UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF	)	**Docket No. SDWA-04-2005-1016**
Gene A. Wilson	)	
Respondent	)	

COMPLAINANT'S REPLY TO RESPONDENT'S PREHEARING EXCHANGE WITNESSES LIST AND MOTION TO STRIKE WITNESSES

COMES NOW, Counsel for Complainant and files this "Reply to Respondent's Prehearing Exchange Witnesses List and Motion to Strike Witnesses." Specifically, Complainant objects to Respondent's inclusion of Mr. Leonard Dangerfield and Ms. Zylpha Pryor as hostile witnesses on behalf of Respondent, for the reasons set forth below, and requests that the Court strike these witnesses from Respondent's Prehearing Exchange Witness list and not allow Respondent to call these witnesses for testimony during the hearing.

Respondent states that it is "imperative" to add Mr. Dangerfield as a witness "to show discrimination, prejudicial treatment and selective enforcement." This statement is without any rational or factual basis, as Mr. Dangerfield has no role in the enforcement of this matter. Mr. Dangerfield is a Freedom of Information Act (FOIA) specialist whose only contact with Mr. Wilson and this case has been in the context of responding to his FOIA requests. Mr. Dangerfield and the FOIA Office have had nothing to do with any of the facts related to the violations alleged herein. Therefore it is unclear how his knowledge would include any facts pertaining to "selective enforcement." Further, Respondent has not provided any factual basis for his assertions of "discrimination" and "prejudicial treatment." Complainant is frankly at a loss to ascertain a FOIA specialist's relationship to any of the facts surrounding the alleged violations.

The FOIA Office receives FOIA requests, which are then assigned to a FOIA specialist. The FOIA specialist then contacts the appropriate EPA office that retains the responsive records, if any. Personnel in that EPA office search for documents responsive to the request and contact the FOIA specialist with the results of their review. The FOIA specialist then advises the requester of problems associated with his receiving or reviewing the records. Such problems may include a

record that is particularly voluminous or a record that is archived and will take a longer than normal period of time to retrieve, and so forth. If there are no such problems, the requester is advised of any costs, and the records are sent to the requester or made available for in-office review. If any records are withheld, the requester is so advised and is also informed of which of the nine FOIA exemptions justify the withholding. The requester has the right to appeal to EPA Headquarters for the release of any withheld documents. If the requester exercises the right to appeal, the FOIA specialist must provide EPA Headquarters with the documents necessary to render a decision on the appeal. Occasionally, as in Respondent's case, the FOIA specialist will oversee the requester's in-office review of documents and will make copies of documents for the requester.

Mr. Dangerfield has performed these ministerial services for Respondent. Absent Respondent's providing some evidence of Mr.Dangerfield's knowledge of or participation in "discrimination, prejudicial treatment, and selective enforcement," Mr. Dangerfield should not be compelled to serve as Respondent's hostile witness. Accordingly, Complainant requests that the Court strike Mr. Dangerfield from Respondent's Prehearing Exchange witness list.

In the same vein, Respondent has not offered the evidence to sustain his demand that the Attorney for Complainant be made a hostile witness for Respondent. Respondent cites the addition of co-counsel to this case for Complainant as evidence of prejudicial treatment and selective prosecution. This is another instance of accusations of prejudicial treatment and selective prosecution by Respondent without any rational or factual basis.

An attorney has every right to add co-counsel to a case without having to provide any justification for doing so. Unfortunately, Respondent takes this addition of co-counsel as a personal affront. While there is no need to explain the addition of co-counsel, for the record, it is standard procedure in Complainant's office to add co-counsel to any administrative case that proceeds to hearing. While Respondent has also provided no evidence of prejudicial treatment or selective prosecution by Complainant, any such cross-examination is properly directed to the enforcement officer who referred the case to Counsel herein. The enforcement officer herein, Mr. Randy Vaughn, selected this case for enforcement action and referred it to Ms. Pryor as the attorney for the Underground Injection Control (UIC) enforcement program. In that capacity,

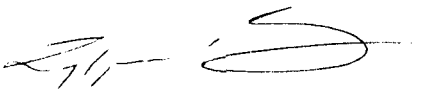
Ms. Pryor is expected to vigorously represent the UIC enforcement program, which is what she has sought to do in this matter. Respondent has presented no facts which should compel this Court to require that the Attorney for Complainant serve as a hostile witness for Respondent. Moreover, requiring Complainant's counsel to testify at hearing in the matter would be inconsistent with the attorney-client privilege. For these reasons, Complainant requests that Ms. Pryor be stricken from Respondent's Prehearing Exchange witness list.

Complainant further requests that, in addition to striking the witnesses from Respondent's witness list, Respondent be prohibited from introducing evidence or argument regarding a selective prosecution defense at the hearing. Respondent has yet to identify any factual basis for such a defense. Respondent should therefore not be allowed to turn the hearing into a circus of accusation and fishing expedition for non-existent evidence.

In attempting to establish a selective prosecution defense, Respondent would confront a "daunting burden." In re B&R Oil Co., 8 E.A.D. 39 (1998). In B & R Oil, the Environmental Appeals Board noted that "Courts have traditionally accorded governments a wide berth of prosecutorial discretion in deciding whether, and against whom, to undertake enforcement actions." Id. To substantiate a claim of selective enforcement or selective prosecution, Respondent must establish "(1) [that he has] been singled out while other similarly situated violators were left untouched, and (2) that the government selected [him] for prosecution 'invidiously or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent the exercise of constitutional rights.'" In re: Newell Recycling Company, Inc., 8 E.A.D. 598 (1999); United States v. Smithfield Foods, Inc., 969 F. Supp. 975, 985 (E.D. Va. 1997).

As noted above, Respondent has presented no basis for asserting such a defense in this case. Respondent has not described any evidence that the enforcement action against him was motivated by any consideration akin to racial or religious bias or a desire to prevent the exercise of a constitutional right; indeed no such evidence exists. Therefore, to the extent that Respondent is asserting a selective prosecution defense, it should be stricken and Respondent should not be allowed to sidetrack the hearing with argument and accusations for which no factual basis exists.

Respectfully submitted,



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