Appendix A

Order, *United States v. Heinrich*, No. 18-3198 (7th Cir. 2020)

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with Fed. R. App. P. 32.1
United States Court of Appeals
For the Seventh Circuit Chicago, Illinois 60604

Submitted April 30, 2020* Decided April 30, 2020
Before
FRANK H. EASTERBROOK, Circuit Judge DIANE S. SYKES, Circuit Judge
AMY J. ST. EVE, Circuit Judge
No. 18-3198

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
PAUL A. HEINRICH,
Defendant-Appellant.
Appeal from the United States District Court for the Western District of Wisconsin.
No. 03-cv-75-jdp James D. Peterson,
Chief Judge.
ORDER
Over 15 years ago, the district court enjoined Heinrich to comply with a federal environmental order. Heinrich had built a road across wetlands on his property, violating the Clean Water Act. He did not comply with the Environmental Protection Agency's order to restore the land, so the United States sued to enforce that order. The district court permanently enjoined Heinrich to restore the wetlands, and we affirmed. United States v. Heinrich, 184 Fed App'x 542 (7th Cir. 2006). In 2018 Heinrich moved to reconsider the injunction under Federal Rule of Civil Procedure 60(b). He argued

We have agreed to decide the case without oral argument because the appeal is frivolous. FED. R. APP. P. 34(a)(2)(A).

primarily that the district judge was prejudiced towards lawyers (like him) and this prejudice prevented him from presenting a defense.
The district court denied Heinrich's Rule 60(b) motion as untimely and meritless. It explained that Rule 60(b) movants must file either one year after judgment or within a reasonable time, depending on the grounds asserted. Heinrich did neither. Moreover, the court explained, he should have raised his assertions of prejudice on direct appeal. See Banks v. Chicago Bd. of Educ., 750 F.3d 663, 667 (7th Cir. 2014).
On appeal Heinrich frivolously argues that the district court wrongly denied his Rule 60(b) motion. He complains that the court cited no precedent and that his case warrants relief under

Rule 60(b)(6) because it is complex and the district judge was vindictive against lawyers. But the district court had robust grounds for denying Heinrich's post-judgment motion. The timeliness of a Rule 60(b)(6) motion depends, in part, on the proffered reason for the delay. Kagan v. Caterpillar Tractor Co., 795 F.2d 601, 609-10 (7th Cir. 1986). Heinrich presented no justification for his 15-year delay in filing his motion. Nor did he explain, as he must, see id. at 606?07, why he was unable to raise on direct appeal the main argument that he presents in his motion?the supposed prejudice of the district judge. These omissions, coupled with the strong interest in finality, required the denial of this motion. See id. at 610.

We have reviewed Heinrich's remaining arguments, and none has merit. AFFIRMED

Appendix B

Opinion and Order, *United States v. Heinrich*, 03-C-075-jdp (W.D Wis. Sept 17, 2018)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, Plaintiff,
v.
PAUL A. HEINRICH and CHARLES VOGEL ENTERPRISES, INC.
Defendants.

OPINION & ORDER 03-cv-75-jdp1

This is an old case involving a civil action filed by the United States to enforce an order by the Environmental Protection Agency that defendant Paul Heinrich remediate a violation of the Clean Water Act. Defendant Heinrich has submitted a motion asking that the permanent injunction against him be dissolved and the he be granted a new trial. Dkt. 215. Heinrich appears pro se, although he is a lawyer licensed in Illinois.

His submission comes with a cover letter to me, as chief district judge, asking me to consider whether it would be appropriate for a judge of this district to hear this matter. I infer that Heinrich thinks that because his motion alleges that Judge Shabaz, the original presiding judge, was biased, the other judges of this district might not be able to evaluate his motion fairly. But as I?ve already indicated in a text-only order, Dkt. 216, I see no reason why a judge of this district cannot address the matter. After all, when a judge of this district recuses himself or herself on the basis of a personal conflict, another judge of this district takes the case unless that judge also has a conflict. So the allegations against Judge Shabaz, who stopped taking cases

1 Because Judge Shabaz is no longer on this court, the case has been reassigned to Judge Peterson.

nearly a decade ago, would not disqualify the entire court. As Judge Shabaz's successor, I am now the presiding judge in this case, and I?ll address Heinrich's request.

I'll start with some background, which I get from the decision of the court of appeals because Heinrich doesn't provide it. United States v. Heinrich, 184 F. App'x 542, 543 (7th Cir. 2006). Heinrich owns property on Little Star Lake in northern Wisconsin. In 1997, Heinrich, without securing the necessary permits, built a road through a wetland so that he could get his seaplane from Little Star Lake to a hangar on his property. The EPA received a complaint, investigated, and ordered Heinrich to remove the road and restore the wetland. When Heinrich did not comply with the restoration order, the United States sued to enforce it. Judge Shabaz granted summary judgment to the United States and on June 17, 2005, issued a permanent injunction requiring restoration of the wetlands and prohibiting further violations of the Clean Water Act on Heinrich's property. Dkt. 175. Heinrich appealed and the Court of Appeals for the Seventh Circuit affirmed.

Now, more than a decade later, Heinrich seeks relief under Rule 60(b) of the Federal Rules of

Civil Procedure. If the motion is brought for the reasons given in subsections (b)(1), (2), or (3), it must be brought within one year of the entry of the judgment or order. Heinrich cites subsections (b)(4) and (b)(6), which are not subject to the one-year limit, but only the limit that such a motion be brought in a reasonable time. But whether Heinrich?s motion is subject to a one-year limitation or the general reasonable-time limit, it is plainly untimely.

