

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4

IN THE MATTER OF: )

Gene A. Wilson )

Respondent. )  
\_\_\_\_\_ )

) Docket No. SDWA-04-2005-1016

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ORDER ON PREHEARING MOTIONS

On July 3, 2007, the undersigned issued a Notice of Hearing in the above-captioned matter. The Notice set forth a schedule for filing prehearing motions, responses and replies. All such pleadings have been filed, and the period provided for prehearing motions has concluded. In accordance with the schedule provided, the parties filed the following documents:

BY COMPLAINANT:

- July 23, 2007, "Supplement to Complainant's Written Statement"\* providing notice of intention to file a prehearing motion to add an exhibit;
- July 25, 2007, "Clarification of Complainant's Position Regarding Permit Requirements to Demonstrate Mechanical Integrity and Submit Monitoring Reports"\*;
- August 3, 2007, "Supplement to Complainant's Prehearing Exchange" pursuant to 40 CFR § 22.19(f) and 22.22(a)\*; and
- August 17, 2007, "Complainant's Reply to Respondent's Prehearing Exchange Witnesses List and Motion to Strike Witness"; "Complainant's Motion and Reply to Respondent's Motion to Make Addition to Documents in Prehearing Exchange List"; and "Complainant's Reply to Second Supplement to Respondent's Prehearing Exchange."

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BY RESPONDENT:

- July 18, 2007, a) "Motion to Make Addition to Respondent's Pre-Hearing Exchange List of Witnesses"; and b) "Motion to Make Addition to Documents in Pre-Hearing Exchange List and Affidavit";
- July 23, 2007, Respondent submits Respondent's Exhibit 55, previously inadvertently omitted\*;

- July 27, 2007, Respondent's Certificate correcting for the record previously filed certificates of service\*;
- July 31, 2007, "Second Supplement to Respondent's Pre-hearing Exchange." Respondent includes by reference prehearing exchange exhibits 1-55; moves to have all documents that had been withheld from his FOIA request included in prehearing exchange; seeks to incorporate all permit files furnished for viewing in Atlanta on April 16 and April 17, 2007, and to add Exhibits 60, 61 and 62-A;
- August 2, 2007, "Addendum to Pre-hearing Exchange Witnesses List"; and
- August 25, 2007, a) Respondent's Joint Replies to Complainant's Pleadings filed on August 17, 2007, and b) "Motion to Enlarge Days Allotted for Hearing or in the Alternative to Dismiss."

The pleadings marked with an asterisk (\*) are made part of the record in this case without necessity for a ruling. All other above-referenced motions are ripe for determination.

### DISCUSSION

Respondent, through several of the above-referenced motions, seeks to add a large number of additional documents to his prehearing exchange of information. More specifically, Respondent's Exhibit 55, entitled, "UIC Permits for G. Wilson FOIA", lists 31 permit files. In support of his motion, Respondent alleges that the files reveal "major inconsistencies" such as one permittee not being required to do any MIT tests although the well had been in use, one permittee being issued a permit in 1991 with only one MIT test required, and one permit being terminated by letter. Referring back to his previously filed "Second Supplement to Respondent's Pre-Hearing Exchange," Respondent seeks to incorporate all of the 31 permit files to "show discrimination, prejudicial treatment and selective enforcement." As described by Respondent, the permit files were "tagged" by him but never actually sent. Respondent contends that the files requested to be made part of Exhibit 55 are already in E.P.A. possession and merely need to be brought to the hearing in Ashland, Kentucky.

In response, Complainant objects to providing these files, arguing that it is Respondent's obligation to submit his own prehearing exchange materials, including all documents he intends to present into evidence at the hearing, in accordance with Section 22.19 of the Consolidated Rules of Practice, 40 CFR § 22.19. Complainant also expresses skepticism that the documents Respondent seeks to obtain and/or add have any relevance to the proceeding. Furthermore, complainant moves that if the documents Respondent wishes to add are not timely added, that Respondent's Affidavit and the handwritten list of permitting files be stricken from the record.

Respondent is referred back to the undersigned's "Order on Respondent's Motion" issued on June 28, 2007. In essence, a motion seeking the same relief was denied. Relying upon section 22.19(e) of the Consolidated Rules of Practice, 40 C.F.R. § 22.19(e), the undersigned Presiding Officer, construing Respondent's motion as a discovery motion, found the discovery sought lacking significant probative value and to be unreasonably burdensome. However, the provision for discovery in matters brought under Subpart I of the Consolidated Rules is, in fact, even more limiting. As set forth at Section 22.52, "Subpart I – Administrative Proceedings Not Governed by Section 554 of the Administrative Procedure Act," 40 CFR § 22.52, "Discovery under § 22.19(e) shall not be authorized, except for discovery of information concerning respondent's economic benefit from alleged violations and information concerning respondent's ability to pay a penalty."

