

## ***District Court Refuses to Penalize CWA Violator***

The United States District Court for the Eastern District of Michigan declined to impose any penalty against a Northern Michigan peat mining company for violations of the Clean Water Act (CWA), even though the United States Environmental Protection Agency (EPA) had sought \$3 million for the violations.

Bay-Houston Towing Company's Michigan Peat Division (Michigan Peat) owns two non-contiguous parcels of wetlands in Minden Township, Michigan. Michigan Peat had continuously mined peat from these parcels in an area known as the "Minden Bog" since 1958 by clearing surface vegetation, excavating the peat moss, and allowing it to dry in the sun. In order to facilitate these mining activities, Michigan Peat constructed ditches that allowed the bog to drain into the nearby Black River Drain, and constructed haul roads across the surface of the bog.

In 1998, EPA issued a compliance order against Michigan Peat, alleging that it was discharging pollutants into the Black River Drain and the Minden Bog without the necessary permits and ordered Michigan Peat to cease such actions. Then, in 1999, the United States initiated an enforcement action in federal court against Michigan Peat, claiming that the mining activities violated the CWA. The court ultimately found that Michigan Peat had violated the CWA by (1) discharging pollutants via the peat bog drainage ditches into the Black River Drain without a National Pollutant Discharge Elimination System (NPDES) permit issued under Section 402 of the CWA, and (2) discharging dredged or fill material into wetlands without a permit issued under Section 404 of the CWA.

During the penalty phase of the proceeding, EPA argued that the court should impose a \$3 million civil penalty against Michigan Peat based on its long-time failure to report its effluent

discharges and the “massive quantities” of pollutants it had discharged. The court concluded, however, that the record did not support *any* penalty against Michigan Peat. First, with respect to Michigan Peat’s failure to obtain a NPDES permit for the discharges to the Black River Drain, the court noted that this violation was “at best technical” and there was “no evidence of substantive injury to the environment.” Further, the court noted that Michigan Peat promptly applied for a permit when the Michigan Department of Natural Resources indicated that a permit was necessary and, while this application remained pending, Michigan Peat’s drainage activities were open and obvious. “There was no surreptitious dumping and the drainage and water flowing into the Black River Drain, which although technically contained pollutants, was not in any way injurious to the waters of the United States,” the court stated. Second, with respect to the Section 404 permit, the court noted that Michigan Peat had applied for that permit as well and, while that application remained pending, there was no record of “any communication from any of the federal agencies to Michigan Peat or any statement by either the Corps of Engineers or EPA that Michigan Peat should cease peat mining pending the approval of its application or that it should change in any way its current methods of peat mining.” The court was critical of the manner in which EPA implemented the Section 404 program in this matter, describing the “world of the § 404 permit as displayed in the record here as an Alice-in-Wonderland world.”

Ultimately, the court held that the CWA violations did not justify a penalty because the lack of a permit under the circumstances was not a serious violation, the activities were well known to the regulatory authorities, there was no economic advantage gained by the lack of a permit, no history of substantive violations, no bad faith, and Michigan Peat made good-faith efforts to comply with applicable requirements once it was advised of the need to obtain the permits. The court noted, however, that its decision not to impose a civil penalty did not resolve

the issue of whether Michigan Peat must restore or reclaim the mined portions of the Minden Bog.

*United States v. Bay-Houston Towing, Co.*, No. 98-73252 (E.D. Mich. Mar. 13, 2002)

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