UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

JUN 29 2012

HAND DELIVERED

Ms. LaDawn Whitehead
Regional Hearing Clerk
United States
Environmental Protection Agency-Region V
77 West Jackson Blvd. - 19th Fl.
Chicago, IL 60604-3590

REPLY TO THE ATTENTION OF:
C-14J

Re: U.S. EPA v. Joseph L. Bollig and Sons, Inc.
Docket No. CWA-05-2011-0008 - Complainant's Motion for Accelerated Decision and Memorandum in Support

Dear Ms. Whitehead:

Pursuant to the May 30, 2012 order of the Court, enclosed please find an original and one copy of Complainant's Motion for Accelerated Decision and Memorandum in Support in the above referenced case. I have also filed copies of this Amended Complaint with the Administrative Law Judge and Respondent by certified mail, return receipt requested.

Sincerely yours,

Thomas P. Turner
Associate Regional Counsel

Enclosure

cc: Hon. M. Lisa Buschmann, ALJ (mail code: 1900L)
Greg Carlson, Water Division (WW-16J)
Kevin C Chow, Assoc. Regional Counsel (C-14J)

Joseph L. Bollig and Sons, Inc.
c/o: William T. Curran, Esq.
Curran, Hollenbeck & Orton, SC
111 Oak Street, PO Box 140
Mauston, WI 53948-0140

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

	)	**Motion for Accelerated**
	)	**Decision in**
In The Matter Of:	)	**Proceeding to Assess Amended**
	)	**Class II Administrative**
	)	**Penalty Under Section 309(g)**
Joseph L. Bollig and Sons, Inc.,	)	**of the Clean Water Act,**
New Lisbon, Wisconsin,	)	**33 U.S.C. §1319(g).**
	)	
	)	**DOCKET No. CWA-05-2011-0008**
RESPONDENT.	)	

MOTION FOR ACCELERATED DECISION

Pursuant to 40 C.F.R. § 22.16 and § 22.20 of the Consolidated Rules of Practice, the United States Environmental Protection Agency (EPA or Complainant) moves this Court for an Accelerated Decision in this matter in its favor with respect to all issues of Respondent's liability and penalty. In support thereof, Complainant states as follows:

1. On August 26, 2011, Complainant filed a one (1) count complaint against Respondent alleging violations of Sections 301 and 404 of the Clean Water Act (CWA), 33 U.S.C. §§ 1311 and 1344. The complaint included a proposed penalty for the violations.

2. Respondent is a corporation that is organized under the laws of Wisconsin.

3. On June 7, 2012, pursuant to the May 30, 2012 Order of this Court, Complainant filed an Amended Complaint alleging the same violations as described in paragraph 1 above and including the same proposed penalty amount.

4. Specifically, the Amended Complaint alleges that Respondent violated Sections 301 and 404 of the CWA in the following manner: Between approximately February 2008 and March 2009, Respondent worked on behalf of the Mauston-New Lisbon Union Airport (Airport)

of Mauston, Wisconsin. Respondent performed or directed the discharge of dredged and fill material and organic debris from excavators and bulldozers into approximately seven (7) acres of forested and scrub/shrub wetland occupying a portion of Airport property. Complainant alleges as well that the Airport wetland property, constituting the Site for purposes of this matter, immediately abuts a relatively permanent water (RPW), designated unnamed tributary 1 (unt1). Unt1 flows into the Lemonweir River. The Lemonweir River is historically a Traditional Navigable Water and a tributary to the Wisconsin River, an interstate water body. Prior to Respondent's alleged filling activities, unt1 exhibited seasonal characteristics of water flow during winter thaw, spring and fall rain or thunder storms. At no time (during the 2008-2009 filling activities), did Respondent have a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, to discharge dredge material and organic debris into the above referenced forested and scrub/shrub wetland area that composes the Site. The dredge materials and organic debris discharged into the unnamed tributary on the Site property constitute "pollutants" as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6). Excavators and bulldozers are discernible, confined and discrete conveyances, specifically rolling stock, and constitute "point sources" as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14). The addition of dredge material and organic debris from excavators and bulldozers, or earth moving equipment, into wetlands and/or waters of the United States constitutes a "discharge of a pollutant" as defined by Section 502(12) of the CWA, 33 U.S.C. § 1362(12). Therefore, Respondent is a person who discharged pollutants from a point source into waters of the United States, without a permit, in violation of Section 404 of the CWA, 33 U.S.C. § 1344.

5. Under 40 C.F.R. § 22.20(a), "[t]he 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 [s]he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law."

6. Under 40 C.F.R. § 22.15(c), a party is only entitled to a hearing where there are genuine "issues raised by the complaint and answer." Respondent's Answer, Initial Prehearing Exchange, and Supplemental Prehearing Exchange have provided no such issues of fact.

7. As demonstrated in the attached Memorandum in Support of Motion for Accelerated Decision, no genuine issue of material fact exists as to Respondent's liability for the alleged violation and Complainant is entitled to judgment regarding liability as a matter of law. Indeed, Respondent has admitted to all of the factual elements of the alleged violation.

8. The proposed penalty for Respondent's violations was calculated pursuant to statutory requirements and Agency guidance. The proposed penalty is fair and reasonable and there is no dispute of material fact as to how it was calculated.

9. Pursuant to this Court's February 29, 2012, Prehearing Order (at Section VI, pp. 5-6, "Procedures for Motions and Extensions of Time"), on June 28, 2012, Complainant contacted Respondent and sought to inquire as to whether Respondent would object to this Motion. Respondent has stated that it does not agree with this Motion, and reserves the right to review and reply to this Motion.

10. Therefore, for the reasons set forth above and in the attached Memorandum in Support of Motion for Accelerated Decision, Complainant moves for an accelerated decision in its favor as to all issues of Respondent's liability and penalty in this matter.

Respectfully submitted,

Thomas P. Turner
Kevin C. Chow
Associate Regional Counsels

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

	)	**Memorandum In Support Of**
	)	**Motion for Accelerated**
	)	**Decision in**
In The Matter Of:	)	**Proceeding to Assess Amended**
	)	**Class II Administrative**
	)	**Penalty Under**
	)	**Section 309(g) of the Clean**
	)	**Water Act, 33 U.S.C. §1319(g).**
Joseph L. Bollig and Sons, Inc.,	)	
New Lisbon, Wisconsin,	)	
	)	**DOCKET No. CWA-05-2011-0008**
RESPONDENT.	)	

MEMORANDUM IN SUPPORT OF MOTION FOR ACCELERATED DECISION

Complainant hereby moves for the entry of judgment in its favor as to the issues of Respondent's liability and penalty in this matter.

