UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
C.W. SMITH, GRADY SMITH,	)	
& SMITH'S LAKE CORPORATION	)	Docket No. CWA-04-2001-1501
	)	
RESPONDENT	)	

ORDER ON MOTIONS

Clean Water Act – By motion dated December 7, 2001, Complainant, the United States Environmental Protection Agency ("EPA"), moved pursuant to 40 C.F.R. Section 22.20(a), for an accelerated decision on liability and penalty in the above-stated case. That Motion alleges violations of Section 301 the Clean Water Act ("CWA") and asserts that EPA is entitled to judgment as a matter of law. In the alternative, Complainant seeks a partial accelerated decision as to liability. By motions dated December 7, 2001, C.W. Smith, Grady Smith, and Smith's Lake Corporation (hereinafter, "Respondents"), moved pursuant to 40 C.F.R. Section 22.20(a), for dismissal in the above-stated case. In the alternative, Respondents moved, pursuant to 40 C.F.R. Section 22.12(b) for bifurcation and for a stay of the above-stated case. The parties filed replies to each others motions. **Held:** Complainant's Motion for Accelerated Decision and Respondents' Motions are **Denied.**

Before: Stephen J. McGuire
United States Administrative Law Judge

Date: February 6, 2002

Appearances:

For Complainant:
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I. Introduction

On November 2, 2000, Complainant issued a Complaint and Notice of Opportunity for Hearing to C.W. Smith, Grady Smith, and Smith's Lake Corporation (collectively referred herein as "Respondents"), alleging violations of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1311, 1344. The Complaint sought a civil penalty in an amount up to the maximum of $137,500 under subsection 309(g) of the CWA, 33 U.S.C. § 1319(g). An affidavit executed by the Regional Hearing Clerk, on December 21, 2000, states that she had not received an Answer in this matter as of that date. *See* Motion for Default Judgment, Ex. B. Thereafter, on December 21, 2000, Complainant filed a Motion for Default Judgment against Respondents, seeking the maximum penalty of $137,500. That motion was filed on the basis that all three Respondents did not file an Answer to the Complaint. On January 10, 2001, one of the respondents, Grady Smith, filed a Response to Motion for Default Judgment. The other two respondents, C.W. Smith and Smith's Lake Corporation, did not file responses. Complainant filed a Reply to respondent Grady Smith's Response on January 22, 2001.

On April 4, 2001, the Regional Judicial Officer ("RJO") for EPA Region IV issued a Decision and Order on Motion for Default and Order to Show Cause. As to respondent Grady Smith, the RJO denied Complainant's Motion for Default Judgment. However, the Order commanded Grady Smith to file an Answer to the Complaint on or before April 20, 2001. Grady Smith subsequently filed his Answer on April 20, 2001.

As to respondents C.W. Smith and Smith's Lake Corporation, the RJO ordered that these respondents "show cause" in writing why a default judgment should not be entered and ordered them to file an Answer. The RJO's Order further specified, "Failure by Respondents to comply with this Order will result in entry of default judgment against them."

On May 24, 2001, the RJO issued a "Order Finding Default with Respect to Liability of Respondents C.W. Smith and Smith's Lake Corporation." This Order found that neither C.W. Smith nor Smith's Lake Corporation had complied with the RJO's earlier order in that neither had filed an Answer to the Complaint. In the May 24, 2001 Order, the RJO determined that C.W. Smith and Smith's Lake Corporation were in default with respect to liability. The RJO forwarded the case to the EPA Office of Administrative Law Judges ("OALJ") for determination of liability and remedy with respect to respondent Grady Smith, and for determination of remedy with respect to respondents C.W. Smith and Smith's Lake Corporation.

Normally, as to a default order under the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"),

> When the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued . . . . The relief proposed in the complaint

> or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act. For good cause shown, the Presiding Officer may set aside a default order.

40 C.F.R. § 22.17(c) (2000). The Rules of Practice further provide, "Any penalty assessed in the default order shall become due and payable by respondent without further proceedings 30 days after the default order becomes final under § 22.27(c)." *Id*. § 22.17(d).

Although the RJO had issued an Order determining liability for C.W. Smith and Smith's Lake Corporation, she declined to issue a default order as to the amount of the penalty. Applicable case precedent holds that it is within the discretion of the Presiding Officer to stay the imposition of the penalty as to defaulting Respondents when other Respondents have not defaulted and are still actively litigating the case. This discretion was found and exercised by the presiding ALJ in an "Order on Motions for Summary Judgment, for Dismissal, and for Default" in *Corporacion para el Desarrollo Economico y Futuro de la Isla Nena*, Docket No. CWA-II-97-61, 1998 EPA ALJ LEXIS 78 (ALJ, Feb. 3. 1998) (hereinafter referred to as *"CODEFIN")*. In *CODEFIN*, the ALJ declined to assess a penalty as to a Respondent who had failed to timely file an Answer to EPA's Complaint. *Id*. at *21. The ALJ reasoned that the penalty could not be fairly apportioned among the defaulting and non-defaulting parties until their liability and roles were determined.

In the case at bar, EPA's Complaint demands a penalty " . . . up to a maximum of $137,500." Compl. at 2, ¶ 13. The EPA later filed its Motion for Default Judgment in which it clearly demands the maximum penalty of $137,500. *See* Motion for Default Judgment, Memorandum at 3-9 (Dec. 21, 2000). EPA alleges that non-defaulting respondent Grady Smith was an officer and shareholder of Smith's Lake Corporation, which is one of the defaulting respondents. *See* Motion for an Accelerated Decision (Dec. 7, 2001). Following the example in *CODEFIN*, the Court declines to issue an order as the penalty to be assessed against the defaulting respondents, C.W. Smith and Smith's Lake Corporation as it is not yet sufficiently clear what the fair apportionment of the penalty should be among the parties.

At issue are the following motions. On December 7, 2001, Respondents filed two motions to dismiss. Also on December 7, 2001, EPA filed a motion for accelerated decision.[1]

[1] Additionally, on December 27, 2001, Respondents filed a "Motion for Extension of Time in Which to File" as to responding to EPA's Motion for Accelerated Decision. However, that motion is moot as it appears Respondents did in fact file their Response to EPA's Motion for Accelerated Decision on that same day of December 27, 2001.

II. Standard For Motions for Accelerated Decision and Motions to Dismiss

Section 22.20(a) of the Rules of Practice authorize the ALJ to render accelerated decisions and dismissals in certain situations. 40 C.F.R. § 22.20(a) (2000). As to accelerated decisions, the Rules of Practice provide,

> 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.

Id. As to Motions to Dismiss, the Rules of Practice provide,

> The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

Id.

