



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-06-2012-2712
)
Respondent) Dated: February 11, 2014

**ORDER ON RESPONDENT'S MOTION TO
SUPPLEMENT PREHEARING EXCHANGE**

AND

ORDER DIRECTING SUBMISSION OF ADDITIONAL INFORMATION

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 June 2007 to September 2010, 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 during this time, the United States Army Corps of Engineers issued a written Cease and Desist Order instructing Respondent to stop unauthorized work at the subject property. 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 which alleges certain deficiencies in Respondent's Prehearing Exchange. Specifically, Complainant challenges the sufficiency of Respondent's summaries of expected witness testimony and asserts that Respondent did not provide sufficient documentation to support an inability to pay argument. Complainant asserts that the summaries of

testimony in Respondent's Prehearing Exchange are not sufficient for Complainant to determine prior to the hearing whether rebuttal witnesses are necessary and whether Complainant will challenge and of Respondent's witnesses. Complainant asserts further that Respondent did not provide documentation to support its claim of inability to pay the proposed penalty, and therefore Complainant is unable to determine Respondent's ability to pay the proposed penalty or whether a rebuttal witness is necessary.

On September 26, 2013, Respondent filed a Motion to Supplement Respondent's Prehearing Exchange ("Motion" or "Mot."), with an attached Supplemental Prehearing Exchange. The Motion states that Complainant's attorney was contacted and did not object to the Motion. Complainant did not file any response to the Motion.

II. Respondent's Motion to Supplement Prehearing Exchange

Respondent's Motion appears to be responsive to Complainant's assertions of deficiencies in Respondent's Prehearing Exchange.¹ Respondent's Motion states that although Respondent's counsel thought that his original prehearing exchange was sufficient, "he has been informed that more detail is necessary, and therefore has included it in the supplement." R's Mot. at 1. The Motion explains that some necessary exhibits and information had been omitted because counsel did not have access to them at the time of filing, and that others had been omitted inadvertently. *Id.*

Respondent's Supplemental Prehearing Exchange adds the following additional information to the original Prehearing Exchange: (1) a page long description of the expected testimony of fact witness Gordon "Paco" Swain; (2) a specific name and brief summary of expected testimony of the witness previously identified only as an unnamed representative of the Livingston Parish Gravity Drainage District #5; and (3) names and summary of testimony for a potential witness representing "Hancock Holding Company, Hancock Bank and/or Whitney Bank" to testify as to documents and other communications regarding the bank's loan to Respondent. ¶ 6.

Respondent's Supplemental Prehearing Exchange expands the list of proposed exhibits to add Exhibits 4 and 5, but does not include the actual exhibits. Respondent describes Exhibit 4 as "All records of Hancock Holding Company, Hancock Bank and Whitney Bank which in any way pertains to any business of any of those entities with the respondent," and states that "It is anticipated that compulsory process will be necessary to secure these documents, and copies will be provided Complainant as soon as they are obtained." *Id.* at 4. Respondent's proposed Exhibit 5 is described as

¹ Under similar procedural circumstances in the parallel action involving the same parties but different real property, Docket No. CWA-06-2012-2710, Complainant filed a Motion to Compel Production of Information. However, in the instant case, Complainant has not filed such a motion.

curriculum vitae or resume of expert witnesses. *Id.*

Respondent's Supplemental Prehearing Exchange also expands the description of Respondent's proposed Exhibit 3, regarding financial documents and Respondent's ability to pay, and includes copies of the federal individual income tax returns (Form 1040 and associated forms) of Gordon L. Swain and his wife for years 2005-2012, and of state income tax returns of Gordon L. Swain and his wife for years 2005-2009.

III. 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.

IV. Discussion, Conclusions and Order

Addition of the information provided in Respondent's Supplemental Prehearing Exchange is unopposed by Complainant. The additional information appears responsive to deficiencies Complainant had alleged with respect to Respondent's original Prehearing Exchange.

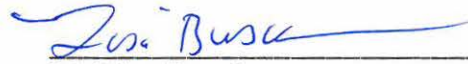
Thus, for good cause shown, the unopposed Motion to Supplement Respondent's Prehearing Exchange is **GRANTED**.

Nevertheless, Respondent has failed to comply with the requirement in

the undersigned's Prehearing Order, dated April 19, 2013, that "[i]ncluded among the documents produced shall be a curriculum vita or resume for each identified expert witness." PHO at 2. Respondent named two expert witnesses in the Supplemental Prehearing Exchange . Thus, Respondent is **ORDERED** to provide a curriculum vita or resume for each identified expert witness in another supplemental prehearing exchange.

Respondent did not provide a summary of testimony of proposed witnesses Gary Perkins, Jason Harris, or Tim Kimmel. Therefore, and given Complainant's assertions in its Rebuttal Prehearing Exchange of deficiencies in Respondent's submissions, Respondent is **ORDERED** to provide a summaries of testimony of proposed witnesses Gary Perkins, Jason Harris, or Tim Kimmel.

SO ORDERED.




M. Lisa Buschmann
Administrative Law Judge

In the Matter of Paco Swain Realty, L.L.C., Respondent
Docket No. CWA-06-2012-2712

CERTIFICATE OF SERVICE

I certify that the foregoing **Order on Respondent's Motion to Supplement Prehearing Exchange and Order Directing Submission of Additional Information**, 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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