I. SUMMARY OF ARGUMENT

As set forth in the Complaint, the Respondent violated Sections 301 and 404 of the Clean Water Act (CWA), 33 U.S.C. §§ 1311 and 1344. Specifically, Complainant alleges that, between February 2008 and March 2009, Respondent performed or directed the discharge of dredged and fill material and organic debris from excavators and bulldozers into approximately seven (7) acres of forested and scrub/shrub wetland occupying a portion of the Mauston-New Lisbon Union Airport (Airport) property without a required permit under Section 404 of the CWA, 33 U.S.C. § 1344. Complainant alleges as well that the Airport wetland property (Site) immediately abuts a relatively permanent water (RPW), designated unnamed tributary 1 (unt1). Unt1 flows into the Lemonweir River. The Lemonweir River is a Traditional Navigable Water (TNW) and a tributary to the Wisconsin River, an interstate water body. Prior to Respondent's alleged filling activities, unt1 exhibited documented seasonal characteristics of water flow during

winter, spring and fall seasons. At no time (during the 2008-2009 filling activities), did Respondent have a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, to discharge dredge material and organic debris into the above referenced forested and scrub/shrub wetland area that composes the Site.[1] The dredge material and organic debris discharged into unt1 on the Site property constitute "pollutants" as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6). Excavators and bulldozers are discernible, confined and discrete conveyances, specifically rolling stock, and constitute "point sources" as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14). The addition of dredge material and organic debris from excavators and bulldozers, or earth moving equipment, into wetlands and/or waters of the United States constitutes a "discharge of a pollutant" as defined by Section 502(12) of the CWA, 33 U.S.C. § 1362(12). Therefore, Respondent is a person who discharged pollutants from a point source into waters of the United States, without a permit, in violation of Section 404 of the CWA, 33 U.S.C. § 1344.

Respondent, in its Answer (and subsequent Prehearing Exchange submissions), admitted most of the violations set forth in the Complaint, including the existence of wetlands at the Site, the filling actions that it performed during 2008 and 2009 during its work for the Airport at the Site, and that the Respondent discharged a pollutant from defined point sources. Respondent has

---

1 Respondent has repeatedly asserted that its employer, the Airport, ultimately received a CWA Section 404 permit for its filling activities at the Site. See, Respondent's September 28, 2011 Answer, at p. 4; Respondent's April 27, 2012 Prehearing Exchange, at p. 2; and Respondent's June 13, 2012 Supplemental Prehearing Exchange, at pp. 4-5. In fact, the record clearly indicates that the Airport received a March 11, 2010 Notice and After-the-Fact letter of permission from the U.S. Army Corps of Engineers (ACE) under Section 404 of the CWA, 33 U.S.C. § 1344. This was subsequent to Respondent's filling activities of 2008-2009, and after Respondent had also received a May 28, 2009 copy of the Wisconsin Department of Natural Resources' (WDNR) Notice of Noncompliance-Wisconsin Wetland Law. Both documents indicated that the initial filling actions taken at the Site were in violation of the law. See, Complainant's Prehearing Exchange at Complainant's Exhibits (CEs) 3 and 11. Thus, the issuance of an After-the-Fact letter of permission is irrelevant for purposes of determining Respondent's liability for its past violations.

also admitted the existence of a physical connection, unt1, between the Site wetlands and the Lemonweir River, and that the Lemonweir River is a TNW.

Respondent has challenged the legal jurisdiction of Complainant over the Site wetlands, describing it as an isolated part of the Airport. (See, Respondent's Answer at p. 5; Respondent's Supplemental Prehearing Exchange at p. 3.) However, Respondent previously acknowledged the CWA Section 404 jurisdictional authority (over the same Site wetlands) of both the ACE and the WDNR, as demonstrated by the uncontroverted and unchallenged evidentiary record submitted by Complainant in its March 30, 2012 Prehearing Exchange. (See, fn.1 above, and Complainant's Prehearing Exchange at CEs 1, 3, 11, 18, 21 and 28.) Since Respondent has accepted Complainant's Prehearing Exchange documentary submissions, without reservation, Respondent has essentially undermined its own challenge to EPA's jurisdiction. (See, Respondent's Initial Prehearing Exchange, pp. 4-5.) Moreover, Respondent's essential defense against Complainant's federal jurisdictional authority over the Site wetlands is premised on a false representation of facts. In its June 13, 2012 Supplemental Prehearing Exchange, Respondent asserts that "[t]he [EPA] lacks jurisdiction in this matter because the Airport site is a non-federal wetland under either the Scalia or the Kennedy test in that the historic man-made ditch running east from Sumiec Road on the west to the railroad tracks on the east no longer exists." Respondent's Supplemental Prehearing Exchange, p. 3. This is a patently incorrect statement. It is contradicted by both Respondent's own Answer indicating that Respondent acknowledges that the Site owner (Airport) needed to secure a CWA 404 permit for the filling work to be done at the Site (pp. 5-6, No. 18); and, by Complainant's Prehearing Exchange Exhibits that clearly reveal: the delineation of the Site wetlands was performed by the Airport's

own contractor (CEs 19 and 22); the EPA Watershed map of the Site and unt1(CE 20); the Wisconsin Wetland Inventory regarding the Site and unt1 (CE 21); and the EPA and ACE respective jurisdictional wetland determinations that the Site falls under federal CWA Section 404 (CEs 1 and 13).

If this Court agrees that Respondent has refuted its own asserted defense against the existence of unt1 as a connecting seasonal waterway between the Site wetlands and the Lemonweir River, then there are no factual matters in dispute as to the question of Respondent's liability for violation of Sections 301 and 404 of the CWA.

Therefore, an accelerated decision finding the Respondent liable is warranted. Further, the proposed penalty for these violations was calculated according to statutory requirements and applicable policy. The proposed penalty is fair and reasonable and judgment for Complainant should be entered.

II. QUESTIONS PRESENTED

1. Whether any genuine issue of material fact exists as to the Respondent's liability for unpermitted discharge of pollutants from a point source into waters of the United States.

2. Whether Complainant's calculation of the proposed penalty was fair and proper pursuant to the CWA statutory requirements and applicable guidance and policy.

III. SUMMARY OF FACTS

1. At all times relevant to this matter, Respondent was a corporation organized under the laws of Wisconsin with a business address of N5990 State Road 58, New Lisbon, Wisconsin. Respondent does not directly address this asserted fact. Thus, pursuant to 40 C.F.R. § 22.15(d), it should be deemed admitted. Complainant also directs this Court's attention to supporting

documentation at CEs 26 and 42, the excerpt from Respondent's business website, and a 2012 Dun and Bradstreet Financial Report on Respondent's business.

2. At all times relevant to this matter, Respondent was a "person" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5). Respondent does not directly address this assertion as fact, but rather calls it a legal conclusion. The Court may take judicial notice of the definition of "person" within the above referenced section of the CWA, as encompassing corporations. See Lilly, "An Introduction to the Law of Evidence," Section 7, p. 15.

