BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of: Dave Erlanson, Sr., Individual, Swan Valley, Idaho, Respondent.	DOCKET NO. CWA-10-2016-0109 **COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTIONS TO SUPPLEMENT PREHEARING EXCHANGE AND COMPLAINANT'S SECOND MOTION IN LIMINE**

Pursuant to Section 22.16(b) of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" ("Part 22 Rules"), the U.S. Environmental Protection Agency, Region 10 ("Complainant" or "EPA") submits this response brief, opposing in part Respondent's Motion to File Out of Time for Additional Witnesses, Witness Summaries, and Affidavit, served on April 2, 2019, and Motion to Court to Accept into Evidence the Enclosed Exhibits, served on April 5, 2019 (collectively referenced herein as "Motions to Supplement Prehearing Exchange"). EPA also submits, pursuant to 40 C.F.R. §§ 22.19 and 22.22(a)(1), this Second Motion in Limine.

Complainant respectfully requests (1) an order denying, in part, Respondent's Motion to File Out of Time for Additional Witnesses and (2) an order *in limine*, excluding evidence and testimony that is irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value, in accordance with 40 C.F.R. § 22.22(a)(1). Such a limiting order will help to ensure an efficient hearing.

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FACTUAL BACKGROUND

Pursuant to the Second Prehearing Order, dated February 24, 2017, EPA and Respondent were required to submit their Initial Prehearing Exchanges on April 7, 2017, and April 28, 2017, respectively. Docket No. 19. Complainant filed its Prehearing Exchange on April 7, 2017. Docket No. 23. In an order dated April 27, 2019, the Presiding Officer granted Respondent's Request for Extension of Time to File Prehearing Exchange and extended the deadline to file that document to May 8, 2017. Docket No. 25. Respondent's Prehearing Exchange failed to provide the names of witnesses and exhibits that he intends to introduce regarding the assessment of an appropriate penalty, and instead requested leave to supplement the exchange when relevant information became available. Docket No. 26. On May 9, 2017, the Presiding Officer granted the requested leave and required Respondent to supplement his Prehearing Exchange by May 22, 2017. Docket No. 28. Respondent did not file a supplemental prehearing exchange before that deadline.

On December 14, 2018, EPA filed its Motion to Compel Additional Discovery and Compliance with Second Prehearing Order. Docket No. 45. EPA requested that, in compliance with 40 C.F.R. 22.19(a)(2) and the Second Prehearing Order, Respondent provide a list of witnesses intended to be called at hearing and a brief narrative summary of their expected testimony. In response, Respondent stated that he does not intend to offer "any witnesses/testimony, visual (CD) offerings, case law, environmental studies at this hearing . . . [And a]t this hearing, I will be the only witness for Erlanson!" Respondent's Response to EPA's Motion in Limine at 1-2. In an order dated March 18, 2019, the Presiding Officer granted EPA's Motion in part, requiring Respondent to "file and serve a brief narrative summary of the

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proposed testimony within 14 days of the date of this Order" if he wishes to offer any testimony. Docket No. 56. Respondent failed to file and serve narrative summaries within the alloted time. On April 2, 2019, and April 5, 2019, Respondent filed the present motions, requesting leave to introduce new witnesses and exhibits at the hearing in this matter.

STANDARDS

I. Motions to Supplement Prehearing Exchange

Section 22.19 of the Part 22 Rules require parties to submit prehearing exchanges and require that a party who has submitted its prehearing exchange "shall promptly supplement . . . the exchange when the party learns that the information exchanged . . . is incomplete . . . , and the additional . . . information has not otherwise been disclosed to the other party pursuant to this section." 40 C.F.R. § 22.19(f). When a party fails to supplement its prehearing exchange in the time allowed by the Presiding Officer, this tribunal has required parties to submit a motion explaining the reasons for not submitting it sooner. *In re 99 Cents Only Stores*, Dkt. No. FIFRA-9-2008-0027, at *5, ALJ (June 19, 2009) (Biro, C.J). A supplement may be denied where it is "not prompt or where the existing information is not incomplete, inaccurate or outdated, and particularly where there is evidence of bad faith, delay tactics, or undue prejudice." *Id*. at *4.

II. Motion in Limine

While motions *in limine* are not addressed in the Part 22 Rules, the Rules provide that "[t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value." 40. C.F.R. § 22.22(a). In such instances, when the Part 22 Rules are silent on an issue, the Presiding Officer may rely on federal court practice, specifically, the Federal Rules of Civil Procedure and the Federal Rules of Evidence, as

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guidance. *See In re Carroll Oil Company*, 10 E.A.D. 635, 649, (EAB 2002); *In re Wego Chem. & Mineral Corp.*, 4 E.A.D. 513, 524 n. 10 (EAB 1993). Under federal law, motions *in limine* "should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose." *Noble v. Sheahan*, 116 F.Supp.2d 966, 969 (N.D. Ill. 2000). "A motion *in limine* is the appropriate vehicle for excluding testimony or evidence from being introduced at hearing on the basis that it lacks relevancy and probative value." *In re Carbon Injection Systems LLC et al.*, Dkt. No. RCRA-05-2011-0009, ALJ (May 31, 2012) (Biro, C.J.) (granting Complainant's motions *in limine*).

