

CURRAN, HOLLENBECK & ORTON, S.C.

MAUSTON OFFICE:

111 OAK STREET
P.O. BOX 140
MAUSTON, WI 53948-0140
TELEPHONE (608) 847-7363
FACSIMILE (608) 847-4155
CURRANLAWOFFICE.COM

ATTORNEYS AT LAW:

FRED D. HOLLENBECK*
WILLIAM T. CURRAN
JOHN R. ORTON
THOMAS J. CASEY
CATHERINE CURRAN ORTON
ERIC S. JOHNSON
ANDREA VON HOFF
*COURT COMMISSIONER

DELLS/DELTON OFFICE:

140 EAST ADAMS STREET
P.O. BOX 370
LAKE DELTON, WI 53940-0370
TELEPHONE (608) 253-7363
FACSIMILE (608) 253-4155
CURRANLAWOFFICE.COM

July 13, 2012

RECEIVED
JUL 17 2012

REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

Honorable M. Lisa Buschmann, ALJ
Office of Administrative Law Judges
US Environmental Protection Agency, Mail Code 1900L
1200 Pennsylvania Avenue, NW
Washington DC 20460

Re: US EPA v Joseph L Bollig & Sons Inc, CWA-05-2011-0008,
Opposing Complainant's Motion to Supplement Prehearing Exchange
and Supplemental Exhibit

Dear Judge Buschmann:

We continue our special appearance without waiving jurisdictional objections.

EPA's Site Inspection Report on this matter is dated November 6, 2009.

This Court issued its Prehearing Order February 29, 2012. This is a procedure I presume that Complainant is well familiar with. I further assume that one of the objects of having this procedure and "hearing" is to provide Respondent with due process and the appearance that the Complainant is not being favored in this matter.

The original Prehearing Order asked that the Complainant produce its Prehearing Exchange by March 30 and its rebuttal by May 11.

Complainant filed a subsequent Motion seeking to have Respondent's disclosures made in greater detail. No request was made by Complainant for additional time. The Court entered that Order on May 30.

Now, more than 2 years and 7 months after EPA's Inspection Report and 90 days past its Prehearing Exchange date, it seeks to supplement the record.

We oppose the Court allowing this supplement. First, there is nothing

CURRAN, HOLLENBECK & ORTON, S.C.

July 13, 2012

Page 2

accompanying the Motion to show good cause for the delay. Secondly, there is not even an attempt to show the significance of this evidence. It is conceded that the Lemonweir River is part of the jurisdictional waters of the United States, thus, showing pictures of that river at flood stage is of very little or no relevance.

Very truly yours,

CURRAN, HOLLENBECK & ORTON, SC



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

WTC:dlr

Enclosures

cc: Ms. LaDawn Whitehead (2 copies)
Atty Thomas P Turner

CURRAN, HOLLENBECK & ORTON, S.C.

MAUSTON OFFICE:

111 OAK STREET
P.O. BOX 140
MAUSTON, WI 53948-0140
TELEPHONE (608) 847-7363
FACSIMILE (608) 847-4155
CURRANLAWOFFICE.COM

ATTORNEYS AT LAW:

FRED D. HOLLENBECK*
WILLIAM T. CURRAN
JOHN R. ORTON
THOMAS J. CASEY
CATHERINE CURRAN ORTON
ERIC S. JOHNSON
ANDREA VON HOFF
*COURT COMMISSIONER

DELLS/DELTON OFFICE:

140 EAST ADAMS STREET
P.O. BOX 370
LAKE DELTON, WI 53940-0370
TELEPHONE (608) 253-7363
FACSIMILE (608) 253-4155
CURRANLAWOFFICE.COM

July 13, 2012

Honorable M. Lisa Buschmann, ALJ
Office of Administrative Law Judges
US Environmental Protection Agency, Mail Code 1900L
1200 Pennsylvania Avenue, NW
Washington DC 20460



Re: US EPA v Joseph L Bollig & Sons Inc, CWA-05-2011-0008,
Opposing Complainant's Motion for Accelerated Decision

Dear Judge Buschmann:

Please consider this letter my special appearance on jurisdiction and expression of opposition to Complainant's Motion for Accelerated Decision.

1. §22.20 Accelerated Decision.

I take this section to mean that this is a pretrial dispositive motion akin to a summary judgment motion under the Federal Rules of Civil Procedure only granting the presiding officer slightly wider latitude.

2. §22.22 Evidence

I take this section to mean that the Court will employ rules of evidence similar to the Federal Rules of Evidence in determining what evidence is in admissible form.

3. §22.22(b) Examination of Witnesses.

I take this section to mean that even though this is an internal EPA Court, the Respondent has due process rights to cross-examine witnesses as set forth in the Federal Rules of Civil Procedure.

CURRAN, HOLLENBECK & ORTON, S.C.

July 13, 2012

Page 2

4. Accelerated Decision is an Extreme Remedy.

The case law is clear that summary judgment motions are treated as extreme remedy, not to be used lightly, because they deprive the citizen of due process, that is, the right to a hearing and the right to cross-examine Complainant's witnesses.

5. No Evidentiary Basis.

Complainant has provided the Court with no evidentiary basis to make this decision. All of its vague references to its prehearing exchange materials do not rise to the level of admissible evidence. He did not even bother to submit these documents and statements he apparently is relying upon in Affidavit form.

6. There are Genuine Issues of Material Fact.

(a) Our evidence is that this is an isolated wetland that does not have sufficient connection under either the Scalia or Kennedy tests to the Lemonweir River as alleged by Complainant. Thus, this airport property is a non-federal wetland governed by the Wisconsin Department of Natural Resources (WDNR) under Chapter 30 of the Wisconsin Statutes.

