3/27/96

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
GALLAGHER & HENRY	)	Docket No. CWA-A-0-012-93
Countryside, Illinois	)	
	)	
Respondent	)	

ORDER ADDRESSING RESPONDENT'S MOTIONS TO AMEND ITS ANSWER AND SUPPLEMENT ITS PREHEARING EXCHANGE

On March 6, 1996 Respondent filed a motion for leave to file "instanter" a Second Amended Answer to the Complaint in this proceeding. Also on March 4, 1996 Respondent filed a supplement to its prehearing exchange. On March 18, 1996 Complainant filed a motion in opposition to Respondent's motion to file its Second Amended Answer and to strike Respondent's supplement to its prehearing exchange.

Motion to File Second Amended Answer

Amendments to pleadings are generally freely granted in order to best serve the ends of justice by presenting the real issues in the case. However, in the instant motion, Respondent has not articulated any specific new information or position that would support its need to file a Second Amended Answer. Respondent only states that it "has discovered information relevant to the activities at Brittany Glen and Tinley Park [two of the three wetland sites at issue in this proceeding] that it did not previously possess and that EPA did not have when it filed the Complaint." Respondent then refers to the supplement to its prehearing exchange.

A comparison of the proposed Second Amended Complaint with the Respondent's First Amended Complaint reveals changes in response to several allegations. Rather than providing newly discovered information, however, the Second Amended Complaint is actually more reticent. For example, in the response in the First Amended Answer to paragraph 11 of the Complaint, Respondent first denies the allegations of discharging fill into the three wetland sites, and then provides a statement describing its activities at the sites. In the proposed Second Amended Complaint, Respondent offers only a general denial in response to paragraph 11. Similarly, in response to paragraphs 15 and 16 of the Complaint, the Second Amended Answer only states a general denial of the allegations, while the First Amended Answer provided additional explanations of why the allegations were denied.

Respondent has not indicated in its motion or supplement to its prehearing exchange that it has learned that any of the statements in the First Amended Answer are erroneous. The general denials in response to ¶¶11, 15, and 16 in the Second Amended Answer are not necessarily inconsistent with the responses in the First Amended Answer, which also consisted of denials followed by supporting statements. Respondent has not provided any specific reason why it wishes to amend its answer in this way. Respondent has thus not stated the grounds for its motion to amend its answer with particularity, as required by the EPA Rules of Practice, 40 C.F.R. §22.16(a)(2). Therefore, the motion is denied to the extent that the responses to the cited allegations will be deemed not to replace those in the First Amended Answer, but will be read in conjunction.

The Second Amended Answer also expands on two of the seven affirmative defenses raised in the First Amended Answer. In its Second Amended Answer, Fourth Affirmative Defense, Respondent now states that the activities at Site #1 and Site #2 were authorized by Nationwide Permit 26, in addition to repeating the defense in the First Amended Answer, which only stated that the activities at Site #3 were authorized by Nationwide Permit 3. Respondent also states that because Site #1 was restored, no after-the-fact permit was required; and that an after-the-fact permit issued by the Army Corps of Engineers retroactively permitted the project at Site #2. While Respondent has not specifically supported this change in its motion, these amendments are sufficiently specific to speak for themselves. They are made sufficiently in advance of the hearing to not cause any prejudice to Complainant. Respondent will have the burden of going forward to sustain these amended affirmative defenses for the two subject sites. For these reasons, the motion for leave to file a Second Amended Answer is granted with respect to the amendment of Respondent's Fourth Affirmative Defense.

In the Fifth Affirmative Defense in the Second Amended Answer, Respondent expands upon the reasons it contends these claims are barred by the Clean Water Act and the Memoranda of Agreement between the EPA and the Army Corps of Engineers. Nothing in this defense in the Second Amended Answer appears inconsistent with the shorter treatment of this topic in the First Amended Answer. The proposed amendments simply provide additional specific facts and circumstances alleged to support Respondent's position with respect to all three sites. The proposed amended material is sufficiently specific to speak for itself and will not cause prejudice to Complainant. Therefore, leave to file a Second Amended Answer is granted with respect to the amendment of Respondent's Fifth Affirmative defense.

