UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	DOCKET NO. CWA-10-2011-0086
ROBERT M. LOOMIS AND NANCY M. LOOMIS Haines, Alaska,	
Respondents.	

MOTION IN LIMINE

I. INTRODUCTION

Pursuant to sections 22.16 and 22.22(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits ("CROP"), 40 C.F.R. §§ 22.16, 22.22(a), and consistent with Rules 103, 401, 402 and 403 of the Federal Rules of Evidence, Complainant moves to exclude the proposed testimony of many of Respondents' proposed fact and expert witnesses. As set forth below, the Presiding Officer should exclude the testimony of these witnesses because either: (1) Respondents cannot show how the proposed testimony is relevant to the facts or law of the instant matter; or (2) the proposed testimony is otherwise immaterial, unduly repetitious, unreliable or lacks probative value.

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II. BACKGROUND

On June 16, 2011, Complainant filed the complaint in this case pursuant to section 309(g) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g), proposing a civil penalty for violations of section 301 of the CWA, 33 U.S.C. § 1311. Specifically, Complainant alleges that 1) from June 2006 to April 30, 2010 Respondents discharged stormwater to tributaries of the Chilkat River and to wetlands adjacent to those tributaries without the required National Pollutant Discharge Elimination System (NPDES) permit, and 2) between 2006 and 2009, Respondents dredged and filled wetlands on their property without a CWA section 404 permit.

In her Order Setting Prehearing Procedures dated, August 18, 2011, the Presiding Officer[1] instructed the parties to provide in the Opening and Reply Prehearing Exchanges "the names of any expert or other witnesses it intends to call at hearing, together with a brief narrative summary of each witness's expected testimony." *In re Loomis*, EPA Docket No. CWA-10-2011-0086, at 2 (ALJ, Prehearing Order, Aug. 18, 2011)). Both parties timely filed their Prehearing Exchanges and Reply Prehearing Exchanges. Respondent's Prehearing Exchange listed 48 fact witnesses and five expert witnesses. The instant matter is set for a 10-day hearing, beginning on May 1, 2012.

III. STANDARD FOR MOTION IN LIMINE

Section 22.22 of the CROP states that the "Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable or of little probative value . . ."

[1] Initially, the Presiding Officer in this case was Judge Barbara Gunning.

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40 C.F.R. § 22.22(a). Using this standard, which is similar to the standard used by federal courts in the cases cited below, the EPA Administrative Law Judges ("ALJs") have granted *in limine* motions for the grounds specified in section 22.22 as well as to make the case more efficient and to clarify the issues remaining for trial. *See e.g., Yaffe Iron and Metal Co., Inc. v. EPA*, 774 F.2d 1008 (10th Cir. 1985) (stating that "EPA rules of procedure for administrative hearings give latitude to the presiding officer in determining whether to exclude or admit evidence" and upholding the ALJ's exclusion of expert witness because testimony was irrelevant and immaterial); *In re 1839 Realty Corp.*, Docket No. CWA-2-I-98-1017, 1999 WL 362869, at *3 (ALJ Order Granting Complainant's Motion in Limine, April 8, 1999) (granting EPA's motion to exclude witnesses listed in Respondent's prehearing exchange because, inter alia, the purpose in seeking the testimony was "irrelevant, immaterial, and of little, if any, probative value" in relation to the issues at bar in that case).

Federal courts have broad discretion when ruling on motions *in limine* and have supported the use of *in limine* motions to weed out irrelevant, immaterial, and confusing evidence presented by litigants. *See Jenkins v. Chrysler Motors Corp.*, 316 F.3d 663, 664 (7th Cir. 2002)("[J]udges have broad discretion in ruling on evidentiary questions during trial or before on motions *in limine*."); *Woods v. Slater Transfer and Storage, Inc.*, No. 2:08-cv-00948-GWF, 2010 WL 3433052, at *2-3 (D. Nev. Aug, 27, 2010) (granting motion *in limine* to exclude proposed witness testimony regarding plaintiff's physical condition because it was irrelevant to the alleged breach of contract at issue in the case). Federal courts have also granted such motions where evidence proposed in a case would amount to a waste of time. For example, in *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238 (3d Cir. 1983), the court stated that it favored *in limine* hearings for evidence questions "not only because the court's *in limine*

consideration was far more efficient than if the rulings were deferred until the trial, with consequent interruptions, but also because the *in limine* procedure permitted more thorough briefing and argument than would have been likely had the rulings been deferred." *Id.* at 260, *rev'd on other grounds*, *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 475 U.S. 574 (1986).

