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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Condor Land Company,	)	Docket No. CWA-404-95-106
	)	
Respondent	)	

INITIAL DECISION

By: Carl C. Charneski
Administrative Law Judge

Issued: December 8, 1998
Washington, D.C.

Appearances

For Complainant:

Melissa Allen Heath, Esq.
Phillip G. Mancusi-Ungaro, Esq.
U.S. Environmental Protection Agency
Atlanta, Georgia

For Respondent:

Robert M. Hustead, Esq.
Homestead, Florida

I. Overview

Section 404 of the Clean Water Act ("CWA," or the "Act"), 33 U.S.C. § 1344, authorizes the United States Army Corps of Engineers (the "Corps"), to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." For purposes of the Act, the phrase "navigable waters" has been construed to include wetlands. *United States v. Riverside Bayview Homes,*

474 U.S. 121, 131-132 & n.8 (1985). Section 301(a) of the Act, 33 U.S.C. § 1311(a), provides in part that the "discharge of any pollutant by any person" is unlawful unless in compliance with the permitting requirements of Section 404.

In this case, Condor Land Company ("Condor") engaged in landclearing activities on a South Florida tract of land identified as Section 8. This property is approximately 53 acres in size. *Compl. Exs. 9 & 16.* A key issue here is whether Section 8 is a "wetland" for purposes of Clean Water Act jurisdiction. The U.S. Environmental Protection Agency ("EPA") claims that it is and asserts that Condor violated Section 301(a) of the Act when it cleared the land without first obtaining a Section 404 permit. Accordingly, EPA initiated this enforcement proceeding. EPA seeks a civil penalty of $32,160 for this Section 301(a) violation.(1)

For the reasons set forth below, Condor is held to have violated Section 301(a) of the Clean Water Act as alleged. In addition, Condor is assessed the full penalty sought by EPA.

II. Facts

The facts underlying this wetlands dispute are straightforward. In the administrative complaint, EPA alleges that between the years 1990 and 1993, Condor used bulldozers and loaders to mechanically clear and plow wetlands. This is the area known as Section 8. EPA asserts that the bulldozers and loaders constitute point sources within the meaning of Section 502(14) of the Clean Water Act. 33 U.S.C. § 1362(14). It further asserts that these land clearing activities constitute a discharge of a pollutant (in this case, earthen material) within the meaning of Sections 502(6) and 502(12) of the CWA. 33 U.S.C. §§ 1362(6) & (12).

Arguing that because Section 8 is a "water of the United States," as defined in Section 502(7) of the CWA, 33 U.S.C. § 1362(7), EPA charges that Condor committed a Section 301(a) violation when it discharged a pollutant, *i.e.,* when it redeposited earthen material in the clearing of Section 8, without first having obtained a permit as required by Section 404 of the Act. 33 U.S.C. §§ 1311(a) & 1344.

Condor admits that it owns Section 8, that it is a "person" as defined by 40 C.F.R. 232.2, and that it used bulldozers and front-end loaders to clear land and move material at the disputed site. *Jt. Ex. 1.* Respondent maintains, however, that Section 8 is not a wetland, that it does not constitute a "water of the United States" for purposes of Clean Water Act jurisdiction, and that, in any event, its activities in Section 8 are lawful because they fall under a farming exemption recognized by CWA Section 404(f). 33 U.S.C. § 1344(f).

III. Discussion

A. The Violation

(i) Is Section 8 a Wetland?

The answer to this question is in the affirmative. While the term "wetlands" is not defined in the Clean Water Act, it is defined in the Code of Federal Regulations. There, EPA defines wetlands as "those areas inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 40 C.F.R. 230.3(t). To illustrate this definition, Section 230.3(t) cites swamps, marshes, bogs and "similar areas."(2)

In order to assist field personnel in making a wetlands determination, EPA relies upon the Corps' 1987 *Wetlands Delineation Manual* (the "1987 Manual"). *See Resp. Ex. 25.* In this manual, the Corps sets out three criteria for making a wetlands determination. Those criteria are (1) a prevalence of hydrophytic plants, (2) hydrological conditions suited to such plants, and (3) the presence of hydric soils.(3)

Condor argues that EPA erred in following the 1987 Manual, and not the 1989 Manual,

in making its wetlands determination regarding Section 8. Respondent further argues that, in any event, the government personnel making this determination did not follow the procedures set forth in either manual.[(4)]

Condor's challenge to the use of the 1987 Manual must fail. First, the 1987 Manual is a guidance document only (as was the 1989 Manual prior to its being suspended by EPA and the Corps). This guidance document is intended to assist government field personnel in making a wetlands determination on a site-by-site basis. Ultimately, however, as explained below, it is the specific observations of the field personnel regarding the physical characteristics of the subject property that is the key to determining whether such property meets the regulatory definition of a wetland. The manual is only an aide to reaching that determination.

