UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
MR. C.W. SMITH, MR. GRADY SMITH,	)	
& SMITH'S LAKE CORPORATION,	)	**Docket No. CWA-04-2001-1501**
	)	
Respondents	)	

ORDER ON RESPONDENT'S MOTION TO FILE PREHEARING BRIEF OUT OF TIME AND ON PARTIES' REQUESTS TO SUPPLEMENT PREHEARING EXCHANGE

On March 10, 2003, Respondents filed and served a Motion to File Their Prehearing Brief Out Of Time along with a Request to Supplement Prehearing Exchange. On March 11, 2003, Complainant submitted a Motion for Leave to Supplement Prehearing Exchange. To date, no reply to those pleadings have been received.[1]

Complainant's Motion for Leave to Supplement Prehearing Exchange seeks to add an Affidavit of Michael Wylie to its Prehearing Exchange. Grounds stated in the Motion are that Complainant's witness, Michael Wylie, may be unable to testify at the hearing because he has been attending to his seriously ill father in Mississippi, and that the testimony of Mr. Wylie could be presented through the affidavit if he is unavailable at the hearing.

Rule 22.22(d) of the Consolidated Rules of Practice, 40 C.F.R. § 22.22(d), provides that the Presiding Judge may admit into evidence the affidavits of witnesses who are unavailable, and that the term "unavailable" shall have the meaning accorded to it my Rule 804(a) of the Federal Rules of Evidence. Rule 804(a) provides that "unavailability" includes situations in which the declarant: (1) is exempted by ruling of the court on ground of privilege from testifying; (2) persists in refusing to testify despite an order of the court to do so; (3) testifies to a lack of memory of the subject matter; (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance by process or other reasonable means. The illness of a parent is not included in these situations. Consequently, Complainant has not met the requirement of Rule 22.22(d) for admission of the

[1] The parties are entitled under Rule 22.16(b) (40 C.F.R. § 22.16(b)) to a 15 day response period. However, in light of the fact that hearing in this matter is set to begin on March 18, 2003, such time is not available nor is a response deemed necessary to rule on the matters raised in the pleadings.

affidavit, and the request to supplement the prehearing exchange with Mr. Wylie's affidavit is **DENIED**. [2]

In their Motion to File Their Prehearing Brief Out Of Time, Respondents state that family and business engagements have delayed their completion of the prehearing brief and therefore request an extension of three days, until Tuesday, March 11, 2002, to file their pre-hearing brief. For good cause shown, this Motion is **GRANTED.**

In their Request to Supplement, Respondents seek to add as certain maps, aerial photographs and property owner lists to their prehearing exchange so it may identify and offer them as exhibits into evidence at hearing. Rule 22.22(a), of the Consolidated Rules of Practice which govern this proceeding provides that:

> If, however, a party fails to provide any document [or] exhibit . . . required to be exchanged under 22.19(a)(e) or (f)[3] to all parties at least 15 days before the hearing date, the Presiding Officer shall not admit the document, exhibit or testimony into evidence, unless the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information, or had good cause for not doing so.

40 C.F.R. § 22.22(a).

The hearing in this case is set to begin on March 18, 2003, thus the Respondents are attempting to supplement its prehearing exchange less than 15 days prior to the hearing. Nevertheless, Respondents' Request fails to state any good cause for their failure to exchange this information in a more timely manner as required by Rule 22.22(a). Therefore, Respondents' Request to Supplement their Prehearing Exchange with these additional maps, photographs and documents is **DENIED**.

In their Request to Supplement, Respondents also ask that they be allowed to address three issues at the hearing and to inquire of witnesses and submit evidence and authority touching upon those issues. Each of those issues will be addressed here in turn.

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[2] In the event that Mr. Wylie is unable to testify at the hearing, Complainant may, if appropriate, move to continue part of the hearing for the purpose of presenting testimony of Mr. Wylie, or move to reopen the hearing under Rule 22.28.

[3] Rule 22.19(a), (e) and (f) (40 C.F.R. §§ 22.19(a), (e) and (f)) require that parties provide to each other as part of the prehearing exchange process all documents and exhibits they anticipate offering into evidence at a hearing as well as the identification of anticipated hearing witnesses and a summary of their testimony. That Rule further provides that a document that has not been included in prehearing information exchange "*shall* not be admitted into evidence," except in accordance with Section 22.22(a) (italics added).