3. At all times relevant to this matter, Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibited the discharge of pollutants into navigable waters except in compliance with, inter alia, a permit issued pursuant to CWA Section 404, 33 U.S.C. § 1344. Respondent does not directly address this assertion as fact, but rather calls it a legal conclusion. The Court may take judicial notice of the terms of the statute within the above referenced section of the CWA, as defining the requirements for a CWA Section 404 permit. See Lilly, "An Introduction to the Law of Evidence," Section 7, p. 15.

4. At all times relevant to this matter, Section 404 of the CWA authorized the Secretary of the Army, acting through the Chief of Engineers, ACE, to issue permits for the discharge of dredged or fill material into navigable waters at specified disposal sites. 33 U.S.C. § 1344. Respondent does not directly address this assertion as fact, but rather calls it a legal conclusion. The Court may take judicial notice of the role of the ACE in the issuance of Section 404 permits in the above referenced section of the CWA. See Lilly, "An Introduction to the Law of Evidence," Section 7, p. 15.

5. At all times relevant to this matter, Section 502(5) of the CWA defined "person" as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body," 33 U.S.C. § 1362(5). Respondent does not directly address this assertion as fact, but rather calls it a legal conclusion. The Court may take judicial notice, as previously described in paragraph 2. See Lilly, "An Introduction to the Law of Evidence," Section 7, p. 15.

6. At all times relevant to this matter, Section 502(12) of the CWA defined "discharge of pollutants," as, inter alia, "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12). Respondent does not directly address this assertion as fact, but rather calls it a legal conclusion. The Court may take judicial notice of the CWA definition of a discharge of pollutants. See Lilly, "An Introduction to the Law of Evidence," Section 7, p. 15.

7. At all times relevant to this matter, Section 502(6) of the CWA defined "pollutant," as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water," 33 U.S.C. § 1362(6). This statutory definition would therefore include organic debris as a form of "biological materials" and earthen materials as a form of "sand" and "cellar dirt." Respondent does not directly address this assertion as fact, but rather calls it a legal conclusion. The Court may take judicial notice of the CWA definition of pollutant. See Lilly, "An Introduction to the Law of Evidence," Section 7, p. 15.

8. At all times relevant to this matter, Section 502(14) of the CWA defined "point

source," as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation or vessel or other floating craft, from which pollutants are or may be discharged," 33 U.S.C. § 1362(14). Respondent does not directly address this assertion as fact, but rather calls it a legal conclusion. The Court may take judicial notice of the CWA definition of point source. See Lilly, "An Introduction to the Law of Evidence," Section 7, p. 15.

9. At all times relevant to this matter, Section 502(7) of the CWA defined "navigable waters" as "the waters of the United States, including the territorial seas," 33 U.S.C. § 1362(7). Respondent does not directly address this assertion as fact, but rather calls it a legal conclusion. The Court may take judicial notice of the CWA definition of navigable waters. See Lilly, "An Introduction to the Law of Evidence," Section 7, p. 15.

10. At all times relevant to this matter, the regulation at 40 C.F.R. § 230.3(s) defined the term "waters of the United States" to include "all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce,...intrastate lakes, rivers, streams (including intermittent streams) rivers, streams,...wetlands...the use of which could affect interstate or foreign commerce,...tributaries of [such other] waters,... [and] wetlands adjacent to [all such] waters." Respondent does not directly address this assertion as fact, but rather calls it a legal conclusion. The Court may take judicial notice of the regulatory definition of waters of the United States. See Lilly, "An Introduction to the Law of Evidence," Section 7, p. 15.

11. At all times relevant to this matter, the regulation at 40 C.F.R. § 230.3(t) defined "Wetlands" as "those areas that are inundated or saturated by surface or groundwater 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." Respondent does not directly address this assertion as fact, but rather calls it a legal conclusion. The Court may take judicial notice of the regulatory definition of waters of the United States. See Lilly, "An Introduction to the Law of Evidence," Section 7, p. 15.

12. At all times relevant to this matter, the Mauston-New Lisbon Union Airport was located at W7493 Ferdon Road, Mauston, Wisconsin (Juneau County). This assertion is admitted by Respondent. Thus, it should be deemed admitted by this Court. Complainant also directs this Court's attention to CEs 1-5, indicating repeated communications with the Airport at the above-stated location.

13. At all times relevant to this matter, the Airport was an airfield, created by public ordinance (City of Mauston, WI, Mauston-New Lisbon Union Airport Ordinance, Chapter 10, September 27, 2005) and operated as a joint public venture by a 'Union Airport Commission', located in the southeast quarter, Section 28, Township 16 North, Range 3 East, Town of Lisbon, Juneau County, Wisconsin. This assertion is not directly denied by Respondent. Thus, pursuant to 40 C.F.R. § 22.15(d), it should be deemed admitted.

14. At all times relevant to this matter, the Airport Site area of disturbance was an approximately seven (7) acre portion of forested and scrub/shrub wetland, to the immediate southwest of the principal airstrip of the Airport. Respondent denied that the "area of disturbance was about 7 acres" and alleged that such "area of disturbance" was "much smaller." (See, Respondent's September 28, 2011 Answer, at Section II, No. 5, and, in contrast, Respondent's April 27, 2012 Initial Prehearing Exchange at Section IIA, No. 1, p. 2, and IIB., A,

p. 4.) It is apparent that Respondent's Answer construes "area of disturbance" to mean location of actual damage, whereas the Complaint uses "area of disturbance" to mean the overall Airport Site wetland area within which damage has occurred. As Respondent's April 27, 2012 Initial Prehearing Exchange at Section IIA, No. 1, p. 2, and IIB., A, p. 4, refers to a "7 acre parcel", and as EPA considers the size of the Site (as opposed to total size of actual damage) to be approximately 7 acres, it appears the parties are in consensus on this assertion of fact. Respondent's Answer does not directly deny that the Site is approximately 7 acres in size. Thus, pursuant to 40 C.F.R. § 22.15(d), it should be deemed admitted.

15. At all times relevant to this matter, the seven acre portion of forested and scrub/shrub wetland immediately abutted a relatively permanent water ("RPW"), namely, unt1. (See, Complainant's Amended Administrative Complaint at Attachments A and B.) Respondent denied that the area "contained" any unnamed tributary. (See Respondent's September 28, 2011 Answer, at Section II, No. 6, p. 4). EPA alleges that the Site abuts unt1, and does not allege that the Site "contains" unt1. Respondent has not directly denied this factual allegation. Thus, pursuant to 40 C.F.R. § 22.15(d), the allegation that the Site abuts unt1 should be deemed admitted.