Therefore, based upon this regulatory mandate limiting discovery in this proceeding, Respondent's Motion to produce 31 permit files in EPA's possession is hereby denied. However, neither support exists nor is any purpose served in striking either Respondent's Affidavit or the handwritten list of exhibits from the record. The relevance, credibility and weight attributed to those two documents can be better determined at hearing. Respondent's Exhibits 60, 61 and 62-A are accepted as part of the record in this case.

I will now address Respondent's motions seeking to add Lynn Dangerfield and Zylpha Pryor as witnesses, as well as to reconsider adding Mr. Poston to Respondent's list of witnesses notwithstanding that he appears on Complainant's witness list.

In a motion filed on May 1, 2007, Respondent sought to add Mr. Randy Poston to his list of witnesses to be called at hearing. This motion was denied by Order dated June 28, 2007, on the basis that Mr. Poston's testimony would be redundant since Respondent already sought a subpoena for the appearance of Doug Hamilton to testify that EPA had problems with its contracted inspectors. In the current motion, Respondent explains his intention to have Mr. Poston testify to the fact that Respondent at no time placed in operation the well that is the subject of this proceeding, as well as to other matters relevant to lack of harm to the environment and to the water quality on his farm at Collier Creek. Respondent distinguishes Mr. Poston's testimony from that of Mr. Doug Hamilton who will address plugging procedures.

Since this has already been ruled upon, Respondent's motion is, in actuality, one for reconsideration of the undersigned's previous ruling. However, a number of other witnesses listed in Respondent's prehearing information exchange of November 14, 2006, in addition to Mr. Hamilton, are to testify to these same facts. Respondent has failed to provide any basis upon which to change my previous denial of this motion to subpoena Mr. Poston to testify.

Respondent also seeks to add Mr. Dangerfield, to testify as to discrimination, prejudicial treatment and selective enforcement. However, as Complainant contends in its Reply, this statement is without factual basis. Mr. Dangerfield is a FOIA officer,

removed from enforcement proceedings. Having failed to sufficiently establish a basis for calling Mr. Dangerfield to testify at the proceeding, he is stricken from Mr. Wilson's list of witnesses.

Similarly, Respondent seeks to add counsel for Complainant, Zylpha Pryor to his list of witnesses at hearing, for the purpose of further establishing prejudicial treatment and selective prosecution of Respondent. I am persuaded by Complainant's position that a) there is no support for adding Ms. Pryor to Respondent's list of witnesses and b) doing so would in all likelihood be constrained by attorney-client privilege. There is nothing introduced by Respondent to even hint prejudicial treatment by Counsel for Complainant as opposed to her advocating a position in litigation that is contrary to that of Respondent. Ms. Pryor will be stricken from Respondent's list of witnesses.

The Prehearing Order was unequivocal - the deadline for filing prehearing Motions was August 3, 2007. Only responses and replies were to be filed thereafter. Therefore, Respondent's "Motion to Enlarge Days Allotted for Hearing or in the Alternative to Dismiss," was filed beyond the date set for filing motions and as such will not be considered at this time. Furthermore, I refer Respondent to the Notice of Hearing issued on July 3, 2007, setting the dates for hearing based upon a review of the prehearing information exchange. Respondent was afforded ample opportunity to request additional days for hearing at the time of his initial prehearing exchange as well as until August 3, 2007, the deadline for filing motions. Lastly, consideration of Respondent's motion would necessitate allowing time for Complainant to respond followed by a period for reply by Respondent, all of which would require postponement of the hearing. As Section 22.21(c) of the Consolidated Rules provides, "No request for postponement of a hearing shall be granted except upon motion and for good cause shown." 40 CFR § 22.21(c). This has been interpreted to require a circumstance such as consent of the parties due to settlement or an emergency concerning key witnesses or counsel. *In the Matter of TIFA, Limited, I.F. & R. Docket No. II-547-C, Order on Complainant's Motion to Amend Complaint and Respondent's Motions to Amend Answer; for Adjournment of Hearing; and for Discovery, October 22, 1998.* I find Respondent's pleading lacking any showing of good cause for such postponement.

In support of excluding the aforementioned two proposed witnesses, Ms. Pryor and Mr. Dangerfield, Complainant seeks to have all evidence or argument regarding Respondent's defense of selective prosecution stricken as a defense in this proceeding. This is tantamount to a Motion to Strike a Defense. For the reasons discussed above regarding the August 3, 2007, deadline that had been set for filing motions, Complainant's request is untimely and will therefore not be considered at this time.

However, notwithstanding the fact that Respondent's defense will not be stricken at this time, it is imperative that Respondent remain mindful that the standard for proving selective prosecution is high and that parameters will be set for establishing this defense at hearing.

