



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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

REPLY TO THE ATTENTION OF:
C-14J

Re: U.S. EPA v. Joseph L. Bollig and Sons, Inc.
Docket No. CWA-05-2011-0008 - Complainant's Reply to Respondent's Opposition to
Complainant's Motion for Accelerated Decision

Dear Ms. Whitehead:

Pursuant to the Consolidated Rules of Practice at 40 Code of Federal Regulations, Section 22.16(b), enclosed please find an original and one copy of Complainant's Reply to Respondent's Opposition to Complainant's Motion for Accelerated Decision in the above referenced case. I have also filed copies of this Amended Complaint with the Administrative Law Judge and Respondent by certified mail, return receipt requested.

Sincerely yours,

Thomas P. Turner
Associate Regional Counsel

Enclosure

cc: Hon. M. Lisa Buschmann, ALJ (mail code: 1900L)
Greg Carlson, Water Division (WW-16J)
Kevin C Chow, Assoc. Regional Counsel (C-14J)

Joseph L. Bollig and Sons, Inc.
c/o: William T. Curran, Esq.
Curran, Hollenbeck & Orton, SC
111 Oak Street, PO Box 140
Mauston, WI 53948-0140

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

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In The Matter Of:

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

RESPONDENT.

)
) Complainant's Reply to
) Respondent's Opposition to
) Complainant's Motion for Accelerated
) Decision in Proceeding to Assess
) Amended Class II
) Administrative Penalty
) Under Section 309(g)
) of the Clean Water Act,
) 33 U.S.C. §1319(g).
)
) DOCKET No. CWA-05-2011-0008
)
) HON. M. LISA BUSCHMANN

**COMPLAINANT'S REPLY TO RESPONDENT'S OPPOSITION
TO COMPLAINANT'S MOTION FOR ACCELERATED DECISION**

Pursuant to 40 C.F.R. § 22.16(b) of the Consolidated Rules of Practice, the United States Environmental Protection Agency (EPA or Complainant) hereby replies to Respondent's (Bollig or Respondent) July 13, 2012 (filed July 16, 2012) Opposition to Complainant's Motion for an Accelerated Decision in this matter in its favor with respect to all issues of Respondent's liability and penalty. In reply, Complainant states as follows:

- 1) At paragraph 5, p. 2, Respondent contends that Complainant "has provided the Court with no evidentiary basis to make this decision." Respondent is incorrect. Complainant's June 29, 2012 Motion for Accelerated Decision and Memorandum in Support cites repeatedly to the Initial and Supplemental Prehearing Exchange that was submitted by Complainant, with no objections or countervailing documentation supplied by Respondent. Indeed, on April 27, 2012, Respondent indicated that it would "rely on the same documents provided by EPA, presuming they are complete."

See, Respondent's Special Appearance and Initial Prehearing Exchange, at Section II.B., p. 4. For Respondent to now take the position that it will question the underlying record that it has reviewed and accepted, is inherently contradictory.

- 2) At paragraph 6(a), p. 2, Respondent contends that the Site wetland is not subject to federal regulation, and governed only by state law (citing Wis. Stat. Chapter 30 and, previously, Chapter 281). Respondent is incorrect. Wisconsin Statutes Chapter 30 essentially outlines the State's requirements for individual or general permits when dealing with regulated wetlands. The Chapter does not set limits to any assertion of federal wetlands jurisdiction. This is especially true at Wis. Stat. Ch. 30.06 (Waiver of certain provisions of this chapter):

The department, by rule, may waive the applicability to specified navigable waters of the United States of all or part of those provisions of this chapter which relate to the establishment of bulkhead or pierhead lines or the placing of structures or deposits in navigable waters or the removal of materials from the beds of navigable waters. **The department may promulgate such rule only after it has entered into an agreement with the appropriate federal agency wherein it is agreed that the comparable federal law will be enforced on the waters in question in lieu of the state law which is being waived.** The objective of such agreement shall be to avoid duplication of administration with respect to navigable waters over which this state and the U.S. government have concurrent jurisdiction, in those situations wherein administration by a single governmental agency will tend to avoid confusion and the necessity of obtaining permits from both the state and federal governments by those who are subject to the law and at the same time will adequately protect the public interest. The agreement may contain such further provisions as are designed to achieve this objective. (Emphasis added).

This legislative intent does not support Respondent's assertion of state jurisdiction limiting federal jurisdiction in the present matter.

