UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
	)	
DR. DANIEL J. McGOWAN,	)	DOCKET NO. CWA-07-2014-0060
	)	
	)	
Respondent	)	

COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION TO STRIKE

1. Summary of Pleadings

On April 17, 2015, Complainant, the United States Environmental Protection Agency, Region VII (EPA), e-filed a Motion for Accelerated Decision as to Liability and Motion to Strike Respondent's Affirmative Defenses.

On April 27, 2015, Complainant and Respondent, Dr. Daniel J. McGowan, jointly filed a Motion for Extension to file, respectively, a Response to Complainant's Motion for Accelerated Decision and Motion to Strike and a Reply to Respondent's Response. ALJ M. Lisa Buschmann granted parties' Motion for Extension on April 28, 2015.

Respondent filed a Response to the Motion for Accelerated Decision and Motion to Strike on May 18, 2015.

On May 28, 2015, Complainant and Respondent jointly filed a Motion to Supplement their Prehearing Exchanges. Complainant moved to supplement with the addition of a witness,

Bruce Danatt. Respondent moved to supplement with the addition of an email from Andy Glidden to Schuckman. To date, the Court has not ruled on the admissibility of this supplemental evidence.

Complainant filed a Reply to Respondent's Response on June 5, 2015. Among other Declarations, the Reply included a Declaration from Bruce Danatt, the witness Complainant sought to add in its Motion to Supplement its Prehearing Exchange.

On June 23, 2015, Respondent filed a Motion to Strike three Declarations that were attached to Complainant's Reply to Respondent's Response. In its Motion, Respondent asserts that: (1) 40 C.F.R. Part 22 provides for Presiding Officer discretion in allowing Declarations; (2) the Declarations produce a "sandbagging effect" that is harmful to Respondent; (3) allowing the Declarations to be included in the record would be prejudicial to Respondent, and; (4) the Declarations include new facts to which Respondent should be allowed to respond.

2. Complainant's Response to Respondent's Motion to Strike

In support of its Response to Complainant's Motion to Strike the Declarations of Barry Harthoorn, Bruce Dannat and Paul Boyd attached to Complainant's June 5, 2015 Rebuttal, Complainant states as follows:

a. 40 C.F.R. § 22.16 expressly allows for movants to include affidavits "or other evidence" in a reply to a Motion without an order from the Presiding Officer.

In its Motion to Strike, Respondent cites 40 C.F.R. § 22.16(a), which allows for other parties to file responses to a motion and allows the movant to file a reply to the response. Additionally, the regulation allows for the Presiding Officer to permit "additional responsive documents" as appropriate. In this case, Respondent argues that three Declarations attached to Complainant's June 5, 2015 Reply to Respondent's Response are "additional responsive

documents" and that the Presiding Officer should not allow the Declarations to be submitted into evidence. Respondent's assertion that the three Declarations are "additional responsive documents" that are only permitted by order of the Presiding Officer is erroneous.

A plain reading of the regulation reveals Respondent's error. First, 40 C.F.R. § 22.16(a) distinguishes between "responses" and "replies" filed after a motion and "additional responsive documents." Only the "additional responsive documents" are afforded Presiding Officer consideration for admissibility, not the "responses" or "replies." Second, in the very next section, 40 C.F.R. § 22.16(b), the regulations state that responses and replies "*shall* be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon." The three Declarations in question were attached to Complainant's Reply and fall squarely into the types of documents unambiguously allowed for in this provision. Third, 40 C.F.R. § 22.16(b) does not provide for the Presiding Officer to consider the admissibility of such "other evidence." Because the regulations specifically allow for the filing of responses, replies and "other evidence" accompanying such, Respondent's contention that Complainant's Declarations are only permitted by order of the Presiding Officer is clearly incorrect.

b. Complainant's Declarations were limited to issues raised in Respondent's response and are, therefore, not unfairly prejudicial.

In its Motion to Strike, Respondent asserts that Complainant's Declarations are unfairly prejudicial because they were not included in Complainant's original Motion for Accelerated Decision and Motion to Strike. In its analysis, Respondent relies on *Tischon Corp. v. Soundview Communications, Inc.* (2006 U.S. Dist. LEXIS 97309 (N.D. Ga. Feb. 15, 2005)), in which the Court struck affidavits submitted by the movant in its reply to the non-movant's response to a motion for summary judgment. Citing Rule 6(d) of the Federal Rules of Civil Procedure, the

Court concluded that the affidavits were unfairly prejudicial because they were "not limited to addressing an argument initiated by defendants in their responses." *Id.* In the decision, the Court states that parties may not submit "evidence of new, substantive facts at the last minute," but that affidavits may be properly submitted if they are in reply to issues raised by the opposing party. *Id.* Respondent's assertions that Complainant improperly submitted Declarations are in error because Complainant submitted them directly in reply to issues raised by Respondent.

Similar to the FRCP requirements laid out in *Tishcon*, 40 C.F.R. § 22.16(b) also requires that movant's replies "be limited to issues raised in the response." In adhering to this provision, the Declarations at issue here were submitted directly in response to issues raised in Respondent's response to the Motion for Accelerated Decision and Motion to Strike:

1. Paul Boyd's Declaration that Respondent's discharges were not part of generally-accepted "normal dam operations" was submitted in response to Respondent's claim that the discharges were associated with "continuous flow" within the dam and part of "normal dam operations." Respondent's Response, pp. 7, 11, 12.
2. Barry Harthoorn's Declaration that water levels were extremely low in Dr. McGowan's reservoir was submitted in response to Respondent's claim that he was unable to perform repairs on his dam because the Corps' Cease and Desist Order prevented him from draining the reservoir. Respondent's Response, pp. 3, 18.
3. Bruce Dannatt's Declaration that Respondent had explored options for sediment removal prior to his discharges was submitted in response to Respondent's claim that he was unable to perform repairs on his dam because of the Corps' Cease and

Desist Order (Respondent's Response, pp. 3, 18), and that the discharges were necessary to avoid loss of the dam. *Id,* p. 15.

