UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Dave Erlanson, Sr.,	)	**Docket No. CWA-10-2016-0109**
	)	
Respondent.	)	

ORDER ON MOTIONS

I. RELEVANT PROCEDURAL HISTORY

The Director of the Office of Compliance and Enforcement at the United States Environmental Protection Agency ("EPA" or "Agency"), Region 10 ("Complainant"), initiated this proceeding on June 20, 2016, by filing a Complaint against Dave Erlanson, Sr. ("Respondent"), pursuant to Section 309(g)(2)(B) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act ("Act" or "CWA"), 33 U.S.C. § 1319(g)(2)(B). The Complaint alleges that on July 22, 2015, Respondent unlawfully discharged pollutants from a point source into a navigable water without authorization under a National Pollutant Discharge Elimination System permit, in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a). See Compl. ¶¶ 3.1-3.9. On July 18, 2016, Respondent filed an Answer denying the charge and requesting a hearing on the matter. Answer at 1.

This Tribunal issued a Prehearing Order on August 11, 2016, which ordered the parties to file and serve, *inter alia*, lists of names of their proposed witnesses, identifying each as a fact witness or expert witness, a brief narrative statement of each witnesses' proposed testimony, and a curriculum vitae or resume for each identified expert witness. In addition, the parties were ordered to file and serve copies of all documents and exhibits intended to be introduced into evidence. This prehearing exchange process was to be completed by October 28, 2016.

On September 23, 2016, Respondent's former attorney entered his appearance in this matter. Complainant's counsel, after conferring with Respondent's attorney, requested, and was granted, an extension of time until November 11, 2016, to submit Complainant's prehearing exchange of information, thereby delaying the conclusion of the prehearing exchange process until December 5, 2016.

By Order dated November 17, 2016, this Tribunal granted the parties' joint motion to participate in Alternative Dispute Resolution ("ADR") and appointed a neutral to facilitate a settlement of this proceeding. The ADR process concluded unsuccessfully in February 2017.

On February 23, 2017, I was designated to preside in this proceeding. I issued a Second Prehearing Order on February 24, 2017, directing the parties to file the same information that was ordered in the August 11, 2016 Prehearing Order.

On April 7, 2017, after being granted an extension of time, Complainant filed his Initial Prehearing Exchange.

On May 8, 2017, after being granted an extension of time, Respondent filed his Initial Prehearing Exchange contemporaneously with a Motion for Leave to File a Revised or Supplemental Prehearing Exchange to submit documents that were identified but omitted from his Initial Prehearing Exchange. I granted the motion ordered Respondent to file a revised or supplemental prehearing exchange by May 22, 2017, which he did not do.

On June 6, 2017, Complainant filed his Rebuttal Prehearing Exchange contemporaneously with a Motion for Accelerated Decision. After I granted an extension of time to file a response, Respondent timely filed his Brief in Opposition to Motion for Accelerated Decision on August 2, 2017. Complainant filed his Reply in Support of Motion for Accelerated Decision on August 14, 2017.

On September 27, 2018, I granted Complainant's Motion for Accelerated Decision as to Respondent's liability for the violation charged in the Complaint, leaving the civil administrative penalty to be decided after a hearing.

On November 5, 2018, I issued a Notice of Hearing Order that scheduled the hearing to commence on February 12, 2019, and established deadlines for the filing of documents prior to the hearing.

On December 14, 2018, Complainant filed a motion to conduct additional discovery and a motion in limine. Respondent's attorney withdrew from representation on December 18, 2018, 11 days before responses to Complainant's motions were due on December 29, 2018.

On December 28, 2019, the U.S. Environmental Protection Agency along with many other federal government agencies shut down due to an appropriations lapse, and the Office of Administrative Law Judges was closed. The office did not reopen until January 28, 2019. The cease in operations of the U.S. EPA interrupted the orderly processing of motions and other logistical processes required for the hearing in this case to proceed as scheduled. Consequently, on January 31, 2019, I issued an Order Rescheduling Hearing, informing the parties that the hearing would commence on May 14, 2019.