His main argument, expressed in sections 1 through 6 and 8 of his motion, is that Judge Shabaz was deeply prejudiced against Heinrich because he is a lawyer, and as a result Judge Shabaz did not give Heinrich a fair chance to present his case. Heinrich doesn?t say whether he asked Judge Shabaz to recuse himself; my review of the docket of the case suggests that he did not. Had Heinrich moved for recusal and been denied he could have raised the issue on appeal. And, even if he did not seek recusal, he could have raised any of the specific deficiencies in Judge Shabaz?s decision-making that he cites in section 1 through 6 and 8 on his appeal. A Rule 60(b) motion is not a substitute for an appeal. Stoller v. Pure Fishing Inc., 528 F.3d 478, 480 (7th Cir. 2008).

His secondary argument, presented in section 7, is that the government secured the injunction through fraud and concealment. According to Heinrich, during the district court litigation, government entities were re-writing a field manual to encourage illegal practices by government employees, but the government withheld this from the court. An allegation of fraud by an opposing party falls within the ambit of subsection (b)(3), which is subject to the one-year limit, which expired about 14 years ago. And Heinrich doesn?t say when or how he discovered the information about the re-writing of the field manual, so I cannot conclude that he has made his motion in a reasonable time anyway.

Heinrich gives one more reason for his motion in section 9: the law is now more favorable to him. As he puts it, if the case were brought today, his case would have been summarily dismissed. Heinrich acknowledges that this is not an independent reason to grant relief under Rule 60, and I will not grant relief on this basis. A change in the law would not be grounds for reopening a long-closed civil case. Hill v. Rios, 722 F.3d 937, 938 (7th Cir. 2013) (?Rule 60(b) cannot be used to reopen the judgment in a civil case just because later authority shows that the judgment may have been incorrect.?).

In any event, Heinrich does not articulate anything that he wants to do that is prohibited under the permanent injunction. The only continuing restriction is that Heinrich is enjoined from future violations of the Clean Water Act. So if he wants to build a road through a wetland area, he can do so if he goes through whatever permitting process is applicable today. I will not reopen this long-closed case, or give Heinrich any of the relief he seeks.

ORDER

IT IS ORDERED that defendant Paul Heinrich?s motion, Dkt. 215, is DENIED.

Entered September 17, 2018.

BY THE COURT:

/s/ _____ JAMES D. PETERSON

District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, Plaintiff,
v.
PAUL A. HEINRICH and CHARLES VOGEL ENTERPRISES, INC.
Defendants.

OPINION AND ORDER 03-cv-75-jdp

I denied the motion by defendant Paul A. Heinrich to dissolve the injunction and reopen this case. Dkt. 217. Heinrich has filed a motion for reconsideration. Dkt. 218. Heinrich has again made this filing with a cover letter suggesting that I should consider the matter before it is filed publicly. I decline to keep his motion from the public record of this case.

A motion for reconsideration serves the limited purposes of correcting manifest errors of law or fact, or presenting new evidence that could not have been presented the first time around. Oto v. Metro. Life Ins. Co., 224 F.3d 601, 606 (7th Cir. 2000). Heinrich?s motion for reconsideration just reiterates his arguments about why his case should be reopened, and contends that I was wrong to deny his original motion. This is a basis for an appeal, not a motion for reconsideration.

ORDER
IT IS ORDERED that defendant Paul Heinrich's motion for reconsideration, Dkt. 218, is DENIED.
Entered October 3, 2018.
BY THE COURT:
/s/ _____ JAMES D. PETERSON
District Judge

Appendix C

Order, *United States v. Heinrich*, No 05-3199 (7th Cir. 2006)

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT CHICAGO, ILLINOIS 60604

Argued April 14, 2006 Decided June 6, 2006

Before

Hon. WILLIAM J. BAUER, Circuit Judge Hon. ILANA DIAMOND ROVNER, Circuit Judge
Hon. TERENCE T. EVANS, Circuit Judge

ORDER

Paul Heinrich owns nine and a half acres of land on Little Star Lake in northern Wisconsin. A licensed pilot, Heinrich uses the property to operate a business offering "scenic seaplane rides." Most of his land is a white cedar swamp wetland subject to state and federal regulations. Heinrich's problems began when he decided he wanted to build a road from the lake upland to an aircraft hangar on his property. Starting in 1996, he began making inquiries of various officials with the Wisconsin Department of Natural Resources (WDNR) and the Army Corps of Engineers. At first he was honest about needing to build the road to move his seaplane. When he was told he would be unlikely to get the necessary permits, Heinrich changed his story and said he planned to build a "logging road," which is subject to fewer restrictions. But a Corps official who visited the property in May 1997 told Heinrich that idea also was unlikely to fly.

In August 1997, Heinrich chose to go ahead and build the road anyway, misrepresenting to his contractor that he had the necessary approvals. Two years later, officials received a complaint, and the federal EPA began investigating. Heinrich continued to characterize the project as a "logging road" on his "silviculture hobby farm." The EPA ordered Heinrich to restore the wetlands, and when he didn't, the agency issued a notice of violation. The government eventually filed suit to enforce the order. The district court, after granting summary judgment for the government, imposed a monetary penalty and issued a remedial order. Heinrich appeals, and we review the statutory interpretation behind the district court's summary judgment decision de nova. United States v. B & W Inv. Props., 38 F.3d 362, 366 (7th Cir. 1994).