As discussed more fully below, the proposed testimony of Respondents' fact witnesses and many of its expert witnesses is irrelevant, immaterial, unduly repetitious or of little probative value. Therefore, the proposed testimony should be excluded pursuant to 40 C.F.R. § 22.22.

IV. ARGUMENT

A. THE TESTIMONY OF MANY OF RESPONDENTS' PROPOSED FACT WITNESSES SHOULD BE LIMITED OR EXCLUDED.

Respondents have identified 48 fact witnesses in their Prehearing Exchange. The proposed testimony of each of the witnesses listed below must be relevant either to liability or to one or more of the statutory penalty factors listed below in order to be admissible under 40 C.F.R. § 22.22(a). Section 309(g) sets out the following factors for the Presiding Officer to consider when assessing a penalty in a CWA case:

> In determining the amount of any penalty assessed under this subsection, the Administrator or the Secretary, as the case may be, shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require. . .

33 U.S.C. § 1319(g)(3). As shown below, many of the proposed witnesses cannot meet the 40 C.F.R. § 22.22(a) requirements, and therefore should be excluded. Complainant will address each fact witness in the order in which Respondents have listed them in their Prehearing Exchange.

1. **Robert M. Loomis.**

Complainant objects to the proposed testimony of Respondent, Robert Loomis, regarding the existence of the pad prior to Respondents taking possession or acquiring ownership of Property. This factual background is unrelated to the alleged violations, yet Respondents have already discussed the history of the pad and the events that created the pad at length[2] and appear intent on continuing the discussion during the hearing scheduled for May 1, 2012. As stated in Complainant's Response to Respondents' Motion to Dismiss, however, "[t]he origins of the pad, natural or otherwise, are not at issue."[3] The history of the pad prior to Respondents' ownership and when and how the pad was created prior to 2006 has no relevance to Respondents' liability for civil penalties for stormwater discharges and placement of fill without the required CWA permits since 2006, or to the "nature, circumstances, extent and gravity of the violation." 33 U.S.C. 1319(g)(3). Further, Complainant is willing to stipulate that a pad, including the road to the culvert, existed prior to the alleged violations at issue in this action and is willing to stipulate as to the approximate size of the pad prior to Respondents' construction activities or filling during the period in question. Complainant moves *in limine* to exclude all testimony regarding the history of the pad on Respondents' Property because it is irrelevant, immaterial, of little probative value, and would amount to a waste of time.

2. **Marvin Smith.**

Mr. Smith's proposed testimony is that DOT&PF used the Property to place fill beginning in the 1960s. Again, the history of the pad prior to Respondents' ownership and when and how the pad was created has no relevance to Respondents' liability in this case and should

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[2] Resp't Prehearing Exchange, at 4-9; Resp't Mot. to Dismiss EPA's CWA § 402 Claims, at 10-15.
[3] Complainant's Opposition to Resp't Mot. to Dismiss, at 17.

be excluded.

3. **Roger Schnabel**.

Complainant objects to the proposed testimony of Mr. Schnabel regarding the existence or history of the pad for the reasons stated above. In the event the Presiding Officer finds this information relevant, to the extent Mr. Schnabel will testify about the same, or substantially the same, information regarding the existence of the pad, his testimony should be excluded as unduly repetitious in light of the testimony of other fact witnesses.

4. **Spencer Overturf.**

Mr. Overturf's testimony appears to mirror that of his employer, Mr. John McGraw (discussed below), and as such is therefore unduly repetitious. To the extent Mr. McGraw will testify about the same, or substantially the same, information, his testimony should be excluded.

5. **John McGraw.**

Complainant has no objections to the proposed testimony of Mr. McGraw.