In the January 31 Order, I established deadlines for the filing of documents prior to the hearing. The documents ordered to be filed were, in substance, the same documents called for in the November 5, 2018 Notice of Hearing Order. Notably, the January 31 Order stated the following:

> Non-dispositive motions, such as motions for additional discovery, motions for subpoenas, and motions in limine, shall be filed no later than **March 15, 2019**.

> Similarly, a party seeking to add witnesses, exhibits, or otherwise supplement its prehearing exchange may do so only by motion after **March 15, 2019**. Belated supplements to a party's prehearing exchange may be excluded from evidence at the undersigned's discretion.

Order Rescheduling Hr'g at 2

On March 8, 2019, I issued an Order providing Respondent additional time, until March 15, 2019, to file responses to Complainant's December 14, 2018 motions. Respondent timely filed responses on March 12, 2019, in addition to filing a "Motion to Appeal." In Respondent's response to Complainant's Motion in Limine, styled "Motion to Limine," he stated, "I do not intend to offer any witnesses/testimony, visual (CD) offerings, case law, environmental studies at this hearing," and that "[a]t this hearing, I will be the only witness for Erlanson!" Mot. to Lim. at 1-2.

On March 18, 2019, I issued an Order on Complainant's Motion to Compel Additional Discovery and Compliance with Second Prehearing Order, Complainant's Motion in Limine, and Respondent's Motion to Appeal. In granting Complainant's Motion to Compel Additional Discovery and Compliance with Second Prehearing Order, I ordered Respondent, if he intended to testify, to file and served a brief narrative summary of his proposed testimony by April 1, 2019. In granting Complainant's Motion in Limine, it was ordered that "Respondent may not introduce evidence or testimony relating solely to his liability for the charge in the Complaint as that issue has been decided. In addition, Respondent's Exhibits RX01 and RX03 may not be introduced into evidence at hearing." Order on Complainant's Mot. to Compel Additional Disc. and Compliance with Second Prehr'g Order, Complainant's Mot. in Lim., and Respondent's Mot. to Appeal at 9.

On April 5, 2019, Respondent filed a Motion to File Out of Time for Additional Witnesses ("Motion to File Out of Time").

On April 12, 2019, Respondent filed a document styled "Motion to Court to accept into Evidence the Enclosed Exhibits pertaining to Docket # CWA-10-2016-2019 in the case of Erlanson v. EPA," which is deemed and hereinafter referred to as "Motion to Add Additional Proposed Exhibits." He also filed a document styled "Evidences in support of motion to dismiss, a brief under 309(g)(4)(b) evidences deemed exculpatory," which is deemed and hereinafter referred as "Motion to Dismiss."

On April 12, 2019, Complainant's counsel filed Complainant's Motion for Leave to File Second Supplemental Prehearing Exchange.

On April 18, 2019, Complainant's counsel filed Complainant's Response to Respondent's Motions to Supplement Prehearing Exchange and Complainant's Second Motion in Limine.

On April 26, 2019, Complainant's counsel filed Complainant's Response to Respondent's Motion to Dismiss.

This Order addresses the several motions filed by the Parties on April 5th, 12th, and 18th, 2019.

II. RESPONDENT'S MOTION TO FILE OUT OF TIME FOR ADDITIONAL WITNESSES

The Motion to File Out of Time did not provide an explanation for why Respondent did not file and serve his witness list by the April 1 deadline, but only offered "I'm sorry for this motion but you are aware of my situation[,] so I ask that you accept these witnesses . . . ." Mot. to File Out of Time at 1. In the Motion, Respondent provided brief narrative summaries of the testimonies of four proposed witnesses: 1) Kevin Landon, 2) Dave Hembree 3) Ron Miller, and 4) Dave Erlanson, Sr. Two of the proposed witnesses, Kevin Landon, and Dave Hembree, have never been identified as proposed witnesses in any of Respondent's filings.

