UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Joseph L. Bollig and Sons, Inc.,	)	**Docket No. CWA-05-2011-0008**
	)	
Respondent.	)	**Date: May 30, 2012**

ORDER ON COMPLAINANT'S MOTIONS TO AMEND COMPLAINT, FOR DEFAULT, AND TO STRIKE PORTIONS OF PREHEARING EXCHANGE, AND ORDER SCHEDULING HEARING

This proceeding was initiated by a Complaint filed by the United States Environmental Protection Agency, Region 5 ("Complainant" or "EPA") on August 26, 2011. Respondent filed an Answer and the parties engaged in Alternative Dispute Resolution, but were unable to resolve this matter by settlement, so the undersigned was designated to preside in this proceeding. On February 29, 2012, the undersigned issued a Prehearing Order directing Complainant to file a prehearing exchange of information by March 30, 2012 and for Respondent to file its prehearing exchange no later than April 27, 2012. Complainant timely filed its Prehearing Exchange, and Respondent's Prehearing Exchange, dated April 27, 2012, was received by the undersigned on May 3, 2012. Complainant filed a Rebuttal Prehearing Exchange on May 11, 2012.

The prehearing exchange process in this matter has been completed and the pending motions are ruled upon below. Therefore, the matter may be scheduled for hearing.

I. Order on Complaint's Motion to Amend Complaint

On April 27, 2012, Complainant submitted a Motion to Amend the Complaint, in which Complainant seeks to correct three typographical errors and add a map as an attachment to the Complaint, with references thereto in the Complaint. Attached to the Motion is a proposed amended complaint. The Motion indicates that the Respondent has no objection to the relief requested, and Respondent did not file any response within the 15-day time period provided in the applicable procedural rules, 40 C.F.R. Part 22 ("Rules") for filing responses to motions. 40 C.F.R. § 22.16(b).

The Rules provide that once an answer has been filed, "the complainant may amend the

complaint only upon motion granted by the Presiding Officer." 40 C.F.R. § 22.14(c). The Rules do not provide any standard for granting leave to amend a complaint, but the Federal Rules of Civil Procedure ("FRCP") and federal court decisions interpreting the FRCP provide guidance. FRCP 15(a) provides that "[t]he court "should freely give leave" to amend a complaint "when justice so requires." In *Foman v. Davis*, 371 U.S. 178, 182 (1962), the Supreme Court stated:

> In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be "freely given."

There is no undue delay, bad faith, dilatory motive, futility of amendment, or repeated failure to cure deficiencies apparent in this case. Further, the typographical errors are not misleading and amendments thereof would not result in undue prejudice. The additional map and references thereto in the proposed amended complaint are not prejudicial, especially where the hearing in this matter will be scheduled to commence in a few months.

Therefore, the Motion is granted. Given the nature of the amendments, Respondent is not required to file an answer to the amended complaint, and its Answer to the initial Complaint shall be deemed its answer to the amended complaint.

II. Complainant's Motion for Default

A. Parties' submissions

On May 11, 2012, Complainant filed a Motion for Default Judgment ("Default Motion") which was received by the undersigned on May 21, 2012. In the Default Motion, Complainant contends that Respondent's Prehearing Exchange is technically deficient and was not timely filed in conformity with either the Prehearing Order or the provisions of 40 C.F.R. § 22.5. Default Mot. at 1–2. Complainant contends, and the record shows, that while Respondent served its Prehearing Exchange on April 27, 2012, the Prehearing Exchange was not filed with the Hearing Clerk until April 30, 2012. Default Mot. at 1. The Prehearing Exchange also was not accompanied by a copy thereof or by a certificate of service. Default Mot. at 2. Complainant argues that these defects warrant an entry of default against Respondent and a consequent finding that Respondent admits to "all facts alleged in the complaint," waives its "right to contest such factual allegations," and is fully liable for the proposed penalty of $60,000. Default Mot. at 2 (quoting 40 C.F.R. § 22.17(a)). Complainant acknowledges that Respondent opposes the Motion. Default Mot. at 2.