III. Standard for *Pro se* Litigants

The federal courts and the Environmental Appeals Board have stated that "more lenient standards of competence and compliance apply to pro se litigants." *Hall v. Dworkin*, 829 F. Supp. 1403, 1414 (N.D.N.Y. 1993); see also *In re Occidental Chemical and Agricultural Products*, 2 E.A.D. 30, 33 (JO 1985) ("[A] pro se party . . . must be given reasonable latitude in effectuating its intent"); *In re Envotech,* L.P., 6 E.A.D. UIC Appeal Nos. 95-2 through 95-37, slip op. at 10 (EAB, Feb. 15, 1996) ("[T]he Board endeavors to construe petitions broadly, particularly when they are filed by persons unrepresented by legal counsel . . . ."). Nonetheless, a litigant who elects to appear pro se takes upon himself or herself the responsibility for complying with the procedural rules and may suffer adverse consequences in the event of noncompliance. *In re Rybond, Inc*., 6 E.A.D. 614 (EAB 1996).

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DISCUSSION

I. Response to Respondent's Motions to Supplement Prehearing Exchange

EPA challenges Respondent's Motions to Supplement Prehearing Exchange because Respondent failed to comply with the Second Prehearing Order and 40 C.F.R. § 22.19(a). Specifically, Respondent failed to (A) identify Dave Hembree and Kevin Landon as expert witnesses or lay witnesses and (B) provide Dave Erlanson's qualifications for testifying as an expert witness.

The Presiding Officer's Second Prehearing Order, dated February 24, 2017, explicitly required that Respondent file a "list of names of the expert and other witnesses intended to be called at hearing, identifying each as a fact witness or an expert witness, a brief narrative summary of their expected testimony, and a curriculum vitae or resume for each identified expert witness." Docket No. 19, p. 2. Respondent is subject to similar prehearing exchange obligations under 40 C.F.R. § 22.19(a). In the present Motions, Respondent failed to comply with these requirements.

A. EPA Requests that Respondent's Motions to Supplement Prehearing Exchange Be Denied as to the Testimony of Dave Hembree and Kevin Landon.

In Respondent's Motion to File Out of Time for Additional Witnesses, Respondent failed to comply with the Second Prehearing Order and 40 C.F.R. § 22.19(a), because he did not indicate whether proposed witnesses would serve as expert witnesses or lay witnesses. Respondent's failure to exchange the required information, despite numerous opportunities, warrants exclusion of the proposed testimony.

The Part 22 Rules and the Second Prehearing Exchange require that Respondent identify expert and lay witnesses. 40 C.F.R. § 22.19(a); Docket No. 19. The identification of expert and

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lay witnesses is important because the Federal Rules of Evidence have specific requirements governing the admissibility of both lay and expert testimony. Pursuant to Rule 602, lay testimony must be based on personal knowledge or observation. Rule 701 requires that any opinion testimony of lay witnesses must be limited to opinions or inferences which are rationally based on the perception of the witness. Lay witnesses may "offer an opinion on the basis of relevant historical or narrative facts that the witness has perceived." *In re Housing Authority of the City of Moundville, et al*., Dkt No. CAA-03-2003-2011, ALJ (June 7, 2004) (Biro, C.J.) (quoting *MCI Telecomm. Corp. v. Wanzer*, 897 F.2d 703, 706 (4th Cir. 1990)). Under Rule 702, an expert who is qualified by knowledge, skill, experience, training or education may provide testimony, which may be in the form of an opinion, of scientific, technical, or other specialized knowledge. An expert witness may not only provide an opinion or inference from facts or data perceived, but also from those "made known to the expert at or before the hearing." Fed. R. Evid. 703.

In this case, Respondent has not indicated that Mr. Landon and Mr. Hembree have the relevant personal knowledge required to testify as lay witnesses. Their summaries do not describe their involvement in, or observation of, Mr. Erlanson's dredging activity on July 22, 2015. Therefore, without a demonstration that these witnesses possess such personal knowledge or experience to demonstrate that their testimony would be reliable and probative, their testimony cannot be admitted as lay witnesses. *In re Liphateh, Inc.,* FIFRA-05-2010-0016, ALJ (June 2, 2011) (Biro, C.J.).