Second, insofar as these on-site observations are concerned, there is substantial record evidence in this case supporting EPA's position that Section 8 is indeed a wetland. (It is noteworthy that Condor called no witnesses to rebut the testimony of complainant's witnesses.) In that regard, three witnesses testifying on behalf of EPA had conducted an on-site inspection of the Section 8 tract and each concluded that it is a wetland.[(5)]

Brad Rieck, an employee of the U.S. Fish and Wildlife Service, visited the site sometime during the summer of 1993, as well as in April and December of 1996. The purpose of his visits was to assist EPA in its wetlands enforcement program. Tr. 22, 29, 69. As noted, Rieck concluded that Section 8 is a wetland. Even though Rieck did not conduct the kind of surveys suggested by the 1987 or 1989 Manuals, he did do a visual dominance survey and considered the dominance of hydrophytic species, facultative obligate, hydric soil characteristics, and hydrology evaluations. Tr. 83, 86-87. Rieck concluded that in Section 8 there was "far greater" than the 50 percent of wetland vegetation of hydrophytic species that is required by the 1987 Manual. Tr. 88. During these visits, he found a predominance of wetland vegetative species, otherwise known as hydrophytic species. Rieck particularly noted the presence of Ludwigia, Sagittaria, Willow, Brazilian Pepper, and Saltbush Dichiomena.
Tr. 30-32; *Compl. Ex. 17* (Photos 4D& 4E). *See* Tr. 71 (Rieck: Sagittaria is a wetland indicator); *see also, Compl. Ex. 21* for a partial inventory of destroyed vegetation.

In addition, Rieck found that the soil on the Condor site is Biscayne Marl. He testified that this means that the soil is a "hydric soil." Tr. 33; *Compl. Exs. 4 & 17* (Photo 4G). Further testifying as to the hydrology of the site, Rieck stated that he observed water saturation to the surface, even during the dry season. In fact, the soil was "mushy." Tr. 34-35. Also, Rieck dug a hole which filled with water after five minutes, indicating that the Condor site had a wetland hydrology. Tr. 73; *see Compl. Ex. 17* (Photo 5C) showing standing water on the site.

Michael Zimmerman, an ecologist with the National Park Services Everglades National Park, conducted a site visit of Section 8 in May of 1992. Tr. 161-163. Like Rieck, Zimmerman concluded that this area is a wetland. Tr. 173. He based his wetland determination on the type of vegetation, soil, and hydrology of the site. Tr. 168, 172. Zimmerman determined that the vegetation was predominantly hydrophytic. Also, he too noticed the presence of standing water, even though it was toward the end of the dry season. Tr. 171.

Finally, Robert Paulson, a Corps biologist, likewise conducted an inspection of Section 8 and concluded that it was a jurisdictional wetland. Paulson based his determination upon what he observed of the plant communities and the hydrological conditions. Tr. 208, 218, 222.

In sum, the unchallenged testimony of EPA's witnesses is sufficient to show that the Condor site, *i.e.,* Section 8, is a wetland within the meaning of 40 C.F.R. 230.3(t).

(ii) Is This Wetland Subject to the Jurisdiction of the Clean Water Act?

Condor argues that the involved Section 8 tract is not a jurisdictional wetland for CWA purposes. Respondent essentially argues that Clean Water Act jurisdiction does not lie because this site is not a navigable body of water and because it has no effect upon interstate commerce. As support for this argument, Condor principally relies upon the definition of the term "waters of the United States" appearing at 33 C.F.R. 328.3, and the decisions of *The Daniel Ball*, 77 U.S. 557 (1870) and *Minnehaha Creek Watershed District v. Hoffman*, 597 F.2d 617 (8th Cir. 1979). *Resp. Br. at 10-13.* Condor's argument is rejected.

