



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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In the Matter of: )
Paco Swain Realty, L.L.C., ) Docket No. CWA-06-2012-2710
Respondent ) Dated: February 11, 2014

ORDER GRANTING MOTIONS TO SUPPLEMENT PREHEARING EXCHANGES AND ORDER ON COMPLAINANT'S MOTION TO COMPEL PRODUCTION

I. Procedural Background

This proceeding was initiated by the Director of the Water Quality Protection Division, United States Environmental Protection Agency, Region 6 ("Complainant" or "EPA") filing a Complaint on May 15, 2012 under section 309(g) of the Clean Water Act (the "Act" or "CWA"), 33 U.S.C. § 1319(g). The Complaint alleges that on multiple dates from about April 2007 through May 2008 Respondent discharged, and/or agreed with other persons to discharge, dredged material and/or fill material from point sources into wetlands without a permit issued under Section 404 of the Act. The Complaint alleges further that Respondent failed to comply with an Administrative Order under which Respondent was required to cease and desist the discharges, stabilize all disturbed areas, apply for an after-the-fact permit, and if the permit is denied, to restore the wetlands to the natural hydrology and allow revegetation. The Complaint therefore charges Respondent with violations of Section 301(a) of the CWA and proposes assessment of a civil penalty of an amount up to the statutory maximum.

On March 1, 2013, Respondent filed an Answer to the Complaint, denying liability for civil penalties and asserting several affirmative defenses. A Prehearing Order was issued on April 19, 2013, directing the parties to file prehearing exchanges, and thereafter the dates for filing were extended by one month to allow the parties to pursue settlement of this matter. Each of the parties filed a prehearing exchange.

On August 9, 2013, Complainant filed a Rebuttal Prehearing Exchange and Motion to Compel Production of Information Required by the Rules of Practice and the Prehearing Order. Therein, Complainant requests an order compelling Respondent to supplement its prehearing exchange by producing information and documents which it was required to produce in its initial prehearing exchange.

On September 5, 2013, Complainant filed a Motion to Supplement Complainant's Prehearing Exchange, requesting to add another exhibit to correct an error in a previously submitted document.

On September 26, 2013, Respondent filed a Motion to Supplement Respondent's Prehearing Exchange, with an attached Supplemental Prehearing Exchange.

## **II. Applicable Legal Standards**

The procedural rules governing this proceeding are the Rules of Practice at 40 C.F.R. Part 22 ("Rules"). Regarding the required contents of a prehearing exchange, the Rules provide as follows, in pertinent part:

Each party's prehearing exchange shall contain: (i) The names of any expert or other witness it intends to call at the hearing, together with a brief narrative summary of their expected testimony . . . ; and (ii) Copies of all documents and exhibits which it intends to introduce into evidence at the hearing.

40 C.F.R. § 22.19(a)(2).

As to supplementing prior exchanges, the Rules specify that:

A party who has made an information exchange . . . shall promptly supplement or correct the exchange when the party learns that the information exchanged . . . is incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party . . .

40 C.F.R. § 22.19(f). The Prehearing Order issued in this matter directs parties who intend to supplement a prehearing exchange to file a motion with the supplement, explaining why the exhibits or witnesses were not provided in the original prehearing exchange.

With regard to failure to exchange information, the Rules provide, "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." 40 C.F.R. § 22.19(a). Section § 22.22(a) in turn provides that a document, exhibit, witness name or summary of testimony must be filed at least 15 days prior to the hearing date or it will not be admitted into evidence, unless the party offering it "had good cause for failing to exchange the required information" and provided it to the 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 Rules further provide:

Where a party fails to provide information within its control as required . . . , the presiding officer may, in [her] 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(g).