Respondent has indicated his intention to show discrimination, prejudicial treatment and selective enforcement. However, other than claiming that EPA's underground injection control program in Kentucky was carried out inconsistently with regard to himself and others in the regulated community, Respondent has not indicated how he will support his very broad claim of prejudice or discrimination. As noted by Chief Administrative Law Judge Biro in the case, *In the Matter of Martex Farms, Inc.*, 2005 EPA ALJ Lexis 54, the Environmental Appeals Board "has held that a "selective enforcement defense requires a showing not only of being 'singled out,' but also that the government has selected the respondent for enforcement action 'invidiously or in bad faith, i.e., based upon such impermissible consideration as race, religion, or the desire to prevent the exercise of constitutional rights.'" *In re Newell Recycling Company, Ind.*, 8 E.A.D. 598, 635 (EAB 1999) (quoting *United States v. Smithfield Foods, Inc.*, 969 F.Supp. 975, 985 (E.D. Va. 1997) (quoting *United States v. Production Plated Plastics, Inc.*, 742 F. Supp. 956, 962 (W.D. Mich 1990). See also, *In re B&R Oil Co.*, 8 E.A.D. 39, 51 (EAB 1998). The burden of proof on the part of a proponent of "selective enforcement" is 'rigorous,' 'demanding,' 'daunting,' and 'high.' See, e.g., *In re B&R Oil Co.*, 8 E.A.D. 39, 51 (EAB 1998): 'Respondent faces a daunting burden in establishing that the Agency engaged in illegal selective enforcement, for courts have traditionally accorded governments a wide berth of prosecutorial discretion in deciding whether, and against whom, to undertake enforcement actions. . .'"

While Respondent claims that documents he seeks to introduce into evidence and witnesses he intends to examine at hearing will establish that he was singled out for enforcement by EPA over other similarly situated in the regulated community, thus far he has neither alleged nor exchanged prehearing information in support of the second prong of this defense: that he was so selected for prosecution invidiously or in bad faith based upon some factor such as race, religion, or a desire to prevent the exercise of Constitutional rights. In order to prevail, Respondent must, within the time he is allotted at hearing, meet his burden with respect to both prongs of this defense.

IT IS ORDERED:

1. Other than Respondent's Exhibits 60, 61 and 62-A, Respondent's motion to add to his prehearing exchange all other documents not exchanged to date, including documents withheld from his FOIA request as well as permit files furnished for viewing on April 16 and 17, 2007, is hereby **denied**.

2. Respondent's motion to add to his list of witnesses Randy Poston, Lynn Dangerfield and Zylpha Pryor, is **denied**.

3. Respondent's motion to enlarge days allotted for hearing or in the alternative to Dismiss is **denied**.

4. Complainant's Motion to strike Respondent's Exhibit 55 and Affidavit is **denied**.

5. Complainant's Motion to Strike Respondent's defense of selective enforcement is **denied**.

Date: 9/4/07

Susan B. Schub  
Susan B. Schub  
Regional Judicial Officer

I hereby certify that I have this day served a true and correct copy of the foregoing Order on Prehearing Motions, in the Matter of Gene A. Wilson, Docket No., SDWA-04-2005-1016, on the parties listed below in the manner indicated:

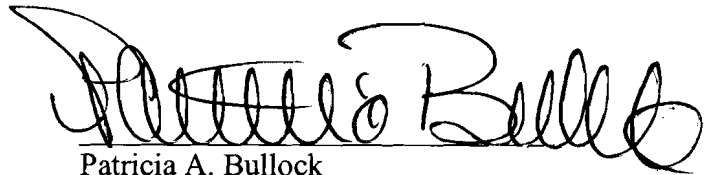
Mr. Gene A. Wilson  
101 Madison Street  
P.O. Box 702  
Louisa, Kentucky 41230

(Certified Mail – Return  
Receipt Requested)

Zylpha Pryor, Esq. and  
Paul Schwartz, Esq.  
U.S. Environmental Protection Agency  
Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303

(via Intra-Office Mail)

Date: 9-4-07

A handwritten signature in black ink, appearing to read "Patricia A. Bullock", written over a horizontal line.

Patricia A. Bullock  
Regional Hearing Clerk  
U.S. Environmental Protection  
Agency, Region 4  
61 Forsyth Street, S.W.  
Atlanta, GA 30303  
404/562-9511

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<b>FROM: (PLEASE PRINT)</b> PHONE (404) 562-9511 EPA 61 FORSYTH ST SW STE 9T25 ATLANTA GA 30303-8960 Pat Bullard, RHR	<b>TO: (PLEASE PRINT)</b> PHONE ( ) Gene Wilson 101 Madison Street P.O. Box 702 Louisville, KY 40230
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