Heinrich's seaplane access road met the criteria of a Corps nationwide permit that was in effect at the time, known as "NWP 26," which allowed small projects like his with minimal environmental impacts to proceed without advance federal approval. See 33 U.S.C. § 1344(e). However, under NWP 26, projects like Heinrich's still needed a state water quality certification. See 33 C.F.R. § 330.4(c).

Heinrich's defense boils down to two arguments: that Wisconsin waived its right to require water quality certification for NWP 26 projects, or that because of bureaucratic snafus between the Corps and the WDNR, he did not get proper notice that certification was required. We must reject both arguments.

Federal regulations require that a state evaluate a Corps nationwide permit for compliance with

its water quality standards. 33 C.F.R. § 330.4(c)(l). If a state denies blanket water quality certification for a particular NWP, or if the Corps deems the conditions imposed by a state to be the equivalent of a denial, then individuals seeking to proceed under a NWP must obtain individual water quality certifications.

Heinrich contends that Wisconsin waived its right to require individual water quality certifications because it did not submit valid paperwork to the Corps in time for a February 11, 1997, deadline applicable to NWPs in effect for the year 1997. The record indicates that the Corps received a FAXed copy of Wisconsin's water quality decision on the deadline, though Heinrich disputes whether the state properly followed its own procedures to make the decision legally effective by that date. At the latest, it appears the decision would have become effective on March 29, 1997, after the state commend period closed. The Corps did not reject the state's submission as untimely.

Heinrich did not raise his state procedural arguments in the district court, and so we decline to address them on appeal. See Republic Tobacco Co. v. N. At!. Trading Co., 381 F.3d 717, 728 (7th Cir. 2004) ("We have long refused to consider arguments that were not presented to the district court in response to summary judgment motions. Appellate review is not designed to serve as an unsuccessful party's second bite at the apple -- an opportunity to raise issues and arguments that were not brought forth below." (Internal citations and quotation marks omitted.)). Suffice it to say that while Wisconsin may or may not have blown a deadline set by the Corps, the Clean Water Act, which is the controlling statute here, imposes a penalty of waiver only ifa state fails to act "within a reasonable period of time (which shall not exceed one year)." 33 U.S.C. § 1341(a)(l). Since the Corps issued its request for state certifications on December 13, 1996, and Wisconsin's certification was effective at the latest on March 29, 1997, the state was within the one-year statutory time frame. Heinrich cannot escape liability for his wetlands violation by arguing in retrospect that the State waived certification.

Although the Corps accepted the state's decision as timely, it determined on April 30, 1997, that the substance of Wisconsin's decision was inconsistent with the Corps' regulations, and the decision was thus interpreted as a denial of NWP certification. This meant that each applicant seeking to use NWP 26 in the state would have to obtain an individual state water quality certification. Heinrich believes the requirement should not have been applied to him because there was no official public notice, to him or anyone else, that the Corps had interpreted the state's decision as a denial of blanket certification and thus that individual water quality certifications would be needed.

The relevant regulation says only (and rather vaguely) that Corps district engineers "will take appropriate measures to inform the public of which activities, waterbodies, or regions require an individual ... water quality certification before authorization by NWP." 33 C.F.R. § 330.4(c)(4). We might agree with Heinrich that Corps officials should have done more to let those potentially affected by the Wisconsin decision know that they had to get individual certifications. But we cannot find that the Corps' failure to do so violated any statute or regulation requiring notice by publication.

By contrast, the regulations are clear that an individual water quality certification is required where a state has denied blanket certification under a particular NWP. 33 C.F.R. § 330.4(c)(6). Nowhere do the regulations

indicate that landowners are entitled to assume that blanket certification is in effect unless they're specifically told otherwise. Yet Heinrich, who has reminded us throughout his brief and oral argument that he is a practicing attorney, seems to assume that he had a legal right to go forward with his access road simply because no one ever told him he couldn't. Rather than looking in vain for post-hoc justifications, he should have read the appropriate regulations more carefully and inquired about the status of state water quality certification requirements before he cavalierly moved forward with his project. The record indicates that Heinrich had contacts with various officials who probably could have steered him in the right direction and saved him an expensive violation -- if he hadn't created confusion by trying to flimflam them into believing that his seaplane access road was actually a "logging road," the requirements for which are covered by different policies.

Heinrich also seeks to have the government's suit against him dismissed because he was not personally served with the EPA compliance order. (He got it by certified mail.) As legal authority, he cites cases dealing with statutory requirements concerning notice of a citizen's intent to sue to enforce a government regulation, see Hallstrom v. Tillamook County, 493 U.S. 20 (1989), or over a government official's failure to perform some act or duty, see Greene v. Reilly, 956 F.2d 593 (6th Cir. 1992). But these cases have nothing to do with the mode by which an EPA administrative order is served. While the Clean Water Act specifies that such orders "shall be by personal service," 33 U.S.C. § 1319(a)(5), the record shows that Heinrich received the order, responded to it without objecJng to the mode of service, and was not prejudiced by the absence of personal service. The district court did not err in finding that Heinrich thus waived strict compliance with the personal service requirement. See United States v. Myslajek, 568 F.2d 55, 57 (8th Cir. 1977).

Finally, Heinrich argues that the $75,000 penalty he was assessed, along with an order to restore his wetlands to their previous condition, were "draconian and an abuse of discretion." Our own review of the record satisfies us that the district court properly considered the relief requested by the government and Heinrich's objections to it.

The judgment of the district court is AFFIRMED.