Generally, the preferred initial remedy for an insufficient prehearing exchange is to compel the party to produce the information rather than to exclude it or find the party in default. See, *Alan Richey, Inc.*, EPA Docket No. CWA-06-2004-1903, 2005 EPA LEXIS 46, \*8 (ALJ, August 18, 2005)(Order on Respondent's Combined Motion to Strike Complainant's Prehearing Exchange and Motion to Default Complainant and Motion for Suspension of Prehearing Exchange). As my esteemed colleagues have stated, the purpose of the narrative summary of testimony "is to prevent surprises to the parties and the resulting inefficiencies at the hearing, and to permit adequate preparation for hearing." *Id.* \*11-12; *Pekin Energy Co.*, EPA Docket No. 5- EPCRA-95-045, 1997 EPA ALJ LEXIS 89 (ALJ, March 25, 1997)(Order Requiring Supplemental Prehearing Exchange); *Cello-Foil Products*, EPA Docket No. 5-RCRA-97-005, 1998 EPA ALJ LEXIS 24 (ALJ, February 18, 1998)(Order Granting Complainant's Motions to Compel Supplemental Prehearing Exchange and to Strike Attachments.). Summaries of testimony "must convey sufficient information concerning the witnesses' connection to the case at hand, to notify the opposing party of the general substance and context of the testimony of each witness." *Alan Richey* \*11-12 (citing *Henry Velleman*, EPA Docket No. 5-CAA-97-008, 1998 EPA ALJ LEXIS 27 (ALJ, March 18, 1998)(Order Compelling Compliance with Prehearing Order and Denying Motion to Strike Proposed Witnesses)).

### **III. Motions to Supplement Prehearing Exchanges**

#### **A. Complainant's Motion**

Included as an exhibit in Complainant's Prehearing Exchange is a Jurisdictional Declaration Form ("JD Form") that describes the acreage of the jurisdictional wetlands on the subject property owned by Respondent. The original JD Form was prepared October 19, 2009, by Mr. William Nethery, a Senior Botanist with the United States Army Corps of Engineers ("Corps"). On September 3, 2013, Mr. Nethery discovered a clerical error on the form, noting that he had initially prepared two JD Forms and, in consolidating those into one form, he inadvertently omitted six acres of wetlands from the second form. Thus, on September 3, 2013, Mr. Nethery prepared a corrected JD Form, now labeled as Complainant's Exhibit 22. Complainant's Motion is supported by a Declaration of William Nethery. Complainant states that "[t]his error does not affect the conclusions of the JD Form, the Jurisdictional Determination (Exhibit 6 to Complainant's Prehearing Exchange) or the penalty calculation." Mot. ¶ 5, Decl. ¶ 5.

In its Motion, Complainant notes that it contacted Respondent's counsel before filing the Motion, but Respondent's counsel did not indicate whether he objects. Mot. ¶ 8. To date, Respondent has not submitted any response to the Motion.

For good cause shown, and pursuant to 40 C.F.R. § 22.19(f), this unopposed Motion will be granted.

#### **B. Respondent's Motion**

Respondent states in its Motion to Supplement that some necessary exhibits and information were omitted from its Prehearing Exchange because counsel did not have access at the time of filing, whereas others were omitted inadvertently. It appears that the Supplement is intended to remedy at least in part the deficiencies alleged by Complainant in its Motion to Compel Production of Information. The Supplement includes summaries of witness testimony, lists additional exhibits, provides the name of a witness, and contains copies of tax returns apparently in support of a claim of inability to pay a penalty. The Motion states that Respondent's counsel has discussed his request with Complainant's attorney, who did not object. Further, Complainant has not filed a response to Respondent's Motion.

For good cause shown, and pursuant to 40 C.F.R. § 22.19(f), this unopposed Motion will be granted.

#### **IV. Complainant's Motion to Compel Production of Information**

Complainant's Motion to Compel requests an order compelling Respondent to supplement its prehearing exchange by producing information required by the Prehearing Order and by 40 C.F.R. § 22.19(a): "(1) names of all fact and expert witnesses referenced in Respondent's Prehearing Exchange who may be called by Respondent at the hearing, (2) summaries of expected testimony by each witness sufficient to apprise Complainant of the substance of each witness' expected testimony, (3) a curriculum vita or resume for each designated expert witness, (4) and supporting documentation, if any, upon which Respondent bases its claim of inability to pay the proposed penalty." Motion at 8.

Complainant argues that Respondent's prehearing exchange lacks information sufficient for Complainant to determine, prior to the hearing, whether rebuttal witnesses are necessary and whether Complainant will challenge any of Respondent's witnesses. Complainant points out that Respondent's prehearing exchange fails to include witness names or a summary of expected testimony for three of five described witnesses, including one expert, namely: "Representative(s) of Whitney Bank, lender and mortgagee on the subject property . . .," "Representative(s) of Gulf South Research Corporation (Expert Witness), which inspected the subject site and prepared a Wetland Delineation dated October 2007," and a "representative of Livingston Parish Gravity

Drainage District with jurisdiction over the drainage canals pertinent to the property.” Respondent’s Prehearing Exchange at 1.