16. At all times relevant to this matter, unt1 was a relatively permanent water which flows into the Lemonweir River, a TNW. Respondent alleges that the area is "an isolated area which is not connected to the Lemonweir River or any other navigable water." (See Respondent's September 28, 2011 Answer, at Section II, No. 7, p. 4). EPA construes Respondent's allegation as a denial of EPA's allegation that unt1 is relatively permanent water which flows into the Lemonweir River. Respondent's assertion that the Site is "isolated" from

the Lemonweir River is erroneous, and is undermined by Respondent's own prehearing exchange statements. In Respondent's April 27, 2012 Initial Prehearing Exchange, at Section II.A, Nos. 5 and 7, pp. 3-4, and in its June 13, 2012 Supplemental Prehearing Exchange, at Section II.B, pp. 2-3, and Section II.D, No. 11, p. 3, Respondent acknowledges the existence of a "ditch" or connection between the Airport Site wetland and the Lemonweir River, that Complainant is identifying as unt1. Respondent merely attempts to assert that such "ditch" or connection is or historically has been subject to variation in water flow or other characteristics. The extensive photographic and field record of Complainant's Site Investigation Reports, and ACE and WDNR studies support the existence of substantial water flow and therefore the existence and function of unt1 as a RPW, as asserted by Complainant. (See, CEs 1, 3-5, 13, 20-21). In the face of EPA's documentation, Respondent cannot show there is a genuine issue of material fact with respect to the existence of a hydraulic connection between the Site and the Lemonweir River through unt1 on a relatively permanent basis. (See, CEs 1, 3-5, 13, 20-21).

17. At all times relevant to this matter, the Lemonweir River was a TNW and a tributary to the Wisconsin River, an interstate water body. Respondent admitted this fact. (See Respondent's September 28, 2011 Answer, at Section II, No. 4, p. 4) Thus, it should be deemed admitted by this Court. Complainant's assertion is also amply supported by both the evidentiary record and applicable federal law. (See, CEs 21, 29-30, 32-40; 33 C.F.R. at 328.3 and Part 329; 40 C.F.R. 230.3(s)(1), and U.S. v. Rapanos, 547 U.S. 715, at 739-743 (2006)).

18. At all times relevant to this matter, and prior to Respondent's filling activities, unt1 exhibited seasonal characteristics of water flow during the winter, spring and fall seasons. Respondent's Answer does not specifically deny this allegation. As noted above, in

paragraph 16, Respondent's prehearing exchange statements confirm or acknowledge seasonal characteristics of unt1. (See, Respondent's April 27, 2012 Initial Prehearing Exchange, at Section II.A, Nos. 5 and 7, pp. 3-4, and June 13, 2012 Supplemental Prehearing Exchange, at Section II.B, pp. 2-3, and Section II.D, No. 11, p. 3.) Respondent does not deny EPA's factual assertion of seasonal characteristics for unt1, instead denying that "any part of the area involved was a navigable water." (See, Respondent's September 28, 2011 Answer, Section II, No. 7, p.4.). Whether a water body is a "navigable water" is a legal conclusion and jurisdictional issue determined after consideration of facts. Thus, pursuant to 40 C.F.R. § 22.15(d), Complainant's factual assertion that unt1 exhibits seasonal characteristics should be deemed admitted. Complainant's Site Inspection Reports further support this assertion. (See, CEs 4-5).

19. At all times relevant to this matter, unt1 was a water of the United States, as defined at 33 C.F.R. § 328.3(a) and 40 C.F.R. § 232.2 and thus a "navigable water" as defined at Section 502(7) of the CWA, 33 U.S.C. § 1362(7). Respondent has denied "that any part of the area involved was a navigable water." (See, Respondent's September 28, 2011 Answer, Section II, No. 7, p.4.) However, Respondent, as noted in paragraphs 16 and 18 above, acknowledges the existence of a "ditch" or connection, designated by EPA as unt1, between the Site wetland and the Lemonweir River, with seasonal characteristics. The factual bases for EPA's determination that the Site wetlands and unt1 are jurisdictional waters of the United States are set forth in greater detail in CEs 1, 4, 5, 13, 19, and 22. As there are no genuine issues of material fact with regard to connectivity and seasonality, Complainant's assertion should be deemed admitted and the Court should find that unt1 is a "navigable water".

20. At all times relevant to this matter, specifically between February 2008 and

March 2009, Respondent performed or directed the discharge of dredged and fill material and organic debris from excavators and bulldozers at the forested and scrub/shrub Airport wetland area comprising the Site, as described above in paragraph 14. (An outline of the discharge areas is included in Complainant's June 7, 2012 Amended Complaint at Attachment A). Respondent initially alleged that it "did not discharge or place any fill material onto the airport grounds" (see, Respondent's September 28, 2011 Answer, at Section II, No. 8, pp. 4-5), but then later in the same Answer acknowledged that it did perform (and later attempted restoration of) "land clearing" at the Site, in the above mentioned locale, during that time period. (See Respondent's September 28, 2011 Answer, at Section II, Nos. 16-20, pp.5-6.) And, Respondent's prehearing exchange even described the process of "logging" and burying "stumps and brush on the premises." (See Respondent's April 27, 2012 Initial Prehearing Exchange, at Section IIA, No. 1, p. 2, and Respondent's June 13, 2012 Supplemental Prehearing Exchange, at Section A, pp. 1-2, and Section D, No. 17, p. 5.) Further, the evidentiary record fully supports Complainant's assertion. (See CEs 3, 6-7, 10-11, 14, and 18). There is no genuine issue of material fact with respect to Respondent's activities as alleged by EPA. Pursuant to 40 C.F.R. § 22.15(d), Complainant's assertion should be deemed admitted.

21. At all times relevant to this matter, Respondent did not have a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, to discharge dredge material and organic debris into the forested and scrub/shrub wetland area referenced above in paragraphs 14 and 20. Respondent initially denied this assertion, and further alleged that the actions taken by Respondent were "within the purview of a permit issued by the ACE and the WDNR." (See Respondent's September 28, 2011 Answer, at Section II, No. 8, pp. 4-5.) However, in later

statements in the same Answer and in its prehearing exchange, Respondent admitted to performing (and later attempting restoration of) "land clearing," including the burying of stumps. (Id., at Section II, Nos. 17 and 20, pp. 5-6, and Respondent's April 27, 2012 Initial Prehearing Exchange, at Section IIA, No. 1, p. 3, and Section IIB, F, p. 5, and Respondent's June 13, 2012 Supplemental Prehearing Exchange, at Section A, pp. 1-2, and Section D, No. 17, p. 5) Further, the evidentiary record fully supports Complainant's assertion. (See CEs 3, 6-7, 10-11, 14, and 18). Finally, the permit referenced by Respondent was an After-the-Fact letter of permission, i.e., issued on March 10, 2011 to the Airport, well after Respondent's filling activities, for restoration and injunctive relief purposes. (CE 11) Thus, Respondent has not denied that it did not have a permit at the time it performed its activities, and there is no genuine issue of material fact that it did not have a permit at such time. Pursuant to 40 C.F.R. § 22.15(d), Complainant's assertion should be deemed admitted.