6. **Sean Barclay.**

Mr. Barclay's testimony appears to mirror that of his employer, Mr. John McGraw, and as such is therefore unduly repetitious. To the extent Mr. Barclay will testify about the same, or substantially the same, information, his testimony should be excluded.

7. **Bernard Loomis.**

Mr. Bernard Loomis' proposed testimony is that the Pad existed when he bought the Property in the 1960s, he witnessed the City of Haines and others place fill onto the Property during the 1960s and '70s, and other features of the Property prior to Respondents taking ownership of the Property. As stated above, testimony about the existence of the pad and history of the Property prior to Respondents ownership of the Property is irrelevant to Respondents'

liability and should therefore be excluded.

8. **Terry Sele.**

Mr. Sele's proposed testimony is that the pad existed on the Property for decades and that SRI only placed fill on the existing pad. For reasons stated above, Mr. Sele's testimony regarding the history of the pad is irrelevant and should be excluded. Also, Mr. Sele's testimony appears to mirror that of his employer, Mr. Schnabel, and as such is therefore unduly repetitious. To the extent Mr. Sele will testify about the same, or substantially the same, information as Mr. Schnabel, his testimony should be excluded.

9. **Stanley Jones.**

Mr. Jones' proposed testimony is that the process of glacial rebound converted the land near Respondent's property from wetlands to uplands. This testimony is of little probative value and should be excluded because Mr. Jones was not identified as an expert witness and there is no indication that he possesses expertise in wetland identification or delineation or in the geologic processes that result in glacial rebound. Testimony regarding observations Mr. Jones has had on his own property is also of little probative value and likely irrelevant to the question of whether Respondents' property contains wetlands subject to Clean Water Act permitting requirements. Additionally, because Respondents list four expert witnesses who are expected to testify regarding whether Respondents placed fill in jurisdictional wetlands, Mr. Jones' testimony should be excluded as unduly repetitious.

Looking to the Federal Rules of Evidence for guidance, rule 701 governs opinion testimony by lay witnesses and requires the testimony to be:

1) rationally based on the perception of the witness,
2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and
3) not based on scientific, technical, or other specialized knowledge within

the scope of Rule 702.

Respondents' Prehearing Exchange refers to Mr. Jones as the owner of a golf course in the vicinity of Respondents' Property. There is nothing in the Prehearing Exchange or inherent from Mr. Jones' position as a golf course owner which suggests that Mr. Jones has the knowledge, experience, or expertise to testify on the subject of glacial rebound in the area nor in particular its impact on Respondents' property or wetlands thereon. Therefore, Mr. Jones' testimony should be excluded.

10. **Robert Venerables.**

Mr. Venerables is expected to testify that the placement of fill on Respondent's property did not require permits from the EPA and USACE. Mr. Venerables was the Haines City Manager when Respondent received permits from the City of Haines to place fill material on their Property. However, Mr. Venerables is not the appropriate witness for this testimony. Mr. Venerables has not been identified as an expert witness nor would his position as Haines City Manager qualify him as an expert on federal regulatory matters. Mr. Venerables is not employed by the EPA or USACE and is not qualified to testify regarding what types of activities require a permit from EPA or USACE. As such, Complainant moves *in limine* to exclude this testimony as irrelevant, immaterial, and of little probative value.

11. **Ralph Strong.**

Mr. Strong's proposed testimony is that he has driven by Respondents' Property for decades and that pad existed on the Property for decades. For reasons stated above, Mr. Strong's testimony regarding the history of the pad is irrelevant and should be excluded. In the event the Presiding officer finds this information relevant, to the extent Mr. Strong will testify about the same, or substantially the same, information regarding the existence of the pad, his testimony

should be excluded as unduly repetitious in light of the testimony of Respondent Loomis, Mr. Smith, Mr. Schnabel, Mr. Bernard Loomis, and Mr. Seles.