The Clean Water Act limits federal jurisdiction to "navigable waters," a term defined as "waters of the United States, including the territorial seas." 33 U.S.C. §1362(7). Considering the record as a whole, EPA correctly asserts that "[t]he area at issue in this matter is part of a continuous wetland system which is contiguous with Florida Bay or Biscayne Bay, coastal estuaries which, as influenced by the ebb and flow of the tide, without question constitute waters of the United States." *Compl. R.Br. at 4-5.*

In that regard, aerial photographs clearly show that Section 8 is adjacent to the C-111 Canal. *See Compl. Exs. 5, 6, 7 & 8; see also, Compl. Ex. 20* (photograph identified as S-4(6)). Also, EPA witness Michael Zimmerman characterized Section 8 as a portion of the C-111 Canal Basin. Tr. 163. Zimmerman additionally noted in his investigation report that Section 8 serves as a buffer to the Everglades National Park. *Compl. Ex. 22.* Moreover, there is testimony in this case that in 1960, Hurricane Donna caused high groundwater levels and tidal surges directly affecting the salinity level of Section 8. Tr. 126-127. This testimony establishes a direct connection between the Condor site and coastal waters. *See Compl. Ex. 16* (map identified as Exhibit A, showing proximity of Section 8 to coastal waters). Thus, the record establishes that Section 8 is a wetland system contiguous with coastal waters. As such, pursuant to the regulatory definition of "waters of the United States" appearing at 33 C.F.R. 328.3(a)(7), the Condor site is subject to Clean Water Act jurisdiction. *See U.S. v. Banks*, 115 F.3d 916, 921 (11th Cir. 1997)(court finding hydrological connection between wetlands and adjacent navigable tidal waters).

Moreover, as noted earlier, the U.S. Supreme Court in *United States v. Riverside Bayview Homes*, 474 U.S. 121, 131-132 & n.8 (1985), has held that for purposes of the Clean Water Act, the phrase "navigable waters" includes wetlands. Specifically, the Court upheld as not unreasonable an interpretation by the Corps that the CWA is applicable to wetlands "adjacent to but not regularly flooded by rivers, streams, and other hydrographic features more conventionally identifiable as 'waters'."[(6)]

Accordingly, the involved Section 8 wetland is subject to the jurisdiction of the Clean Water Act. The decisions cited by Condor do not involve the Clean Water Act and, therefore, simply do not support a contrary holding.

(iii) Was There a Discharge of a Pollutant?

The answer to this question also is in the affirmative. Condor is incorrect in arguing that the landclearing activities in Section 8 do not constitute the discharge of a pollutant. Condor's position clearly is inconsistent with the decisions in *Rybachek v. EPA,* 904 F.2d 1276 (9th Cir. 1990); *United States v. M.C.C. of Florida, Inc.,* 772 F.2d 1501 (11th Cir. 1985); and *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897 (5th Cir. 1983). As the *Avoyelles* Court observed:

> The word "addition" as used in the definition of the term "discharge," may reasonably be understood to include "redeposit." As the district court recognized, this reading of the definition is consistent with both the purposes and legislative history of the statute .... [W]e hold that the district court correctly decided that the landclearing activities on the Lake Long Tract constituted a discharge within the meaning of the Act. [Fn. Omitted]

715 F.2d at 923-924.[(7)]

(iv) Is There a Farming Exemption?

Condor claims that it did not have to obtain a Section 404 permit to clear the land in Section 8 due to the farming exemption provision contained in the CWA. The burden is upon respondent to prove that such an exemption applies in this case. Condor clearly has failed to carry that burden.

Exemptions to the general requirement for a Section 404 permit are set forth in Section 404(f) of the Clean Water Act. Section 404(f)(1) in part provides that a permit is not required for the discharge of dredged or fill material where "normal farming" is taking place. 33 U.S.C. § 1344(f)(1). Both EPA and the Corps have promulgated regulations which provide that the "normal farming activities" exemption is available only to discharge activities that are "part of an established (*i.e.,* ongoing) farming ... operation." 40 C.F.R. 232.3(c)(1)(ii)(A) & (B); 33 C.F.R. 323.4(a)(1)(ii).