22. At all times relevant to this matter, the dredge material and organic debris discharged into the unnamed tributary on the Property constituted "pollutants" as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6). Respondent has denied this assertion. (See Respondent's September 28, 2011 Answer, at Section II, No. 8, pp. 4-5.) However, as previously noted, Respondent later acknowledges that it performed "land clearing" on the Site wetland at this time, and that the "land clearing" consisted to some degree of placing stump and shrub materials into the wetland. (Id., at Section II, Nos. 17 and 20, pp. 5-6, and Respondent's April 27, 2012 Initial Prehearing Exchange, at Section IIA, No. 1, p. 3, and Section IIB, F, p. 5, and Respondent's June 13, 2012 Supplemental Prehearing Exchange, at Section A, pp. 1-2, and Section D, No. 17, p. 5). And, Complainant's evidentiary submissions of Respondent's billing

history and Complainant's, ACE and WDNR reports of investigation of the Site wetland fully support this assertion. (See, CEs 1-5.) Thus, pursuant to 40 C.F.R. § 22.15(d), Complainant's assertion should be deemed admitted. Finally, dredge materials and organic debris are well within the definition of "pollutants" at Section 502(6) of the CWA, 33 U.S.C. § 1362(6), which includes dredged spoil, solid waste, biological materials, rock, sand, cellar dirt, and other materials. The Court may take judicial notice of the definition of "pollutant" and find there is no genuine issue of material fact in finding that the materials at issue here fall within the definition.

23. At all times relevant to this matter, excavators and bulldozers are discernible, confined and discrete conveyances, specifically rolling stock, and constituted "point sources" as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14). Respondent denied this allegation, alleging it is a bare legal conclusion not stating any fact. (See Respondent's September 28, 2011 Answer, at Section II, No. 9, p. 5.) Respondent's Answer does not include any specific denial of the use of excavators and bulldozers. Thus, pursuant to 40 C.F.R. § 22.15(d), Complainant's factual assertion that excavators and bulldozers were used should be deemed admitted. With respect to Complainant's legal conclusion that excavators and bulldozers are "point sources", such equipment is well within the definition of "point sources" at Section 502(14) of the CWA, 33 U.S.C. § 1362(14), which means any "discernable, confined, and discrete conveyance" including but not limited to rolling stock, from which pollutants may be discharged. The Court may take judicial notice of the definition of "point sources" and find there is no genuine issue of material fact in finding that the equipment at issue here falls within the definition.

24. At all times relevant to this matter, the addition of dredge material and organic

debris from excavators and bulldozers, or earth moving equipment, into wetlands and/or waters of the United States constituted a "discharge of a pollutant" as defined by Section 502(12) of the CWA, 33 U.S.C. § 1362(12). Again, Respondent denied this allegation, alleging it is a bare legal conclusion not stating any fact. (See Respondent's September 28, 2011 Answer, at Section II, No. 9, p. 5.) As already noted, there are no genuine issues of material fact with respect to Respondent's use of bulldozers, excavators, or earth moving equipment (i.e., "point sources") to add or otherwise place dredge materials and organic debris (i.e., "pollutants") into wetlands abutting unt1 which flows under seasonal characteristics to the Lemonweir River and ultimately the Wisconsin River (i.e., "waters of the United States" or "navigable waters"). These elements form the definition of "discharge of pollutants" at Section 502(12) of the CWA, 33 U.S.C. § 1362(12). The Court may take judicial notice of the definition of "discharge of pollutants" and find there is no genuine issue of material fact in finding that Respondent discharged pollutants.

25. At all times relevant to this matter, Respondent was a person who discharged pollutants from a point source into waters of the United States, without a permit, in violation of Section 404 of the CWA, 33 U.S.C. § 1344. Again, Respondent denied this allegation, alleging it is a bare legal conclusion not stating any fact. (See, Respondent's September 28, 2011 Answer, at Section II, No. 9, p. 5.) With respect to Complainant's assertion that Respondent is a "person", this Court may take judicial notice of the definition of "person" at Section 502(5) of the Act, 33 U.S.C. § 1362(5), which includes corporations, and find there is no genuine issue of material fact that Respondent, an admitted corporation, is a "person". As noted above in paragraph 25, there is no genuine issue of material fact that Respondent discharged pollutants from a point source into waters of the United States. As noted above in paragraph 21, there is

also no genuine issue of material fact that Respondent did so without a permit. The Court may take judicial notice that these elements form a violation of Section 404 of the CWA, 33 U.S.C. § 1344, and find there is no genuine issue of material fact in finding that Respondent violated the CWA.

26. At all times relevant to this matter, each day the pollutants remain in the waters of the United States constituted a continuing violation of the Act and an additional day of violation of Section 301 of the CWA, 33 U.S.C. § 1311. Respondent denied this allegation, alleging it is a bare legal conclusion not stating any fact. (See Respondent's September 28, 2011 Answer, at Section II, No. 9, p. 5.) The Court may take judicial notice that Section 301(a) of the CWA, 33 U.S.C. § 1311(a) provides that the discharge of any pollutant by any person except in compliance with a permit under Section 404 of the CWA, 33 U.S.C. § 1344, shall be unlawful.

27. Complainant initially filed its Complaint on August 26, 2011.

28. Respondent filed its Answer on September 29, 2011.

29. The Parties engaged in Alternative Dispute Resolution, which was not successful. Thereafter, Complainant filed its Prehearing Exchange on March 30, 2012. Respondent filed its Initial Prehearing Exchange on April 27, 2012, and its Supplemental Prehearing Exchange on June 13, 2012. Complainant filed a Motion to Amend its Complaint on April 27, 2012, which was granted by this Court on May 30, 2012. Complainant filed a Rebuttal Prehearing Exchange on May 11, 2012.

III. STANDARD OF REVIEW

A Motion for Accelerated Decision shall be granted where no genuine issue of material fact exists, and a party is entitled to judgment as a matter of law on all or some of the issues

before the court. See, 40 C.F.R. § 22.20. In the present case, based upon the facts presented, the legal discussion concerning those facts and the lack of any relevant affirmative defenses on the part of Respondent, this court should find for the Complainant as to the issue of Respondent's liability and penalty in this case.

In a final decision of the Administrator applying 40 CFR 22.20(a), the Environmental Appeals Board (EAB) has held that "a person is not entitled to an evidentiary hearing unless that person puts a material fact at issue." (See In Re Green Thumb Nursery, Inc., FIFRA Appeal No. 95-4a, at 14 (EAB, March 6, 1997).) The EAB went on to hold that:

> [n]ot only must a party opposing summary judgment raise an issue of material fact, but that party must demonstrate that this dispute is "genuine" by referencing probative evidence in the record, or by producing such evidence.