Appendix D

Judgment, *United States v. Heinrich*, No. 03-C-075-S (W.D Wis. June 17, 2005)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

This action came for consideration before the court with DISTRICT JUDGE JOHN C. SHABAZ presiding. The issues have been considered and a decision has been rendered.
IT IS ORDERED AND ADJUDGED THAT JUDGMENT IS ENTERED IN FAVOR OF PLAINTIFF AGAINST DEFENDANT WITH COSTS RESTRAINING AND ENJOINING DEFENDANT FROM FURTHER VIOLATIONS OF THE CLEAN WATER ACT IN T8HaE AREA DESCRIBED AS FOLLOWS: A SITE SITUATED IN THE NORTHWEST 1/4, SECTION 10, TOWNSHIP 41 NORTH, RANGE 8 EAST, STAR LAKE, VILAS COUNTY, WISCONSIN CONTAINING WETLANDS CONSISTING OF WHITE CEDAR SWAMP; AND THAT DEFENDANT FULLY RESTORE SAID WETLANDS TO THEIR PRE CLEAN WATER ACT VIOLATION CONDITION IN ACCORDANCE WITH THE COURT'S APPROVED RESTORATION PLAN ATTACHED HERETO AS EXHIBIT A.
THAT IN THE EVENT ANY RESTORATION REQUIREMENT IS NOT COMPLETED BY DEFENDANT BEFORE THE DATES SET FORTH IN THE COURT'S APPROVED RESTORATION PLAN DEFENDANT SHALL BE LIABLE FOR PAYMENT OF NOT MORE THAN $1,000.00 PER DAY AS DETERMINED BY THE COURT FOR EACH DAY THE RESTORATION PLAN REQUIREMENT IS NOT COMPLETED AFTER SAID DATE;
THAT DEFENDANT PAY THE BALANCE OUTSTANDING OF THE $75,000 CIVIL PENALTY PREVIOUSLY ORDERED IN THIS MATTER AS FOLLOWS:
$16,250NOTLATERTHANJANUARY5, 2006
$16,250NOTLATERTHANJANUARY5, 2007
$16,000NOTLATERTHANJANUARY5, 2008 FOR A BALANCE OF $48,500

IT IS FURTHER ORDERED THAT JUDGMENT IS ENTERED IN FAVOR OF PLAINTIFF UNITED STATES OF AMERICA AGAINST DEFENDANT PAUL A. HEINRICH DISMISSING ALL COUNTERCLAIMSWITH PREJUDICE AND COSTS.
9a
Approved as to form this 17th day of June,
2005. s/ John C. Shabaz JOHN C. SHABAZ
DISTRICT JUDGE
s/ Theresa M. Owens Theresa M. Owens, Clerk
s/ L. Jensen
By Deputy Clerk
June 17 2005

EXHIBIT A
COURT APPROVED RESTORATION PLAN FOR DEFENDANT HEINRICH'S WHITE CEDAR SWAMP

The Court has ordered full restoration of Defendant's property on Little Star Lake, Wisconsin (the "site") to its pre violation conditions consistent with EPA's Restoration Guidelines. Pre-violation conditions were a White Cedar and Black Spruce dominated forested wetland system. Therefore, once fill removal is completed, trees must be planted.

Wetland restoration of the site will consist of removal of fill material, reconstruction or relayering of the natural soil horizons, best management practices prior to, during and after construction (e.g., erosion control), seeding and planting of native wetland plant species, including trees and herbaceous plants, and a period of monitoring and corrective action to ensure successful establishment of pre-violation conditions. The goal of restoration is to reestablish a forested wetland system that mimics the elevation, soil layering and plant community of the surrounding undisturbed white cedar swamp. A detailed restoration plan follows consistent with the Restoration Guidelines.

I. Existing PhysicalConditions

A. Surveyed Site Plan. No later than ten days after the Court approves this Restoration Plan Defendant Heinrich shall provide to EPA a surveyed site plan showing property boundaries, buildings, water bodies, wetlands, areas of unpermitted fill, elevation contours and other ground surface features at a scale of 1 inch = 25 feet.

Prior to commencement of earth moving Defendant Heinrich shall take spot elevations in undisturbed soil....

Appendix E

Memorandum Opinion and Order, *United States v. Heinrich*, No. 03-C-75-S (W.D. Wis. Sept. 18, 2003) note 23a is in the wrong place it should be at 41a

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,
Plaintiff, Case# 03-C-75-S
V.
PAUL A. HEINRICH, Defendant.

Memorandum and Order

Plaintiff United States of America commenced this Compliance Order enforcement action pursuant to § 309(a) of the Clean Water Act, 33 U.S.C. S 1319(a), seeking to recover civil penalties and compel defendant Paul Heinrich to restore a wetland through which he constructed a road. Defendant seeks a determination that his construction of the road was not in violation, or was exempt from or permitted by the CWA and further asserts various defenses to CWA enforcement. Jurisdiction is provided by 28 U.S.C. § 1331, 1345, 1355 and the CWA. The matter is presently before the Court on cross motions for summary judgment on all claims and defenses. The following facts are not disputed for purposes of the pending motions.

FACTS

Plaintiff Heinrich owns real property in Vilas County, Wisconsin consisting of 9.5 acres and 480 feet of frontage on Little Star Lake. The non-wetland portion of the defendant's property includes a house, garage and shed. It also includes a 60 x 68 foot storage building constructed by defendant. Eight of the 9.5 acres, including the lake frontage, are a white cedar swamp wetland. The cedar swamp slopes toward and is hydrologically connected to Little Star Lake. Little Star Lake has 100 surface acres and a maximum depth of nine feet. It is connected by surface water and drains into Star Lake and ultimately into the Wisconsin and Mississippi rivers.