Nor does Respondent's prior citation (to Wis. Stat. §§ 281.31 and 281.36) support this assertion. Respondent's June 13, 2012 Supplemental Prehearing Exchange, at Sections C and D, p. 3, stated that the Site was potentially a "non-federal Wetland"

and that “this isolated wetland is controlled by WDNR...” However, the revised version of the Wisconsin statutes deletes the use of the “non-federal” language.¹ The old version of Wis. Stat. § 281.36(1m) defines “nonfederal wetlands’ as those wetlands not subject to federal regulation due to SWANCC or any subsequent judicial interpretations, including non-navigable, intrastate, isolated wetlands.” There is no longer any language that differentiates federal and non-federal wetlands. Respondent relies heavily on this old law that is no longer applicable. The revised version of Wis. Stat. § 281.36, does not mention isolated wetlands. Chapter 281 of the Wisconsin Statute does not mention isolated wetlands. Therefore, the Wisconsin statutes do not limit federal jurisdiction over wetlands because they essentially just follow the federal wetlands interpretation as expressed in U.S. v. Rapanos, 547 U.S. 715 (2006).

Federal jurisdictional analysis was properly performed at the Site by the U.S. Army Corps of Engineers (Corps) on November 24, 2009. See, Complainant’s March 30, 2012 Initial Prehearing Exchange at Complainant’s Exhibit (CE) 1. The Corps determined that a federally regulated wetland exists at the Airport Site. Id. at Section I.B, p. 1. Equally, EPA also submitted a federal jurisdictional analysis of the Airport Site, based upon 2009 and 2011 Site Investigation Reports of EPA Life Scientist Greg Carlson (CEs 4 and 5). The EPA wetlands jurisdictional determination is dated March 2012 (CE 13). All of these evidentiary documents were accepted by Respondent, and they support Complainant’s determination of proper federal jurisdiction of the Airport Site wetland.

¹ 2011 Wisconsin Assembly Bill No. 463, Wisconsin One Hundredth Legislature - 2011-2012 Regular Session, 2011 Wisconsin Assembly Bill No. 463, Wisconsin One Hundredth Legislature - 2011-2012 Regular Session

- 3) At paragraph 6(b), p. 2, Respondent contends that there is disputed evidence of provable discharge “from” the Site, and that Complainant has produced no evidence that any material has “left or potentially could have left” the Site based on activities of the Respondent. Respondent mischaracterizes the nature of the violation. EPA has alleged that the Site is a wetland and is itself a water of the United States, and that Respondent has discharged dredged and fill material and organic debris into or upon such wetland without a permit issued under Section 404 of the Act, 33 U.S.C. § 1344, in violation of Section 301 of the Act, 33 U.S.C. § 1301. Complainant need not produce any evidence that pollutants have left the Site for purposes of establishing the above violation.
- 4) At paragraphs 6(b) and 6(c), pp. 2-3, Respondent contends that the Site is not a wetland that could affect a downstream water source, and that the unnamed tributary number 1 (unt1) identified by Complainant in the Complaint and its Initial Prehearing Exchange is non-existent. Respondent is incorrect. Respondent’s contention is again undercut by the above-mentioned evidentiary documentation of the existence of a federally recognized wetland and of unt1 as a Relatively Permanent Water course (RPW) in paragraph 2 of this Reply (CEs 1, 4-5, and 13). Complainant also submits that the EPA Watershed map of the Mauston-New Lisbon Union Airport (CE 20) also supports the existence of both the Airport Site as a federally regulated wetland and unt1 as a RPW. Complainant further submits that Complainant’s Exhibits 4, 5, and 13 support the existence of a connection between the wetlands and the Lemonweir River through unt1.
- 5) At paragraph 6(c), Respondent further contends that no real unnamed tributary exists,

and that Complainant has described the effect of Respondent's non-permitted filling activities at the Site as "small and temporary". Respondent is incorrect. Complainant re-asserts its argument from paragraph 3 of this Reply regarding the existence and flow of untl. And, Complainant also notes that Respondent is contradicted by CE 13, as cited to in Respondent's Opposition statement. CE 13 indicates the existence of untl and its water-bearing capacities.

Respondent also relies upon a phrase ("small and temporary") that Complainant contends was expressed, if at all, during pre-filing negotiations, after Complainant issued its Notice of Intent to File (NOI)/Small Business Reform Act (SBREFA) letter in January 2011, and prior to filing the Complaint in August 2011. The phrase, if used at all by either party, was used in the context of good faith settlement negotiations. Generally, settlement negotiations are confidential and not subject to later evidentiary use in litigation, in order to allow for robust good faith settlement discussions. Complainant's formal position in this matter, as indicated in the Complaint and subsequent filings of record, has not varied. Complainant alleged (and continues to allege) that between 2008 and 2009, Respondent performed mechanized land clearing across seven (7) acres of forested and shrub-scrub wetland, grading and filling of stump holes, and later excavated soil and biological debris from the Site and deposited such material into other portions of the 7-acre federally recognized jurisdictional forested and shrub-scrub wetland Site without a Clean Water Act Section 404 permit. (CE 2, 5)

- 6) At paragraph 6(c) and (d), pp. 2-3, Respondent contends that its witnesses will demonstrate that untl "no longer exists" and that their testimony will "isolate" the

airport from federal jurisdiction. Complainant notes that Respondent's witnesses' testimony will be about areas west of the Chicago, Milwaukee, St. Paul, and Pacific Railroad tracks, where EPA's witness and documentary evidence provide ample proof of the existence of bed and bank structure and of at least seasonal water flow through until. See CEs 4, 5, and 13.