To summarize, Respondent's motion for leave to file its Second Amended Answer is granted in part and denied in part. This Order will allow the Second Amended Answer to be filed, but it will not completely replace the First Amended Answer. The two are to be

read in conjunction and both are considered the operative Answers to the Complaint in this proceeding. In effect, Respondent is not allowed to withdraw the responses in the First Amended Answer to paragraphs 11, 15, and 16 of the Complaint, while Respondent is allowed to amend and supplement its Fourth and Fifth Affirmative Defenses. No other significant differences between the First and Second Amended Answers were discerned. In any event, both Amended Answers remain operative, and all their responses and defenses may be read in conjunction.

Motion to Strike Respondent's Supplement to Prehearing Exchange

Respondent's supplement to its prehearing exchange, although it is, as characterized by Complainant, "unscheduled," will be accepted. While technically the supplement should have been accompanied by a motion for leave to file the additional material, such motions are normally freely granted provided they do not prejudice the opposing party. Discovery is a continuing process. The parties here filed their initial prehearing exchanges over two years ago, and their reply exchanges a year ago. It is to be anticipated that, as the hearing finally approaches, some changes and additions will be made in the witnesses and evidence to be presented.

Complainant's contention that the new material will cause prejudice to its preparation is not persuasive. Respondent's new proposed witnesses and evidence are to address areas well within the issues encompassed by the prior pleadings and prehearing exchanges already on file. These include the work done at the Tinley Park site, drainage conditions, and expert testimony on wetland delineations at the sites. Regardless of Respondent's evidence, the Complainant has the burden of going forward and the ultimate burden of proof in this proceeding. Complainant may, however, submit a reply to Respondent's supplement to its prehearing exchange, by April 17, 1996.

The fact that some of the proposed material is being considered in settlement negotiations is no reason to exclude it or to further postpone the hearing. The hearing has been set for some time at a mutually convenient date, and there has been ample time for settlement negotiations as well as for hearing preparation. There is still a full month until the start of the hearing. Therefore, there will be no further extensions unless the case is actually settled in advance of the scheduled start of the hearing on April 30, 1996.

Resumes for Expert Witnesses

In order to speed up the hearing, the parties are directed, to the extent not already done so, to submit a resume or c.v. for each proposed expert witness, for introduction at the hearing. This additional prehearing exchange must be filed by April 17, 1996.

Summary of Rulings

1. Respondent's Motion for Leave to File Instanter Second Amended Answer is denied in part and granted in part. Respondent's Second Amended Answer will be accepted in conjunction with Respondent's First Amended Answer, which will both be considered the operative Answers in this proceeding.

2. Respondent's supplement to its prehearing exchange is accepted, and Complainant's motion to strike that prehearing exchange is denied. Complainant may file a reply to Respondent's supplement by April 17, 1996.

3. The hearing will not be adjourned unless the proceeding is actually settled before the scheduled April 30, 1996 starting date.

4. The parties are directed to exchange resumes or c.v.'s for their proposed expert witnesses by April 17, 1996.

Andrew S. Pearlstein
Administrative Law Judge

Dated: March 27, 1996
Washington, D.C.

IN THE MATTER OF GALLAGHER & HENRY, Respondent
Docket No. CWA-A-O-012-93

CERTIFICATE OF SERVICE

I certify that the foregoing Order Addressing Respondent's Motions to Amend its Answer and Supplement its Prehearing Exchange, dated March 6, 1996, was sent in the following manner to the addressees listed below:

Original by Regular Mail to: Jodi L. Swanson-Wilson
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, IL 60604-3507

Copies by Fax and Regular Mail to:

Counsel for Complainant: Thomas J. Martin, Esq.
Associate Regional Counsel
U.S. EPA Region 5
77 West Jackson Boulevard
Chicago, IL 60604-3507
Fax: (312) 353-4135

Counsel for Respondent: Johnine J. Brown, Esq.
BrownMartin, P.C.
35 East Wacker Drive
Suite 1356
Chicago, IL 60601-2102
Fax: (312) 236-1451

Maria A. Whiting
Legal Assistant
U.S. EPA, Mail Code 1900
Office of Administrative Law Judges
401 M Street SW
Washington, DC 20460

Dated: March 27, 1996
Washington, DC