(b) There is disputed evidence of provable discharge, actual or potential, from this site. Complainant has produced no exhibit or report that establishes a single grain of sand or a single particle of decayed leaf, or any other material or compound, that left or potentially could have left this site based upon the activities of the Respondent.

(c) The ditch or unnamed tributary upon which the Complainant relies is a figment of past history and our evidence is that it no longer exists. Respondent has identified witnesses who will testify that what decades ago was a ditch now has no defined banks, nor any flow, nor any carrying capacity. This is consistent with the statement of Mr. Carlson of the EPA that the effect on the airport site of the activity was "small and temporary". So small, in fact, it could not be measured. It is also consistent with their Exhibit 13 showing that at their March, 2012 visit (spring wet season), where they could find any ditch, it had a depth ranging from 1.8 inches to 2.4 inches with no measurable flow. It is also consistent with Complainant's brief, paragraph 14 beginning

CURRAN, HOLLENBECK & ORTON, S.C.

July 13, 2012

Page 3

on page 8, when they described “area of disturbance” as “the over all airport site wetland area . . . as EPA considers the size of the site (as opposed to the total size of actual damage) to be approximately 7 acres . . .” Certainly, if the “total size of actual damage” was significant, they would be required to prove that fact.

(d) Competing Inferences.

Complainant’s brief at the top of page 11 cites our witnesses, Gregory Cowan and Robert Nicksic, as evidence that there is an adequate connection between the airport and the Lemonweir River. Respondent contends that their testimony clearly isolates the airport from federal jurisdiction under either the Scalia or the Kennedy tests. Contrary to Complainant’s brief assertion at page 11, we do deny EPA’s factual assertion of sufficient seasonal characteristics for a connection between the airport and the Lemonweir River. We acknowledge that, historically, it was, decades ago, a “ditch”, but it has not performed that function in the most recent decades.

(e) If it is in dispute, our witnesses will testify that there was no fill material brought into the airport, as originally suspected on the initial inspection. That allegation by the WDNR has been withdrawn. In fact, fill material was removed. Thus, no wetlands were lost or impaired in any way.

(f) After-the-fact 404 Permit.

Complainant begins with the position that the issuance of this permit is not relevant. Then, he goes on to say that because the airport got a 404 Permit, is an indicia that the Respondent has somehow acquiesced to federal jurisdiction. In fact, the EPA should be embarrassed that the WDNR and the ACE resolved this matter and concluded that no penalty was required and the EPA, coming late to the action, is attempting to overrule that resolution. We have consistently maintained our special appearance in these proceedings and maintained our objection that there is no federal jurisdiction.

(g) Complainant claims their proposed penalty is reasonable in accordance with normal procedure, but they refuse to provide the factual basis, which remains in dispute:

CURRAN, HOLLENBECK & ORTON, S.C.

July 13, 2012

Page 4

i Gravity - They imply they gave significant weight to the “gravity” of the actual damage. However, Greg Carlson has characterized the environmental effect as “small and temporary”.

ii Complainant implies they have assigned a significant component to culpability/recalcitrance while they concede that Respondent has had no prior CWA violations. Further, we maintain that any lack of cooperation was caused EPA’s Greg Carlson’s refusal to cooperate and rude obstruction with Respondent’s good faith efforts.

In conclusion, the large number of genuine issues of material fact lead us to believe that this filing was more in the nature of a “discovery” effort than a serious request for accelerated decision.

If the Court wants to set a further briefing schedule or a list of additional information from the parties, we will be glad to cooperate. Thank you.

Very truly yours,

CURRAN, HOLLENBECK & ORTON, SC



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

WTC:dlr

Enclosures

cc: Ms. LaDawn Whitehead (2 copies)
Atty Thomas P Turner

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:

DOCKET No. CWA-05-2011-0008

Joseph L. Bollig and Sons, Inc.,
New Lisbon, Wisconsin,

Honorable M. Lisa Buschmann
Administrative Law Judge

Respondent.

RECEIVED
JUL 17 2012
REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

CERTIFICATE OF SERVICE OF RESPONDENT'S
OPPOSITION TO COMPLAINANT'S MOTION TO SUPPLEMENT
PREHEARING EXCHANGE AND SUPPLEMENT EXHIBIT AND
RESPONDENT'S OPPOSITION TO COMPLAINANT'S MOTION FOR
ACCELERATED DECISION

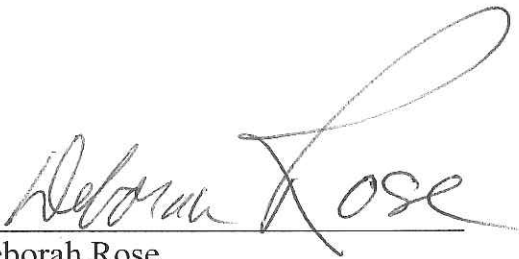
I hereby certify that Respondent's Opposition to Complainant's Motion to Supplement Prehearing Exchange and Supplement Exhibit and Respondent's Opposition to Accelerated Decision in the above matter was filed with those stated below by placing it in the US Mail on Friday, July 13, 2012.

Honorable M. Lisa Buschmann
Office of Administrative Law Judges
US Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Attorney Thomas P Turner
Associate Regional Counsel
US EPA - Region 5
77 West Jackson Boulevard
Chicago, IL 60604-3590

Ms. LaDawn Whitehead
Regional Hearing Clerk
US Environmental Protection Agency -
Region V
77 West Jackson Blvd - 19th Floor
Chicago, IL 60604-3590

Dated: July 13, 2012



Deborah Rose
Assistant to Atty William T Curran
Attorney for Respondent
111 Oak Street, PO Box 140
Mauston, WI 53948-0140
(608) 847-7363