Little Star lake is used for recreational purposes including fishing and boating. Errington's Resort, which offers cabins and a motel to interstate guests, has operated on Little Star Lake since 1950, The resort is open all year and its guests swim, boat, snowmobile and hunt on the lake.

Defendant Heinrich is a commercial pilot who owns a sea plane and operates a business called "Scenic SeaPlane Rides" which offers seaplane rides to customers. He stores his seaplane in the storage building on the property and takes off and lands the plane on Little Star Lake.

In December 1996 defendant contacted both the Wisconsin Department of Natural Resources (WDNR) and the Regulatory Project Manager for the United States Army Corps of Engineers (Corps) to inquire about constructing a road through the wetland for the purpose of moving his seaplane between the storage building on his property and Little Star Lake. Both the WDNR and the Corps advised defendant that he required permits to construct the road and the Corps

agent advised defendant that he was unlikely to receive the necessary permits.

On January 16, 1997 defendant filed a permit application with the Corps to construct a "permanent logging road." The application showed that fill would be placed to construct a fifteen foot wide road and a twenty foot strip on either side of the road would be logged. A copy of the application was also received by the WDNR. On February 10, 1997 the Corps and WDNR inspected defendant's property. The Corps agent advised defendant to apply for an access path with a dual purpose. The WDNR agent advised defendant that WDNR would probably deny a request for certification pursuant to §401 of the CWA.

On May 20, 1997 federal, state and county officials inspected defendant's property, The WDNR's agent advised plaintiff that in his opinion construction of the access road would involve the discharge of fill material into the wetland and would require a State Water Quality Certification pursuant to section 401 of the CWA. He further advised defendant that it was his opinion that the project would be unlikely to receive such a certification.

In 1997 defendant hired Vogel Enterprises, Inc (Vogel) to construct a road through the wetland, advising Vogel that he had obtained all necessary permits and that the road was exempt from permit requirements because it was a logging road. Using a backhoe, a bulldozer and a Posi Track with a bucket Vogel built the road by leveling the top of an existing ridge and pushing muck between the ridge and the area that had been leveled for the storage building and topping the road with topsoil taken from the property. The road extended through the wetland to approximately 100 feet from the lake shore, at which point the land became too wet to continue construction in that manner. In October 1998 Vogel installed two culverts beneath the road. In spring 1999 defendant installed a wooden boardwalk extending the road an additional 100 feet to the lake using logs, wooden planks and Spancrete blocks.

On November 20, 2000 plaintiff issued an administrative compliance order requiring defendant to cease all discharges of fill and to submit a plan to restore the wetlands. The compliance order and a subsequent amendment were sent to defendant by certified mail and were actually received by defendant on or about December 7 and March 23, 2001, respectively. Defendant denied that any permit was required and refused to restore the property to its former state. Plaintiff commenced this action to enforce the compliance order.

MEMORANDUM

Plaintiff moves for summary judgment arguing that the undisputed facts establish that by constructing the wetland road defendant discharged a pollutant into navigable waters without a permit in violation of 33 U.S.C. 131 l(a) and 1362(12). Defendant contends that he is entitled to summary judgment because he did not add fill to the wetland, forest road construction does not constitute pollution from a point source, the road was not constructed on or in waters of the United States and the construction of the road fell within an exemption or was permitted by a nationwide permit which required no application. Alternatively, defendant contends that factual disputes preclude resolution of the issues on summary judgment. Defendant also argues that plaintiffs second claim, enforcement of the administrative compliance order, is procedurally improper because he was not properly served with the compliance order which plaintiff seeks to enforce. Finally, defendant seeks summary judgment on the basis that plaintiffs actions are unconstitutional.

Summary judgment is appropriate when, after both parties have the opportunity to submit evidence in support of their respective positions and the Court has reviewed such evidence in the

light most favorable to the nonmovant, there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), Federal Rules of Civil Procedure.

A fact is material only if it might affect the outcome of the suit under the governing law. Disputes over unnecessary or irrelevant facts will not preclude summary judgment. A factual issue is genuine only if the evidence is such that a reasonable factfinder, applying the appropriate evidentiary standard of proof, could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986). Under Rule 56(e) it is the obligation of the nonmoving party to set forth specific facts showing that there is a genuine issue for trial.

CWA Violation

CWA makes the "discharge of any pollutant" unlawful unless the discharge is authorized by a statutory exemption or a permit. 33 U.S.C. 1311(a). The "discharge of any pollutant" means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Accordingly, in order to prevail on its claim plaintiff must demonstrate that defendant (1) discharged a pollutant (2) from a point source

(3)into navigable waters. Were all three elements established it must be determined whether the discharge was authorized by permit or exemption. Each of the three elements and the existence of a permit or exemption are the subject of dispute in these crossmotions.

The term "pollutant" includes "dredged spoil,... biological materials, . . . rock, sand [and] cellar dirt." 33 U.S.C. § 1362(6). it is undisputed that defendant, either by redepositing material from the surrounding wetland or depositing material from dry land, placed dirt, sand, logs and leaves into the wetland to build the road and boardwalk, all of which satisfy the definition of pollutant. Plaintiffs discussion concerning whether the materials constitute "fill" within the meaning of federal regulations is irrelevant to the issue of whether there has been a discharge of a pollutant. Status of a pollutant as "fill" does not affect whether a pollutant has been discharged but is relevant in the application of 33 U.S.C. § 1344 and the regulations enacted pursuant to it (see, e.g., 33 CFR § 323; 40 CFR § 232) which address permits (and exemptions) for dredged or fill material. This issue is addressed separately in the context of defendant's forest road exemption defense.