The evidence in this case shows that Condor's activities in the Section 8 tract do not qualify for an agricultural exemption. These activities were not part of an ongoing farming operation. First, it is undisputed that Condor used bulldozers and front-end loaders to clear the land. This suggests the initiation of farming activity, not the continuation of such. *See U.S. v. Robert Brace; Robert Brace Farms,* 41 F.3d 117, 126 (3rd Cir. 1994)("Our determination is consistent with the holdings of numerous other courts that have found the 'normal farming' exemption inapplicable because modifications were required to resume farming.")

Second, the testimony of the witnesses establishes that any farming activity conducted by Condor in this area had been abandoned prior to the land clearing activities in this case. In fact, there is testimony in the record that farming had not occurred on this land since 1960, when Hurricane Donna adversely affected the salinity of the soil. Tr. 125-126. In any event, EPA witness Rieck testified that on the basis of aerial photographs taken of the Condor site, Section 8 had not been cultivated since 1985. Tr. 44-45, 55. This testimony alone supports EPA's assertion that any farming activity taking place on this disputed tract had long since been abandoned by Condor prior to its landclearing activities of 1990 to 1993. As a result, the farming exemption of Section 404(f) is not applicable.

As a final argument regarding the farming exemption issue, Condor states that it had applied to the Corps for a Section 404 permit for its Section 8 site while the present EPA enforcement proceeding was pending. In that regard, in a letter dated November 13, 1996, the Corps granted Condor an agricultural exemption, replying that "the proposed continuation of agricultural activities at the project site will not require authorization from the Corps of Engineers." *Resp. Ex. 27.* By letter dated December 16, 1996, however, the Corps revoked this agricultural exemption. The Corps December 16 revocation letter in part read:

> The jurisdictional determination, and corresponding wetland map sent to you on 12 December 1996, identifying those areas which are under Corps of Engineers ... regulatory jurisdiction remain valid. However, our office has been made aware of the fact that the property listed above [*i.e.,* Section 8], and the Condor Land Company are involved in an ... [EPA] Administrative Complaint, file number CWA-404-95-106, concerning unauthorized fill activities. It has also been brought to our attention that documentation indicates prior authorized or exempt activities on the above listed property during the past five years included mechanized brushcutting (as opposed to mechanized landclearing), but did not include crop production.

Compl. Ex. 33.

Condor essentially argues that the Corps' revocation of its agricultural exemption was improper. *Resp. Br. at 17-19.* It takes issue with EPA's informing the Corps of the present enforcement case, as well as with certain factual assertions made by the Corps in its revocation letter, including the Corps' assertion that agricultural activities had ceased on Section 8.

Condor's arguments are unpersuasive. First, there has been no showing that EPA acted improperly in informing the Corps of the present action. In fact, this notification by EPA is a valid exercise of its role as having the final say on wetlands jurisdictional determinations.

43 Op. Att'y Gen. 15 (1979). Second, a Corps employee testified in this case that the agricultural exemption would not have been issued in the first place had the Corps been aware of the present enforcement action. Indeed, the witness stated that in light of this enforcement action, the Corps did not have the authority to grant the exemption. Tr. 215-217. Given these circumstances, Condor's argument that the Corps must stand by an erroneously issued 404(f) exemption has no merit.

B. Penalty Assessment

Section 309(g) of the Clean Water Act provides for the assessment of a civil penalty for a Section 301 violation. Section 309(g)(2)(B) allows for the assessment of up to $10,000 per day for each day the violation continues, with a maximum penalty of $125,000. 33 U.S.C. § 1319(g)(2)(B). For purposes of determining the appropriate penalty, Section 309(g)(3) directs the taking into account of the "nature, circumstances, extent, and gravity of the violation ... 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).

EPA seeks a civil penalty of $32,160. EPA called one witness to testify specifically with respect to the Agency's proposed penalty assessment. Complainant also addressed this issue in its post-hearing brief. Condor, on the other hand, called no witnesses to testify as to the penalty issue; nor did respondent address this issue in its brief.

Measuring the evidence in the record against the statutory criteria of Section 309(g)(3), it is held that the civil penalty requested by EPA is appropriate. *See EPA Br. at 16-17.*[(8)] In that regard, EPA correctly determined that the violation in this case had a "moderate" environmental significance. While the Condor site was a functioning 53-acre wetland, EPA acknowledged that it was not a pristine wetland. Tr. 243. In addition, EPA properly took into account the importance of this Section 8 wetland due to its being adjacent to the State everglades preserve, the lack of cooperation exhibited by Condor in furnishing EPA with requested information, and the need to deter others from committing similar violations. Tr. 243-244.