I. Constitutional Issue

The initial issue identified by Respondents in their Request is "Whether the actions [of Complainant] under the Clean Water Act constituted a taking of property contrary to the fifth amendment of the United States Constitution and the Taking Clause of the Georgia Constitution without just and adequate compensation."

First, this legal issue has already been addressed by this Tribunal. Respondents' Motion to Dismiss for Lack of Jurisdiction, for Summary Judgment, and Judgment on the Pleadings raised (at p. 4), *inter alia,* the claim that the action constituted "an illegal taking of rights in land." Judge McGuire denied the claim, as the remedy for such alleged takings can be pursued in other venues, citing to *Riverside v. Bayview Homes, Inc.,* 474 U.S. 121 (1985); Order on Motions at 12. The Supreme Court in that case cited the principle that "so long as compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional," and explained that "the possibility that the application of a regulatory program may in some instances result in the taking of individual pieces of property is no justification for the use of narrowing constructions to curtail the [federal CWA] program if compensation will in any event be available in those cases where a taking has occurred," pointing out that "the Tucker Act, 28 U.S.C. § 1491 . . . presumptively supplies a means of obtaining compensation for any taking that may occur through the operation of a federal statute . . . [and] is available to provide compensation for takings that may result from the [Government's] exercise of jurisdiction over wetlands." *Riverside,* 474 U.S. at 128-129. The Court stated that the proper course of action for resolving a takings dispute is "not to resist the [Government's] suit for enforcement by denying that the regulation covers the property, but to initiate a suit for compensation in the Claims Court." *Id. See also, Anthony Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001); *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)("a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.")

Thus, the ruling on this issue is the law of this case and may not be relitigated in subsequent stages of this proceeding except to prevent plain error.[4] *See, J.V. Peters & Co.*, 7 E.A.D. 77, 93 (EAB 1997), *aff'd sub nom. Shillman v. United States,*1:97-CV-1355 (N.D. Ohio Jan. 14, 1999), *aff'd in part*, 221 F.3d 1336 (6th Cir. 2000), *cert. denied sub nom. J.V. Peters & Co. v. United States*, 69 U.S.L.W. 3269 (Jan. 8, 2001) (citing JAMES W. MOORE, MOORE'S FEDERAL PRACTICE PP 404[1] & 404[10](2d ed. 1991)) (a decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation.); *Schoolcraft Constr., Inc.*, 8 E.A.D. 476, 482 (EAB 1999), *Lyon County Landfill*, 2002 EPA App. LEXIS 4, *27 , 2002 EPA App. LEXIS 4 (EAB 2002), *Rogers Corporation*, 2000 EPA App. LEXIS 28, * , 2000 EPA App. LEXIS 28 (EAB 2000), *Bethenergy*, 1992 EPA

[4] Plain error is defined as an error "so obvious and substantial that failure to correct it would infringe a party's due process rights and damage the integrity of the judicial process." Black's Law Dictionary 563 (7th ed. 1999)

App. LEXIS 74, *7; 3 E.A.D. 802 (EAB 1992) (while the doctrine of the law of the case is a heavy deterrent to vacillation on arguable issues, it is not designed to prevent the correction of plain error) *citing* 1B Moore's Federal Practice § 0.404[1] (2nd Ed. 1991).

Respondents have not alleged, much less shown, any "plain error" in the prior ruling in this case. Moreover, to the extent that such error exists, they had an opportunity to raise the matter and challenge the ruling in connection with a Motion for Reconsideration they filed in response to the Order. That Motion was denied by Order dated July 29, 2002.

Therefore, in the event a judgment is entered against Respondents in this matter, they may raise such issue, if they deem it appropriate, in federal court. However, they may not due so at the administrative hearing to be held in this proceeding.

II. Lack of Violating Activity

The second issue raised by Respondent is "Whether or not the actions taken by respondents constitute a *de minimus* disturbance of land and soil in a pre-existing dry creek bed, thereby failing to rise to the level of violation of The Clean Water Act or the regulations dealing with the Lake Carlton property."