Because Complainant's Declarations were submitted directly in reply to issues raised in Respondent's response in accordance with 40 C.F.R. § 22.16(b) and the FRCP requirements outlined in the *Tishcon* case, the Declarations were properly submitted and, therefore, not unfairly prejudicial to Respondent.

c. Respondent's Reliance on "Sandbagging" Case Law is Erroneous

In his Motion to Strike, Respondent claims that EPA deliberately withheld its best evidence in order to "sandbag" Respondent's chances to an adequate defense. However, Respondent's arguments for "sandbagging" are erroneous for the following reasons:

First, Respondent's claim of "sandbagging" is misplaced. Courts have defined "sandbagging" as a method of "[t]rial by ambush" in which an opposing party withholds evidence until late in the proceedings and without affording an opportunity to respond. *Vierro v. Bufano*, 925 F. Supp. 1374, 1380 (N.D. Ill. 1996). Respondent claims that the Declarations submitted by Complainant in its reply constitute "new factual allegations" (Respondent's Motion to Strike at 2). However, EPA named two of these individuals as witnesses in its Prehearing Exchange, as required under 40 C.F.R. §22.19. EPA also gave prior notice to Respondent of the addition of the third witness and Respondent did not object to the addition.[1] Since Respondent was given proper notice of these witnesses, they can hardly say they were "ambushed" when

[1] As discussed above, EPA and Respondent submitted a Joint Motion to Supplement the Prehearing Exchanges to the Court on May 28, 2015. In the Motion, EPA sought to include Bruce Dannatt as a witness. EPA consulted with opposing counsel concerning this addition and opposing counsel did not object. In the same Motion to Supplement, Respondent also sought to add new evidence without objections from EPA. To date, the Court has not ruled on the Motion to Supplement the Prehearing Exchanges.

Complainant submitted Declarations on the witnesses' behalf as supporting evidence in its reply, particularly when the rules specifically allow for such submissions and the Declarations were in direct response to Respondent's assertions. 40 C.F.R. § 22.16(b).

Second, Respondent's assertions that his arguments are supported by case law are erroneous. Respondent relies on two "sandbagging" cases, *Pike v. Caldera* and *Viero v. Bufano*, in which the courts granted motions to strike evidence presented later in the proceedings. However, both cases were challenged and, in both cases, subsequent courts allowed the alleged "sandbagging" facts to remain in evidence.[2] *McLauglin Equipment Co., Inc. v. Servaas*, No. IP98-0127-C-T/K, 2004 WL 1629603, at *12 (S.D. Ind. Feb. 18, 2004); *Memphis Pub. Co. v. Newspaper Guild of Memphis, Local 33091*, No. 4-2620 B/P, 2005 WL 3263878, at *2 (W.D. Tenn. Nov. 30, 2005).

Third, Respondent cites *judicial* case law, which can be distinguished from administrative law and proceedings concerning evidentiary submissions. While motions for accelerated decisions under 40 C.F.R. §22.20(a) are similar to motions for summary judgment addressed in Rule 56 of the FRCP, they are not the same. The primary objective of an administrative pleading is to "facilitate a decision based on the merits of a controversy." *In re Behunke Lubricants, INC.*, Docket No. FIFRA-05-2007-0025, 2008 WL 711033, at *6 (EPA ALJ, Mar. 5, 2008). Generally speaking, "administrative pleadings are liberally construed and easily amended." *In re Lazarus, INC.*, TSCA-V-C-32-93, 7 E.A.D. 318, 1997 WL 603524, at *10 (EAB 1997). Complainant's Declarations were submitted in accordance with the

[2] In fact, the *Pike* court held that the evidence in dispute specifically did *not* constitute sandbagging. 188 F.R.D. 519, 532 (D. Ind. 1999).

administrative rules and were of the type generally allowed in administrative proceedings.

Concerning administrative practice, Motions to Strike are the "appropriate remedy for the limitation of impertinent or redundant matter in any pleadings (*In re Dearborn Refining Co.*, Docket No. RCRA-05-2001-0019, 2003 EPA ALJ Lexis 10, at *6 (EPA ALJ, Jan. 3, 2003)) and are considered "drastic and harsh remedies that are rarely used." *In re Behunke Lubricants, INC.*, at *6. Courts have typically viewed these motions with much "disfavor." *Id.*

As discussed above, the Declarations provided in Complainant's reply do not constitute "sandbagging" because they were authorized by the regulations, were in direct response to issues raised by Respondent and were submitted by declarants Complainant had named as witnesses. Further, Respondents have failed to raise any assertions in support of its Motion to Strike indicating that the Declarations are "impertinent or redundant."

Therefore, Respondent's Motion to Strike should be denied.

c. If the Court Allows, Complainant Supports a Reply to Complainant's Declarations

In its Motion to Strike, Respondent requests that, if the Court allows the submission of the three Declarations into evidence, it should be given an opportunity to respond. Complainant does not object to such an opportunity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of July, 2015, I sent via the OALJ E-filing system the original Memorandum in Support of Motion for Accelerated Decision to Sybil Anderson, the Office of Administrative Law Judges Hearing Clerk, and sent one true and correct copy via email to Mr. Stephen D. Mossman, Esq. at SDM@MattsonRicketts.com.

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Signature of Sender