

IN THE UNITED STATES DISTRICT COURT
 FOR THE EASTERN DISTRICT OF NORTH CAROLINA
 SOUTHERN DIVISION
 No. 7:01-CV-36-BO (3)

FILED

JAN 08 2003

DAVID W. DANIEL, CLERK
 US DISTRICT COURT, EDNC
 DEP. CLERK

NORTH CAROLINA SHELLFISH)
 GROWERS ASSOCIATION and)
 NORTH CAROLINA COASTAL)
 FEDERATION)
)
 Plaintiffs)
)
 vs.)
)
 HOLLY RIDGE ASSOCIATES, L.L.C.,)
 And JOHN A. ELMORE)
)
 Defendants)
)
 _____)

**PLAINTIFFS' REPLY IN SUPPORT
 OF MOTION FOR PARTIAL
 SUMMARY JUDGMENT ON
 LIABILITY**

While Defendants' response amply demonstrates that the parties do not agree about everything in this case, it nevertheless fails to meaningfully controvert the basic propositions Plaintiffs have offered: that Defendants have constructed a series of point sources which have discharged stormwater and other pollutants into waters of the United States, including wetlands, without required permits. The fact that some issues remain disputed does not diminish the appropriateness for summary disposition of many liability issues without trial. Resolving issues and narrowing the scope of trials is precisely the function of summary judgment.

ARGUMENT

I. WATERS OF THE UNITED STATES.

Defendants do not dispute that Stump Sound and Batts Mill Creek are navigable waters of the United States. Defendants also concede that the wetlands adjacent to Stump Sound are waters of the United States, see Defs.' Resp. at 27, and thus that Ditch 17 both has been excavated in wetlands and discharges to jurisdictional wetlands. Therefore, Plaintiffs are entitled

to partial summary judgment declaring that Stump Sound, Batts Mill Creek, the wetlands adjacent to Stump Sound including the wetlands to which Ditch 17 discharges, and Ditch 17, are all jurisdictional waters.

Regarding Cypress Branch, Defendants do not dispute the basic proposition that a tributary to a navigable water is itself a water of the United States, but dispute instead whether Cypress Branch is a tributary of Batts Mill Creek. (Defs.' Resp. at 25-26.) This attempt fails for several reasons. First, Defendants have not disavowed, in this proceeding or elsewhere, their factual stipulation in the North Carolina Office of Administrative Hearings, that the Morris Landing Tract "drains to the [Atlantic Intracoastal Waterway] and to Cypress Branch, a perennial stream that forms the southern boundary of much of the tract. Cypress Branch is a tributary of Batts Mill Creek."¹ Nor have they disavowed the conclusion of their own expert, Davis Fennell, that intermittent storm flows travel down Cypress Branch, traverse the wetland flat, and enter Batts Mill Creek, thus establishing Cypress Branch as at least an intermittent stream which is a tributary to Batts Mill Creek. (Fennell Dep. at 50; see Pls.' Mem. Supp. Partial Summ. J. on Liability at 11-13). Intermittent flow is sufficient for CWA jurisdiction over a tributary and its adjacent wetlands. United States v. Edison, 108 F. 3d 1336, 1342 (11th Cir. 1997); Headwaters v. Talent Irrigation Dist., 243 F. 3d 526, 534 (9th Cir. 2002); 33 C.F.R. § 328.3(a)(3). Fennell also agrees that coastal streams commonly flatten out into braided channels. (Fennell Dep. at 49). Finally, the official maps and aerial photographs submitted by both parties clearly demonstrate the unbroken, blue-line stream characteristics of Cypress Branch. Defendants have not shown a genuine and material issue of fact regarding whether Cypress Branch is a tributary

¹ Attachment A to Miller Decl. at 11 (emphasis added). The Miller Declaration is Exhibit 8 to Plaintiffs' Motion for Summary Judgment.

to Batts Mill Creek, and Plaintiffs are entitled to partial summary judgment that Cypress Branch is a water of the United States.²

Defendants also fail to dispute the fact that an unbroken system of wetland extends from Batts Mill Creek upstream along the path of Cypress Branch to points well above Bishops Road on the Morris Landing Tract.³ This system of wetlands is adjacent to Cypress Branch as well as Batts Mill Creek. Plaintiffs are entitled to partial summary judgment that the wetlands along Cypress Branch and the southwestern portion of the Tract are jurisdictional, adjacent wetlands.

