

CURRAN, HOLLENBECK & ORTON, S.C.

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ATTORNEYS AT LAW:

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June 13, 2012

BY UPS
Ms. LaDawn Whitehead
Regional Hearing Clerk
US Environmental Protection Agency - Region V
77 West Jackson Blvd - 19th Floor
Chicago, IL 60604-3590

Re: US EPA v Joseph L Bollig & Sons Inc
Docket No. CWA-05-2011-0008

RECEIVED
JUN 14 2012

**REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY**

Dear Ms. Whitehead:

Enclosed please find the original and one copy of Respondent's Supplemental Prehearing Exchange and Respondent's Certificate of Service of Respondent's Supplemental Prehearing Exchange in the above matter for filing. One copy has been served on the ALJ by mail and one copy has been served on the attorney for the EPA by mail.

Very truly yours,

CURRAN, HOLLENBECK & ORTON, SC



BY: William T. Curran
(Reply to Mauston office)

WTC:dlr

Enclosures

cc: Hon. M. Lisa Buschmann, ALJ
Atty Thomas P Turner

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June 13, 2012

Honorable M. Lisa Buschmann
Office of Administrative Law Judges
US Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue, NW
Washington, DC 20460



Re: US EPA v. Joseph L. Bollig & Sons, Inc
Docket No. CWA-05-2011-0008

Dear Judge Buschmann:

Enclosed please find one copy of the Respondent's Supplemental Prehearing Exchange and one copy of Respondent's Certificate of Service of Respondent's Supplemental Prehearing Exchange in the above matter. I am filing the original and one copy with the Regional Hearing Clerk and serving one copy on counsel for the EPA by mail.

Very truly yours,

CURRAN, HOLLENBECK & ORTON, SC

A handwritten signature in black ink that appears to read "W.T. Curran".

BY: William T. Curran
(Reply to Mauston office)

WTC:dlr

Enclosures

cc: Ms. L. Whitehead, Regional Hearing Clerk
Atty Thomas P Turner

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:

DOCKET No. CWA-05-2011-0008

Joseph L. Bollig and Sons, Inc.,
New Lisbon, Wisconsin,

Honorable M. Lisa Buschmann
Administrative Law Judge

Respondent.

RECEIVED

JUN 14 2012

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U.S. ENVIRONMENTAL
PROTECTION AGENCY

**RESPONDENT'S SPECIAL APPEARANCE
AND SUPPLEMENTAL PREHEARING EXCHANGE**

In compliance with ALJ Buschmann's Order of May 30, 2012, Respondent supplements its Initial Prehearing Exchange as follows:

A OVERVIEW

This story has several chapters.

Chapter 1 - The FAA and the State Aeronautical Bureau issue a safety directive requiring the 7 acres, of which 2 are wetlands, on the southeast end of the runway, to be cleared and made mowable.

Chapter 2 - On March 22, 2006, Commissioner Doug Wells called the WDNR explaining this clearing project and inviting them to inspect, which inquiry went unanswered by the WDNR. Similarly, on the same date, Mr. Wells called the USACE leaving a detailed message as to the scope of the work to be done and inviting them to contact the Airport or the WDNR.

On the same date, Mr. Wells contacted the Juneau County Zoning Administrator to

discuss the project and was told there were no permits needed.

Chapter 3 - After waiting for a reponse for 2 years, the Airport hired Bollig to log the trees on the affected glide slope area 2/15/2008, representing they had taken care of the WDNR and the USACE.

Chapter 4 - The WDNR (Will Stites) and the USACE (Simone Kolb) worked diligently with the Airport and its engineers to promptly reach a plan confirming the restoration of the wetlands. (None were lost). After confirmation from the WDNR and the USACE that the restoration plan had been approved and would be the only penalty required, the restoration plan was then completed with no negative impact to the part of the area that was wetland.

Chapter 5 - The EPA requests information. When asked for clarification, it refuses to clarify what it is seeking, but then seeks extra penalty for failure to provide information.

Chapter 6 - EPA comes in, after the fact, and asks for fines alleging great gravity of the offense, while at the same time acknowledging that the effect on the environment was "small and temporary".

B SUMMARIES OF "ABUTTING LANDOWNERS"

Respondent's witness #6 will be Robert Nicksic, N5532 Black Road, New Lisbon, Wisconsin, 53950, a lifelong resident of the area in question, as this part of the Airport was previously owned by his parents, Joseph and June Nicksic. Mr. Nicksic will testify that while some of the water that flows through the Sumiec Road culvert may come from

the airport land, the majority of it comes from springs on land abutting it to the south. He will also confirm Mr. Cowan's testimony that there is no relatively permanent non-navigable ditch between Sumiec Road and the railroad track.

