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In the matter of: )  
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DAVID D'AMATO, )  
Anchorage, Alaska )  
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)  
Respondent )  
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DOCKET NO. CWA 10-2010-0132

**COMPLAINANT'S RESPONSE TO  
RESPONDENT'S MOTION TO  
DEPOSE HEATHER DEAN**

On April 4, 2011, Respondent filed a Motion to Depose Heather Dean. The document asks that Respondent be allowed to depose Heather Dean, a witness named in Complainant's Initial Prehearing Exchange. Because Respondent has not met the standard for additional discovery, Respondent's motion should be denied.

**STANDARD FOR ADDITIONAL DISCOVERY**

The "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits" ("Rules of Practice"), at Section 22.19(e), describe the conditions that must be met before the Presiding Officer may order additional discovery:

*Other Discovery.* (1) After the information exchange provided for in paragraph (a) of this section, a party may move for additional discovery. The motion shall specify the method of discovery sought, provide the proposed discovery instruments, and describe in detail the nature of the information and/or documents sought (and, where relevant, the proposed time and place where discovery would be conducted). The Presiding Officer may order such other discovery only if it:

- (i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;
- (ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and
- (iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

There are further conditions that must be met before depositions may be ordered:

(3) The Presiding Officer may order depositions upon oral questions only in accordance with paragraph (e)(1) of this section and upon an additional finding that:

- (i) The information sought cannot reasonably be obtained by alternative methods of discovery; or
- (ii) There is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

### **BACKGROUND**

On April 4, 2011, Respondent filed a Motion to Depose Heather Dean. At no time had Respondent previously asked for an opportunity to question Ms. Dean. On April 6, 2011, Complainant's counsel contacted Respondent by telephone and offered to make Ms. Dean available for informal questioning by Respondent. Complainant's counsel and Respondent agreed that such a conference might obviate the perceived need for a deposition. Respondent agreed to withdraw his Motion to Depose Heather Dean promptly and to coordinate with Complainant to schedule such a telephonic conference. Complainant informed the Court of these developments in "Complainant's Motion to Extend Time for Filing Response to Respondent's Motion to Depose Heather Dean," filed on April 7, 2011. As of May 11, 2011, Respondent has not withdrawn his Motion to Depose Heather Dean and no telephonic conference has been scheduled.

## ARGUMENT

In his motion, Respondent did not attempt to, and cannot, establish that the Section 22.19(e) conditions have been met. Most crucially, Respondent has not shown that Complainant refused to provide the requested information voluntarily as required by Section 22.19(e)(1)(ii). Respondent had not even requested this information from Complainant before filing his motion. Complainant has offered and stands ready to permit Ms. Dean to answer questions informally by telephone at any reasonable scheduled time.

Respondent's description of the requested information is somewhat vague ("specific application of a scientific method or regulatory methodology"), and thereby fails to describe in detail the nature of the information sought, as required by Section 22.19(e)(1). Complainant notes, however, that information about Ms. Dean's methods can be found in several of the documents included in Complainant's Prehearing submittals. Complainant's Exhibit CX-09 is Ms. Dean's inspection report from June 2006, titled "Reconnaissance of Unauthorized Activities at David D'Amato Property, Memo to File from Heather Dean," and includes photos and field notes. Complainant's Exhibit CX-10, titled "Wetland Determinations & Channel Measurements at David D'Amato Property, Memo to File from Heather Dean" and containing maps, photos, and wetland determination data sheets, is a detailed explication of Ms. Dean's site-specific application of her methods for determining the presence of wetlands and the assessment of impacts.<sup>1</sup> Ms. Dean's methods of describing and assessing the tributary network draining the site

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<sup>1</sup> The widely used and legally accepted method for delineating wetlands is the 1987 Corps of Engineers Wetlands Delineation Manual, Technical Report Y-87-1. The official online version can be found at <http://el.erd.c.usace.army.mil/wetlands/pdfs/wlman87.pdf>. A 2007 Alaska-specific supplement to the 1987 Manual can be found at [http://www.usace.army.mil/CECW/Documents/cecwo/reg/erdc-el\\_tr-07-24.pdf](http://www.usace.army.mil/CECW/Documents/cecwo/reg/erdc-el_tr-07-24.pdf). Ms. Dean followed these procedures in her wetlands determinations on Respondent's property, and thus the 1987 Manual and Alaska supplement are appropriate references for Ms. Dean's methods.

and the physical relationship of wetlands to those tributaries are provided in detail in CX-17, titled “Jurisdictional Considerations for Waters Directly Affected by David D’Amato’s Unauthorized Work, Memo to File from Heather Dean.”


Section 22.19(e)(3) of the Rules of Practice describes an additional finding that must be made when the discovery sought is a deposition. The Presiding Officer must find either that the information sought cannot reasonably be obtained by alternate discovery methods or that there is reason to believe that relevant evidence may not be preserved for hearing. Complainant respectfully argues that neither finding can be made here. First of all, Respondent has not demonstrated that the information sought cannot be obtained by alternate methods. Interrogatories, where questions about the use and interpretation of Ms. Dean’s methods are posed to Ms. Dean in writing, or requests for production, where copies of documents describing Ms. Dean’s methods are requested by Respondent, are alternate methods well-suited to provide the kind of information Respondent seeks. Secondly, Respondent cannot demonstrate that the relevant evidence may not be preserved for hearing. Ms. Dean has been named as a witness by Complainant and will be available for examination and cross-examination at hearing.

Respondent did not provide the proposed time and place of the requested deposition in his motion, as required by Section 22.19(e)(1). Since Respondent and Ms. Dean both live in Anchorage, that would be the likely location of such a deposition. Ms. Dean cannot, however, be deposed without counsel present, and Complainant’s counsel is in Seattle. The time and expense for counsel to travel from Seattle to Anchorage is significant and would be unduly burdensome to Complainant, in contravention of Section 22.19(e)(1)(i), given that there are multiple alternative ways for Respondent to obtain the information he seeks.

## CONCLUSION

Respondent filed a Motion to Depose Heather Dean on April 4, 2011, and has not withdrawn it, despite having assured Complainant's counsel that he would do so. Given that the motion has not been withdrawn and remains outstanding, Complainant must oppose this motion. Because Complainant has offered voluntarily to make Heather Dean available for informal questioning, because Ms. Dean's methods have been described in some detail in Complainant's prehearing submittals, and because the time and expense of a deposition are unduly burdensome to Complainant given the alternate methods available to Respondent to obtain the requested information, Respondent's Motion to Depose Heather Dean should be denied.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of May, 2011.



JENNIFER L. BYRNE  
Assistant Regional Counsel  
Region 10

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of "Complainant's Response to Respondent's Motion to Depose Heather Dean," with copies of all exhibits, was filed and sent to the following persons in the manner specified, on the date below:

Original and one copy, hand-delivered:

Carol Kennedy, Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 10  
1200 Sixth Avenue, Mail Stop ORC-158  
Seattle, WA 98101

A true and correct copy, by certified mail, return receipt requested:

David D'Amato  
17211 Kings Way Drive  
Anchorage, AK 99516

A true and correct copy, by pouch mail:

Judge Barbara A. Gunning  
Office of Administrative Law Judges  
U.S. Environmental Protection Agency  
Mail Code 1900L  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460-2001

Dated: 11<sup>th</sup> May 2011

  
Jennifer Eason