Id. at 16. Furthermore, "[s]ummary disposition may not be voided by merely alleging that a factual dispute may exist, or that future proceedings may turn up something." Id. at fn.24. Respondent 's Pre-hearing Exchange and Supplemental Pre-hearing Exchange are devoid of evidence in support of its denial of facts. Respondent has identified only potential witnesses that may support its assertions of intent (in its actions), the nature of its actions, or the function of the connecting seasonal waterway between the Site wetland and the TNW. Respondent has failed to identify any documents or witnesses that directly undermine Complainant's allegations. Under this standard, no trial is warranted and the Complainant is entitled to judgment in its favor. (See also 40 CFR 22.15(c)-(d).)

IV. ARGUMENT

EPA is entitled to an accelerated decision in its favor on the issues of liability and penalty for the cited violations because there are no genuine issues of fact material to Respondent's

liability under the cited regulations and Respondent can establish no defenses which excuse this liability. Under EPA's Consolidated Rules of Practice, the Presiding Officer may grant accelerated decision to all or any part of the proceeding when "no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." (See, 40 CFR 22.20(a); and In the Matter of Urschel Laboratories, Inc., RCRA Docket No. V-W-89-R-35 (1991).)

Similarly, Complainant is entitled to an accelerated decision as to the penalty for the violations, as there is no dispute that the penalty was calculated pursuant to statutory and policy guidelines, and is fair and reasonable for the scope of Respondent's violations. (See, In the Matter of Spitzer Great Lakes Co., TSCA Docket No. TSCA-V-C-082-92 (1997).)

A. Respondent Has Not Created Genuine Issues of Material Fact

In the instant case, Respondent has failed to create genuine issues of material fact pertaining to its actions defining the essential violation set forth in the Amended Complaint. In its September 28, 2011, Answer, at Section II, No. 4, p. 4, Respondent admits to the assertions of paragraphs 2-3, 14, 16-18, and 20 of the Amended Complaint. Respondent has also offered no or inadequate denial or refutation to the factual assertions of paragraphs 1, 4-13, 15, and 27-30. Thus, there is no dispute that the Amended Complaint is based upon Part 309(g) of the CWA, 33 U.S.C. § 1319(g), pertaining to enforcement of the federal environmental regulatory laws defined by Parts 301 and 404 of the CWA, 33 U.S.C. §§ 1311 and 1344, for the protection of waters of the United States, brought under the proper authority of the U.S. EPA Water Division Director, and that Respondent is a person that performed work at the Airport wetlands Site during the time period in question, approximately the months of February 2008 and March 2009, and discharged pollutants from a point source into waters of the United States, without a permit, in violation of

Section 404 of the CWA, 33 U.S.C. § 1344.

Equally, there is no material fact at issue concerning the status of unt1, and its connection between the Airport Site wetland and the Lemonweir River. As demonstrated in Complainant's 'Summary of Facts' (above), Respondent has not successfully challenged the existence nor the function of unt1 as a Relatively Permanent Water and water of the United States. Complainant's Prehearing Exchange contains submissions of objective determinations made by Complainant, the ACE, and the WDNR, indicating that the Airport Site wetlands was a regulated entity, and that a jurisdictional determination would support the biological, chemical, physical and ecological relationship between the Airport Site wetland and the Lemonweir River, due to unt1 as a connecting waterway. (See, CEs 1, 3-5, 13, 20-21.)

Further, Respondent has itself admitted that no genuine issue of material fact exists as to a connection through unt1 between the Airport Site wetland and the Lemonweir River, and Respondent has acknowledged the possibility of the unt1 connection having some degree of "effect on the chemical, physical and biological integrity of the navigable water, that is, the Lemonweir River." (See, Respondent's June 13, 2012 Supplemental Prehearing Exchange, at Section D, 11, p. 3.) Equally, Respondent has briefly sought to raise a question of legal jurisdiction (of Complainant) at the Site, pursuant to the "Scalia test or the Kennedy test" (See, Id.) Respondent is referring to two legal standards identified in the U.S. Supreme Court's Rapanos v. U.S., 547 U.S. 715 (2006) decision. However, Complainant would note that regardless of which standards is applicable, it is at best only tangentially related to whether Respondent has asserted a genuine issue of material fact in the present matter. Respondent has not supported any of its assertions of a material fact at issue with objective documentation in the

record of its Answer, nor in either of its Prehearing Exchanges. Thus, Respondent cannot point to a material fact of record that would prevent a finding by this Court as to liability. Further, Complainant asserts that it has properly set out an acceptable proof of federal jurisdiction, under the standard set forth in Rapanos, 547 U.S. at 742-743, and based upon the accepted EPA and ACE findings, and the accepted WDNR findings and the Wisconsin Wetland Inventory .

In identifying Mr. Gregory J. Cowan, and Mr. Robert Nicksic of the Mauston-New Lisbon, Wisconsin area, as potential witnesses concerning the question of the unt1, Respondent's own statements indicate that neither witness can offer professional, scientific evaluations of unt1 as a Relatively Permanent Water and water of the United States. (See, Respondent's April 27, 2012 Initial Prehearing Exchange, at Section IIA, 5, p. 3, and Respondent's June 13, 2012 Supplemental Prehearing Exchange at Section B, p. 2.) Further, Respondent's potential witnesses do not appear to be proffered to contest the overall existence or function of unt1. If this is the case, then no real dispute as to a material issue of fact is presented by Respondent as to this matter.

Because Respondent has not identified any document or witness that it will use at any hearing to contest any factual allegation of its liability, Respondent "is not entitled to an evidentiary hearing unless that person puts a material fact at issue,..." (See Green Thumb Nursery, Inc., at 14.) Therefore, there is no need for an evidentiary hearing on the issue of Respondent's liability for the violation described in the Amended Complaint.

Since neither Respondent's conduct nor its asserted rationalizations of its violation represent genuine issues of material fact, accelerated decision in favor of EPA on the issue of liability for the cited regulations should be granted.

B. Respondent's "Affirmative Defenses" Fail

Respondent alleges Complainant lacks jurisdiction and no permit was needed because the "area in question is not waters of the United States, but instead is an isolated part of the Airport." (See September 28, 2011, Answer, at Section II, No. 11, p. 5.) This issue is already discussed in greater detail above. Complainant's documentation demonstrates the existence of a hydraulic connection, i.e., unt1, subject to seasonal characteristics, between the wetlands and the Lemonweir River. Therefore, the wetlands are not "isolated". In the face of data provided by Complainant at CEs 1, 4, 5, 13, 19, and 22, demonstrating that the wetlands and unt1 are jurisdictional waters of the United States, Respondent is only proffering witnesses whose testimony will only confirm or acknowledge seasonal characteristics of unt1.

