

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7

IN THE MATTER OF)
)
)
DR. DANIEL J. McGOWAN,) DOCKET NO. CWA-07-2014-0060
)
)
Respondent)
) JOINT MOTION TO
) SUPPLEMENT PREHEARING
) EXCHANGE
)
_____)

Pursuant to Prehearing Order and 40 C.F.R. § 22.19 of the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties,” 40 C.F.R. Part 22 and the Presiding Officer's Order of December 19, 2014, Complainant, United States Environmental Protection Agency (EPA), and Respondent, Dr. Daniel J. McGowan (Respondent), jointly submit this Motion to Supplement Complainant’s Prehearing Exchange.

I. Background

On March 6, 2014, EPA filed an administrative complaint against Respondent for alleged violations of Sections 301 and 404 of the Clean Water Act, 33 U.S.C. §§ 1311 and 1344, specifically for discharges of dredged and/or fill material into waters of the United States without a CWA Section 404 permit.

On December 19, 2014, the Presiding Officer ordered the parties to file their Prehearing Exchanges at specified deadlines. Complainant filed its initial Prehearing Exchange on February 12, 2015. Respondent filed its Prehearing Exchange on March 6, 2015. Complainant’s Rebuttal

to Respondent's Prehearing Exchange was filed March 19, 2015. A hearing for this matter has not yet been scheduled.

40 C.F.R. §§ 22.22(a) states that the Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value (except evidence related to settlement). Section II of the Prehearing Order, however, requires the parties to motion the Court to supplement their Prehearing Exchanges. Section VI of the Order also requires a party intending to file a motion to contact the opposing party to inquire whether it has any objection to the relief sought in the motion.

II. Complainant's Motion

Complainant moves to supplement its Prehearing Exchange with the addition of a witness, Bruce Danny.

III. Justification

In Respondent's May 18, 2015 Memorandum and Points of Authority in Opposition to Complainant's Motion for Accelerated Decision as to Liability and Motion to Strike ("Respondent's Memorandum"), Respondent raises an issue of fact counter to EPA's allegations: In support of Respondent's argument that he is exempt from Clean Water Act 404 requirements because of his intention to perform maintenance on his dam, Respondent contends that he was prevented to complete any maintenance because of the Cease & Desist Orders issued by the U.S. Army Corps of Engineers ("Dr. McGowan was prevented from completing all of the repairs because the USACE ordered him to cease and desist and to close the dam gates"). Respondent continues to argue that the discharges from his dam were necessary to avoid loss of the structure and to perform required maintenance.

EPA continues to allege, however, that Respondent's maintenance claim is merely pretext for dredging the reservoir without a permit. EPA has demonstrated through evidence that Respondent explored options for removing sediment above the dam. Executing these options would have allowed him to make repairs to his dam prior to and after his 2011 and 2012 discharges. EPA contends that Respondent rejected those options in favor of an inexpensive "quick fix" to his sand problem.

To that end, EPA seeks to add Bruce Danny as a witness. Mr. Danny, a contractor, will testify that in the winter of 2011/2012, Will Williams, a part-time worker for Respondent, contacted Mr. Danny on behalf of Respondent to discuss options for removing sediment above the dam. Mr. Danny described to Mr. Williams how sediment could be mechanically removed. Specifically, Mr. Danny explained to Mr. Williams how the creek could be re-routed around the dam, the kind of equipment necessary to remove sediment, and estimates concerning costs for removal.

EPA did not include Mr. Danny as a witness in our Prehearing Exchange because Respondent had not yet raised the argument that it was the Corps that prevented him from performing maintenance on his dam. Also, EPA was made aware of this witness after it submitted its Prehearing Exchange.

EPA has communicated with Respondent's attorney about this motion and Respondent does not object to its filing.

IV. Conclusion

For the reasons stated above, Complainant requests that the Presiding Officer grants its motion to supplement its Prehearing Exchange with an additional witness.

V. Respondent's Motion

Respondent moves to supplement its Prehearing Exchange with the addition of an email that was included in his Memorandum and Points of Authority in Opposition to Complainant's Motion for Accelerated Decision as to Liability and Motion to Strike. The email was an attachment to Stephen D. Mossman's Affidavit and is an email from Andy Glidden to Jeff Schuckman regarding "Plum Valley Res."

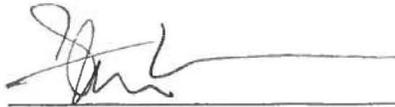
Respondent's Attorney has communicated with EPA about this motion and Complainant does not object to its filing.

Respectfully submitted,



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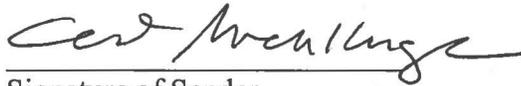


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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of May, 2015, I sent via the OALJ E-filing system the original and one copy of this Status Update, to Sybil Anderson, the Office of Administrative Law Judges Hearing Clerk, and sent one true and correct copy via email to Mr. Stephen D. Mossman, Esq. at SDM@MattsonRicketts.com.

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Signature of Sender