From a Point Source

"Point source means any discemable, confined and discrete conveyance." 33 U.S.C. § 1362(14). Backhoes and bulldozers used to deposit materials in wetlands are point sources. Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 922 (5th Cir. 1983); Borden Ranch Partnership v. United States Army Corps of Engineers, 261 F.3d 810, 815 (9th Cir. 2001); see also United States v. Huebner 752 F.2d 1235, 1242-43 (7th Cir. 1985). The machines used by defendant and Vogel to place materials into the wetland on the road bed were point sources within the meaning of the CWA.

Discharge ofa Pollutant

Defendant argues that the road was for forestry activities that such activities are generally regulated as non-point source activities and, therefore, his road construction activities were a non-point source activity. Accepting for purposes of this element that defendant's activities were for silviculture the argument fails. It is neither logically sound nor supported by the regulations he cites. It is true that the primary pollutant discharge from forestry activities is non point source

runoff caused by the clearing of vegetation, construction of roads, and other activities which affect surface drainage. See 40 CFR 122.27. However, this certainly does not contradict the fact that forest roads constructed through wetlands constitute point source discharges. The applicable regulation, 40 CFR § 122.27, explicitly states as much:

[Silviculture Point Source] does not include non-point source silvicultural activities such as . . . road construction and maintenance from which there is natural runoff. However, some of these activities (such as stream crossings for roads) may involve point source discharges of dredged or fill material which may require a CWA section 404 permit.

A forestry purpose does not convert an obvious point source discharge of fill material into a wetland into a non-point source discharge.

Into Navigable Waters

"Navigable waters" means waters of the United States.

33 U.S.C. § 1362. The term "waters of the United States" is defined at 33 CFR § 328.3(a) to mean:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce....

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intra-state lakes, rivers, streams (including intermittent streams) mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(I) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.

Little Star Lake is an intra-state lake used by interstate travelers for recreational purposes, § 328.3 (a) (3), and a tributary of the Wisconsin river (a water used in interstate commerce) and the Mississippi river (an interstate water), § 328.3(a)(5).

Defendant's only argument in opposition to this element is that his wetlands are not "adjacent" to Little Star Lake within the meaning of § 328.3(a)(7) because there are lily pads in the lake at the point where the cedar swamp meets the lake. His argument fails as a matter of fact, statutory interpretation and common sense. "Adjacent" means "bordering, contiguous or neighboring." Under any reasonable interpretation defendant's cedar swamp, which ends at the open water of Little Star Lake, is adjacent to the lake. The parenthetical reference in § 328.3(a)(7) which excludes from coverage wetlands adjacent to "waters that are themselves wetlands" is a reference to wetlands which are themselves waters of the United States without regard to adjacency, that is wetlands identified in § 328.3(a)(l)-(6) which qualify for waters status independent of their relationship to lakes, rivers and streams. A wetland such as defendant's which adjoins a lake which affects interstate commerce and is a tributary to navigable and interstate waters is not affected by the exception.

Were defendant's non-sensical interpretation accepted virtually all adjacent wetlands would be excluded from coverage beyond the first foot because the balance would be adjacent to other wetlands. As the Supreme Court recognized in United States v. Riverside Bayview Homes, Inc.,

474 U.S. 121, 135 (1985) the basis for jurisdiction over wetlands adjacent to open waters is their function as "integral parts of the aquatic environment." To arbitrarily exclude wetlands from coverage because there are lily pads at the lake shoreline would be to ignore the fundamental basis for their inclusion. Not surprisingly, the only court to have expressly considered defendant's argument characterized it as absurd. North Carolina Shellfish Growers Ass'n v. Holly Ridge Assoc., LLC., 2003 W.L. 21995171, *16 at n. 5.

Permit or Exemption

All elements of a CWA violation having been established, defendant is liable unless his actions in building the road through the wetland was exempted from coverage or was performed pursuant to a permit. Defendant argues that his actions were exempt from coverage by the forest road exemption, 33 U.S.C. 1344 (f) (1) (E) and, alternatively, that his actions were permitted pursuant to Nationwide Permit 26 (NWP 26).

Forest Road Exemption.

The discharge of fill material is not prohibited under the CWA ifit is
for the purpose of construction or maintenance of farm roads or forest roads ... where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics ofthe navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized.
33 U.S.C. § 1344 (f) (1) (E) . Defendant maintains that his road satisfies all requirements for the exemption.

Plaintiff contends that the exemption, does not apply because the defendant's road is not a "forest road" within the meaning of the Act and because, were it a forest road, its construction was not in accordance with best management practices as required by the Act. The evidence is overwhelming that the construction of the road was not for forestry purposes and that its construction was not in accordance with best management practices. Accordingly, there is no genuine issue of fact and plaintiff is entitled to summary judgment in its favor.