On May 21, 2012, Respondent filed a certificate of service for its Prehearing Exchange dated April 27, 2012, but to date, no other response to the Default Motion has been received by the undersigned. Under the Rules, Respondent's response is due on May 31, 2012, given the 15

day response period and the additional five days for motions served by mail. 40 C.F.R. § 22.16(b), 22.7(c). However, where a motion will be denied, it is not necessary before ruling on the motion to wait until a response is filed or for the expiration of the time period for a response.

B. Discussion and Conclusion

The Rules provide that "[a] party *may* be found to be in default . . . upon failure to comply with the information exchange requirements of [40 C.F.R.] § 22.19(a) or an order of the Presiding Officer . . . . Default by respondent constitutes . . . an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations." 40 C.F.R. § 22.17(a) (emphasis added). Section 22.19(a) requires each party to file a prehearing information exchange "[i]n accordance with an order issued by the Presiding Officer . . . ." 40 C.F.R. § 22.19(a). The Rules provide that a prehearing exchange is "served" on the date it is placed in the mail, but "filed" on the date that it is received by the Hearing Clerk. 40 C.F.R. §§ 22.5(a)(1), 22.7(c). All filed documents must be submitted in duplicate and be accompanied by a certificate of service. 40 C.F.R. § 22.5(a)(1), (3).

There is a preference in the law for deciding cases on the merits. *See JHNY, Inc.*, 12 E.A.D. 372, 384 (EAB 2005) ("[W]e have endorsed the general principle of law disfavoring default as a means of concluding cases."). "As a general principle, default orders are not favored and doubts are usually resolved in favor of the defaulting party." *Rybond, Inc.*, 6 E.A.D. 614, 616 (EAB 1996) (quoting *In re Thermal Reduction Co., Inc.*, 4 E.A.D. 128, 131 (EAB 1992)). A default order should only be entered if there is good cause under the totality of circumstances to do so. *JHNY, Inc.*, 12 E.A.D. at 384.

The prehearing exchange process plays a "key role" in administrative practice, and "failure to comply with an ALJ's order requiring exchange is one of the primary justifications for entry of default." *Id.* at 382. A "single failure to file a timely prehearing exchange" may justify an entry of default. *Id.* at 389.

However, in this instance, the deficiencies in Respondent's Prehearing Exchange do not warrant a finding of default. Respondent did at least serve its Prehearing Exchange before the filing deadline had expired, and its error occasioned an insubstantial delay of three days. There is no indication that the late filing prejudiced Complainant in any way. Respondent's failure to file a second copy of its Prehearing Exchange or a certificate of service were similarly minimal errors that also have not caused Complainant any apparent prejudice. The defects in Respondent's filing do not indicate that Respondent is not fully participating in this matter or attending to its defense in good faith, nor do they threaten the integrity of this proceeding. It is concluded that Complainant has not shown good cause under the totality of the circumstances to enter a default against Respondent in this instance, and therefore Complainant's Default Motion is denied.

III. Motion to Strike

A. Complainant's Arguments

Also on May 11, 2012, Complainant filed a Motion to Strike Portions of Respondent's Initial Prehearing Exchange, requesting that if an order of default is not entered against Respondent, then portions of Respondent's Prehearing Exchange should be stricken from the record and certain witnesses identified in the Prehearing Exchange should not be allowed to testify at hearing. Mot. to Strike at 1–5, 9. Complainant states that Respondent opposes the Motion. Mot. to Strike at 9.

Complainant contends that Respondent has not adequately identified several potential witnesses listed in Respondent's Prehearing Exchange, has not provided a sufficient summary of certain potential witnesses' testimonies, and has indicated that certain witnesses will only offer cumulative testimony. Mot. to Strike at 2–4. Consequently, Complainant requests that several witnesses and statements be stricken from Respondent's Prehearing Exchange. *Id.* at 7. Complainant contests certain statements of fact identified in Respondent's Prehearing Exchange as being "not in dispute" and requests that they be stricken. *Id*. at 4-5. In addition, Complainant argues that Respondent failed to provide adequate narratives in support of its affirmative defenses. *Id.* at 8.