Regarding the large lake on the Tract, to which Ditches 13, 14, 15, and 16 drain, Defendants offer no evidence to dispute Plaintiffs' contention that the lake is a water of the United States as an impoundment of a tributary of Stump Sound. Defendants' own stormwater management map depicts the lake outlet and drainageway that connects the lake directly to Stump Sound. (Pls.' Ex. 6). Plaintiffs are entitled to partial summary judgment that the lake, its adjacent wetlands, and Ditches 13, 14, 15, and 16 that connect to the lake are waters of the United States.

Defendants' WET-1 map shows Ditches 11/12 and 9/10 discharging into the jurisdictional wetlands. This fact is confirmed by Defendants' expert Dr. Lea, who testified regarding flow of water and sediment from Ditches 2, 9/10, and 11/12 to Cypress Branch or its adjacent wetlands. (See Pls.' Ex. 7; Pls.' Mem. Supp. Partial Summ. J. on Liability at 18, and citations therein). Similarly, Defendants' wetland map shows a continuous connection between the adjacent wetlands and a ditch that connects to Ditch 4, where it is undisputed that sediment

² Defendants' reading of 33 C.F.R. § 328.3(a)(7), Defs.' Resp. at 24, does not affect this analysis. According to Defendants' interpretation only the first millimeter of wetlands bordering a water would be jurisdictional, and all other wetlands would be "waters that are themselves wetlands." This result is ridiculous under any circumstances, and especially so here in the case of an undisputed surface water connection.

³ This is undisputed even under Defendants' version of the wetland map, WET-1, which depicts wetlands continuously along the southwestern boundary of the Tract along Cypress Branch, and is evident from the topographic maps and aerial photos that have been submitted.

has been discharged. (Wylie Field Notes at 2-3; Wylie photos WP19.D4.P29-30, WP21-22.D4.P33-35). Plaintiffs are entitled to partial summary judgment that at least Ditches 2, 4, 9/10, and 11/12 are waters of the United States.

Ultimately, Defendants argue for a sweeping extension of the United States Supreme Court's ruling in Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) ("SWANCC"). SWANCC did not, however, hold that "the CWA governs waters only if those waters are navigable-in-fact or are adjacent to navigable-in-fact." (Def.' Resp. at 23). Courts around the country, including the Fourth Circuit, have strongly rejected this proposition. See Pls.' Mem. Supp. Partial Summ. J. on Liability at 5-6 (citing United States v. IGC, 2002 U.S. App. LEXIS 13232, 9-11 (4th Cir. 2002), and others). None of the waters for which Plaintiffs seek summary judgment are isolated within the meaning of SWANCC.

Plaintiffs are entitled to partial summary judgment that Stump Sound, Batts Mill Creek, Cypress Branch, the on-site lake, the wetlands adjacent to these waters, and the ditches that connect to these waters, are all waters of the United States and subject to CWA jurisdiction.

