether the equipment used by Respondent is a Point Source within the meaning of § 502(14) of the Act, 33 U.S.C. § 1362(14)**. For all intent and purpose, this is not an issue in dispute. It is established, by virtue of Respondent's answer to the information request letter, that Respondent

[1]Contrary to the case at hand, the property owner is also a named defendant in Florida Keys Community College.

used a bulldozer, an excavator and two loaders to clear and fill the subject property. These pieces of equipment are established to be point sources within the meaning of Section 502(14) of the Act. See Avoyelles Sportmen's League, Inc., v. Marsh, 715 f.2d 897, 923 (5th Cir. 1983).

4. **Whether the discharge constitutes "pollutants" within the meaning of § 502(6) of the Act, 33 U.S.C. § 1362(5)**: Respondent's Answer contests this finding as a function of another contested allegation. However, there is certainly sufficient information in the record to support a finding that pollutants were discharged. As Complainant accurately points out in its Brief, Phoenix's Response to the Information Request, as well as the Revised Permit Application, indicate that this project involved fill of 3 to 5 feet in depth, for a total of over 28,000 cubic yards of fill to raise the elevation of the soccer fields. It is again, well established in the case law that this earthen material constitutes a pollutant within the meaning of the regulations (40 C.F.R. § 232.2) and the Act, 33 U.S.C. § 1362(6). Id.

5) **Whether the area into which the discharge occurred constitutes waters of the United States**:

Wetlands are defined as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstance do support, a prevalence of vegetation typically adapted for life in saturated soil conditions..." 33 C.F.R. 328.3(d). Federally regulated wetlands constitute "waters of the United States". 33 U.S.C. § 1251. It was concluded by the Supreme Court in United States v. Riverside Bayview Homes, 474 U.S. 121, that Congress' definition of navigable waters for purposes of the Clean Water Act extends beyond those waters that actually support navigation, and includes wetlands. The regulations define "waters of the United States" to include "Wetlands adjacent to waters (other than waters that are themselves wetlands)

otherwise comprising waters of the United States ...". The wetlands in the instant case fall under this definition because they are adjacent to West Bay. (See Complainant's Brief in Support of Motions for Accelerated Decision, p. 13 and Revised Permit Application, (Complainant Exhibit ["C Ex"] 13). The key to identifying a wetland is the presence of vegetation "typically adapted for life in saturated soiled conditions." 33 C.F.R. 323.2(c). The COE's three parameter approach to determine existence of a wetland, looking for the presence of hydric soils, wetlands hydrology and vegetation is the definitive method to delineate the extent of wetlands. I am satisfied that these steps were taken in the survey submitted by the permittee's own consultant and confirmed by the COE.

In its Answer, Respondent argues that there is no "navigable water" anywhere within the project site, thereby disputing that the impacted area classifies as jurisdictional wetlands. Respondent claims that the only way to determine the extent to which wetlands had been filled would have been to survey the area in question. However, Respondent's position on this issue is flawed since the delineation is, in fact, well supported by a survey. The City of Panama City Beach's own consultant, Environmental Services, Inc., sought confirmation of a delineation through submittal of a location map and data sheets documenting the presence of wetland soils, vegetation and hydrology. The COE visited the Site and confirmed the consultant's delineation. The steps taken in making this determination are outlined in the Mitigation Plan submitted on May 4, 1999. I find that Respondent's denial of this material fact is not a genuine issue in dispute in this proceeding.

6. **Whether Respondent had a permit for this activity as required by § 404 of the Act, 33 U.S.C. § 1344.**

As discussed above, Respondent, tries unsuccessfully, to absolve itself of any responsibility for the absence of a permit since it was the City that was the permittee. Alternatively, Respondent claims that a verbal agreement had been reached between the City and the permitting agencies upon which Respondent justifiably relied. However, as Complainant points out, there is no evidence submitted by Respondent substantiating the basis for their belief that such permission had been granted. I am in agreement with Complainant, that it is not reasonable to assume that a permitting scheme involving public notice, public comment rights and state water quality certification can be substituted by a verbal agreement. I therefore find that Respondent's suggestion of a verbal permit does not rise to the level of a germane issue of fact in dispute.

Both parties address the ramification of the eventual issuance of the after-the-fact permit. However, while this may be relevant to the issue of penalty, it is irrelevant to a determination of liability. Section 404 of the Act regulates the discharges that occur without a permit. The after-the-fact permitting process does not serve to automatically and retroactively absolve from liability a party who prematurely conducted unpermitted activity.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent, Phoenix Construction Services, Inc., is a "person" within the meaning of Section 502(5) of the Act, 33 U.S.C.§ 1362(5).

2. Between February and August 1999, Respondent and/or Agents acting on behalf of Respondent, utilizing mechanzied equipment, discharged dredged and/or fill material into wetlands.

3. The mechanized equipment used by Respondent were "point sources" within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14).

4. The dredged and/or fill material, which consisted of earthen material is a "pollutant" within the meaning of 40 C.F.R. §232.2 and Section 502(6) of the Act, 33 U.S.C. § 1362(6).