Thus, the nature, circumstances, extent, gravity, and culpability of this Clean Water Act violation can be characterized as "moderate." There was no economic benefit to respondent as a result of its noncompliance and there was no evidence regarding the ability to pay and history of violations criteria; nor was there any showing that justice requires a lowering of the penalty.

ORDER

It is held that Condor Land Company violated Section 301(a) of the Clean Water Act as alleged by the U.S. Environmental Protection Agency. 33 U.S.C. § 1311(a). Pursuant to Sections 309(g)(2)(B) and (3) of the Act, respondent is assessed a civil penalty of $32,160. 33 U.S.C. §§ 1319(g)(2)(B) & (3). Condor shall pay the civil penalty within 60 days from the date of this order.[(9)] Unless this case is appealed to the Environmental Appeals Board in accordance with 40 C.F.R. 22.30, or unless it is directed for review *sua sponte*, it will become a final order of the Board.

Carl C. Charneski
Administrative Law Judge

1. Condor does not dispute EPA's authority to bring this action. *See* 43 OP. Att'y Gen. 15 (1979)(delineating CWA enforcement authority between EPA and the Corps).

2. The Army Corps of Engineers similarly defines the term "wetlands." 33 C.F.R. 328.3(b).

3. In 1989, EPA, the Corps, the U.S. Fish and Wildlife Service, and the U.S. Department of Agriculture's Soil Conservation Service issued a joint manual for wetlands determination (the "1989 Manual"). *See Resp. Ex. 26.* Congress, however, has prohibited the Corps from using the 1989 Manual for a wetlands jurisdictional determination, unless the landowner has consented to its use. *See* Title I of the Energy and Water Development Appropriations Act of 1992, Pub. L. No. 102-104. As a result of this Congressional prohibition, EPA and the Corps subsequently announced that both agencies would use the 1987 Manual for wetlands determination. 58 *Fed. Reg.* 4995 (1993).

4. It is an interesting twist to this case that Condor seeks to rely upon the 1989 Manual even though a major criticism of that document has been that it allegedly expanded EPA's and the Corps' authority to determine wetlands jurisdiction. *See* The Environmental Law Reporter, *Wetland's Deskbook,* 2d ed. at 14-15. Nonetheless, it is the opinion of this court that EPA would have established wetlands jurisdiction even under the 1989 Manual. *See, e.g.,* Tr. 188 (testimony of Corps biologist that the Condor site was a wetland under either 1987 or 1989 Manual).

5. All three witnesses used the 1987 Manual for guidance. Tr. 23, 168, 218.

6. *See Avoyelles Sportmen's League, Inc. v. Marsh,* 715 F.2d 897, 914 (5th Cir. 1983) ("Congress expressly stated its intent that the term 'navigable waters' be given the broadest possible constitutional interpretation.")

7. In a related matter, Condor has filed a post-hearing motion to dismiss, arguing that "incidental fallback" which takes place during mechanized land clearing does not constitute the discharge of a pollutant. For this proposition, Condor cites *American Mining Congress, et al. v. United States Army Corps of Engineers,* 951 F.Supp. 267 (D.C.D.C. 1997). There, the Court struck down what is known as the "*Tulloch* rule" and held that incidental fall back occurring during a dredging operation did not constitute the addition of a pollutant under the CWA. The District Court's decision subsequently was affirmed in *National Min. Ass'n v. U.S. Army Corps of Engineers,* 145 F.3d 1399 (D.C. Cir. 1998). Because that case involved incidental fallback only, it is not controlling here where there was substantial movement of earthen material at the Condor site. Tr. 151-152, 165, 174. Indeed, the D.C. Circuit noted that its holding addressed only "incidental fallback." *See* 145 F.3d at 1405 ("we do not hold that the Corps may not legally regulate some forms of redeposit under its § 404 permitting authority. [Fn. Omitted]." Accordingly, Condor's motion to dismiss is *denied.*

8. In fact, the penalty sought by EPA in this case is at the lower end of the penalty scale for CWA Section 301(a) violations in Region IV. Tr. 246.

9. Payment may be made by mailing, or presenting, a cashier's or certified check made payable to the Treasurer of the United States, and addressed to Nations Bank, EPA Region 4 (Regional Hearing Clerk), P.O. Box 100142, Atlanta, Georgia, 30384.