Regarding the unnamed “Representative(s) of Whitney Bank,” Complainant argues that “Respondent’s witness designation is not clear as to whether Respondent’s witness is knowledgeable as to the proceedings between Hancock Bank and Respondent or whether Respondent’s witness is akin to a custodian of records.” Motion at 4. Further, Complainant explains that, since Respondent’s prehearing exchange does not identify a specific individual, Complainant cannot determine whether it may need to call a rebuttal witness, such as Mr. Brandon Case, Vice President of Special Assets for Hancock Bank, who is knowledgeable about the status of Respondent’s loan for the subject property. Motion at 2-4. As Respondent failed to name a representative from the bank, Complainant objects to Respondent calling any representative from Whitney bank or the related Hancock Bank as a witness except Mr. Brandon Case or a similar official familiar with the current status of the bank’s actions as to the subject property. *Id.* at 3.

Similarly, concerning the unnamed “Representative(s) of Gulf South Research Corporation (Expert Witness),” Complainant argues that it cannot ascertain whether Respondent’s expert from Gulf South is one of the inspectors listed on the report data form and whether they will testify regarding the report’s conclusions, only to the validity of the data collected, or merely attempt to lay a foundation for admissibility of the document, without providing Complainant an opportunity to question the report’s author about its substance and underlying assumptions. *Id.*

Additionally, Complainant notes that Respondent has failed to provide the required resume or curriculum vita for its two expert witnesses, and failed to provide any written report or opinion prepared by Respondent’s proposed witness Tim Kimmel that would indicate the expert testimony he may render at hearing and the basis upon which he relies to formulate his opinion in this case. Motion at 5.

Lastly, Complainant asserts that Respondent must provide documentation to support its claimed inability to pay the proposed penalty. Motion at 5. Without such documentation, Complainant is unable to determine Respondent’s ability to pay the proposed penalty or to determine whether a rebuttal witness is necessary. *Id.* In addition, Complainant asserts that

#### **V. Discussion and Conclusions as to Complainant’s Motion to Compel**

Respondent’s Supplemental Prehearing Exchange remedies some but not all of the deficiencies highlighted by Complainant.

### **A. Names of Witnesses**

Respondent's Supplemental Prehearing Exchange provides the names and summaries of testimony of the potential individual witness or witnesses who are representatives from Gulf South Research Corporation and Livingston Parish Gravity Drainage District. As to witnesses from Whitney Bank, Respondent provides a more detailed listing in the Supplemental Prehearing Exchange: "Corporate representative(s) of Hancock Holding Company, Hancock Bank and/or Whitney Bank, including without limitation Brandon Case, Jim Patrick, Billy Price and/or (by FRCP 30(b)(6) deposition, a designee with knowledge of all dealings with Paco Swain Realty LLC," along with a description of expected testimony. Respondent's Supplemental Prehearing Exchange ("R's Suppl. PHE") at 3. Respondent also names an additional expert witness. Despite the lack of certainty regarding the bank witnesses, Respondent has satisfied the requirement of providing witness names.

### **B. Summaries of Expected Testimony**

Respondent's Supplemental Prehearing Exchange provides a very detailed summary of the expected testimony of fact witness Gordon "Paco" Swain, and a brief summary of expected testimony of Howard Nass, the representative of Gulf South Research Corporation, indicating that he performed the October 2007 Wetland Delineation upon which Respondent relied "to some extent." R's Suppl. PHE at 3. This Wetland Delineation was provided as Exhibit 1 in Respondent's original Prehearing Exchange and is discussed at some length in Complainant's Motion for Accelerated Decision (at 8-9). Respondent's summary of this witness' expected testimony is sufficient to prevent surprise and allow Complainant to adequately prepare for this witness' testimony at the hearing.

The summary of testimony for expert witness Tim Kimmel in Respondent's original Prehearing Exchange states merely "Biologist, wetlands evaluation, remediation and mitigation." The identical information appears completely unchanged in Respondent's Supplemental Prehearing Exchange (at 3), despite Complainant's prior assertion that Respondent "failed to provide any written report or opinion prepared by Mr. Tim Kimmel that would indicate the expert testimony he may render at hearing and the basis upon which he relies to formulate his opinion in this case." Motion at 5. Complainant's point is well taken that Respondent has failed to provide a sufficient summary of Mr. Kimmel's expected testimony.

