



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

October 3, 2011

REPLY TO THE ATTENTION OF
E-19J

Honorable Susan L. Biro
Office of Administrative Law Judges
U. S. Environmental Protection Agency
Ariel Rios Building, Mailcode: 1900L
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

RE: In The Matter of: *Joseph L. Bollig & Sons, Inc.*
Docket No.: CWA-05-2011-0008
Complaint Date: August 26, 2011
Total Proposed Penalty: \$60,000

Dear Judge Biro:

Enclosed is a copy of the Respondent's Answer to an Administrative Complaint for *Joseph L. Bollig & Sons, Incorporated* in New Lisbon, Wisconsin.

Please assign an Administrative Law Judge for this case.

If you have questions contact me at (312) 886-3713.

Sincerely,

A handwritten signature in blue ink that reads "La Dawn Whitehead".

La Dawn Whitehead
Regional Hearing Clerk

Enclosure

cc: William T. Curran, Esquire
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(608) 847-7363

Thomas Turner, Esquire
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September 29, 2011

Regional Hearing Clerk
Region 5, US EPA
77 W Jackson Boulevard (E-19J)
Chicago, IL 60604-3590

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SEP 30 2011

**REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY,**

Re: Docket #CWA-05-2011-0008
ATTN: WW-16J

Dear Clerk:

Enclosed please find original and one copy of Respondent's Special Appearance, Answer, Request for Hearing, Request for Settlement Conference and Recusal. Thank you.

Very truly yours,

CURRAN, HOLLENBECK & ORTON, SC



BY: William T. Curran
(Reply to Mauston office)

WTC:dlr
Enclosures

cc: Atty Thomas Turner
Associate Regional Counsel
EPA
77 W. Jackson Boulevard (C-14J)
Chicago, IL 60604-3590

Mr Gregory T. Carlson
Enforcement Officer, EPA
77 W. Jackson Boulevard
Chicago, IL 60604

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:

JOSEPH L. BOLLIG & SONS, INC.
New Lisbon, Wisconsin,

Respondent.

Case No. CWA-05-2011-0008

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U.S. ENVIRONMENTAL
PROTECTION AGENCY

RESPONDENT'S SPECIAL APPEARANCE, ANSWER, REQUEST FOR
HEARING, REQUEST FOR SETTLEMENT CONFERENCE AND RECUSAL

The Respondent appears specially without waiving its challenge to the jurisdiction of the EPA or Region 5 in this matter, and states:

I. REQUEST FOR SETTLEMENT CONFERENCE AND RECUSAL.

While the Respondent requests an informal settlement conference, it also requests the recusal of Greg Carlson as the representative of the EPA with whom Respondent must deal on the grounds that he has developed an unreasonably bitter attitude toward settlement. Respondent has no objection to Attorney Thomas Turner.

1. EPA, Army Corps of Engineers (ACE) and Wisconsin Department of Natural Resources (WDNR) all concede that no wetlands were filled in or lost.

2. EPA concedes that any effect on the environment was "small and temporary".

3. The same amount of seasonal wetland (less than 7 acres), its topography and its contour have not changed since pre-2006, nor was there ever any intention or action to change those.

4. When the EPA first contacted Respondent with a request for information, Respondent replied by phone to Gregory Carlson advising him that the City had an engineering firm putting together a comprehensive set of data and asking Mr. Carlson what he needed. Mr. Carlson's response was that if Respondent is too stupid to understand Mr. Carlson's demand, then he should hire someone who could read.

5. The goal of the project was to comply with the FAA safety requirements only. They required tree removal and site maintenance along Runway 32 to maintain the vegetation at a very low height.

6. The Municipal Airport Commission assumed the responsibility of securing the necessary approvals. They contacted both the ACE and the WDNR more than a year in advance of action, representing to Respondent that they had fulfilled this obligation and Respondent need do nothing more.

7. The WDNR and the ACE commenced their review of this project because of a WDNR mistaken suspicion that wetlands were being filled in, which everyone now concedes was not true.

8. The Airport, with cooperation of Respondent, hired an engineering firm which provided the governmental inquiry with all of the information and analysis that it requested.

9. The WDNR and the ACE authorized the Airport and Respondent to complete the project just as originally planned under which there was no component of restoration or alteration because no wetland had been lost or made less effective as an area to seasonally hold surface water.

10. There was no profit motive or financial gain as the total amount of this oral contract for all the work done by Respondent did not exceed \$9,000.00.

11. EPA has conceded that Respondent has been working in the land excavation field for decades and does not have a single violation of the Clean Water Act or any environmental laws.

12. In March, 2011, Respondent's counsel again attempted a settlement negotiation. Respondent asked if Mr. Carlson would review with him his "Settlement Penalty Calculation Worksheet". Mr. Carlson refused, but acknowledged that the "A" factors involving the environmental impact were minimal. Mr. Carlson would not discuss the "B" factors covered on Policy pages 12-18 to evaluate the gravity of the action. Respondent pointed out:

A Degree of Culpability - Carlson conceded that Bollig had never had a CWA violation and Carlson did not dispute that the Airport Commission assured Respondent that it had made the necessary arrangements with the WDNR and the ACE. Respondent had no reason to doubt the Commission.

B Violator's Control - The size and scope of the project was within the

Airport Commission's total control. Work done by Respondent did not even rise to the level of a written contract. The nature and extent of the FAA requirements; the contacts with ACE and WDNR; and, after the fact, the obligation to provide a detailed engineering report were assumed by and under the total control of the Airport.