A long line of decisions by the OALJ and the Environmental Appeals Board (EAB), has established that this procedure is analogous to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. *See e.g., In re CWM Chem. Servs., Inc.*, 6 E.A.D. 1 (EAB, "Order on Interlocutory Appeal," May 15, 1995).

The burden of showing there exists no genuine issue of material fact is on the party moving for summary judgment. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). In considering such a motion, the tribunal must construe the factual record and reasonable inferences therefrom in the light most favorable to the non-moving party. *Cone v. Longmont United Hospital Ass'n*, 14 F.3d 526, 528 (10th Cir. 1994). The mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 256 (1986). Similarly, a simple denial of liability is inadequate to demonstrate that an issue of fact does indeed exist in a matter. A party responding to a motion for accelerated decision must produce some evidence which places the moving party's evidence in question and raises a question of fact for an adjudicatory hearing. *See In the Matter of Bickford, Inc.*, Docket No. TSCA-V-C-052-92, 1994 TSCA LEXIS 90 (EPA ALJ, Nov. 28, 1994).

"Bare assertions, conclusory allegations or suspicions" are insufficient to raise a genuine issue of material fact precluding summary judgment. *Jones v. Chieffo*, 833 F. Supp. 498, 503 (E.D. Pa. 1993), *aff'd*, 22 F.3d 301 (3rd Cir. 1994) (mem.). The decision on a motion for summary judgment or accelerated decision must be based on the pleadings, affidavits and other

evidentiary materials submitted in support or opposition to the motion. *See Calotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); 40 C.F.R. § 22.20(a) (2000); FED. R. CIV. PRO. 56(c).

Upon review of the evidence in a case, even if a judge believes that summary judgment is technically proper, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial. *See Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979).

III. Discussion

A. Respondents' "Motion to Dismiss for Lack of Jurisdiction, Over the Persons of C.W. Smith, Grady Smith, and Smith's Lake Corporation"

Respondents challenge this Court's personal jurisdiction over them in their "Motion to Dismiss for Lack of Jurisdiction, Over the Persons of C.W. Smith, Grady Smith, and Smith's Lake Corporation." In particular, that motion to dismiss challenges the sufficiency of service of process on Respondents and charges failure of EPA to comply with standards of due process.

The undisputed facts are as follows. Respondents Grady Smith (a.k.a. James Grady Smith)[2] and C.W. Smith are brothers. *See* EPA's "Response to Motions to Dismiss," Attach. #3, at 7 ("Responses of James Grady Smith to Section 308 Information Request"). Grady Smith and C.W. Smith have been the sole officers and shareholders of Smith's Lake Corporation. *See id*., at 3; "Complainant's Rebuttal Prehearing Exchange," Compl. Ex. 36, Attached Ex. 1, at 1-2 ("Responses to [sic] C.W. Smith to Section 308 Information Request"). At times throughout the existence of Smith's Lake Corporation, Grady Smith has held as little as 50% of the shares of Smith's Lake Corporation to as much as 90% of the shares, with C.W. Smith holding all remaining shares. *See* "Response to Motions to Dismiss," Attach. #3, at 3-4 ("Responses of James Grady Smith to Section 308 Information Request"); Compl. Ex. 36, Attached Ex. 1., at 4. As of late April 2001, Grady Smith (a.k.a. James G. Smith, Sr.) was listed in State of Georgia Secretary of State records as the agent for service of process for Smith's Lake Corporation, with an address listed as 3552 Lake Carlton Road, Loganville, Georgia 30052. *See* "Response to Motions to Dismiss," Attach. #2. Georgia Secretary of State records also listed Grady Smith as Chief Executive Officer of Smith's Lake Corporation, and lists Grady Smith's address as 3552 Lake Carlton Road, Loganville, GA 30052. *See id*. Respondents admit that the residence of James Grady Smith, at 3552 Lake Carlton Road, Loganville, Georgia 30052, was the last known corporate address of Smith's Lake Corporation. *See* "Response to Motions to Dismiss," Attach. #3, Ex. 1 at 1; Compl. Ex. 36, Attached Ex. 1, at 2. The December 7, 2001 Affidavit of Grady Smith also shows that Grady Smith resides at 3552 Lake Carlton Road.

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[2] Although the Complaint names "Grady Smith" as a respondent, it appears that his full name is James Grady Smith. *See* "Response to Motions to Dismiss," Attach. #3, Ex. 1.

Georgia Secretary of State records, as of late April 2001, listed C.W. Smith as Secretary of Smith's Lake Corporation, and listed C.W. Smith's address as 800 York Street, Apt. 2400 Gastonia, North Carolina 28052. *See* "Response to Motions to Dismiss," Attach. #2. However, in other legal documents, Respondent C.W. Smith uses the 3552 Lake Carlton address as his own address. For instance, in an easement dated November 6, 1998, under "Grantor's Address," is the following: "C.W. Smith[,] 3552 Lake Carlton Road[,] Loganville, Ga. 30052." "Response to Motions to Dismiss," Attach. #4. Finally, a quitclaim deed, executed June 10, 2000, purporting to transfer property concerning or in the vicinity of Lake Carlton from Smith's Lake Corporation to C.W. Smith, contains a handwritten note as follows: "Mail to: C.W. Smith[,] 3552 Lake Carlton Rd.[,] Loganville, Ga 30052." "Response to Motions to Dismiss," Attach. #5; Motion for Default Judgment, Exhibit P. Finally, the January 10, 2001 "Response to Motion for Default Judgment," at 1, shows that C.W. Smith owns property at 3552 Lake Carlton Road and leases that property to his brother, Grady Smith.

The record indicates that C.W. Smith does not wish to respond to matters concerning the bodies of water alleged to be at issue in EPA's Complaint. For instance, in a state action dated November, 17, 2000, concerning similar matters, a Superior Court judge granted an Order of Default on August 22, 2001, after failure of C.W. Smith to timely respond to that lawsuit after Order for Service by Publication. *See* "Motion to Dismiss for Lack of Jurisdiction, For Summary Judgment, and Judgment on the Pleadings . . . ," Ex. 1: "Order" at 1. That state action was filed November 17, 2000. *See* "Motion for Default Judgment," Ex. P: "Petition for Temporary Restraining Order, Interlocutory Injunction, and Permanent Injunction" at 1.

Smith's Lake Corporation owned three (3) pieces of property, those being Freeman's Lake, Lake Carlton, and a small lot at Lake Carlton. *See* "Response to Motions to Dismiss," Attach. #3, Ex. 1, at 2. On November 3, 2000, EPA sent a copy of the Complaint in the above-captioned matter via certified mail, with return receipt requested. *See* "Response to Motions to Dismiss," Attach. #1. The return receipt notes the corresponding EPA docket number of "CWA-04-2001-1501." *Id.* The return receipt also indicates that the Complaint was addressed to:

> Mr. C.W. Smith
> Mr. Grady Smith
> Smith's Lake Corporation
> 3552 Lake Carlton Road
> Loganville, Georgia 30052

Id.