12. **List of 37 Residents of the City of Haines or Surrounding areas**

Respondents' Prehearing exchange lists 37 potential witnesses that "can attest to their observations of the Property" and that the pad on the Property existed for decades. As stated above, the history of the pad prior to Respondents' ownership and when and how the pad was created has no relevance to Respondents' liability for stormwater discharges and placement of fill without the required Clean Water Act permits. Additionally, Complainant is willing to stipulate that a pad existed prior to the alleged violations at issue in this action and is willing to stipulate as to the size of the pad prior Respondents' construction activities during the period in question. Complainant moves *in limine* to exclude all testimony from the 37 potential fact witnesses regarding the existence and history of the pad on Respondents' property because it is irrelevant, immaterial, of little probative value, and would amount to a waste of time.

Additionally, Respondents' Prehearing Exchange contains sparse information regarding potential testimony about "their observations of the Property" and its relevancy. Complainant therefore objects to Respondents calling these witnesses until Respondents offer further clarification of the purpose and scope of the testimony. *In re 1839 Realty Corp.*, Docket No. CWA-2-I-98-1017, 1999 WL 362869, at *3 ("unless further elucidation on the Respondent's reason for calling [the witness] is provided, the EPA's objection to [the witness's] testimony would be sustained if renewed at hearing.") However, even if some observations by local residents may be relevant, 37 witnesses' observations is overly repetitious and to the extent it is the same or similar testimony to be provided by Robert Loomis, Mr. Schnabel, or Mr. McGraw, unnecessary.

B. TWO OF RESPONDENTS' PROPOSED EXPERT WITNESSES SHOULD BE EXCLUDED.

Respondents' Prehearing Exchange identifies five expert witnesses, four of whom are expected to testify that Respondents did not fill wetlands: Ray Kagel, Susan Kagel, Alan Busacca, and Don Reichmuth. For the following reasons, the Presiding Officer should exclude the testimony of Alan Busacca and Don Reichmuth.

Dr. Busacca and Dr. Reichmuth are expected to testify simply that "Respondents did not fill wetlands."[4] Respondents' Prehearing Exchange provides scant information as to what exactly they will testify about and includes no expert reports from either of these two witnesses. To the extent one can determine from the Prehearing Exchange the scope of the proposed testimony, it appears to be unduly repetitious of testimony provided by Ray and Susan Kagel, who are also expected to testify that Respondents did not fill wetlands and who have visited the site and written a report on the issue. Therefore, the Presiding Officer should exclude the testimony of Dr. Busacca and Dr. Reichmuth.

V. CONCLUSION

Respondents' long list of fact witnesses is made up of multiple witnesses to testify regarding facts that are irrelevant to any of the genuine issues in this case. Much of the proposed testimony, if not irrelevant, is regarding the same basic set of facts, and is therefore unduly repetitious. For all the foregoing reasons, testimony of fact witnesses Robert Loomis, Marvin Smith, Roger Schnabel, Spencer Overturf, Sean Barclay, Bernard Loomis, Terry Sele, Stanley Jones, Robert Venerables, Ralph Strong, and the 37 other fact witnesses from in or around Haines, Alaska, should be limited or excluded.

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[4] Resp't Prehearing Exchange, at 31-32.

Respondents' have failed to show why expert witnesses Alan Busacca and Don Reichmuth should be allowed to testify. To the extent one can determine from the Prehearing Exchange the scope of the proposed testimony, it appears to be unduly repetitious of testimony provided by Respondents' other experts, Ray and Susan Kagel, and therefore should be excluded.

Respectfully submitted this 16th day of March 2012.

Lori Houck Cora

Lori Houck Cora
Endre M. Szalay
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CERTIFICATE OF SERVICE

In the Matter of Robert M. Loomis and Nancy M. Loomis, No. CWA-10-2011-0086, I certify that the foregoing "Motion in Limine " was sent to the following persons, in the manner specified, on the date below:

Original and one true and correct copy, by hand delivery;

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

One true and correct copy, by Pouch Mail to:

The Honorable M. Lisa Buschmann
Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

One true and correct copy, by first class U.S. Mail to:

Brian J. Stibitz, Esq.
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Dated: 3-16-2012

Sharon Eng

Sharon Eng, Paralegal
Environmental Protection Agency