- C Motivation - There was no motivation to avoid a Permit, as it would be easily granted to a Municipal Airport to comply with FAA regulations.
- D Need for Deterrent - This situation controlled by a Municipal Airport and the FAA is not likely to repeat.
- E Recalcitrance - There is no allegation of "bad faith" or unjustified delay in preventing, investigating or remedying any potential violation.

13. Respondent asked EPA for a citation of authority for their jurisdiction and proposed penalty. They could produce none. In fact, they tried to suggest similar cases in the penalty determination as: Slinger Drainage, Inc. (1999); Condor Land Company (1998); VICO Const. Corp. (2005) and Phoenix Construction (2004). An analysis shows that the cases are not relevant:

- A Wetlands Lost - In the cases provided: 50 acres; 53 acres; 117 acres; 3.5 acres. Compare that to some part of a 1.5 acre - 7 acre parcel.
- B In all cases cited, the contractor was being pursued as the one obligated to secure the Permit and failing to do so. In our case, the Airport had the duty to secure the Permit.
- C In several of the cases, the contractor/owner was uncooperative, which is not the case here.
- D It is conceded that none of the cases had as the "underlying purpose" compliance with an FAA Safety Order.
- E In each of the cases cited, there was a huge profit motive or an advantage conveyed. Here, there was no benefit to Bollig from non-compliance.
- F At this Airport, no wetlands were lost or degraded. There was no

evidence of erosion or other downstream effect. Any effect was “small and temporary”.

14. After Respondent reviewed EPA’s citation of authority, Mr. Carlson refused to discuss precedent with Respondent.

15. Counsel explored the idea of a Supplemental Environmental Project (SEP) with a “Consent Decree” as a resolution. Although three or more such projects were suggested to Mr. Carlson, he rejected them all. Mr. Carlson then suggested a project with the “Lake Tomah Watershed”. We were provided the Lake Tomah Watershed SEP by the local conservation officials to whom Mr. Carlson had referred us. On August 19, 2011, we submitted their proposal to Mr. Carlson. We did not even get the courtesy of a reply.

II. RESPONDENT’S ANSWER AND REQUEST FOR HEARING.

The Respondent appears specially without waiving its challenge to the jurisdiction of the EPA or Region 5 in this matter, and states:

1. Denies the allegations contained in paragraph 1 as bare legal conclusions and not factual allegations and disputes the EPA’s authority over this isolated part of the Mauston-New Lisbon Union Airport.
2. Denies the allegations contained in paragraph 4 as bare legal conclusions.
3. Alleges that the ACE and the WDNR did issue a permit for the actions taken by Respondent at this site and denies all of the rest of the allegations contained in paragraphs 5-13 and 15 as bare legal conclusions.
4. Admits the allegations of paragraphs 14, 16, 18, 20.
5. Denies the Complainant’s characterization that the area of disturbance was about 7 acres and alleges it was much smaller.
6. Denies that the relevant area contained any unnamed tributary.
7. Alleges that the area in question is an isolated area which is not connected to the Lemonweir River or any other navigable water, further denying that any part of the area involved was a navigable water.
8. Denies the allegations contained in paragraphs 24, 25 and 26 and

affirmative alleges that the Respondent did not discharge or place any fill material onto the airport grounds and, further, that the actions taken by the Respondent were within the purview of a permit issued by the ACE and the WDNR.

9. Denies the allegations contained in paragraphs 27-30 alleging that they are bare legal conclusions not stating any fact.

10. Denies that the Complainant is entitled to assess any penalty against Respondent.

AND AS AND FOR AFFIRMATIVE DEFENSES, the Respondent alleges:

11. That the Complainant lacks jurisdiction in this matter and no 404 Permit is required because the area in question is not waters of the United States, but instead, is an isolated part of the Airport.

12. No wetlands were destroyed or degraded.

13. The government has already elected its remedies in the form of an approved plan and permits issued by the ACE and the WDNR, each and every term of which has been completely complied with.

14. Complainant is estopped from pursuing any further enforcement action in that the EPA knew or should have known that the ACE had taken jurisdiction of this matter; had elected its remedies; issued a Permit approving the action to conclude the matter.

15. In reliance upon the election of remedies by the ACE, the Respondent and the Airport fulfilled each and every term which the ACE and the WDNR sought, all of which was done with the knowledge of EPA.

16. The action restoring the area was not taken until after the ACE Permit to do so had been approved.

17. The land clearing at the Airport was done as safety improvements required by the Federal Aviation Association.

18. Complainant is estopped from further enforcement action on the additional grounds that the Airport, as a governmental entity, represented (or misrepresented) and assured Respondent that it had secured the necessary approvals from the ACE and the WDNR by direct contact between the Airport Commission and these other governmental

entities in 2006, before the work was commenced.

19. Respondent was entitled to rely on the representations of the Airport as a governmental entity.


20. Immediately upon request, the Airport Commission, in cooperation with Respondent, hired an engineering firm to do an analysis of the entire area and a detailed confirmation that the Airport's plan, from the beginning, was to restore the area in a way that would not destroy or damage any wetland.

21. The ACE's Permit was obtained on March 11, 2010.

WHEREFORE, Respondent demands that this Complaint be dismissed in its entirety, with prejudice, or, in the alternative, a hearing on the Complaint and Respondent recover his costs and attorneys fees herein.

Dated: September 28, 2011.

CURRAN, HOLLENBECK & ORTON, SC

BY: 

William T. Curran
State Bar No. 1016520
A Member of the Firm
Attorneys for Respondent
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