In an affidavit, Grady Smith avers that a person known as Philip Starnes signed the receipt for service of the Complaint. *See* "Motion to Dismiss for Lack of Jurisdiction, Over the Persons of C.W. Smith, Grady Smith, and Smith's Lake Corporation," Attach. #2 (hereinafter, "Grady Smith's affidavit"). A review of the receipt verifies this averment as it shows a signature bearing the name Philip Starnes. *See* "Response to Motions to Dismiss," Attach. #1. Grady Smith's affidavit avers that there is a bait shop located at 3568 Lake Carlton Road, where access is had

to the two lakes in the northern part of Lake Carlton. This bait shop adjoins the property on which Grady Smith's residence is located. *See* "Motion to Dismiss for Lack of Jurisdiction, For Summary Judgment, and Judgment on the Pleadings . . . ," Attach. #2, at 1 (Final Order). Grady Smith's affidavit also avers that Mr. Starnes leased the bait shop during the fishing seasons in the year 2000, from March to the middle of September. Grady Smith's affidavit further avers that Mr. Starnes had a key to the bait shop but that he was not authorized to accept process on behalf of Respondents, that he was not an employee of Respondents, and that he had no official business at the lake at the time at which he signed the Complaint.

On December 21, 2000, EPA filed and served its "Motion for Default Judgment." The certificate of service for the Motion indicates that it was served as follows:

BY CERTIFIED MAIL TO:

Mr. C.W. Smith
Mr. Grady Smith
Smith's Lake Corporation
3552 Lake Carlton Road
Loganville, Georgia 30052

BY CERTIFIED MAIL TO:

Mr. Richard Hubert, Esquire
Attorney for Grady Smith
191 Peachtree Street, NE
9th Floor
Atlanta, GA 30303

None of the Respondents claim that service was deficient as to the "Motion for Default Judgment." Respondent Grady Smith timely filed his "Response to Motion for Default Judgment" on January 10, 2001. In that Response, Grady Smith does not assert that he failed to file an Answer due to insufficient service of process. Instead, Grady Smith states that one of the reasons for failing to timely file his Answer was that his attorney had refused to file the Answer and informed Grady of this fact the day prior to the deadline. *See* "Response to Motion for Default Judgment." Grady Smith said he was unable to obtain a new attorney until after the deadline had passed. *See id.* Another reason Grady Smith says he did not timely file his Answer was that Respondents had engaged in settlement discussions with EPA and that he expected that a settlement was "imminent." *Id.* In support, Grady Smith describes discussions and proposals that occurred more than a year prior to the filing of the Complaint. *See id.* In contrast, in the attached Answer to a state court action also concerning Respondents' activities as to the Lake Carlton area, dated December 18, 2000, Grady Smith did claim insufficient service of process as a defense. *See* "Response to Motion for Default Judgment," Ex. 2, at 2. It is noted that in both Grady Smith's Response to (EPA's) Motion for Default Judgment and his Answer to the state action, he was represented by the same attorney.

Considering the facts in the light most favorable to Respondents, the Court finds that actual service of process of the Complaint was achieved on both respondents Grady Smith and Smith's Lake Corporation. The achievement of actual service of process obviates the failure of Complainant to strictly comply with the service of process procedures of the Rules of Practice. *See In the Matter of City of Orlando, Florida*, Docket No. CWA-04-501-99, 1999 EPA ALJ LEXIS 38, at *6-7 (ALJ, "Order," July 7, 1999). Although Respondents assert, in their Motion to Dismiss that a non-employee signed the receipt for service of process, at no point do any of the Respondents claim that they did not *actually* receive the Complaint. Indicating that the Complaint was actually received, is Grady Smith's Response to Motion for Default Judgment, in which he claims that he did not timely answer the Complaint because his attorney had refused to handle or proceed with his case shortly before the filing deadline and that he anticipated a settlement with Complainant. In that Response, Grady Smith did not claim failure to actually receive the Complaint. Grady Smith timely filed his Response to Motion for Default Judgment, which further makes this case analogous to *City of Orlando*, in which a timely filed Answer indicated that the proper officials of Respondent did receive notice. *See id*. Furthermore, Grady Smith is one of the two officers of Smith's Lake Corporation, and as such, the achievement of actual service of process on Grady Smith constitutes actual service of process on Smith's Lake Corporation.

As to sufficient service of process on Respondent C.W. Smith, the current version of the Rules of Practice, which are applicable to the case at hand, provides the following:

> Complainant shall serve on respondent, or a representative authorized to receive service on respondent's behalf, a copy of the signed original of the complaint, together with a copy of these Consolidated Rules of Practice. Service shall be made personally, by certified mail with return receipt requested, or by any reliable commercial delivery service that provides written verification of delivery.
>
> (ii)(A) Where respondent is a domestic or foreign corporation, a partnership, or an unincorporated association which is subject to suit under a common name, complainant shall serve an officer, partner, a managing or general agent, or any other person authorized by appointment or by Federal or State law to receive service of process.

40 C.F.R. § 22.5(b)(1)(i)-(ii)(A) (2000). The Rules of Practice further provide, "Service of the complaint is complete when the return receipt is signed." *Id.* § 22.7(c).

Several cases have clarified what constitutes sufficient service of a Complaint on a respondent or representative. In *Katzon Brothers, Inc. v. United States Environmental Protection Agency*, the Tenth Circuit analyzed sufficiency of service of process under the Rules of Practice

and under due process standards. 839 F.2d 1396 (10th Cir. 1988).[3] The Tenth Circuit began by announcing that "[A]gencies are free to fashion their own rules of procedure, so long as these rules satisfy the fundamental requirements of fairness and notice." *Id*. at 1399; *see also Baker v. Latham Sparrowbush Assoc.*, 72 F.3d 246, 255 (2nd Cir. 1995) (following *Katzon Brothers*); *Hess & Clark, Division of Rhodia, Inc. v. FDA*, 495 F.2d 975, 984 (D.C. Cir. 1974) (holding that the service of process requirements of the Federal Rules of Civil Procedure are not binding on administrative agencies). As such, the *Katzon Brothers* court concluded that the Rules of Practice and the requirements of due process alone determine whether EPA's service of process is proper.[4] *See Katzon Bros., supra*, at 1399. In *Katzon Brothers*, the Tenth Circuit determined that the certified mail service under the Rules of Practice does not require actual delivery. *See id*. The Rules of Practice, when service is to be on a corporation, for instance, merely requires that the letter sending the Complaint be properly addressed, rather than actually delivered, to an officer, partner, agent, officer, or other authorized individual. *See id*. The Tenth Circuit concluded, "Any other interpretation would severely hinder service of process on corporations by certified mail, since the postal service employee would have to wait on the corporation's premises until the officer, partner, or agent could sign the return receipt." *Id*. (footnote omitted). Additionally, the EPA has held that a person who signs a certified mail receipt green card and picks up mail at a respondent's business post office box is authorized to receive service of process under the Rules of Practice. *See In the Matter of Herman Roberts*, Docket No. OPA 99-512, 2000 EPA RJO LEXIS 211 (RJO, "Order," April 14, 2000).