Respondent states that Mr. Landon is a dredger and owns federal mining claims on the South Fork Clearwater River, including the claim directly above Respondent's claim. In addition, Respondent asserts that "[Mr. Landon's] dredge appears in Hughes report!" Mot. to File Out of Time at 4. He offers Mr. Landon's testimony to explain the operation of a suction dredge and to "point out terms of overburden, slurry, mine waste and tailings!" *Id*. at 4.

As to Mr. Hembree, Respondent states that he is a "fellow dredger and owns many claims . . . on the South Fork of Clearwater River[;]" that he is "involved with many mining organizations . . . and is current chair of the '10 Mile Mining District[;]'" and that "[h]e has worked in concert with the US FS and Idaho Dept of Water Resources." *Id*. at 5. Respondent offers Mr. Hembree's testimony to explain the "current and past studies relating to TMDL limitations and the (15) dredge limits on the SFCR. as well as the past/present dredging regulations!" *Id*. He will further testify to "his interactions with state and Federal agencies." *Id*.

Ron Miller's proposed testimony is presented in an "Affidavit of Truth," wherein he describes his interactions with several US Forest Service officials, including Complainant's witness Clinton Hughes, officials from the Idaho Department of Water Resources, and law enforcement officers from the Idaho County Sheriff Department on July 22 and 26, 2015, in relation to his own and Respondent's dredging activities on these dates. *Id*. at 6-11.

Finally, Respondent's narrative summary describes his nearly 33 years of mining experience in the western United States and Alaska and his varied work experiences, including building roads with the US Forest Service in the Allegheny National Forest. He states that he has had "many dealing with government officials . . . and [is] aware of many inconsistencies between local, county, state and federal agencies." *Id*. at 2-3. "[He] has been called as an expert witness on 3 separate occasions concerning timber related issues and have been to Article 3 Federal Court . . . !" *Id*. at 3. He proposes to testify about suction dredging and "the beneficial aspects to aquatic/fish and stream ecology!" *Id*. He also proposes to provide legal argument, testify to the facts, and what he sees as a "nexus of legal contradictions" of the various government agencies. *Id*.

Complainant opposes Respondent's Motion to File Out of Time to add Dave Hembree and Kevin Landon to Respondent's proposed witness list because Respondent failed to comply with the Second Prehearing Order dated February 24, 2017 and 40 C.F.R. § 22.19(a), and because Respondent failed to identify either individual as a fact or expert witness. Complainant asserts that Respondent has not indicated that Mr. Landon or Mr. Hembree have relevant personal knowledge to testify as lay witnesses, nor do the brief narrative summaries provide sufficient information to determine if they qualify as expert witnesses. In addition, Complainant opposes any testimony by Respondent that would purport to offer an expert opinion as applied to "ecological or other impact." Complainant's Resp. to Respondent's Mot. to Supp. Prehr'g Exchange and Complainant's Second Mot. in Lim. at 8.

The procedural rules governing this proceeding at 40 C.F.R. § 22.19 provide, in pertinent part:

> (a) Prehearing information exchange.
>
> (1) In accordance with an order issued by the Presiding Officer, each party shall file a prehearing information exchange. Except as provided in § 22.22(a), a document or exhibit that has not been included in prehearing information exchange shall not be admitted into evidence, and any witness whose name and testimony summary has not been included in prehearing information exchange shall not be allowed to testify. Parties are not required to exchange information relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence. Documents and exhibits shall be marked for identification as ordered by the Presiding Officer.
>
> (2) Each party's prehearing information exchange shall contain:
>
> (i) The names of any expert or other witnesses it intends to call at the hearing, together with a brief narrative summary of their expected testimony, or a statement that no witnesses will be called; and (ii) Copies of all documents and exhibits which it intends to introduce into evidence at the hearing.
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> * * *
>
> (f) Supplementing prior exchanges. A party who has made an information exchange under paragraph (a) of this section, or who has exchanged information in response to a request for information or a discovery order pursuant to paragraph (e) of this section, shall promptly supplement or correct the exchange when the party learns that the information exchanged or response provided is incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party pursuant to this section.
>
> (g) Failure to exchange information. Where a party fails to provide information within its control as required pursuant to this section, the Presiding Officer may, in his discretion:

(1) Infer that the information would be adverse to the party failing to provide it;

(2) Exclude the information from evidence; or

(3) Issue a default order under § 22.17(c).