II. DISCHARGES OF POLLUTANTS FROM POINT SOURCES WITHOUT A PERMIT.

At pages 28-29 of their response, Defendants state in general terms that they have not discharged pollutants from point sources that require permitting under CWA § 402. Again, Defendants' Response is noteworthy for what it does not dispute. Defendants do not dispute that sand, sediment, and fecal coliform are pollutants subject to regulation under CWA, nor that their ditches and check dams are point sources as defined in the Act. (See Pls.' Mem. Supp. Partial Summ. J. on Liability at 19-27). There is no dispute that Defendants excavated over 30 acres of land and that their ditches discharge stormwater, yet Defendants contend that no permit is

required for discharges of stormwater from the ditches they excavated. (Defs.' Resp. at 28). Stormwater discharges from "clearing, grading, and excavation activities" that disturb five acres or more total land area require a CWA permit. 33 U.S.C. § 1342(p)(3)(A); 40 C.F.R. § 122.26(b)(14)(X); Hughey v. JMS Dev. Corp., 78 F. 3d 1523, 1525, n1. (11th Cir. 1996). While Defendants protest that they are not a "construction site," they completely fail to address the extensive CWA authority that regulates stormwater discharges from land excavation sites as industrial discharges, even though that is precisely the CWA violation which Plaintiffs are pursuing.

Thus, Defendants have failed to dispute the basic CWA violation of the discharge of stormwater from an excavation site exceeding five acres, via ditch point sources, without a permit. Instead, Defendants' contend that an EPA regulation regarding silvicultural activities, 40 C.F.R. § 122.3(e), exempts them from the NPDES permitting requirement. (Defs.' Resp. at 28-29). The regulation purports to exempt only "non-point source silvicultural activities," and therefore does not by its terms cover Defendants' discharges, which come from large, discrete ditches. The rule also limits the exemption to surface drainage or road construction and maintenance "from which there is natural runoff." Id. Defendants' activities have greatly concentrated and accelerated runoff through the ditches, thus creating "unnatural" runoff accordingly ineligible for exemption under this rule. More importantly, EPA cannot by rule exempt from regulation those point sources which are explicitly regulated by statute. The CWA itself regulates discharges of pollutants from point sources, defined to include ditches, and Congress did not establish any silvicultural exemption from the NPDES permit requirement for ditches or other point sources on silvicultural sites. To the extent that this rule would operate to exempt from NPDES permitting the discharge of pollutants from statutory point sources such as

ditches, the rule is invalid as being in direct conflict with the express terms of the CWA, and therefore cannot afford Defendants any relief. Accordingly, even if some (highly disputed) evidence would suggest that Defendants' activities were silvicultural in nature, the dispute is not material because the regulation they rely upon affords them no relief.

Defendants also concede that significant quantities of sediment have been discharged from the ditches into Cypress Branch and adjacent wetlands, but baselessly contend that this activity did not violate the CWA because it occurred following hurricanes. (Defs.' Resp. at 29-30.) NPDES permits are required to be obtained before any excavation of ditches and before the placement of fill in wetlands, and Defendants point to no exemption from the permitting requirements that is triggered by the size of a storm. Also, the evidence is undisputed that sediment continued to be discharged to Cypress Branch and adjacent wetlands long after the 1999 storms. Dr. Lea, Defendants' expert, visited the Tract in the spring and summer of 2000 and observed sediment moving from Ditches 2, 9/10, and 11/12 into adjoining wetlands and Cypress Branch. (See Pls.' Mem. in Supp. of Partial Summ. J. on Liability at 18.) Gary Mitchell, one of Defendants' wetlands consultants and expert witnesses, describes clean-up of sediment in wetlands at the terminus of those same ditches having to occur in the year 2000 due to continuing discharges from the ditches. (Pls.' Ex. 25 at 151-163.) Mr. Mitchell describes an episode in July, 2000, of a plume of "90 feet of silt downstream" from the last check dam on ditch 9/10, and in December 2000 a plume of silt in "jurisdictional" wetlands "30 feet wide, 12 to 18 inches deep." Id. at 159-161. Defendants do not and can not disavow this evidence of continuing sediment discharges long after the storms.⁴

⁴ Under Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1982), the violation must be "on-going" at the time of the complaint, which here was early in 2001. The testimony of record clearly shows violations were "on-going" at that time. Furthermore, it is undisputed that the discharge of stormwater continues to this date, thus discharging fecal coliform as well.