For fact witness Jimmy Hopkins, Superintendent of Livingston Parish Gravity Drainage District #5, Respondent provides the following summary of expected testimony in its Supplemental Prehearing Exchange: "To describe the nature, function, condition and operations of the streams and tributaries mentioned in documents filed by Complainant, particularly without limitation any effect on the waters within the District's jurisdiction resulting from any of Respondent's work." R's Suppl. PHE at 3. This appears sufficient to apprise Complainant of the context and substance of the expected testimony in order for Complainant to prepare accordingly.

For the potential witnesses from Whitney Bank or Hancock Bank, Respondent describes the expected testimony in the Supplemental Prehearing Exchange as follows: “To testify to the substance and effect of all documents pertinent to the loan to Respondent and all communications of any nature or medium between the Bank and Respondent or Paco Swain.” R’s Suppl. PHE at 3. Respondent lists as proposed exhibits “[a]ll records” of the banks “which in any way pertains to the business of any of those entities with Respondent” but that Respondent anticipates needing compulsory process to secure the documents, and will provide them to Complainant when obtained. *Id.* at 4. The description of testimony should satisfy Complainant that the witness has substantive knowledge of the financial dealings involving Respondent and is not merely a records custodian. There is no standard in the Rules for determining the adequacy of a “brief narrative summary of . . . expected testimony.” 40 C.F.R. § 22.19(a). Respondent’s summary of testimony is sufficient in the circumstances of this case at this point.

### **C. Resumes for Expert Witnesses**

To date, Respondent has failed to provide a resume or curriculum vitae for its three expert witnesses. Respondent states that these may be offered into evidence, but none were actually provided in the Supplemental Prehearing Exchange. Regarding one witness,<sup>1</sup> Respondent states it “presumes that Complainant has obtained the CV or Resume of Howard Nass and GSRC. If not, Respondent will attempt to obtain it and provide it to Complainant. It is anticipated that this testimony will be taken under cross-examination.” R’s Suppl. PHE at 3. However, Complainant does not identify Mr. Nass as an intended witness. Furthermore, the undersigned’s Prehearing Order, dated April 19, 2013, requires that “[i]ncluded among the documents produced shall be a curriculum vita or resume for each identified expert witness.” PHO at 2. Thus, Respondent is ordered to provide such documents

### **D. Documents Supporting Inability to Pay**

In its Answer, Respondent asserts an inability to pay “more than a nominal civil penalty.” Ans. ¶ 23. Respondent’s Supplemental Prehearing Exchange provides federal individual income tax returns (Form 1040 and associated forms) of Gordon L. Swain and his wife for years 2005 through 2012, and state income tax returns of Mr. and Mrs. Swain for years 2005 through 2009. In light of Respondent having provided these key financial documents, and Complainant not having specified any additional documents for Respondent to produce, it does not appear necessary at this point in the proceedings to compel Respondent to produce further documents in support of a claim of inability to pay a penalty.

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1. Although Respondent’s Supplemental Prehearing Exchange does not say whether Mr. Nass is intended as a fact witness or an expert witness, Respondent’s original Prehearing Exchange listed the then-unnamed witness from Gulf South Research Corporation as an expert witness. R’s PHE ¶ 2.

**ORDER**

1. Complainant's Motion to Supplement Complainant's Prehearing Exchange is **GRANTED**.
2. Respondent's Motion to Supplement Respondent's Prehearing Exchange is **GRANTED**.
3. Complainant's Motion to Compel Production of Information Required by the Rules of Practice and the Prehearing Order is **GRANTED** in part and **DENIED** in part, as follows:
  - A. Complainant's request to compel Respondent to produce a curriculum vita or resume for each designated expert witness is hereby **GRANTED** and Respondent is hereby **ORDERED** to produce the same;
  - B. Complainant's request to compel Respondent to produce sufficient summaries of expected witness testimony is **GRANTED** for expert witness Tim Kimmel and Respondent is hereby **ORDERED** to produce the same;
  - C. Complainant's requests to compel Respondent to produce to produce sufficient summaries of expected witness testimony for all other witnesses, to produce the names of all witnesses, and to produce documentation supporting inability to pay are hereby **DENIED** as moot.



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M. Lisa Buschmann  
Administrative Law Judge

In the Matter of Paco Swain Realty, L.L.C., Respondent  
Docket No. CWA-06-2012-2710

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Granting Motions to Supplement Prehearing Exchanges and Order on complainant's Motion to Compel Production**, dated February 11, 2014, was sent this day in the following manner to the addressees listed below:

  
\_\_\_\_\_  
Knolyn R. Jones  
Staff Assistant

Dated: February 11, 2014

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