- 7) At paragraph 6(e), p. 3, Respondent contends that "no fill material [was] brought into the airport.... In fact, fill material was removed. Thus, no wetlands were lost or impaired in any way." Respondent is incorrect. Wetlands were "lost or impaired" by Respondent's activities. Respondent also ignores the fact that EPA has also alleged that dredged material has been discharged into the wetland. Dredged material is material that is excavated or dredged from waters of the United States.

42 C.F.R. § 232.2. Fill material means material (including rock, sand, and soil) placed in the waters of the United States where the material replaces any portion of the water of the United States with dry land or changes the bottom elevation of any portion of such water. Id. In any event, Respondent mischaracterizes the nature of the activities at the Site. Materials weren't merely "removed" from the Site. The dredged and fill materials were excavated from the Site itself and placed or otherwise redeposited into piles, also on the Site. See CEs 2-5. These redistribution activities along with mechanized land clearing constitute a discharge of pollutants. See e.g. U.S. v. Huebner, 752 F.2d 1235, 1243 (7th Cir. 1985); Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 922-924 (5th Cir. 1983).

- 8) At paragraph 6(f), p. 3, Respondent contends that no federal jurisdiction over the Airport Site wetland exists. Respondent is incorrect. First, in the same paragraph,

Respondent correctly notes that the Airport received an “After-the-Fact 404 Permit”. Complainant notes that this Corps Notice and After-the Fact Letter of Permission was issued on March 11, 2010 to the owner-Airport, concerning the Site wetland. This is clearly an action taken by a federal agency exercising its duly delegated federal jurisdiction over the subject matter at hand. Additionally, Respondent claims that “the ACE resolved this matter and concluded that no penalty was required” and that EPA “is attempting to overrule that resolution.” In fact, the ACE referred this matter to EPA for further enforcement, including penalty. See CEs 6, 7. In any event, EPA and the ACE share concurrent enforcement authorities. See CWA §§ 301, 309, 404(n), and 404(s), 33 U.S.C. §§ 1311, 1319, 1344(n), and 1344(s). Generally, as a matter of practice, EPA enforces unpermitted discharges, while the ACE enforces permit violations and unpermitted activities.

- 9) At paragraph 6(g), pp. 3-4, Respondent contends that EPA has refused to provide the factual basis for the penalty calculation, and that the penalty calculation involves genuine matters of material fact in dispute. Respondent is incorrect. Complainant has indeed provided the factual bases for its penalty calculation, including within the Motion for Accelerated Decision itself. Respondent is the party who has failed to put specific facts at issue for purposes of the penalty calculation. Complainant notes that Respondent cannot demonstrate factual faults with the objective calculation and statutory explanation of the proposed \$60,000 penalty factors (See, Complainant’s August 2011 Complaint and June 2012 Amended Complaint, and Complainant’s March 2012 Initial Prehearing Exchange at Section III, pp. 15-21.) Therefore, Respondent has chosen to attack Complainant’s principal witness, EPA Life Scientist

Greg Carlson. Complainant rejects Respondent's characterization of Mr. Carlson as "rude" or "obstructive". Further, Complainant notes that Mr. Carlson is a staff scientist charged with developing a proposed penalty, and that the final determination of enforcement, penalty negotiation, overall settlement, or penalty assessment is not within his authority. Respondent offers no serious argument against the proposed penalty based upon the facts of the case.

Respondent has not created genuine issues of material fact. Therefore, for the reasons set forth above and in its previously submitted Motion for Accelerated Decision and Memorandum in Support, Complainant requests this court reject all of the contentions of Respondent's Opposition to Motion for Accelerated Decision, and requests this court find accelerated decision in its favor as to all issues of Respondent's liability and penalty in this matter.

Respectfully submitted,



Thomas P. Turner
Kevin C. Chow
Associate Regional Counsels

PROOF OF SERVICE

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I certify that the foregoing Complainant's Reply to Respondent's Opposition to Complainant's Motion for Accelerated Decision was sent in the following manner to the addresses listed below:

Original and one copy by hand delivery to:

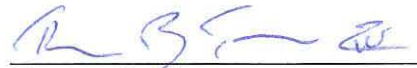
Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region 5
77 West Jackson Blvd.
Chicago, Illinois 60604

Copy by Certified Mail/
Return Receipt Requested to:

Judge M. Lisa Buschmann
Office of Administrative
Law Judges
U.S. Environmental Protection
Agency, mail code: 1900L
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Joseph L. Bollig and Sons, Inc.
c/o: William T. Curran, Esq.
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111 Oak Street, P.O. Box 140
Mauston, Wisconsin 53948-0140

Dated: July 25, 2012


Thomas P. Turner
Kevin C. Chow
Associate Regional Counsels