Complainant argues that the Rules are crafted with the intent to eliminate unnecessary hearings, which would be a waste of public resources, and that the "brief narrative summary of [witness'] expected testimony" as required by the Rules, 40 C.F.R. § 22.19(a)(2)(i) enables counsel prior to hearing "to evaluate the strength or weakness of the case, appropriately responding to what the evidence produced at hearing is likely to reveal." Mot. to Strike at 6. Where the narrative summary of testimony is nothing more than an identification of subject matter of witness' testimony, Complainant argues, it has no opportunity to make this evaluation and thereby to identify new evidence, amend the complaint, dismiss or settle the case, or prepare for cross examination, as appropriate. *Id*. at 7.

B. Relevant Legal Standards

As an initial matter, it is noted that motions to strike evidence are generally used to remove inadmissible testimony or other evidence from the record after it has been formally offered for admission. *See* 77 Am. Jur. 2d Trial § 377; Black's Law Dictionary 1034 (7th ed. 1999) (defining "motion to strike" as "[a] request that inadmissible evidence be deleted from the record and that the jury be instructed to disregard it"). Complainant's request that certain evidence be deemed inadmissible in advance of trial is more appropriately characterized as a motion in limine, and will be treated as such. *See United States v. Parades*, 176 F. Supp. 2d 192, 193 (S.D.N.Y. 2001) (purpose of motion in limine is to allow court to rule on admissibility in advance of trial); Black's Law Dictionary 1033 (7th ed. 1999) (defining "motion in limine" as

"[a] pretrial request that certain inadmissible evidence not be referred to or offered at trial"). "Evidence should be excluded on a motion in limine only when the evidence is clearly inadmissible on all potential grounds." *Parades*, 176 F. Supp. 2d at 193 (citing *Noble v. Sheahan*, 116 F. Supp. 2d 966, 969 (N.D. Ill. 2000)).

The Rules require a prehearing exchange of information to contain "[t]he names of any expert or other witnesses" the party "intends to call at the hearing, together with a brief narrative summary of their expected testimony," as well as "[c]opies of all documents and exhibits" the party "intends to introduce into evidence at the hearing." 40 C.F.R. § 22.19(a)(2). "[A]ny witness whose name and testimony summary has not been included" in the prehearing exchange "shall not be allowed to testify" at hearing except as provided in 40 C.F.R. § 22.22(a)(1). 40 C.F.R. § 22.19(a)(1). These requirements were echoed in the Prehearing Order of February 29, 2012.

C. Discussion and Conclusions

No response to the Motion has been received to date, but as noted above, where a motion will be denied, it is not necessary for the judge to wait until a response is filed or for the expiration of the time period for a response.

Complainant first objects to the proposed testimony of David Donnelly on the grounds that his testimony will be irrelevant or otherwise lacking in probative value. Mot. to Strike at 2. Respondent's Prehearing Exchange states that Mr. Donnelly is the Juneau County Zoning Commissioner who will testify, *inter alia*, about advising Mr. Douglas Wells that the 7 acre parcel at issue was only partially wetlands and that no permit was necessary, and who will authenticate the official County Wetlands map. Testimony to authenticate an exhibit may be relevant to the extent that the exhibit is relevant. Moreover, several factors are considered in assessing a penalty under the Clean Water Act, including the nature, circumstances, extent and gravity of the violation, and respondent's degree of culpability, and it is not apparent that Mr. Donnelly will be unable to provide any testimony that could be probative or relevant regarding any of these factors or regarding Respondent's alleged failure to obtain a permit. Therefore, it is inappropriate to bar Mr. Donnelly from testifying at the hearing.