C NAMES AND SUMMARIES FROM MIDSTATE'S EMPLOYEES

The MidStates employee who took the lead on securing the approval of the WDNR and the USACE in securing the 404 permit was Mike Hinz. In addition to testifying about the cooperative attitude of the WDNR and the USACE and the resolution of this matter without any fine, he will confirm there was no investigation or determination done that this wetland area of the airport was a federal wetland or a non-federal wetland governed by §281.36, Wis. Stats.

D NARRATIVE STATEMENT ON BASIS FOR EACH AFFIRMATIVE DEFENSE

The Respondent's special appearance and responsive pleading lists at page 5 - 6 affirmative defenses. A narrative explanation of those affirmative defenses is:

11. The EPA lacks jurisdiction in this matter because the Airport site is a non-federal wetland under either the Scalia test or the Kennedy test in that the historic man made ditch running east from Sumiec Road on the west to the railroad tracks on the east no longer exists. Any flow from the Airport alleged to reach the railroad tracks is likely only to have a speculative or insubstantial effect on the chemical, physical and biological integrity of the navigable water, that is, the Lemonweir River. Thus, this isolated wetland is controlled by the WDNR under §281.31, Wis. Stats. The requirements from WDNR

have already been met and no fine was recommended or pursued.

12. There is no allegation that any wetlands were destroyed or degraded. In fact, EPA's Gregory Carlson stated in a telephone conversation involving William T. Curran and Thomas Turner that any effect on the wetland was "small and temporary".

13. The Airport, its engineers MSA and Respondent have all complied with the requirements of the USACE and the WDNR in securing an after the fact permit which requirements did not recommend or seek any monetary penalty. Thus, the government has elected its remedy.

14. The government should be estopped from pursuing any further enforcement action when the EPA knew or should have known that USACE with the WDNR had taken jurisdiction of this matter, had elected its remedies, issued a permit and concluded the matter before EPA came in after the fact.

Complainant is further estopped from alleging the acts complained of were of any serious gravity when the effect on the environment was "small and temporary".

Complainant is estopped from alleging any lack of cooperation on the part of Respondent, when Respondent requested an explanation of what Greg Carlson sought over and above what the MidStates engineering firm had already provided him and Greg Carlson failed and refused to tell Respondent what he wanted or tell the Juneau County Zoning Administrator what he wanted.

15. Respondent and the Airport relied to their detriment upon the election of remedies from the WDNR and the USACE in fulfilling each and every term those

agencies sought, all of which was done with the knowledge of EPA.

16. The area was restored after the WDNR and USACE permit was approved, thereby reaffirming that no wetlands were lost or degraded.

17. The land clearing was done at the direction of the Wisconsin Bureau of Aeronautics and the Federal Aviation Association which has exclusive control and authority over Airport safety. These federal safety regulations take precedence over a minor environmental intrusion restored.

18. and 19. Pursuing this claim against Respondent is estopped on the grounds that the Airport, as a governmental entity, represented (or misrepresented) and assured Respondent that it had secured the necessary approvals from WDNR and USACE by direct contact with the Airport Commission and Respondent has a right to rely on the representations of a governmental unit.

20. Complainant is estopped from claiming any gravity of the offense or lack of cooperation in that the Airport Commission and its engineering firm analyzed the area and prepared a detailed restoration plan, which was the Airport's plan from the beginning, which plan was completed and preliminarily approved by WDNR and USACE within 30 days of notice of a problem.

21. Although the WDNR and the USACE preliminarily approved the restoration plan in May or June, 2009, the ultimate USACE permit, through no fault of Respondent, was delayed until March 11, 2010.

Dated: June 13, 2012

Respectfully submitted,

CURRAN, HOLLENBECK & ORTON, SC

BY: 

William T. Curran
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A Member of the Firm
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DOCKET No. CWA-05-2011-0008

Joseph L. Bollig and Sons, Inc.,
New Lisbon, Wisconsin,

Honorable M. Lisa Buschmann
Administrative Law Judge

Respondent.

CERTIFICATE OF SERVICE OF RESPONDENT'S
SUPPLEMENTAL PREHEARING EXCHANGE

I hereby certify that Respondent's Supplemental Prehearing Exchange in the above matter was filed with those stated below by placing it in the US Mail on Wednesday, June 13, 2012 to Hon. M. Lisa Buschmann and Atty Thomas Turner and by UPS to Ms. L. Whitehead, Regional Hearing Clerk.

Honorable M. Lisa Buschmann
Office of Administrative Law Judges
US Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Attorney Thomas P Turner
Associate Regional Counsel
US EPA - Region 5
77 West Jackson Boulevard
Chicago, IL 60604-3590

Ms. LaDawn Whitehead
Regional Hearing Clerk
US Environmental Protection Agency -
Region V
77 West Jackson Blvd - 19th Floor
Chicago, IL 60604-3590



Dated: June 13, 2012

A handwritten signature in black ink that reads "Deborah Rose". The signature is written in a cursive style and is positioned above a horizontal line.

Deborah Rose
Assistant to Atty William T Curran
Attorney for Respondent
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Mauston, WI 53948-0140
(608) 847-7363