In *Katzon Brothers*, the Tenth Circuit also upheld the service of process procedure of the Rules of Practice against a due process challenge. *See Katzon, supra*, at 1400. It concluded, *inter alia*, that due process is satisfied, even if actual notice is not achieved, if an agency employs a procedure reasonably calculated to achieve actual notice. *See id*.

The issue before the Court is whether the Complaint was sufficiently directed at respondent C.W. Smith. *See In the Matter of Medzam, Ltd.*, 4 E.A.D. 87, 93-94 (EAB, July 20, 1992) (focusing on whether a Complaint was properly addressed). It is undisputed that the Complaint was sent by certified mail with return receipt requested and addressed to "Mr. C.W. Smith, Mr. Grady Smith, Smith's Lake Corporation, 3552 Lake Carlton Road, Loganville, Georgia 30052." It is also undisputed that C.W. Smith has employed that address as a mailing address for legal documents. Furthermore, C.W. Smith owns that property and leases it to his brother, respondent Grady Smith.[5] For these reasons, the Complainant could reasonably expect that service to that

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[3] Although *Katzon Brothers* analyzed the former version of the Rules of Practice, the minor differences between the current Rules and the former do not indicate any significant changes. *Compare* 40 C.F.R. § 22.05(b)(1)(i)-(ii) (1985).

[4] Therefore, Respondents' reliance on caselaw concerning the Federal Rules of Civil Procedure and State of Georgia civil procedure are not binding on this issue.

[5] It is also noted that respondent C.W. Smith does not suggest that his brother, respondent Grady Smith, failed to provide actual notice of the Complaint to him.

address would achieve actual service of process on C.W. Smith.

Furthermore, respondent C.W. Smith admits to having performed activities in the lakebed of the former Lake Carlton. *See* "Complainant's Rebuttal Prehearing Exchange," Ex. 36, at 9. As such, "minimum contacts" required by due process have been satisfied. Service of process on C.W. Smith was in accordance with both the Rules of Practice and due process. Even accepting Respondents' allegation that receipt of service was signed by someone who was neither an employee of nor an agent for Respondents, the issue is moot given the actual service on Grady Smith and Smith's Lake Corporation. As with the other Respondents, C.W. Smith does not claim failure to have actual notice of the Complaint filed by EPA.

In accordance with the Rules of Practice and *Katzon Brothers*, the Complaint was sufficiently directed towards Grady Smith and Smith's Lake Corporation. Both Grady Smith and Smith's Lake Corporation list the 3552 Lake Carlton Road address with the Secretary of State of Georgia as their correct address. The Court also finds that C.W. Smith's brother, Grady Smith, was authorized to sign on behalf of his brother, as C.W. Smith used the residence of Grady Smith as a mailing address for at least some legal documents. Given the burden of proof,[6] the Court concludes that Complainant has introduced evidence which demonstrates that service of process was sufficient in this case.

In conclusion, Respondents' "Motion to Dismiss for Lack of Jurisdiction, Over the Persons of C.W. Smith, Grady Smith, and Smith's Lake Corporation" is **DENIED**.

B. Respondents' "Motion to Dismiss for Lack of Jurisdiction, For Summary Judgment, and Judgment on the Pleadings, Alternatively for a Bifurcated Hearing on the Matter of Jurisdiction, Or, for a Stay of Federal Jurisdiction Pending Outcome of State Proceedings" and Complainant's "Motion for Accelerated Decision"

On December 7, 2001, Respondents filed their second motion to dismiss, entitled "Motion to Dismiss for Lack of Jurisdiction, For Summary Judgment, and Judgment on the Pleadings, Alternatively for a Bifurcated Hearing on the Matter of Jurisdiction, Or, for a Stay of Federal Jurisdiction Pending Outcome of State Proceedings." On the same date, EPA filed its "Motion for Accelerated Decision," in which it seeks a finding that Grady Smith violated Section 301 of the CWA and seeks a civil penalty against all three Respondents in the amount of $137,500. In the alternative, EPA seeks a partial accelerated decision against Grady Smith on the issue of liability.

As a threshold issue, Respondents challenge EPA's subject matter jurisdiction in this case,

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[6] Courts operating under the Federal Rules of Evidence generally allow the burden to prove service of process to be shifted to the Complainant. *See* 4A WRIGHT & MILLER, FED. PRAC. & PROC. CIV. 3d § 1083.

citing, *inter alia*, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (hereinafter, *"SWANCC"*), 531 U.S. 159 (2001). In *SWANCC*, the U.S. Supreme Court held that the Migratory Bird Rule was invalid, a rule which attempted to assert jurisdiction over isolated, intrastate, non-navigable wetlands, claiming them to be "waters of the United States." *Id*. at 174. Although *SWANCC* did impose some limitations on CWA jurisdiction, the OALJ has recently clarified that wetlands having at least some connection, direct or indirect, to navigable-in-fact or interstate bodies of water are "waters of the United States" even after *SWANCC*. This is seen in the case *John Lawrence Crescio, III*, in which an ALJ held that wetlands were "waters of the United States" where waters from those wetlands flowed into Cambria Creek, which is a tributary of Fox Lake, which outlets through a dam into Mill Creek, which is the primary tributary of Beaver Dam Lake, which flows into the Rock River, the latter of which is an interstate body of water. Docket No. 5-CWA-98-004, 2001 EPA ALJ LEXIS 143, at *19-28 (ALJ, May 17, 2001).

In the case at bar, the Complaint alleges that Respondents committed unlawful discharges of dredged and/or fill material by backhoes and/or other similar types of equipment into "waters of the United States" in violation the CWA. *See* Compl. at 1-2. The Complaint alleges that Respondents discharged said material into a "Discharge Area," which it describes as property adjacent to Brushy Fork Creek and tributaries in the area formerly occupied by Lake Carlton. Compl. at ¶ 1. It further alleges that the discharges occurred in the lakebed of the former Lake Carlton. *See* Compl. at ¶ 3.