40 C.F.R. § 22.19.

Pursuant to the Rules, it is my responsibility to "conduct a fair and impartial proceeding, assure that the facts are fully elicited, adjudicate all issues, and avoid delay." 40 C.F.R. § 22.4(c). In so doing, I have the authority to admit or exclude evidence and "take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues" arising in this proceeding." 40 C.F.R. § 22.4(c)(6), (10). The Environmental Appeals Board has stated that "a pro se party . . . must be given reasonable latitude in effectuating its intent." *Occidental Chemical and Agricultural Products*, 2 E.A.D. 30, 3 (EAB 1985). However, that does not excuse noncompliance with the procedural rules or orders. *Rybond, Inc.*, 6 E.A.D. 614, 10 (EAB 1996).

As I meticulously described above, the parties were given ample time and multiple opportunities to provide proposed witnesses as required by two prehearing orders and 40 C.F.R. § 22.19(a). Throughout the proceeding, I have afforded Respondent, not only when previously represented by counsel but also now proceeding pro se, much latitude and opportunity to comply with the Rules and this Tribunal's orders. Respondent was provided an opportunity to supplement his Prehearing Exchange by April 1, 2019 but failed to do so. He has not offered any explanation for why he, until now, nearly a month before the hearing, where all of the proposed witnesses and exhibits have been exchanged long ago, was unable to provide these proposed witnesses. In addition, the brief narrative summaries are deficient for the reasons stated by Complainant. Consequently, his Motion to File Out of Time for Additional Witnesses is appropriately denied as to Kevin Landon and Dave Embree.

As to Ron Miller and Dave Erlanson, Sr., both of whom are not additional witnesses, I do not find it unfair to Complainant to allow these narrative summaries, albeit untimely filed, to be accepted. Respondent's Initial Prehearing Exchange identified both of these witnesses, and further stated that Mr. Miller was a percipient witness to the matters alleged in the complaint. Complainant's only opposition regarding these two witnesses is to that of Mr. Erlanson's purported proposed expert testimony on the ecological or other impacts of suction dredging. Respondent does not identify himself as an expert on such subject matter nor has a resume or a curriculum vitae been filed to represent such qualifications in these areas. Consequently, Respondent may not offer expert testimony at hearing on the beneficial impacts of suction dredging to aquatic life or stream ecology.

III. RESPONDENT'S MOTION TO ADD ADDITIONAL PROPOSED EXHIBITS

Respondent proposes to add three additional exhibits: RX 20 (a court opinion from the US District Court for the Eastern District of California, *United States v. Godfrey*, 112 F.Supp. 3d(E.D. Cal. 2015)), RX 21 (a partial copy [pages 1 and 22] of the Comprehensive State Water

Plan South Fork Clearwater River Basin legislative executive summary, dated January 13, 2005), RX 22 (six black and white copies of photographs), and RX 23 (a brief filing in the US Supreme Court). Respondent offers no explanation for the untimely submission of these proposed exhibits and provides no explanation as to the relevance of them for the upcoming hearing.

Complainant opposes the addition of exhibits RX 20 and RX 23, because they are "legal opinions," to which this Tribunal may take administrative notice. Complainant's Resp. to Respondent's Mot. to Supp. Prehr'g Exchange and Complainant's Second Mot. in Lim. at 9-10 (citing *In re Liphatech, Inc.*, Dkt. No. FIFRA-05-2010-0016, at *14). Citing the same case, Complainant asserts that "[i]t 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*. at 10. Complainant further argues that the proposed evidence regarding legal arguments is irrelevant because this Tribunal previously rejected these arguments in the September 27, 2018 Order on Complainant's Motion for Accelerated Decision. *Id*. Complainant also opposes the introduction of RX 21 as is, unless Respondent provides the entire document. Complainant makes no argument as to RX 22.