Respondent alleges "[n]o wetlands were destroyed or degraded." (See September 28, 2011, Answer, at Section II, No. 12, p. 5.) This issue is already discussed in greater detail above. Complainant's documentation demonstrates the filling in of wetlands. (See CEs 2-4, 11, 14-19, and 22.)

Respondent alleges "the government has already elected its remedies in the form of an approved plan and permits issued by the ACE and the WDNR," that the ACE's permit was obtained March 11, 2010, that Complainant is "estopped from pursuing any further enforcement action" due to the ACE's "tak[ing] jurisdiction of this matter" and electing its remedies and issuing a permit, and that Respondent has restored the area under the permit. (See September 28, 2011, Answer, at Section II, Nos. 13-16, 20, 21, pp. 5-6.) These issues are relevant solely to injunctive relief and equitable remedies. In this matter, Complainant seeks legal remedies in the form of penalties for Respondent's alleged violation. In addition to any injunctive relief that

may be sought by EPA under Sections 309(a) (administrative compliance orders) and 309(b) (permanent or temporary injunctions) of the CWA, 42 U.S.C. §§ 1319(a) and (b), EPA is also authorized to assess civil administrative penalties for Section 404 permit violations under Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1). Complainant is in no way estopped from seeking penalties merely because the ACE issued an After-the-Fact letter of permission for purposes of making the Site whole. The ACE After-the-Fact letter of permission is irrelevant as a shield against Respondent's liability for penalties for the violation that preceded the letter of permission.

Respondent alleges the land clearing was done as a safety improvement required by the Federal Aviation Administration, and that EPA is estopped from "further enforcement action" because Respondent relied on representations that the Airport had "secured the necessary approvals from the ACE and WDNR." (See September 28, 2011, Answer, at Section II, Nos. 17-19, pp. 5-6.) There is no genuine issue of material fact that no permit was issued prior to Respondent's work at the Site. Respondent's alleged reliance on Airport representations is not relevant for determining Respondent's liability.

Penalty Calculation

Complainant also notes that its proposed penalty of $60,000 is proper, equitable and was calculated under the appropriate Statutory and Agency guidance and policies of U.S. EPA. In preparing the penalty, as noted in the text of its Amended Complaint and its March 30, 2012 Prehearing Exchange, Complainant took into account the rationalizations raised by Respondent. (See, Amended Complaint, at Section IV, p. 6, and CEs 41-42, and 45.) Respondent's Answer and Prehearing Exchanges fail to raise a factual allegation that would contend that the calculation

of penalty made by Complainant is improper or incorrect. Indeed, Respondent only addresses the matter of the penalty in its responses by noting that the Complainant is "estopped" from seeking a civil penalty from Respondent, and that the civil penalty should more properly be directed at the Site property owner, the Mauston-New Lisbon Union Airport. This does not raise any issues of material fact for contention before this Court.

The calculation of the amended penalty amount was determined by Complainant considering the available information of record, the opinions of its witnesses and the relevant information asserted by Respondent. As noted in Complainant's March 30, 2012 Prehearing Exchange, pursuant to its statutory authority under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), after January 12, 2009, Complainant was authorized to assess a Class II penalty of $16,000 per day of violation up to a maximum of $177,500 (and $11,000 per day of violation up to a maximum of $157,500 after March 14, 2004 and up to January 11, 2009). The subject penalty was calculated by the Complainant in consideration of the factors listed in Section 309(g)(3) of the CWA, 33 § U.S.C 1319(g)(3), as discussed below.

Nature and Extent of Violations

The alleged violation, at the Mauston-New Lisbon Union Airport, was for the purpose of meeting Federal Aviation Administration and State regulations regarding the appropriate vegetation adjacent to airport runways. In other words, the Airport believed it necessary to remove trees and shrubs off the southwest edge of its single, northwest to southeast oriented runway. The Airport hired Respondent to complete this type of work without a written contract specifying the conditions of that work. Thenceforth, the basic nature of the alleged violation consisted of repeated and prolonged discharges of pollutants (i.e., organic debris and soil) into

approximately seven (7) acres of forested and shrub-scrub wetlands (i.e., waters of the United States) from back hoes and front end loaders (i.e., point sources) without obtaining permits issued under Section 404 of the CWA prior to commencing the work. Thus, the alleged violations resulted from the mechanized land clearing of trees and shrubs and land leveling throughout the entire seven (7) acres, and then the excavation of numerous holes in which the accumulated organic debris were to be buried. The hole excavations resulted in numerous spoil piles of excavated soil adjacent to the holes – covering approximately 0.52 acres scattered throughout the site. The alleged violations began in the approximately February 2008, occurring on multiple days, and were reportedly completed on multiple days in the winter of 2009 (through approximately March, 2009).

After discovery of the alleged violations in May 2009, the Airport agreed to restore the Site wetlands, minus the trees and shrubs, and in March 2010 a Section 404 letter of permission to control the parameters of site restoration - not to permit fill to remain in place – was issued. The Section 404 letter of permission applied to the Airport's approximately seven (7) acres of former forested and shrub-scrub wetlands. These wetlands abutted a relatively permanent, though unnamed, waterway straightened for drainage purposes which flows for about one mile to the Lemonweir River - a historically navigable stream. The Lemonweir River subsequently flows about 13 miles and empties into the Wisconsin River – an interstate water body. The earth moving aspects of the Site restoration and the vegetation seeding and planting were supposed to be completed by December 2010, but wetland restoration work continued into January 2012.

1. Circumstances

Since approximately 1958, according to the Respondent's company website, Respondent has been in the earth moving business. In the course of time, it is common for such businesses to work in or near waters. Operators, as well as landowners, are considered liable parties under the regulatory framework of the Clean Water Act. Complainant believes that Respondent displays a high degree of culpability for undertaking the Airport work without a Section 404 permit based on its prior work history in the Section 404 regulatory program. The ACE, who issues the Section 404 permits, maintains a database tracking permit applicants. The ACE database contains six (6) permit actions that predate the Airport work in which Respondent was involved as an "Agent" or "Contractor" of the permittee (i.e., usually involved in constructing landowner permitted work). An ACE Project Manager in the central Wisconsin area in which Respondent conducts business, will testify to his discussions with Mr. Bret Hillyer, Respondent's President, regarding the Section 404 permitting regulations – all prior to Respondent's Airport work.