The only reasonable conclusion from a review of the undisputed evidence is that the road through defendant's wetland was constructed primarily for the purpose of transporting his seaplane to and from Little Star Lake and not for the purpose of forestry. Prior to construction of the road defendant contacted several government agencies making it clear that he intended to build an access road for his seaplane through the wetland. Only after he was advised that the activity was not permitted did he advance a forestry purpose. He constructed a boardwalk extending the road to the lake which serves no forestry purpose but, instead serves the obvious purpose of seaplane access. He uses the road to transport his plane and operate his scenic rides business. Virtually all the logging performed on the property preceded the road and was for the purpose of clearing the land to build the road and provide sufficient width for the plane wings. Logging companies deemed the property not worth commercial harvesting because of its size and hydrology. At most defendant has established that he has made some incidental use of the logs he removed to build and maintain the road. A reasonable fact finder could only conclude that the primary purpose of the road is lake access for the plane and that the purported forestry purpose was a pretext to attempt to establish an exemption from CWA requirements.

Had defendant raised a fact issue on the forestry purpose of the road the exemption would not

apply because the road would not constitute best management practices as required by the Act. Under prescribed best management practices such roads are held to the minimum feasible number width and total length consistent with the purpose of specific farming, silvicultural or mining operations, and local topographic and climactic conditions." 33 CFR 323.4(a)(6)(i). Furthermore, all roads are required to be located sufficiently far from water bodies to minimize discharges, § 323.4(a)(6)(ii), vegetative disturbance is to be kept to a minimum, 323.4(a)(6)(vi) and construction of roads in wetlands is to be avoided entirely if practical alternatives exist, § 323.4(a)(6)(x).

Defendant's very limited "silvicultural operaJons" would probably not require a road. They certainly would not require one the length and width of that constructed, would not require extension to the lake edge and would not require a fiNy foot wide clear cut to the lake. All these features are contrary to best management pracJces because they impose far greater impact on the wetland than would be required for the type of Jmber harvesJng defendant suggests he might perform. All these features are unnecessary to any "silvicultural operaJon" but exist only to facilitate use of the road as a seaplane taxiway. The forest road exempJon does not apply.

Nationwide Permit 26

Pursuant to 33 U.S.C. 1344(e) plainJff may issue discharge permits on a general rather than individual basis for certain acJviJes determined to have minimal environmental impact. Once such a general permit is in place acJviJes which qualify with its terms and condiJons may proceed without individual authorizaJon. 33 CFR 330.2(c). At the Jme of defendant's acJviJes a naJonwide general permit, NWP 26, was in effect, 61 Fed. Reg. 65874, 65916-17 (Dec. 13, 1996). NWP 26 covered

Discharges of dredged or fill material into headwaters and isolated waters provided that the acJvity meets all of the following criteria:

a. The discharge does not cause the loss of more than 3 acres of waters of the United States nor cause the loss of waters of the United States for a distance greater than 500 linear feet of the stream bed;

b. For discharges causing the loss of greater than 1/3 acre of waters of the United States, the permittee notifies the District Engineer in accordance with the "Notification" general condition;

c. For discharges causing a loss of 1/3 acre or less of waters of the United States. the permittee must submit a report within 30 days of completion of the work, containing the information listed below;

d. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands.

Regardless ofthe applicability of NWP 26, an applicant was required to comply with applicable state water quality certification requirements before a permit could be obtained. 33 U.S.C. § 1341(a)(l).

Plaintiff concedes that defendant's project met the criteria for NWP 26 except for requirement c, defendant having failed to submit the requisite report within thirty days after completion of the work. Plaintiff does not contend that the failure to file the report would have voided the permit. However, plaintiff argues that defendant failed to obtain (and in any event would have been denied) a section 401 water quality certification which is a. prerequisite to a permit under NWP 26. Defendant argues that Wisconsin either waived its right to issue section 401 permits generally

or its right to deny defendant's specific request for certification by failing to act on it. 33 U.S.C. § 134l(a) (1). There is no factual support for either of defendant's arguments.

Wisconsin has not waived its right to require water quality certificaTions. Wisconsin Timely submiUed its water quality cerTificaTion condiTions to plainTiff on February 11, 1997 pursuant to 33 CFR § 330.4(c) (1) as demonstrated by defendant's exhibits 16 and 18. As a result of the denial of those conditions, noted in defendant's exhibit 16 and provided by 33 CFR § 330.4(c) (3), all subsequent NWP 26 applications including those of defendant were denied without prejudice until Wisconsin issued an individual 401 certification or waived its right to do so. Defendant concedes that Wisconsin did not issue him an individual 401 certification for his road. In fact, it is undisputed that its agents advised him that they would probably deny any such request. Rather, he asserts that he filed a request for certification to which he received no response within 60 days giving rise to a presumption of waiver of the certification requirement for his project in accordance with § 330.4(c)(6). In support of this argument defendant contends that an "Application for Water Regulatory Permits" filed with the Corps on January 16, 1997, a copy of which was provided to WDNR, constituted an application for state section 401 certification. That document identified the proposed activity as "construction of a permanent logging road in accordance w/33 CFR 323 .4 (a) (6)" and identified the purpose, need and intended use of the project as "logging and other forestry related activities."

Given the stated purpose of the project to construct a forestry road which was exempt from the requirement of a permit, WDNR did not consider it a request for state certification and did not process it as a request for certification. On February 6, 1997, plaintiff send a letter to defendant advising him that his project would not qualify for exemption and instructed him to amend his application to seek a permit. On February 10, 1997 representatives of plaintiff and WDNR met with defendant at his property and advised him to apply for a permit. Clearly at that time neither defendant, plaintiff nor WDNR believed that the January 16, 1997 document was a request for the issuance of a permit or for state certification for the issuance of a permit. Defendant's unequivocal position was that he did not require a permit. No subsequent application was filed. Accordingly, Wisconsin did not waive its right to deny certification.