Similarly, the summaries of Mr. Landon and Mr. Hembree do not provide sufficient information to determine if they possess qualifications of an expert witness. The summary of

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Mr. Landon's testimony explains that he is a dredger but fails to set forth his qualifications to testify regarding suction dredging's "beneficial aspects to aquatic/fish and stream ecology." Mr. Hembree's summary states that he is a dredger who is active in many mining organizations, but it does not explain how he is qualified to testify regarding scientific studies on regulatory programs designed to mitigate the impacts of suction dredge mining. Based on the limited information exchanged, the testimony of Mr. Landon and Mr. Hembree cannot be admitted as expert testimony.

Respondent's failure to identify expert witnesses and provide resumes constitutes a failure to provide information within his control, and the Presiding Officer may "(1) [i]nfer the information would be adverse to the party failing to provide it; (2) [e]xclude the information from evidence; or (3) [i]ssue a default order under § 22.17(c)." 40 C.F.R. § 22.19(g). Respondent has been allowed multiple opportunities, since April 2017, to exchange information regarding the witnesses he intends to introduce at hearing. Most recently, in EPA's Motion to Compel Compliance with Second Prehearing Order, EPA requested that, "[i]f Respondent fails to remedy the omissions in his Prehearing Exchange, EPA respectfully requests the Presiding Officer exclude the testimony of each witness for which an adequate summary has not been provided, in accordance with 40 C.F.R. § 22.19(a)(1) and (g)." Docket No. 45. In the Order, dated March 18, 2019, the Presiding Officer allowed Respondent 14 days to exchange the requisite information. Docket No. 56. In his present Motion, Respondent failed to comply with the Order, impeding EPA's ability to prepare for *voir dire* and cross-examination. Therefore, EPA requests the Presiding Officer exclude the testimony of Mr. Hembree and Mr. Larson, pursuant to 40 C.F.R. § 22.19(g).

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B. EPA Requests that Respondent's Motions to Supplement Prehearing Exchange Be Denied as to the Expert Testimony of Dave Erlanson, Sr.

For the same reasons set forth in the section above, EPA requests that the Presiding Officer exclude any expert opinion testimony from Respondent. Pursuant to the Part 22 Rules, the Second Prehearing Order (Docket No. 19), and the Presiding Officer's March 18, 2019 Order (Docket No. 56), Respondent was required to exchange with EPA a narrative summary of his testimony, including a resume or curriculum vitae for any expert witness. The summary of Respondent's testimony demonstrates that he intends to provide expert opinion testimony regarding "suction dredging and the beneficial aspects to aquatic/fish and stream ecology!" However, Respondent failed to establish his qualifications to provide such expert opinion testimony. While Respondent described that he has mined for many years, worked as a teacher and sawmill owner, and built roads for the U.S. Forest Service, these facts are not pertinent to whether he is qualified to testify regarding the impacts of suction dredging on aquatic ecology.

Mr. Erlanson's testimony, while clearly admissible regarding the facts at issue in this case, should not be treated as expert opinion as it applies to ecological or other impact. Respondent's failure to describe his qualifications to provide expert testimony constitutes a failure to exchange information and impedes EPA's ability to prepare for *voir dire* and cross-examination. Because Respondent failed to provide such information, despite numerous opportunities to do so, EPA requests that the Presiding Officer exclude any expert testimony from Respondent, pursuant to 40 C.F.R. § 22.19(g).

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C. In the Alternative, EPA Requests an Order Requiring Respondent to Supplement his Prehearing Exchange.

If the Presiding Officer, in her discretion, concludes that the exclusion of testimony based on Respondent's failure to exchange information is inappropriate, EPA alternatively requests an order requiring Respondent to supplement his Prehearing Exchange. In similar circumstances, this tribunal has recognized that EPA "is entitled to prepare for hearing and not be the subject of surprise." *In re Housing Authority of the City of Moundville, et al*., Dkt No. CAA-03-2003-2011, at * 3 (ordering Respondent to supplement Prehearing Exchange identifying witness as "an expert witness and providing his resume or curriculum vitae, or identifying him as a fact witness and summarizing the facts to which he is expected to testify, or both as appropriate."); *In re Service Oil, Inc.,* CWA-08-2005-0010, ALJ (March 17, 2006) (Biro, C.J.).

II. Complainant's Second Motion in Limine

Similar to EPA's December 14, 2018 Motion in Limine, an additional limiting order is appropriate given Respondent's new attempt to introduce inadmissible evidence and testimony at the hearing in this matter. Accordingly, EPA respectfully moves this Court to issue an order *in limine* as described below. EPA has conferred with Respondent in advance of filing this motion but was unable to reach agreement.

A. EPA Requests the Exclusion of Testimony and Evidence Related to Legal Analysis.

Respondent's Motions to Supplement Prehearing Exchange indicate that Respondent intends to introduce legal arguments into evidence. The summary of Mr. Erlanson's testimony states that he intends to explain his "legal argument" to the Presiding Officer. Similarly, Mr. Hembree will testify regarding "the past/present dredging regulations." Respondent also

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moves to include in his Prehearing Exchange RX-20 and 23, which are legal opinions. These exhibits are inadmissible.