As to whether the lakebed of the former Lake Carlton is a "water of the United States," EPA asserts the following: Brushy Fork Creek is part of a surface tributary system which ultimately connects to the Atlantic Ocean. *See* "Motion for Default Judgment," Ex. R at 5. In particular, Brushy Fork Creek is a tributary of Big Haynes Creek, which connects to the Yellow River, which drains into Lake Jackson, which forms the Ocmulgee River, which connects to the Altamaha River, which drains into the Atlantic Ocean. *See id*. The EPA also alleges that a "substantial portion" of the lakebed consists of wetlands and that "the apparent wetlands are adjacent to Brushy Creek." *Id*.

In contrast, Respondents' answers to interrogatories repeatedly state that any discharges in the lakebed were onto "dry land" and refers to the lakebed in general as being dry. "Complainant's Rebuttal Prehearing Exchange," Exs. 35, 36. Respondents also challenge federal jurisdiction over the lakebed as "waters of the Untied States" as it appears to have been artificially created. *See* "Motion to Dismiss for Lack of Jurisdiction, For Summary Judgment, and Judgment on the Pleadings . . . ," at 2-3. Respondents claim that the lakebed has been and was privately owned both before and during the times charged in the Complaint and that they had no part in transforming the lakebed to mudflats. *See id*. at 3.

Addressing Respondent's latter argument, even assuming that both Lake Carlton and what is now the lakebed and alleged wetlands of the former Lake Carlton were artificially created by the government or third parties, that, in itself does not defeat CWA jurisdiction. As stated by the

Eleventh Circuit,[7] in *United States v. Eidson*, "There is no reason to suspect that Congress intended to regulate only the natural tributaries of navigable waters. Pollutants are equally harmful to this country's water quality whether they travel along man-made or natural routes." 108 F.3d 1336, 1342 (11th Cir.), *cert. denied*, 522 U.S. 899, 1004 (1997). In *Eidson*, the Eleventh Circuit held that a drainage ditch, which was part of a storm drainage system, was a "water of the United States" under the CWA. *See id*. at 1342-43. In addition, in *Leslie Salt Company v. United States*, the Ninth Circuit held that there was CWA jurisdiction over artificially formed wetlands. 896 F.2d 354, 359-60 (9th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991). Although the government had formed the wetlands on privately-owned land, the Ninth Circuit upheld jurisdiction, concluding, "The fact that third parties, including the government, are responsible for flooding of Leslie's [the defendant's] land is irrelevant." *Id*. at 358. Finally, the OALJ recently upheld CWA jurisdiction over artificially-created tributaries, including a discharge stream and an unnamed creek which were created by discharges of produced water from oil fields. *See In the Matter of Crown Central Petroleum Corp.*, Docket No. CWA–08-2000-06, 2002 EPA ALJ LEXIS 1, at *81-82 (ALJ, Jan. 8, 2002). Accordingly, Respondents' motion to dismiss on this basis is denied.

Respondents also move this Court to dismiss on the ground that the Corps of Engineers' and EPA's actions subject Respondents to "an illegal takings of rights in land." "Motion to Dismiss for Lack of Jurisdiction, For Summary Judgment, and Judgment on the Pleadings . . . ," at 4. As to the "takings" argument, the United States Supreme Court decision in *United States v. Riverside Bayview Homes, Inc*. shows that even if a takings claim were viable, such a claim would not be grounds for dismissal of this case. 474 U.S. 121, 127-29 (1985). In *Riverside*, the Corps of Engineers brought an action to enjoin a landowner from filling wetlands. *See id*. at 124. In that case, the Supreme Court rejected the landowner's argument that CWA jurisdiction over wetlands should be read narrowly to avoid takings of private property. *See id*. at 127-29. Instead, the Supreme Court held that the landowner's proper course of action was not to resist enforcement for the CWA regulations but to seek damages through inverse condemnation. *See id*. at 129 n.6; *see also Leslie Salt*, *supra*, at 358. Therefore, this case will not be dismissed on a"takings" argument, as the remedy for such alleged misconduct can be pursued in other venues.

Respondents next move this Court to dismiss on the ground that "[T]he local regulatory Georgia authorities have already acted in the matter, and continue to act and assert regulatory authority over its inland, intra-state waterbed, lake and creek." "Motion to Dismiss....," at 4. In support, Respondents cite to the U.S. Supreme Court's recognition of States' traditional and primary power over land and use. *See SWANCC*, *supra*, at 174, citing, *e.g. Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994). Respondents thus claim that EPA's and Georgia authorities' actions subject them to "double jeopardy." *Id*.

The facts as to the federal and state actions concerning activities within and in the vicinity of the lakebed of the former Lake Carlton, in brief, show the following: On November 2, 2000,

[7] This matter arises in the Eleventh Circuit.

EPA filed its Complaint against Respondents C.W. Smith, Grady Smith, and Smith's Lake Corporation seeking a civil penalty. On November 17, 2000, Gwinnett County filed a "Petition for Temporary Restraining Order, Interlocutory Injunction, and Permanent Injunction" against C.W. Smith and Grady Smith. "Motion for Default Judgment," Ex. P. That Petition alleged that the Smith brothers, *inter alia*, conducted "[C]learing, grubbing and grading activities on the Lake Carlton property . . . without first obtaining a land disturbance permit from Gwinnett County." *Id*. at ¶ 3. It further alleged that they introduced sediment and debris into the public drinking water supply by filling dirt directly into the floodplain on that property. *See id.* at ¶ 7. That Petition also alleged, "The Defendants' [the Smith brothers] actions have violated the Gwinnett County Development Regulations . . . the Regulations of the Georgia Environmental Protection Division, and the Federal Clean Water Act." *Id*. at ¶ 18. That Petition also noted, "The Federal Environmental Protection Agency has recently issued a penalty order to the Defendants as a result of their illegal and hazardous clearing, grubbing, grading and filling activities on the subject property [Lake Carlton] during the last year." *Id*. at ¶ 19. It continued by alleging that after the filing of EPA's Complaint (along with its assessment of penalty), the Smith brothers recommenced filling and other activities on the property. *See id*. at ¶ 20. Finally, it alleged that the Smith brothers' activities constitute violations of Gwinnett County ordinances, laws of the State of Georgia, and federal laws and regulations referenced in the "Petition." *See id*. at ¶ 31. The Petition did not seek penalties against the Smith brothers but instead sought a temporary restraining order ("TRO") and injunctions. *See id*. at 9. On August 22, 2001, the Superior Court of Gwinnett County issued orders to both C.W. Smith and Grady Smith. *See* "Motion to Dismiss . . . ," Exs. 1, 2. The order to C.W. Smith included a permanent injunction against clearing, grubbing, grading, or filling the Lake Carlton property without first obtaining the required engineering studies and land disturbance permits. *See id*., Ex. 1. The order to Grady Smith issued a permanent injunction against him, enjoining him from any disturbance of the land, including clearing, grubbing, grading, or adding any dirt located on the Lake Carlton property until a Land Disturbance Permit is obtained from Gwinnett County and engineering studies are completed pursuant to Gwinnett County ordinances. *See id.*, Ex. 2. However, it ordered that Grady Smith shall be entitled to landscape the front yard of the 3552 Lake Carlton property between his residence and the adjoining bait shop without a permit. *See id*.