In addition, Respondent was the earth moving contractor at the Greg Wonderly site in New Lisbon, Wisconsin, between 2005 and 2006. (See, CEs 6-7, and 10.) Mr. Wonderly received a cease and desist letter from the ACE in February 2007 for site wetland fill violations where Respondent, as a contractor, had completed the cited work. In 2009-10, Respondent agreed, under the auspices of a WDNR action, to restore approximately six (6) acres of forested wetland disturbed at this site, including a County ditch. Mr. Wonderly has stated that he does not remember whether he told Respondent about the ACE's cease and desist letter in 2007. Mr. Wonderly would not to identify Respondent to the ACE. Also, Mr. Wonderly and Mr. Bret Hillyer, a representative of Respondent, were adverse parties in a related state legal action over

money allegedly owed to Respondent for its work involving Mr. Wonderly's alleged wetland violation site. Mr. Bret Hillyer is the current owner of the Wonderly parcel – an apparent result of the resolution of the legal dispute between Mr. Wonderly and Mr. Hillyer. In light of the amount involved with regard to the dispute between Mr. Wonderly and Mr. Hillyer, reported to be between $80,000 and $148,000, EPA believes it is likely that Mr. Hillyer (in his capacity as a representative and co-owner of Respondent) was aware of the wetlands issue on Mr. Wonderly's property because it was the genesis of the dispute between them over lack of payment to Respondent for the alleged wetland violation on-site. This view is buttressed by the deposition of Mr. Bret Hillyer taken in the Wonderly-Bollig legal matter in which he talks about his knowledge of wetlands and whether wetlands existed on the former Wonderly parcel. (See CE 10). Similar views were expressed by Mr. Bret Hillyer in his WDNR enforcement meeting over restoring the Wonderly wetlands.

The Mauston-New Lisbon Union Airport Commission (Commission) received a bid from Respondent in 2007 regarding the clearing of trees and shrubs from lands adjacent to its runway. In that bid, Respondent acknowledged the "wetness" of the site affected the scheduling of the work. The Commission subsequently hired Respondent to complete the work in early 2008 and early 2009. There is no written contract describing the job specifications or need for any type of permit. There is no further information regarding the work relationship between the two parties in the record other than the payments the Airport made to Respondent for the work.

2. Ability to Pay

EPA has reviewed a Dun & Bradstreet report on Respondent that shows that it has existed since 1961, and is in the excavation and logging business. Further, Respondent has a

good credit rating, maintains many loans from different financial institutions, and pays its suppliers nearly on time. Respondent has not formally raised an "ability to pay" issue.

3. Prior History of Violations

Respondent has no prior history of CWA Section 404 violations, however, EPA notes that Respondent was involved in the Wonderly violation in 2005-2006 and 2009-2011. When asked by the ACE, Mr. Wonderly refused to name Respondent as the contractor, presumably given the dispute between Respondent and Mr. Wonderly. The ACE sent Mr. Wonderly a cease and desist letter in February 2007, prior to Respondent's Airport work.

4. Culpability

EPA believes Respondent's culpability is high regarding its filling work for the Airport. Respondent has been in the earth moving business since at least 1961. Earthmovers, as demonstrated below by Respondent, sometimes work in waters. Respondent is listed in the ACE permit tracking database for six permit actions and is listed as the "Agent' or "Contractor". According to the ACE, it has discussed its Section 404 regulatory program with Mr. Bret Hillyer directly and prior to the Airport's alleged violation. Further, given that ACE permits are required to be posted at jobsites and that permits control job scheduling, it is likely that Respondent was aware of the need for earth moving permits related to its professional work. Because of the institutional knowledge and regular interaction of entities such as Respondent with state and federal regulators, Complainant considers professional earth moving contractors, such as Respondent, to serve as essentially a "second line of defense" for the CWA wetlands and watersheds protection programs. In addition, Respondent has exhibited knowledge that wetlands are a regulatory issue that earth moving firms must address, in Mr. Brett Hillyer's deposition

regarding the legal dispute between Mr. Wonderly and Respondent, and again in Respondent's enforcement meeting with the WDNR and the ACE in September, 2009.

5. Economic Benefit

EPA believes that Respondent, in its normal business operations, prices its services so as to earn a profit and did so when invoicing the Airport for clearing and filling forested and shrub scrub wetlands that underlie the current action.

6. Other Matters as Justice May Require

In 2009, Respondent refused to submit information to Complainant under a valid CWA Section 308, 33 U.S.C. § 1318, Request for Information even after receiving a follow-up letter emphasizing the enforceability of the Request. Only after receiving Complainant's 2011 pre-filing letter, did Respondent respond to the 2009 Request for Information. However, Complainant believes that Respondent's response remains incomplete because it failed to produce requested and relevant information regarding its work at the Wonderly site which was being investigated simultaneously by Complainant. Complainant believes an increase in the penalty is warranted due to Respondent's delay in this case and obstruction of Complainant's other investigation. Further, neither the Airport nor Respondent obtained a stormwater permit under Section 402 of the CWA, 42 U.S.C. § 1342, prior to performing land disturbing activities (at the Airport property) on greater than one acre. While Complainant has not included a Section 402 count in its complaint, this fact contributes to the potential harm from the mechanized land clearing and excavation by allowing sediments an easier path to receiving waters. Complainant's Site inspection found evidence of sediments entering surface waters on the Site. The Site was unprotected for over two years before a permit was issued to restore the Site.

Complainant has arrived at the proposed penalty of $60,000 based on the facts of this case. While there may have only been indirect and potential harm to human health or welfare and the environment, Respondent's degree of culpability is great, and the need has arisen, as a result of their unauthorized actions, to deter Respondent specifically and the regulated community generally from future violations of this nature as these activities may cause adverse cumulative impacts on a watershed scale. Based on consideration of the factors set forth in Section 309(g) of the CWA, 33 U.S.C. § 1319(g), Complainant deems a penalty of $60,000 to be an appropriate initial calculated penalty for the violations alleged against Respondent.

Conclusion

For the reasons set forth above, Complainant proposes that EPA assess a penalty of $60,000.00. However, Complainant may reduce the proposed penalty should Respondent provide the necessary financial information relevant to an assessment of each Respondent's ability to pay, and should Complainant's review of such information demonstrate that a reduction is warranted.

Therefore, Complainant also seeks a favorable accelerated decision on the proposed penalty of $60,000 in this matter, based upon the facts and law of record.

PROOF OF SERVICE

I certify that the foregoing Motion for Accelerated Decision and Supporting Memorandum was sent in the following manner to the addresses listed below:

Original and copy by hand delivery to:

Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region 5
77 West Jackson Blvd.
Chicago, Illinois 60604

Copy by Certified Mail/
Return Receipt Requested to:

Judge M. Lisa Buschmann
Office of Administrative
Law Judges
U.S. Environmental Protection
Agency, mail code: 1900L
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Joseph L. Bollig and Sons, Inc.
c/o: William T. Curran, Esq.
Curran, Hollenbeck & Orton, S.C.
111 Oak Street, P.O. Box 140
Mauston, Wisconsin 53948-0140

Dated: June 29, 2012

Thomas P. Turner
Kevin C. Chow
Associate Regional Counsels