Complainant next objects to the proposed testimony of "abutting landowners" Ed Sumiec, Joseph and June Nicksic and their sons, and Mabel Ferdon, on the ground that no summary of testimony is provided, that their testimony will be cumulative of that of Gregory J. Cowen, and that the sons of Mr. and Mrs. Nicksic are not identified by name. *Id.* at 2–3. The topics on which these witnesses will testify are identified by reference to Mr. Cowen's proposed testimony, and the sons of Mr. and Mrs. Nicksic are reasonably identifiable for the purpose of pretrial preparation. However, Respondent has not identified any information that would be offered on these topics nor indicated how it is not cumulative of that given by Mr. Cowen. At this time it cannot be determined whether their testimony would be clearly inadmissible for all purposes, so

at this time these witnesses should not be barred from testifying at hearing. However, for compliance with 40 C.F.R. § 22.19(a)(2), Respondent is ordered as set forth below to file a supplement to its Prehearing Exchange summarizing the expected testimony of the abutting landowners identified on page four of its Prehearing Exchange.

Third, Complainant objects to the testimony of Ronald Brunner and Floyd Babcock on the grounds that their testimony will duplicate the testimony of Doug Wells, and that their testimony regarding the history of the airport and the safety concerns posed by the wooded area near the runway cannot be relevant to the matter at hand. *Id.* at 3. After examining the Prehearing Exchange, it is apparent that the topics of Mr. Brunner and Mr. Babcock's testimonies are not expected to be identical to those of Mr. Wells, who is expected to testify about violations and corrective action at the airport, while Mr. Brunner and Mr. Babcock will testify about the history of the airport and various safety concerns posed by the landscape. Considering the many factors that may be relevant to assessing a penalty, it is not apparent at this early phase of proceedings that Mr. Brunner's and Mr. Babcock's testimony will be "clearly inadmissible on all potential grounds."

Fourth, Complainant objects to the testimony of "[t]hose employees of the engineering firm, MidStates and Associates, who did the wetlands delineation, and worked cooperatively and promptly with Respondent and the WDNR and the ACOE to secure the 404 permit." *Id.* at 4. Complainant argues that "Respondent has failed to provide acceptable identification of the witnesses" and has not identified the subject of their expected testimony. *Id.* While Respondent has provided some description of the witnesses, it has not provided the names and a brief narrative summary of their expected testimony, and is therefore ordered as set forth below to supply it in a supplement to its Prehearing Exchange.

Finally, Complainant objects to statements of fact labeled A through F in Respondent's Prehearing Exchange. In identifying the documents to be offered at hearing, Respondent states that it will rely upon the documents provided in Complainant's prehearing exchange and that "[i]in limiting our disclosure, we are relying upon their Complaint and prehearing exchange that [statements listed as A through F] are not in dispute," and lists statements A through F. Respondent's Prehearing Exchange p. 4 (emphasis omitted). Complainant objects on the grounds that they are not supported by citations to the record and that some are irrelevant. *Id.*

The assertion in a prehearing exchange of information that certain facts are undisputed is without legal effect. Such assertion may be useful to Complainant in discerning Respondent's position, in forming the basis for stipulations, or for listing facts in dispute that must be resolved at a hearing. Accordingly, the statements listed as A through F in Respondent's Prehearing Exchange are not prejudicial and there is no basis for striking them.

Complainant's point is well taken that Respondent failed to provide adequate narratives in support of its affirmative defenses. The Prehearing Order (at p. 3) required Respondent to submit "a narrative statement explaining in detail the legal and/or factual bases for each such

affirmative defense, and a copy of any documents in support." There is no indication as to whether any of Statements A through F are intended to constitute such narratives. If so, the statements do not identify which affirmative defense they correspond to, do not include any narrative explanation in detail, and do not reference any supporting documentation. In any event, Respondent failed to comply with this requirement of the Prehearing Order. However, a motion to strike a portion of the Prehearing Exchange is not an appropriate remedy for such failure. Instead, to better enable the parties to prepare for hearing, Respondent is ordered, as set forth below, to include the information in a supplement to its Prehearing Exchange. Any failure of Respondent to comply with this second opportunity to submit the information may provide a basis for Complainant to file an appropriate motion.

ORDER

1. Complainant's Motion to Amend the Administrative Complaint is **GRANTED.** Complainant shall file its Amended Complaint **on or before June 8, 2012.** Respondent's Answer to the initial Complaint shall be deemed its answer to the amended complaint.