In addition to the information found in the record, Respondents also assert the following:

> [A]t the hearing for a temporary restraining order, later stayed pending a view of the Lake Carlton property, and a subsequent entry of a consent preliminary injunction granting partial relief in this matter pending further [sic] the completion of studies to be undertaken by Gwinnett County Superior Court (which, to date, have not been completed), could and certainly will be relevant to any orders that may be considered by the ALJ in this proceeding.

"Respondents' Response to EPA's Motion for an Accelerated Decision" at 2. Respondents also allege that the EPA provided witnesses who testified at the temporary restraining order and preliminary injunction hearings. *See id*. Respondents also speak of criminal proceedings in the

state courts, although they do not point to proof of such criminal proceedings in the record and there does not appear to be any such proof in the record. *See id*. at 2-3.

The Double Jeopardy Clause of the U.S. Constitution "[P]rotects only against the imposition of multiple *criminal* punishments for the same offense." *Hudson v. United States*, 522 U.S. 93, 99 (1997) (emphasis in original, citations omitted); *United States v. Ward*, 448 U.S. 242 (1980) (rejecting a double jeopardy argument that the civil penalty provision of Section 311(b)(6) of the CWA was criminal in nature). As double jeopardy is directed at successive punishments by the same sovereign, it would not be applicable to the case at hand, which involves separate state and federal proceedings. *See Abbata v. U.S.*, 359 U.S. 187 (1959); *United States v. Lanza*, 260 U.S. 377 (1922); *United States v. Louisville Edible Oil Products, Inc*., 926 F.2d 584, 587-88 (6th Cir.), *cert. denied*, 502 U.S. 859 (1991) (involves punishments imposed by U.S. EPA and by a local air pollution board). As in *Edible Oil*, the Court concludes that there exists insufficient proof in the record that EPA was either a party to or in control of the state litigation concerning Lake Carlton. Under the U.S. Supreme Court's "laboring oar" test, a nonparty to the state suit, such as EPA, would be bound by that prior judgment if it assumed control over litigation in which it had a direct financial or proprietary interest and then sought to redetermine previously resolved issues in a later proceeding. *See Montana v. U.S.*, 440 U.S. 147, 154-55 (1979); *see also Drummond v. U.S.*, 324 U.S. 316, 317-18 (1945). Even accepting Respondents' unsupported allegations that an EPA witness testified at the state proceedings, such minimal involvement does not establish that EPA was a "laboring oar" in the state litigation. Accordingly, Respondents' motion to dismiss as to the ground of double jeopardy is denied.

However, Respondents' concerns about the combination of state and federal actions as to the same subject matter also suggest the issue of "overfiling." The concept of "overfiling" involves the practice in which federal authorities duplicate enforcement actions of state authorities. *See Harmon Industries, Inc. v. Browner*, 191 F.3d 894, 898 (8th Cir. 1999). In *Harmon*, the Eight Circuit upheld the dismissal of a federal enforcement action of a Resource, Conservation and Recovery Act ("RCRA") matter on the ground that the statute expressly allowed state enforcement of that statute to preclude additional enforcement by the federal government. *See id*. at 902. The *Harmon* court relied on "in lieu of" language in RCRA in holding that the statute expressly limited EPA enforcement power when a state, to which EPA had already delegated enforcement authority, had already acted on the same enforcement matter as to the same defendant. *See id*. at 899-902.

In contrast, the present case concerns the CWA, in which Congress commands, "Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of the title." 33 U.S.C. § 1344(n). Section 1319 of Title 33 of the U.S.C., also referred to as Section 309 of the CWA, is a section that grants enforcement authority to the EPA and is the section under which EPA brings the present case to collect civil penalties for activities including unlawful discharges into navigable waters. As other courts have concluded, the plain language of the CWA does not limit the power of the EPA to pursue this action even though Gwinnett County has already sought enforcement in state courts concerning similar matters and even if there are ongoing proceedings in state courts or ongoing enforcement actions on behalf of

authorities for a state. *See Southern Ohio Coal Co. v. Office of Surface Mining*, 20 F.3d 1418, 1428 (6th Cir.), *cert. denied*, 513 U.S. 927 (1994) (reading the CWA to impose no limitations on the enforcement powers of federal authorities); *United States v. City of Youngstown*, 109 F. Supp. 2d 739, 740-41 (N.D. Ohio 2000) (rejecting the application of *Harmon* due to the plain language of the CWA). . The Court notes, if only for the record, that several courts, including the Ninth Circuit, have rejected the *Harmon* decision.[8]"Overfiling" as it were, is thus permitted under the Clean Water Act.

In the same context, Respondents raise the defense of "res judicata." It at first appears that Respondents waived this defense by not asserting it in the Answer to the Complaint. However, the EAB has construed the Rules of Practice so as to avoid strict rules of waiver as to defenses. *See In re Zaclon, Inc.*, 7 E.A.D. 482, 490-91 (EAB, Jan. 30, 1998); *In re Lazarus, Inc.*, 7 E.A.D. 318, 329-35 (EAB, Sept. 30, 1997). Under the Rules, waiver is not to be strictly enforced, and the ALJ should take into accounts factors such as undue delay, dilatory motive, bad faith, or prejudice. *See Lazarus, supra*. Prejudice can involve unfair surprise, lack of adequate notice, and inadequate opportunity to respond. *See id*. Discretion resides with the ALJ to decide whether to apply waiver. *See id*. In the case at hand, Grady Smith's Response to Motion for Default attached a copy of his Answer in the Georgia case involving Lake Carlton, thus suggesting it would be part of his defense. Grady Smith did not specifically list "res judicata" as a defense in his Answer. However, he did raise similar issues, calling to attention a defense premised upon the state's action on similar subject matter. *See* Answer at 2-3. Finally, Respondents specifically raised the "res judicata" defense in their "Response to EPA's Motion for an Accelerated Decision," at 3. There is no credible evidence of bad faith and the assertion of this defense will not cause undue delay. Furthermore, EPA is not presented with unfair surprise, inadequate notice, inadequate opportunity to respond, or the like. The case being in its early stages, there is no prejudice to EPA. The Court therefore concludes that Respondents did not waive their res judicata defense.