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Defendants also make several unsupported and remarkable assertions regarding Plaintiffs' evidence of fecal coliform pollution. First, Defendants are incorrect in asserting that there must be proof of "an exceedance of the North Carolina water quality standard before there is a violation requiring redress." (Defs.' Resp. at 15). Proof of the discharge of a pollutant in any quantity without a permit establishes a violation. See Gaston Copper, 204 F. 3d 149, 151. Furthermore, Dr. Kirby-Smith has testified by declaration that the ditching on the Morris Landing Tract "will cause elevated fecal coliform counts in the estuarine creeks adjacent to and receiving runoff from the ditches following rainfall that causes surface runoff into the ditches," particularly seriously at Ditch 17. (Kirby-Smith Report ¶¶20-21). It is not necessary for the Plaintiffs to prove the non-existence of other potential sources of fecal coliform bacteria.

Most remarkably, in their response at 14, Defendants quote a newspaper account of a stormwater study by Dr. Lawrence Cahoon of the University of North Carolina at Wilmington, for the proposition that Dr. Kirby-Smith's opinions do not have scientific validity. The Defendants did not designate Dr. Cahoon as an expert witness and did not file with the Court any evidence of Dr. Cahoon's alleged findings. To understand Defendants' contention, Plaintiffs have contacted Dr. Cahoon who, wishing to avoid the misuse of his scientific work, has provided the declaration which Plaintiffs submit with this reply. Dr. Cahoon states:

The results of the Sunset Beach research are highly context- and site-specific, and any results or conclusions from the Sunset Beach research cannot scientifically be considered applicable to a different location without a review of the facts and circumstances of that location. I have not shared my data or analyses or assumed any obligation to do so with the Defendants or their representatives. Therefore, it is not scientifically defensible for Defendants to rely upon a newspaper account of my Sunset Beach research to support any contention that they may have regarding the facts of this case concerning the Morris Landing Tract in Holly Ridge.

(Cahoon Decl. ¶3). Dr. Cahoon also states that his own research at Lake Waccamaw has demonstrated that drainage ditches in undeveloped land deliver significant fecal coliform pollution to receiving waters. *Id.* ¶5. Finally, Dr. Cahoon states that he has reviewed the scientific statements of Dr. Kirby-Smith in this case, concurs with the basic scientific principles presented by Dr. Kirby-Smith, and states that “Plaintiff’s concern regarding fecal coliform contamination is a scientifically reasonable one.” *Id.* ¶ 6. There may be disputed issues of fact concerning the extent and severity of fecal coliform contamination from the Defendants’ excavation activities, but Defendants have offered no challenge to the basic proposition that their ditches are delivering fecal coliform pollution to the receiving waters. For these reasons, Plaintiffs are entitled to partial summary judgment on the issue of Defendants’ liability for discharging stormwater, sediment, sand, and other pollutants from point sources without a permit.

III. DEFENDANTS’ DISCHARGE OF DREDGED OR FILL MATERIAL INTO WETLANDS WITHOUT A SECTION 404 PERMIT AND SECTION 401 CERTIFICATION.

Defendants acknowledge that at least portions of Ditches 4, 9, 10, 11, 16, and 17 were excavated in wetlands, but contend that no regulated discharge of dredged material occurred in the construction of these ditches. (Defs.’ Resp. at 21). Defendants inaccurately assert that Plaintiffs “concur” that these wetland ditching activities resulted in no regulated discharges of dredged material, pursuant to National Mining Association v. U.S. Army Corps of Engineers, 143 F. 3d 1399 (D.C. Cir. 1998). (Defs.’ Resp. at 21). Plaintiffs concur neither with the proposition that incidental fallback of dredged material is not regulated, see United States v. Deaton, 209 F. 3d 331 (4th Cir. 2000), nor that Defendants’ activities complied with the dictates of National Mining Association. Plaintiffs have not moved for summary judgment on this issue

because Plaintiffs do not contend that the facts are undisputed with regard to the precise location of wetlands, the excavation techniques used, and the extent of discharge of dredged or fill material that occurred. These issues are not before the Court on summary judgment.