Like judges in federal court may take judicial notice of certain facts, the Presiding Judge can take administrative notice of the content of statutes, regulations, and filings and no testimony is necessary to draw the Presiding Judge's attention to such uncontested information. *In re Liphatech, Inc*., Dkt. No. FIFRA-05-2010-0016, at *14. It is settled law that legal opinion testimony, or testimony by an expert as to the legal interpretation of a statute or regulation, is not admissible. *Id*. (citations omitted). This tribunal has excluded this type of testimony because "no expert witness can offer probative opinion evidence on the bare meaning of the law or regulation." *Id*.

The proposed testimony and evidence regarding legal arguments are particularly irrelevant to the hearing scheduled in this case, because Respondent's legal arguments were previously rejected. In the September 27, 2018, Order on Complainant's Motion for Accelerated Decision, the Presiding Officer found a genuine issue of material fact as to one issue only: "the degree of harm caused by the violation." Docket No. 39, p. 24. The Presiding Officer reaffirmed this ruling in the Order on Complainant's Motion in Limine, stating: "Respondent may not introduce evidence or testimony relating solely to his liability for the charge on the Complaint as that issue has been decided." Docket No. 56. Testimony concerning Respondent's legal arguments, regulations, and legal opinions that pertain to Clean Water Act liability will not assist the Presiding Officer in determining the harm caused by Respondent's activities, which have already been deemed a violation of the Clean Water Act. Therefore, EPA requests an order

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in limine, excluding any testimony related to legal arguments, statutes, and regulations, and excluding RX-20 and 23.

B. EPA Requests the Completion or Exclusion of RX-21.

EPA requests that the Presiding Officer require Respondent to provide the complete document of RX-21 or exclude it from evidence because it is incomplete. Rule 106 provides that "[i]f a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction . . . of any other part . . . that in fairness ought to be considered at the same time." Fed. R. Evid. 106. "The rule of completeness requires that a full document or set of documents be introduced . . . ." *United States v. Collicot*, 92 F.3d 973, 983 (9th Cir. 1996). This Tribunal has also recognized that EPA is entitled to review a complete version of a document that is offered as an exhibit. *In re Alliant Techsystems, Inc., and Riteway Services, Inc*., Dkt. No. CAA-III-075, ALJ (December 4, 1997).

RX-21 is an exhibit comprised of two pages. The first page is titled, "Comprehensive State Water Plan, South Fork Clearwater River Basin, Executive Summary" and it is dated January 13, 2005. The second page is presumably page 22 of the same document, which provides information on recreational dredge mining. Based on the information exchanged, EPA is prejudiced by an inability to determine whether recreational suction dredging was addressed on pages other than page 22 of RX-21. Therefore, RX-21 should not be admitted unless Respondent provides the entirety of the exhibit to EPA in advance of hearing.

CONCLUSION

Based on the foregoing, EPA respectfully requests that Respondent's Motion to File Out of Time for Additional Witnesses be denied, in part, to exclude the testimony of Dave Hembree

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and Kevin Landon and any expert opinion testimony from Respondent. In the alternative, EPA requests an order requiring Respondent to supplement his Prehearing Exchange, identifying witnesses as an expert witness and providing a resume or curriculum vitae, or identifying witnesses as a fact witness and summarizing the facts to which he is expected to testify.

EPA also respectfully moves this Court to issue an order *in limine* that:

(1) excludes any testimony related to legal arguments, statutes, and regulations, and excludes RX-20 and 23; and,

(2) excludes RX-21 due to incompleteness; or, in the alternative, requires Respondent to supplement his Prehearing Exchange to include the entirety of the document.

Dated this 18th day of April, 2019.

Respectfully submitted,

/s/ J. Matthew Moore
J. Matthew Moore
Assistant Regional Counsel
U.S. EPA, Region 10

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **COMPLAINANT'S RESPONSE TO MOTIONS TO SUPPLEMENT PREHEARING EXCHANGE AND SECOND MOTION IN LIMINE**, dated April 18, 2019, was filed electronically with the Clerk of the Office of Administrative Law Judges using the ALJ e-filing system, which sends a Notice of Electronic Filing to Respondent.

The undersigned also certifies that on this date she served the foregoing **COMPLAINANT'S RESPONSE TO MOTIONS TO SUPPLEMENT PREHEARING EXCHANGE AND SECOND MOTION IN LIMINE**, via regular US Mail, postage prepaid, on Respondent Dave Erlanson, Sr., at P.O. Box 46, Swan Valley, Idaho 83449.

Dated this 18th day of April, 2019.

/s/ Shannon K. Connery

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