This issue was to some extent also addressed in this Tribunal's Order on Motions of February 6, 2002. In that Order (at 11) it was held that the fact that the location where the discharge occurred was a lake bed and/or artificially created did not defeat jurisdiction under the Clean Water Act. However, as indicated in that Order, the issue to be addressed at the evidentiary hearing is whether Respondent Grady Smith engaged in discharges into the waters of the United States within the meaning of and in violation of the Clean Water Act.[5] To the extent that Respondent Grady wishes, in good faith, to introduce factual evidence that he did not engage in activity constituting a "discharge" within the meaning of the Act or that the site at issue did not constitute a "navigable water of the United States" within the meaning of the Act, he may certainly do so.[6] He may also introduce evidence that whatever activity he engaged in which might have constituted a violation was so *de minimus* so as to warrant a reduced penalty.

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[5] Default judgment against the other two named Respondents, C.W. Smith and Smith's Lake Corporation, has already been entered in this matter. *See,* Order Finding Default With Respect to Liability of Respondents C.W. Smith and Smith's Lake Corporation, dated May 21, 2001. Thus, those Respondents have already been found to have engaged in discharges of pollutants into the waters of the United States in violation of the Clean Water Act. The sole issue remaining in regard to those Respondents is the appropriate penalty to be imposed upon them in this action. Those Respondents may choose to appear and defend themselves in regard to the penalty at hearing, but are not required to do so.

[6] The good faith of the parties in the course of litigation is taken into consideration in the penalty determination as a consideration under "such other factors as justice may require." *See, Bollman Hat Company*, 1998 EPA ALJ LEXIS 18, *47 (ALJ 1998)

However, the legal issue, to the extent that it exists, of whether such activity was "*de minimus*" so as to not fall within the coverage of the Act at all is a legal issue to be determined based upon the evidence adduced at hearing.[7]

III. Service Issue

The third issue raised by Respondent is, "Whether or not C.W. Smith was appropriately served, sufficient to give this tribunal jurisdiction over the parties of the subject matter of this proceeding and whether the Default Judgment entered against C.W. Smith may be considered by the Court when evidence of service of the Order and Petition were not shown to have been personally served and that C.W. Smith was out of the jurisdiction. Any alleged service by publication was offered during the time subsequent to the filing of the Petition and Order demanding response to the assertions of Petitioner."

This issue has also already been decided in this action in the February 6, 2002 Order on Motions. That Order was issued in part in response to Respondents' Motion to Dismiss for Lack of Jurisdiction over the Persons of C.W. Smith, Grady Smith, and Smith's Lake Corporation. In that Order it was held that service of process was sufficient. Order on Motions, at 10. Thus, that ruling too constitutes the "law of the case." Respondent has not shown any clear error in the prior ruling in this case such that it warrants revisiting again, particularly since Respondents filed a Motion for Reconsideration of a number of issues in that Order and that such Motion was denied by Order dated July 29, 2002.[8] Therefore, Respondents may not raise this issue again at the hearing.

Furthermore, for clarification, Respondents are hereby advised that they also may not raise at the hearing any other issue of law previously decided in this case. This tribunal's Order of February 6, 2002 addressed a number of legal issues raised by Respondent including claims that this action is barred by doctrines of double jeopardy, res judicata, or overfilling. These issues have been ruled upon and, absent compelling circumstances, will not be addressed again.

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[7] However, it is noted that the Clean Water Act does not explicitly contain a "de minimus exemption" to the prohibition against the discharge of pollutants. *See,* 33 U.S.C. § 1344(f). Thus, evidence on the extent of the violation might be applicable only to the appropriate penalty to be imposed.

[8] Moreover, this same issue was previously considered and ruled upon in this case by the Regional Judicial Officer in connection with a Decision and Order on Motion for Default and Order to Show Cause dated April 4, 2001. *See also,* Order Finding Default With Respect to Liability of Respondents C.W. Smith and Smith's Lake Corporation dated May 21, 2001.

CONCLUSION

1) Complainant's Motion for Leave to Supplement Prehearing Exchange is **DENIED;**

2) Respondents' Motion to File Their Prehearing Brief Out Of Time is hereby **GRANTED**;

3) Respondents' Request to Supplement Prehearing Exchange is **DENIED** in regard to supplementing the prehearing exchange with additional documents or exhibits, and in regard to raising at the hearing the issues of the Constitutionality of the Act and/or sufficiency of service. However, Respondent Grady Smith may, consistent with 40 C.F.R. § 22.22, introduce factual evidence and testimony at the hearing and address issues as to whether he engaged in a discharge of pollutants into "waters of the United States" in violation of the Clean Water Act, as alleged in the Complaint.

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Susan L. Biro
Chief Administrative Law Judge

Dated: March 11, 2003
Washington, D.C.