Under "res judicata," at issue is whether EPA's claim is precluded because of the prior state court judgment. Pursuant to the Full Faith and Credit Clause of the federal Constitution and its implementing statute, "It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984); *see* 28 U.S.C. § 1738. Accordingly, whether the current claim against Respondents are precluded by the prior state court judgment depends on Georgia law.

Under Georgia law,

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[8] *See United States v. Elias*, 269 F.3d 1003, 1009-13 (9th Cir. 2001) (RCRA); *United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, 1116-17 (W.D. Wis. 2001) (RCRA); *United States v. Power Eng'g Co.*, 125 F. Supp. 2d 1050, 1059-65 (D. Colo. 2000) (RCRA); *United States v. LTV Steel Co., Inc.*, 118 F. Supp. 2d 827, 832-35 (N.D. Ohio 2000) (Clean Air Act); *City of Youngstown, supra*, at 740-41 (CWA); *In re Bil-Dry Corp.*, RCRA (3008) Appeal No. 98-4, 2001 EPA App. LEXIS 1, at *29-40 (EAB, Jan. 18, 2001), 9 E.A.D. ___.

> A judgment of a court of competent jurisdiction shall be conclusive between the same parties and their privies as to all matters put in issue or which under the rules of law might have been put in issue in the cause wherein the judgment was rendered until the judgment is reversed or set aside.

O.C.G.A. 9-12-40. Additionally, "For a former judgment to be a bar to subsequent action, the merits of the case must have been adjudicated." O.C.G.A. 9-12-42. Under Georgia law, in order to prevail on a res judicata defense, a respondent must establish the following: (1) identity of the cause of action, (2) identity of the parties or their privies, and (3) previous adjudication on the merits by a court of competent jurisdiction. *See Waldroup v. Greene County Hosp. Authority*, 463 S.E.2d 5, 7 (Ga. 1995). Additionally, Georgia courts recognize a narrow exception to res judicata when its strict application would violate an overriding public policy or result in "manifest injustice." *Fierer v. Ashe*, 249 S.E.2d 270, 273 (Ga. App. 1978).

In an analogous case, *Butler v. Turner*, the Georgia Supreme Court sheds light on whether EPA and Gwinnett County are in privity with each other. 555 S.E.2d 427 (Ga. 2001). In order to establish privity, the interests of the party must fully represent the interests of the other privy and must be "fully congruent" with those interests. *Id*. at 430. In *Butler*, at issue was whether a mother was in privity with the Department of Human Resources ("DHR") in her action to recover child support monies from her child's father. *See id*. at 428. She brought actions for fraud and deceit on the ground that the father had misrepresented his income, thus reducing the amount of the child support payments under state law. *See id*. at 429. However, DHR had previously brought an action to recover child support payments from the father and received a consent judgment. *See id*. at 429-30. The Supreme Court of Georgia held that the mother was not a privy of the DHR in the DHR'S child support recovery action. *See id*. at 430. In doing so, it noted that the mother was not a plaintiff in the suit and had no control over the litigation and expressly was not represented by the DHR. *See id*. Although the DHR stood, to some degree, in the shoes of the mother who sought the support payments, it held that the DHR did not have a "complete identity of interest." *Id*. The Supreme Court of Georgia focused on the fact that the DHR's goal was not the same as the mother's. *See id*. The DHR's goal was to recoup monies expended by the State on behalf of the child and to attempt to secure continuing support for the child, whereas the mother sought monies due to the child which should have been ordered in the first place. *See id*. Thus, the "fully congruent" requirement of *Butler* sets a difficult standard to attain in order to establish privity under Georgia law.

Closer to the case at hand is the Georgia Court of Appeals case, *Environmental Waste Reductions, Inc. v. Legal Environmental Assistance Foundation, Inc.*, 455 S.E.2d 393 (Ga. App. 1995). In that case, a company known as Environmental Waste Reductions ("EWR") sought a state permit to build and operate a waste disposal facility. *See id*. at 395. EWR filed a case in the federal Northern District of Georgia seeking declaratory and injunctive relief, challenging the constitutionality of the need and planning provisions in a state environmental law on the ground that they unconstitutionally restricted the interstate movement of waste in violation of the Commerce Clause of the U.S. Constitution. *See id*. at 395-96. Those provisions required an

applicant seeking a state permit to build or operate a waste facility to verify that out-of-state jurisdictions are involved in and have a strategy for meeting state-wide planning requirements and waste reduction goals. *See id*. at 396. The federal court ruled in favor of EWR's challenge and enjoined the director of the Georgia Environmental Protection Division ("EPD") from enforcing those provisions against EWR. *See id*. However, in a state court action, the EPD granted such a permit to EWR but a citizens group joined the action and opposed the grant of that permit. *See id*. at 395. Subsequently, a Georgia Superior Court overturned approval of the permit. *See id*. At issue on appeal, EWR set forth several arguments for why the Superior Court erred in denying it the permit, one of which was that it applied the state law so as to interfere with the movement of solid waste in violation of the Commerce Clause. *See id*. The Georgia Court of Appeals declined to apply res judicata, holding that the issues in the federal and state cases were not identical. *See id*. at 396.

In accordance with Georgia law, at issue is whether EPA and Gwinnett County are "fully congruent." As noted by EPA, the CWA authorizes delegation of enforcement to State authorities rather than to municipalities. *See* 33 U.S.C. §§ 1319(a), 1344(g)-(i). Furthermore, there is no evidence in the record that EPA controlled the Gwinnett County litigation. Even accepting Respondents' bare allegations, of which there is no proof in the record, that employees of EPA testified at the state court action, this in itself falls far from establishing control. The Complaint filed in the state court action recognized that EPA had already assessed the penalty against Respondents and the goal of the state court action was to obtain an injunction so as to prevent future, unpermitted alterations to the lakebed. As in *Butler*, the goals of EPA and the county are not "fully congruent" as they each seek separate relief. The EPA seeks civil penalties but not an injunction against future actions whereas the county sought the injunction but not civil penalties, in contrast to the County. In addition, the County's petition for injunction seeks to enforce county zoning ordinances, among other laws. *See* "Motion for Default Judgment," Ex. P at 5-6. The res judicata holding in the *Harmon* case is distinguishable as it relies in part on Missouri law, which appears to have a much broader view of privity than Georgia. In addition, the EAB has rejected *Harmon* as binding precedent for cases not within the Eight Circuit. *See In re Bil-Dry*, *supra*. Also distinguishable is the Ninth Circuit case, *United States v. IIT Rayonier, Inc*. as it does not apply state law. 627 F.2d 996 (9th Cir. 1980). Furthermore, several district court cases have distinguished or even rejected the res judicata holdings of *Harmon* and/or *Rayonier*. *See Murphy Oil*, *supra*, at 1088-92; *Power Eng'g*, *supra*, at 1065-67; *LTV Steel*, *supra*, at 835-37. Based on the aforementioned analysis, the Court finds that EPA and Gwinnett County interests are not in privity with each other and are thus not "fully congruent". Therefore, Respondent's Motion to Dismiss on res judicata grounds is denied.

