UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
COLLEEN TILLION,	)	
RICK RICHARDS, and	)	**DOCKET NO. CWA-10-2004-0067**
PATRICIA RICHARDS,	)	
	)	
RESPONDENTS	)	

ORDER DENYING RESPONDENTS' MOTION TO STRIKE

This civil administrative penalty proceeding arises under Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g). This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), 40 C.F.R. §§ 22.01-.32.

The United States Environmental Protection Agency, Region X ("Complainant" or the "EPA") on April 30, 2004 filed and served a Complaint on Colleen Tillion, Rick Richards, and Patricia Richards ("Respondents"). The EPA alleged, *inter alia*, that Respondents discharged pollutants into waters of the United States without a permit issued pursuant to Section 402 or 404 of the Clean Water Act, in violation of the Clean Water Act and federal regulations.

Pursuant to the October 7, 2004 Prehearing Order, the EPA filed several proposed exhibits as part of its prehearing exchange. In a motion dated November 30, 2004, Respondents moved to strike seven of EPA's proposed exhibits: in particular, Exhibits CX-6, CX-7, CX-8, CX-16, CX-17, CX-19, and CX-20. Respondents' motion might also be characterized as a motion in limine, as Respondents seek to avoid my consideration of these documents. Respondents challenge exhibits concerning a case against Mr. Clarence Abeldgaard, who is the subject of a separate Clean Water Act enforcement action pending in the federal district court for Alaska, and who is not a party to the case before me. Respondents state that these exhibits are irrelevant and prejudicial, and should be removed from the case file.

In response, the EPA asserts that Respondents have moved to strike information that speaks directly to the nature and character of the land on which Respondents placed fill, to the impacts on surrounding wetland and riparian areas, and to changes in property values resulting from improved access. In countering Respondents' motion, the EPA notes that it has the burden to show that the areas where Respondents placed dredged or fill material included "wetlands" within the meaning of 40 C.F.R. § 328.3(b). Moreover, the EPA contends that in order to determine the penalty proposal the EPA is required to take into account factors such as the

gravity of the violation and any increase in property value realized by Respondents as a result of unpermitted discharges of fill material. Therefore, as explained by the EPA, the specific character of the areas where the dredge or fill material was placed and the impacts of the placement of this material on surrounding wetlands and riparian habitat are facts that are central to EPA's case. Further, the EPA alleges that effects on property values attributable to fill-related access improvements at nearby and similar properties are facts of consequence in this matter. As to CX-20, however, the EPA admits that the ability-to-pay portion of that exhibit is irrelevant, but that pages 2 through 7 contain a discussion of the economic benefit obtained by unpermitted wetland filling in the subject subdivisions and is therefore relevant to this case.

I recognize that Respondents are separate from Mr. Abelgaard and that the EPA is not alleging that Respondents are responsible for the violations of others. EPA's opposition to Respondents' motion to strike states that the proposed exhibits shared between both the instant case and the case against Mr. Abelgaard are shared because both cases concern the same ecosystem. According to the EPA, the exhibits either directly relate to Respondents' property or focus on property immediately adjacent to Respondents' property. Upon my review of the pleadings and proposed exhibits in question, I find that the EPA has demonstrated the relevancy of the exhibits and, as such, Respondents' challenge to the cited exhibits fails at this time. Thus, I hereby DENY Respondents' motion to strike.

However, Respondents may object to the exhibits at the hearing. If Respondents make such an objection, the EPA will be required to demonstrate admissibility and I will consider whether such exhibits are inadmissible. Under the Rules of Practice, 40 C.F.R. § 22.22(a), all evidence will be admitted that is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value, except evidence relating to settlement. Respondents may also object to the use of portions of an exhibit, such as the ability-to-pay analysis in CX-20, if the EPA attempts to use an objectionable part of an exhibit. Moreover, subject to the standards governing admissibility of evidence, Respondents may seek to admit their own exhibits and/or testimony that contradict or rebut evidence presented by the EPA.

Dated: January 13, 2005
Washington, D.C.

Barbara A. Gunning
Administrative Law Judge