I agree with Complainant's arguments in opposition to RX 20 and RX 23. Accordingly, Respondent's motion to add exhibits RX 20 and RX 23 is denied.

As to the remaining proposed exhibits, RX 21 and RX 22, Respondent has offered no explanation for his belated attempt to supplement his proposed evidence. As explained earlier in this Order, Respondent has been provided ample opportunity to comply with the reasonable deadlines imposed, but has failed to do so and without justification. Complainant's willingness to accept a new resubmission of RX 21, in its entirety, does not alter my assessment. With regard to RX 22, Complainant does not oppose the addition of the six photographs contained in that proposed exhibit. However, the date stamps on many of these photos are from days before and after the date of violation and, otherwise don't appear in the July 22, 2015 Mineral Inspection Report. The photographs are of poor quality and don't appear to be relevant to facts bearing upon an appropriate penalty. Consequently, Respondent's motion to add exhibits RX 21 and RX 22 is denied.

IV. MOTION IN LIMINE

In its Second Motion in Limine, Complainant seeks "an additional limiting order…given Respondent's new attempt to introduce inadmissible evidence and testimony at hearing in this matter." Complainant's Second Mot. in Lim. at 9. This motion is not only untimely (the deadline for such a motion was March 15, 2019) but also unnecessary given my rulings above denying Respondent's request to add witnesses, expert testimony, and exhibits. Moreover, this Tribunal previously issued an Order On Complainant's Motion To Compel Additional Discovery And Compliance With Second Prehearing Order, Complainant's Motion In Limine, dated March 18, 2018, in which Complainant's Motion in Limine was granted, thereby excluding from evidence RX 1 and RX 3 and instructing Respondent that he is precluded from introducing evidence or testimony relating solely to his liability for the charged violation since that issue has already been decided by this Tribunal. As such, the scheduled evidentiary hearing is limited to the issue of the amount of any civil penalty that is appropriate for Respondent's violative

conduct.[1] In spite of Complainant's ongoing concerns, a repeated instruction is unnecessary. Rather, the parties' recourse, should, for example, irrelevant or unreliable evidence be offered at the evidentiary hearing, is to timely object to such evidence at hearing and receive a ruling on such an objection. Accordingly, Complainant's Second Motion in Limine is denied.

V. MOTION TO DISMISS

Respondent's Motion to Dismiss appears to be a conglomeration of textual passages from various cases, regulations, statutes, websites, and legal pleadings.

Regarding motions, the Rules provide, in pertinent part, that "[a]ll motions, except those made orally on the record during a hearing, shall . . . [s]tate the grounds therefore, with particularity . . . set forth the relief sought; and [b]e accompanied by . . . other evidence or legal memorandum relied upon." 40 C.F.R. § 22.16(a).

Here, Respondent's motion does not state the grounds with particularity. However, pro se litigants are given more latitude in effectuating their intent. *Occidental Chemical and Agricultural Products*, 2 E.A.D. 30, 3 (EAB 1985). It appears that the Motion to Dismiss seeks to relitigate liability, which has already been decided in the September 27, 2018 Order on Complainant's Motion for Accelerated Decision. Consequently, Respondent's Motion is denied.

VI. COMPLAINANT'S MOTION FOR LEAVE TO FILE SECOND SUPPLEMENTAL PREHEARING EXCHANGE

Complainant seeks to supplement its Prehearing Exchange with proposed exhibit CX 43, characterized by Complainant as a "visual aid" but which is a document "recently created by Dan Kenney, North Zone Fisheries Biologist, Nez-Perce Clearwater National Forests." Complainant's Mot. for Leave to File Second Supp. Prh'g Exchange at 1-2. Complainant states that CX 43 contains photographs that were previously exchanged as a part of CX 38 and CX 39, while other photographs in CX 43 were not included in CX 39. Additionally, Table 1 in CX 43 uses data from CX 39 to "calculate the volume and area of the hole and pile that Respondent created while mining." *Id*. at 3. Complainant asserts that the addition of CX 43 is prompt and not the result of bad faith or undue delay. Further, Complainant asserts that, "[i]n preparing witnesses for their testimony, EPA discovered the utility of a single document containing