5. The discharge area is a "navigable water" within the meaning of 40 C.F.R. § 122.2 and Section 502(7) of the Act, 33 U.S.C. § 1362(7).

6. Section 301(a) of the Act, 33 U.S.C., 33 U.S.C. § 1311(a), prohibits the discharge of dredged or fill material into navigable waters of the United States except in compliance with a permit issued by the COE under section 404 of the Act.

7. At no time did Respondent have a valid COE permit for the discharges described above.

8. Respondent's discharges described above violated Section 301(a) of the Act, 33 U.S.C. § 1311(a), by discharging pollutants from point sources to waters of the United States without authorization.

9. Under Section 309(g)(2)(A) of the Act, 33 U.S.C. § 1319(g)(2)(A), Respondent is liable for the administrative asssessment of civil penalties in an amount not to exceed $11,000 per violation, up to a maximum of $27,500, for violations that occurred on or after January 30, 1997.

ACCELERATED DECISION CONCERNING REMEDY

In determining the appropriate administrative penalty, Section 309(g)(3) of the Act, 33 U.S.C. § 309(g)(3), provides that the following statutory factors should be taken into account:

> ...the nature, circumstances, extent and gravity of the violation, or violations, and with respect to the violator, the 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...

Complainant seeks the maximum allowable Class I Clean Water Act penalty of $27,500, noting that the flagrant nature of Respondent's activity could have justified the bringing of a Class II adminsitrative action, or even a judicial action for a higher penalty. The Respondent, on the other hand, argues that the assumptions upon which the Complainant's penalty is predicated are incorrect, and therefore there is not justification for the penalty proposed.

Part 22 of the Consolidated Rules does not distinguish between liability and remedy when it requires that the Presiding Officer may render an accelerated decision in favor of a party "...if no genuine issue of material fact exists". Section 22.20(2) of the Rules, however, contemplates the case in which an accelerated decision is rendered on less than all issues or claims in the proceeding. This matter is one such case. I find that certain issues of material facts remain in dispute that, while not relevant to a determination of liablity, do pertain to and preclude a determination of remedy at this time. Certain of these issues impact directly upon the assessment of the nature, extent, gravity and circumstances of the violation. They include, but are not limited to the following:

1) During the May 4, 1999, field inspection the FDEP discovered that 2.7 acres of state jurisdictional wetlands had been illegally filled. However, on July 2, 1999, according to the affidavit of the EPA Life Scientist, Joe Negron, 3.426 acres had been filled. One can speculate that the difference in the scope of wetlands filled is attributable to additional filling activity, but that is not clear. While the extent of the wetlands filled is not material to a finding that a violation of the Act took place, it is material

to the penalty determination, and the facts surrounding a significant increase in the assessment of wetlands filled (and/or "impacted") should be better established prior to the penalty assessment.

2) Complainant sufficiently established fill activity taking place on two separate dates, May 4, 1999 and then again on May 10, 1999, (See FDEP Case Report, Exhibit 5). However, in its brief, Complainant also asserts that Respondent "continued the "illegal dredging and filling of wetlands for 6 days..." Based upon the evidence before me, I cannot determine, with any degree of certainty, that the activity took place each day over the course of the six days between site visits. This determination does impact upon the penalty to be assessed.

3) The City of Panama Beach, in its letter of May 14, 1999 (C Ex.11) denies having told the Contractor to begin filling activities. However, that assertion conflicts with what is indicated in another document contained in record. According to the "Notice to Proceed", signed by the City Manager and made part of the contract with Pheonix (See C Ex.10), Respondent was directed to commence work in accordance with the contract on or before, February 19, 1999, a date well before the City ultimately received its dredge and fill permit. Again, as noted above, Phoenix Construction bore the responsibility of being certain that a permit had been issued prior to proceeding with the activity, and failure to do so does not relieve it of liability. However, the fact that the permittee may have directed the illegal work when it knew, or should have known, that the permitting process was pending, is worth consideration in the context of mitigation of the penalty.

I find that these, as well as other issues relating to both the activity and the violator, are material issues in dispute that preclude a determination of penalty at this time absent a hearing and/or submission of additional evidence into the record. Furthermore, while there may be, upon further examination of the

documents already submitted, sufficient information in the record to support a limited number of findings pertaining to penalty, the interests of the parties and judicial economy are best served by examining all remedy-related matters collectively.

CONCLUSION

On the basis of the findings and reasons set forth above, I find that there is no genuine issue of material fact as to liability with respect to the subject action as a matter of law. EPA's Motion for Accelerated Decision is therefore **granted as to liability**. However, I find that genuine issues of material fact exist as to remedy, and therefore Complainant's Motion for Accelerated Decision is **denied as to remedy**. The parties will be notified by Order of the date of the prehearing telephone conference to be held for the purpose of setting a hearing date and exchange of prehearing information on the remedy portion of this proceeding.

Date: January 29, 2001

/S/
Susan B. Schub
Presiding Officer