Defendants turn to the silvicultural exemption to the 404 permitting obligation, 33 U.S.C. § 1344(f)(1)(A), to justify their unpermitted activities. (Defs.' Resp. at 29).⁵ Even if Defendants' ditching activities were conducted as part of an established silvicultural operation, the activities clearly exceed the narrow scope of the exemption from wetland permitting. Section 404(f)(1) exempts from the requirement to obtain a section 404 permit certain narrowly defined activities including "normal silviculture." 33 U.S.C. § 1344(f)(1)(A). The only drainage potentially exempt on established silviculture operations is "minor drainage." 33 U.S.C. § 1344(f)(1)(A); 40 C.F.R. § 232.3(c)(1); 33 C.F.R. § 323.4(a)(1). No plausible construction would support Defendants' contention that several miles of ditches that are typically 5 to 8 feet deep and 4 to 30 feet wide is "minor" drainage.⁶

Minor drainage also "does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland." 40 C.F.R. § 232.3(d)(3)(ii); 33 C.F.R. § 323.4(a)(1)(iii)(C)(2). Moreover, section 404(f)(2) "recaptures" otherwise exempt discharges of dredged or fill material that are incidental to any activity having as its purpose bringing a wetland or other water into a new use, where the flow and circulation of waters may be impaired or the reach of waters reduced. 33 U.S.C. § 1344(f)(2). Defendants' wetland consultant Charles Hollis testified that a purpose of rim ditches such as those Defendants excavated is to interrupt

⁵ Defendants also assert that their activities are authorized by Nationwide Permit #26, (Defs.' Resp. at 12). NWP #26, which expired on June 7, 2000, authorized limited fill in isolated waters or waters above the headwaters of streams. 61 Fed. Reg. 65874 (Dec. 12, 1996). The ditches on the Tract do not meet these requirements. Moreover, Defendants' claim that NWP #26 allows parties to discharge up to 1/10 acre of fill into navigable waters without notifying the Corps is erroneous. Any person conducting fill activities under NWP #26 must notify or report the activities to the Corps of Engineers identifying the affected waters. *Id.* Defendants have provided no evidence of notification to the Corps to support any claim that their activities were authorized by NWP #26.

the flow of water to the wetlands and to shrink them. (Pls.' Ex. 2 at 806-08.) Therefore, the exemption does not apply.

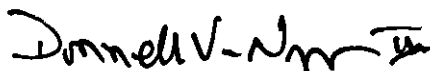
Accordingly, partial summary judgment should be entered denying Defendants any shelter from the Clean Water Act Section 404(f) exemption. In the alternative, partial summary judgment should be entered on Defendants' underlying liability, reserving any issues regarding eligibility for silvicultural exemptions for trial.

CONCLUSION

Rather than disputing the core, material issues of fact that support Plaintiffs' contentions on summary judgment, Defendants dwell on the admittedly disputed facts of the extent of harm to Stump Sound and its tributaries, and of Defendants' intent in excavating their property. These issues are irrelevant to Plaintiffs' Motion for Partial Summary Judgment on Liability.

Defendants offer newspaper quotes rather than evidence, and fail to establish the existence of any genuine issues of material fact concerning the specific claims presented for resolution on summary judgment. Plaintiffs are entitled to partial summary judgment on liability as requested in their motion and in this reply.

Respectfully submitted this 8th day of January, 2003.



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⁶ Undisputed facts regarding ditch dimensions are detailed in EPA field notes, Pls.' Ex. 19.

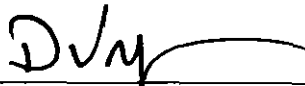
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY was mailed by U.S.

Mail, postage prepaid, to counsel for all parties on this 8th day of January, 2003.

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