[1] In determining the appropriate amount of penalty to impose, the CWA requires the Administrator to consider the following factors: the nature, circumstances, extent, and gravity of the violation; the violator's ability to pay, prior history of such violations, degree of culpability, and economic benefit or savings resulting from the violation; and "such other matters as justice may require." 33 U.S.C. § 1319(g)(3). As observed by the EAB, however, "[t]he Act does not . . . 'prescribe a precise formula by which these factors must be computed' nor does it provide any guidance regarding the relative weight to be given to any of them." *Phoenix Constr. Servs.*, 11 E.A.D. 379, 394 (EAB 2004) (quoting *Advanced Elecs., Inc.*, 10 E.A.D. 385, 399 (EAB 2002)); see also *Tull v. United States*, 481 U.S. 412, 426-27 (1987) (recognizing that the determination of penalties under the CWA is "highly discretionary"). The Rules of Practice, in turn, require this Tribunal to determine the appropriate amount of penalty to assess based on the evidentiary record and in accordance with any penalty criteria set forth in the applicable statute, and to consider any civil penalty guidelines issued under the applicable statute in making its determination. 40 C.F.R. § 22.7(b).

photographs, so that witnesses and the Presiding Officer could compare visible impact through successive years without turning back and forth among exhibits." *Id*.

Respondent has not filed a response to Complainant's motion and a response is not necessary given my ruling.

Complainant's Motion for Leave to File Second Supplemental Prehearing Exchange was filed nearly a month after the deadline for supplementing his Prehearing Exchange and one month before hearing. While initially characterized as a "visual aid," in actuality Complainant's newly proposed exhibit CX 43 contains new proposed evidence, namely "photographs that were not previously exchanged" but which are "very similar," not previously submitted as part of the prehearing exchange process. Complainant's Mot. for Leave to File Second Supp. Prh'g Exchange at 1, 3. Furthermore, Complainant has not persuaded me that this proposed addition was prompt given the fact that the Complaint in this matter was filed on June 20, 2016 and its Rebuttal Prehearing Exchange was filed on June 5, 2017, in which its penalty assessment analysis was submitted, and its assertion that it has only now discovered the usefulness of such a document is unconvincing. Accordingly, Complainant's Motion for Leave to File Second Supplement Prehearing Exchange is denied.

VII. ORDER

(1) Respondent's Motion to File Out of Time for Additional Witnesses is hereby **GRANTED** in part as to Ron Miller and Dave Erlanson, Sr. since these witnesses are not actually "additional" but were previously identified as potential witnesses during the prehearing exchange process. However, the Motion is **DENIED** as to Kevin Landon and Dave Embree. In addition, Respondent may not offer expert testimony on the beneficial aspects of suction dredging to aquatic/fish and stream ecology.

(2) Respondent's Motion to Add Additional Proposed Exhibits is hereby **DENIED**. Respondent's proposed exhibits RX 20, RX 21, RX 22, and RX 23 may not be introduced into evidence at hearing.

(3) Respondent's Motion to Dismiss is hereby **DENIED**.

(4) Complainant's Second Motion in Limine is hereby **DENIED.**

(5) Complainant's Motion for Leave to File Second Supplemental Prehearing Exchange is hereby **DENIED**.

Christine Donelian Coughlin
Administrative Law Judge

Dated: May 2, 2019
Washington, D.C.

In the Matter of *Dave Erlanson, Sr.*, Respondent
Docket No. CWA-10-2016-0109

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order on Motions**, dated May 2, 2019, and issued by Administrative Law Judge Christine Donelian Coughlin, was sent this day to the following parties in the manner indicated below.

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Attorney-Advisor

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Dated: May 2, 2019
Washington, D.C.