2. Complainant's Motion for Default Judgment is **DENIED**.

3. Complainant's Motion to Strike Portions of Respondent's Initial Prehearing Exchange is **DENIED**.

4. Respondent is hereby **ORDERED** to file and serve **on or before June 15, 2012** a supplement to its Prehearing Exchange containing the following:

> A. Summaries of the expected testimony of each of the "abutting landowners" referenced in Paragraph 6 of Respondent's Prehearing Exchange
>
> B. Names and summaries of the expected testimony of each of the employees of MidStates and Associates referenced in Paragraph 8 of its Prehearing Exchange.
>
> C. A narrative statement explaining in detail the legal and/or factual bases for each affirmative defense listed in the Answer, and a copy of any documents in support.

5. If any party intends to file any dispositive motion regarding liability, such as a motion for accelerated decision or motion to dismiss under Rule 22.20(a), it shall file such motion on or before **June 29, 2012**. The filing of a potentially dispositive motion does not stay the deadlines established by this Order and will not constitute good cause for failure to comply with this Order's requirements.

6. Agency policy strongly supports settlement. The parties are directed to hold a settlement

conference and attempt to reach an amicable resolution of this matter. Complainant shall file a status report regarding such conference and the status of settlement on or before **July 20, 2012**.

7. All non-dispositive prehearing motions, such as motions for subpoenas or motions in limine, must be filed on or before **August 31, 2012**. This deadline does not apply to motions to supplement the prehearing exchange.

8. On or before **September 21, 2012**, the parties shall file a Joint Set of Stipulated Facts, Exhibits, and Testimony. The time allotted for the hearing is limited. Therefore, the parties must make a good faith effort to stipulate, as much as possible, to matters which cannot reasonably be contested so that the hearing can be concise and focused solely on those matters which can only be resolved after a hearing.

9. The parties are reminded that any document or exhibit not included in the prehearing exchanges shall not be admitted into evidence, and any witness whose name and testimony summary are not included in the prehearing exchange shall not be allowed to testify at hearing. If a party wishes to add a proposed witness, document, or exhibit to its prehearing exchange, it must file a timely motion to supplement the prehearing exchange no later than **October 1, 2012**. Motions filed after this date will not be considered absent extraordinary circumstances.

10. The parties may, if they wish, file prehearing briefs. The deadline for filing such briefs is **October 5, 2012**. Furthermore, a copy of the briefs must be emailed (oaljfiling@epa.gov), faxed and/or hand-delivered to the undersigned by that date. The brief may serve in lieu of an opening statement at the hearing. Complainant's brief should specifically state each count of the Complaint, and each claim therein, which is to be tried at the hearing and indicate which counts/claims are not. Respondent's brief should at a minimum identify and explain each defense Respondent intends to pursue at the hearing.

11. The hearing in this matter will be held beginning promptly at 9:30 a.m. on Tuesday, **October 16, 2012,** in or around Mauston or Madison, WI, and continuing if necessary on October 17-19, 2012. The Hearing Clerk will make appropriate arrangements for a courtroom. The parties will be notified of the exact location and of other procedures pertinent to the hearing when those arrangements are complete.

> Individuals requiring special accommodations at the hearing, including wheelchair access, should contact the Regional Hearing Clerk, as soon as possible so that appropriate arrangements can be made.
>
> **RESPONDENT IS HEREBY ADVISED THAT FAILURE TO APPEAR AT THE HEARING, WITHOUT GOOD CAUSE BEING SHOWN THEREFOR, MAY RESULT IN A DEFAULT JUDGMENT BEING ENTERED AGAINST IT. COMPLAINANT IS HEREBY ADVISED THAT FAILURE TO APPEAR AT THE HEARING MAY RESULT IN DISMISSAL OF THIS MATTER.**

If either party does not intend to attend the hearing, or has good cause for not being able to attend the hearing as scheduled, it shall notify the undersigned at the earliest possible moment.

SO ORDERED.

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M. Lisa Buschmann
Administrative Law Judge