Respondents also seek dismissal on the ground that their activities involving discharges of dredged or fill material in the lakebed of the former Lake Carlton were exempt from CWA permit requirements. Grady Smith admits he did not have a Corps of Engineers permit for the discharge of dredge or fill material into the lakebed of the former Lake Carlton. *See* Answer at 5, ¶ 8. Rather, Respondents rely on the Section 404(f)(1)(B) and (C) exemptions as to discharges for the purpose of maintenance and/or reconstruction of certain structures. *See* "Motion to Dismiss . . . ," at 5. Those exemptions remove the permit requirement for discharges into navigable waters

when activities are conducted for the purpose of maintenance or emergency reconstruction of recently damaged parts of currently serviceable structures such as dikes, dams, causeways, transportation structures, and the like. *See* 33 U.S.C. § 1344(f)(1)(B). They also remove the permit requirement as to activities conducted "for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches." *Id*. § 1344(f)(1)(C). However, the recapture provisions of the exemption requires a permit for the following discharges:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

Id. § 1344(f)(2).

The facts to date concerning the nature of Respondents' activities at Lake Carlton include the following: It appears that a dam in Lake Carlton was breached as recent as June 1995. Grady Smith's answers to EPA's interrogatories state that the activities conducted in the lakebed of the former Lake Carlton were for maintenance of a dam. *See* "Complainant's Rebuttal Prehearing Exchange," Ex. 35. He also claims that he did not build a road in the lakebed. *See id*. It appears that Respondents might also have been constructing a sewer line in the lakebed, but EPA asserts that much of Respondents' activities did not appear to be connected with construction of the sewer line. *See* Motion for Default Judgment, Ex. G. Other evidence indicates that the dam, which was allegedly being reconstructed by Respondents, broke approximately three (3) years prior to the alleged reconstruction activities. *See id*. In contradiction to Respondents' assertions, in 1997 a witness saw that two roads had been built in the lakebed or considerably rebuilt with added material. *See id*. Although it appears some activities involved landscaping of the property on or in the vicinity of Grady Smith's residence, Grady Smith's answers to interrogatories state that as to that particular material, there were no discharges into the lakebed of the former Lake Carlton. *See id.* Respondents also cite to an instance in which they submitted a plan for reconstruction or constructions of dams to EPA. *See* Motion for Default Judgment, Ex. N. Although Respondents' pre-hearing Motion for Dismissal claims an exemption for farm or fishing ponds, the record does not show that Respondents ever conducted activities associated with building such ponds. Rather, the evidence only shows that Respondents had *proposed* building such ponds. *See id*. Based on the current record, Respondent has not demonstrated that it meets the Section 404(f) exceptions. Respondents' Motion to Dismiss is therefore denied as to this ground.

Alternatively, Respondents move for bifurcated hearings, the first of which to address jurisdictional issues, and that all other federal actions be stayed until jurisdiction is resolved. *See* "Motion to Dismiss for Lack of Jurisdiction, For Summary Judgment, and Judgment on the Pleadings, Alternatively for a Bifurcated Hearing on the Matter of Jurisdiction, Or, for a Stay of Federal Jurisdiction Pending Outcome of State Proceedings." The Rules of Practice provide that

the ALJ may, "[F]or good cause, order any proceedings severed with respect to any or all parties or issues." 40 C.F.R. § 22.12(b) (2000). Although the procedural rules and practices of the federal district courts are not binding on the Court, those rules and practices are considered by analogy. In the district courts, generally the purpose of severance of trials is to further the parties' convenience, to further judicial economy, to avoid delay and prejudice, and to serve the ends of justice. *See* FED. RULE CIV. PRO. 42(b); *Alexander v. Fulton County, Ga.*, 207 F.3d 1303, 1324-26 (11th Cir. 2000); 9 WRIGHT & MILLER, FED. PRAC. & PROC. CIV. 2d § 2388. Broad discretion is vested in the trial judge to weigh such factors. *See Alexander*, *supra* (upholding trial judges' discretion to deny separate trials as to eighteen (18) individual plaintiffs in the same case despite risks of prejudice to the defendant).

Given the Court's rulings on the jurisdictional questions raised by Respondents, the request for bifurcated hearings is essentially moot. Any remaining issues of jurisdiction in the case at hand can be addressed at a hearing concerning liability and/or appropriate penalties. Cases cited by Respondents do not persuade a contrary result. Among others, Respondents particularly rely on a former Fifth Circuit case in which that court remanded for the purpose of having the trial court conduct a comprehensive evaluation as to whether to grant a restoration permit. *See Weiszmann v. Dist. Engineer, U.S. Army Corps of Engineers*, 526 F.2d 1302, 1304 (5th Cir. 1976), *remanded*, 545 F. Supp. 721 (S.D. Fla. 1982). However, even in that case it appears that the Fifth Circuit did not order bifurcation for the remand, and it also appears that the trial court did not bifurcate jurisdiction from other issues. *See id.* Although there may be instances in which trial court judges have bifurcated jurisdictional issues with other issues, it is clear that a determination of bifurcation is made on a case-by-case basis according to the particular facts and circumstances of each case. *See e.g.*, *Alexander*, *supra*. Furthermore, as noted by a federal court of appeals, "[A] safe practice would be never to separate the subject matter jurisdiction issue for separate trial in cases where the factual merits of the case must be considered in deciding the separated issue." *Marks Food Corp. v. Barbara Ann Baking Co.*, 274 F.2d 934, 936 (9th Cir. 1959); *see also* 9 WRIGHT & MILLER, FED. PRAC. & PROC. CIV. 2d § 2389. Respondents' Motion to Bifurcate is therefore denied.

Summary

The RJO's Order finding liability as to Respondents C.W. Smith and Smith's Lake Corporation is upheld. Remaining for hearing is the issue of liability as to Grady Smith, and the amount of the penalty to be assessed against the appropriate Respondents. Reviewing the record thus far, the Court concludes that there exists a genuine dispute of material facts as to whether there were discharges into "waters of the United States" within the meaning of the CWA. Additional factual evidence must therefore be adduced at hearing before the Court would be in a position to determine further liability and penalty issues in this case.

Accordingly, EPA's Motion for Accelerated Decision and Respondent's Motions to Dismiss are **DENIED,** as neither has demonstrated, at this stage of the proceedings, a right to relief.

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Stephen J. McGuire
United States Administrative Law Judge