Additional Defenses

Defendant raises three additional defenses to plaintiffs claims: First, that the doctrine of res judicata bars claims relative to the placement of the boardwalk and boat ramp; second, that the administrative compliance order which. is the basis for the second claim of the complaint was not properly served; third, that the regulation of plaintiffs activities on his property is unconstitutional.

Res Judicata

On August 1, 2000 a WDNR agent issued defendant citations for placing a seaplane ramp and concrete blocks onto the bed of Little Star Lake in violation of Wis. Stat § 30.12 which prohibits the placement of material or structures on the bed of a navigable water. Defendant was ultimately found guilty of the violation involving the concrete blocks and not guilty of the alleged violation involving the ramp. Defendant has removed the blocks. Defendant now argues that the WDNR prosecution of these state law violations precludes the present CWA enforcement action. Since neither the claims nor the parties were the same in the two actions, the defense is inapplicable.

Res Judicata (claim preclusion) precludes parties from raising claims which were previously adjudicated, or which could have been raised in a prior action between them, Allen v. McCurry, 449 U.S. 90, 94 (1980). An action for violation of a Wisconsin statute barring placement of structures on Wisconsin lake beds is plainly distinct from an action for improper discharge of pollutants in violation ofthe CWA. Furthermore, it is undisputed that the State of Wisconsin had no authority to bring a CWA action in state court. Accordingly, the. CWA claim presently before the Court was not and' could not have been litigated in the state action.
Collateral estoppel (issue preclusion) precludes relitigation of an issue of fact or law necessary to a judgment in a prior action involving the same party. Id. Assuming that some common factual issues might exist between the state prosecution and the present CWA action (though this has not been established) it is clear that the United States and the State of Wisconsin are not the same party for purposes of collateral estoppel. The doctrine could only apply against the United States in this action if it exercised control over and carried the "laboring oar" in the previous action. Montana v. United States, 440 U.S. 147, 155 (1979). There is no evidence that the United States had any significant involvement in the state proceeding. Accordingly, there is no legal or factual basis for a res judicata defense.

Unconstitutionality

Defendant contends that defendant's attempted regulation of his wetlands exceeds congressional Commerce Clause authority because the connection between his wetland and interstate commerce is too tenuous and remote. Specifically, that it is unconstitutional to regulate headwaters distant from rivers used in commercial navigation because such bodies of water have an insufficient impact on interstate commerce. The Supreme Court expressly addressed and rejected challenges to Corps authority to regulate wetlands adjacent to all waters of the United States for purpose of protecting the aquatic ecosystem as a whole. Riverside Bayview Homes, 474 U.S. at 133-34. In so doing the Court affirmed not only congressional power under the Commerce Clause to regulate defendant's wetland but also the reasonableness of the Corps interpretation of the CWA in imposing such regulations. Defendant's argument that the regulation is unconstitutional must be rejected.

Improper Service

Finally, defendant suggests that the second claim of the complaint should be dismissed because he was not personally served with the compliance order plaintiff now seeks to enforce in accordance with 33 U.S.C. § 1319(a) (5)(A). Under the circumstances presented here, a failure of personal service is not fatal to plaintiffs claim. It is undisputed that defendant actually received the administrative compliance order and an amendment to it. It is also undisputed that he responded to the order without raising an objection to the mode of service. Pursuant to 33 U.S.C. 1319(a)(4) the order could not take effect until defendant had an opportunity to consult with plaintiff. As a result of these circumstances there is no possibility of prejudice to defendant from the absence of personal service.
Had defendant objected to the form of service at the time it could have been easily and inexpensively corrected. Having chosen not to do so and fully litigating the matter on its merits under circumstances where there is no evidence of bad faith on the part of plaintiff or prejudice to defendant, he has waived strict compliance with the personal service requirement. United States v. Myslajek, 568 F.2d 55, 57 (8th Cir. 1977).

ORDER

IT IS ORDERED that defendant's motion for summary judgment is DENIED.
IT IS FURTHER ORDERED that plaintiffs motion for partial summary judgment is GRANTED.
IT IS FURTHER ORDERED that the parties submit proposed findings of fact and conclusions of law concerning that relief to be awarded by October 1, 2003.
Entered this 18th day of September, 2003. BY THE COURT
s/ John C. Shabaz JOHN C.SHABAZ District Judge

No. _____

In the
Supreme Court of the United States

Paul A. HEINRICH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Certificate of Compliance with Type-Volume limitation

Petitioner, Paul A. Heinrich, hereby certifies, pursuant to Supreme Court Rule 33.1(g)(i), that the attached Petition complies with the type volume limitation. This brief contains 8323 words and is less than 40 pages. This document has been prepared using WordPerfect 9.0.

Affidavit of Filing by U.S. Mail

Petitioner, Paul A. Heinrich, the undersigned, does hereby declare under penalty of perjury under the laws of the United States of America that the following is true and correct. He certifies, under oath, that he placed a copy of his Petition for Certiorari along with a check in the amount of $300.00 USD for filing fees, in the US mail, postage prepaid, and addressed to the Clerk of the Supreme Court of the United States of America, One First Street, NE, Washington, D.C. 20543 on September 28, 2020.

Paul A. Heinrich, *pro se*

Signed and sworn to before me this 28th Day of September, 2020.

Ken Caudill
Notary Public

KEN CAUDILL
Notary Public
State of Wisconsin