UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

MAY 1 1 2012

HAND DELIVERED

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 Motion to Strike Portions of Respondent's Initial Prehearing Exchange

Dear Ms. Whitehead:

Enclosed please find an original and one copy of Complainant's Motion to Strike Portions of Respondent's Initial Prehearing Exchange in the above-referenced case. I have served copies of this Status Report with the Administrative Law Judge (ALJ) and a copy on Respondent by certified mail, return receipt requested.

Sincerely yours,

Thomas P. Turner
Assoc. 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

In the Matter of:	)	**Docket No. CWA-05-2011-0008**
	)	
Joseph L. Bollig and Sons, Inc.,	)	**Hon. M. Lisa Buschmann**
New Lisbon, Wisconsin,	)	**Administrative Law Judge**
	)	
Respondent.	)	
	)	
	)	

MOTION TO STRIKE PORTIONS OF RESPONDENT'S INITIAL PREHEARING EXCHANGE

Complainant, United States Environmental Protection Agency ("U.S. EPA"), Region 5, by counsel, hereby moves before this Court that certain portions of Respondent's April 30, 2012 Prehearing Exchange be stricken as unclear, factually incorrect, and of no probative value to the merits of the case. In support of this motion, Complainant states as follows:

APPLICABLE LAW:

Section 22.19(a)(2)(i)-(ii) of the Consolidated Rules of Practice provides that a party's pre-hearing exchange "shall contain" the names of witnesses that the party intends to call to testify at any hearing, "together with a brief narrative summary of their expected testimony", as well as "[c]opies of all documents and exhibits which it intends to introduce into evidence at the hearing." 40 C.F.R. § 22.19(a)(2)(i)-(ii). By this Court's February 29, 2012 Prehearing Order, the Respondent is also instructed to provide a narrative of all witnesses, documents and evidence intended to be produced at the hearing. Prehearing Order, Section I(A), p. 2. Further, this Court required that the Respondent support any of its stated Affirmative Defenses, assertions, and challenges to the proposed penalty (or limitations of its ability to pay) through narrative explanatory statements covering the legal and/or factual bases for said affirmative defenses or

assertions, or supporting statements and/or financial documents regarding the Respondent's position on the proposed penalty. Prehearing Order, Section I(C), p. 3.

DEFICIENCIES IN RESPONDENT'S INITIAL PREHEARING EXCHANGE

A review of "Respondent's Initial Prehearing Exchange," mailed by Respondent on April 27, 2012, but not received by the U.S. EPA until April 30, 2012, reveals that it has failed to provide any "brief narrative summary" of the expected testimony of some of the witnesses identified, as required by the above referenced Consolidated Rules of Practice and the Prehearing Order.

As to Respondent's presentation of "David Donnelly, Juneau County Zoning Administrator", Respondent's Prehearing Exchange at paragraph 2, p. 2, identified by Respondent as a witness concerning discussions with an official of the Mauston-New Lisbon Union Airport, it is not clear how this serves any probative value with respect to the matter of Respondent's liability for the violation of Section 404 of the Clean Water Act (CWA). Complainant notes that Mr. Donnelly is represented as a local County Zoning Administrator, and not a scientist or official charged with state or federal monitoring, study, implementation or enforcement of the federal CWA. Further, Respondent's statements as to Mr. Donnelly's alleged perceptions of his interactions with Mr. Greg Carlson of U.S. EPA have no bearing on any issues of fact or law in the matter at hand, are not substantiated, relevant, nor probative as to the case. Further, U.S. EPA has a written record of the communication between Mr. Donnelly and Mr. Carlson, and will be submitting it as a part of Complainant's Rebuttal Prehearing Exchange.

As to "Other abutting landowners who can confirm Mr. Cowan's testimony includ[ing] Ed Sumiec, Joseph and June Nicksic and their sons, [and] Mabel Ferdon", Respondent's Prehearing Exchange at paragraph 6, p. 4, identified by Respondent as witnesses, we are told

nothing else. Respondent does not sufficiently identify the specific witnesses that may be called to testify by describing some witnesses as "...and their sons." Further, Respondent fails to "summarize" the facts to which these witnesses will testify. Respondent merely offers these witnesses in confirmation of Mr. Gregory J. Cowan, the purported landowner between the Mauston-New Lisbon Union Airport and the Lemonweir River. Respondent does not offer any information concerning the probative value of these witnesses, and does not indicate whether any of them has specific or useful knowledge of unnamed tributary 1 (as identified in Complainant's August 18, 2011 Complaint at paragraphs 17 and 19, pp. 3-4). In fact, U.S. EPA has already provided a partial visual record (photograph) of unnamed tributary 1 west of the railroad tracks, showing that it is a continuous channel and is clear enough to allow the flow of water between the wetland and the Lemonweir River. See, Complainant's March 30, 2012 Prehearing Exchange, at Complainant's Exhibits (CE) 5, 13. U.S. EPA will also be submitting a higher resolution photograph of unnamed tributary 1 west of the railroad tracks as part of Complainant's Rebuttal Prehearing Exchange.

As to "Ronald Brunner, former Airport Commission Chairman, and Floyd Babcock, former Airport Manager", Respondent's Prehearing Exchange at paragraph 4, p. 3, identified by Respondent as witnesses who would testify to the history and safety concerns of the Airport, there is really no relevance to the testimony of these two witnesses, as presented by Respondent. The matters at hand concern the liability of Respondent for an action involving alleged violation of a strict liability statute, and the matter of a proposed penalty issued for said violation. Neither of the above referenced witnesses (Brunner and Babcock) can offer testimony that would be probative on the subjects at hand. In fact, they would appear to be offered for essentially the same testimony that could be elicited from Mr. Doug Wells, the current Manager of the Airport,

and the official directly cognizant of the violation alleged in this case. See, Complainant's Prehearing Exchange, Section II.A., p. 5.

As to "[T]hose employees of the engineering firm, MidStates and Associates, who did the wetlands delineation and worked cooperatively and promptly with Respondent and the WDNR and the ACOE to secure the 404 permit", Respondent's Prehearing Exchange at paragraph 8, p. 4, Respondent has failed to provide acceptable identification of the witnesses, nor stated what facts they will testify concerning. The probative value of these witnesses is highly doubtful. (Further, Complainant would note that the only "404 permit" that was ever secured at the Site was an after-the-fact permit to control the restoration of the wetlands and dated March 11, 2010). See, Complainant's Prehearing Exchange at Complainant's Exhibit 11, p. 7.

As to Respondent's assertion in its submission of "Documents and exhibits intended to be introduced into evidence", Respondent's Prehearing Exchange at Section IIB, pp. 4-5, wherein Respondent asserts that matters described in subsequent paragraphs A through F "are not in dispute", Complainant notes that this is a supposition and assertion by Respondent that is neither grounded in any presentation of fact or law, generally, nor supported by any references to the existing record relied upon by the parties. Specifically, Respondent cannot point to any portion of the record that supports its assertion at paragraph A, that "EPA, ACOE and WDNR all concede that no wetlands were filled in, lost or made less effective." Complainant objects to this statement as unsubstantiated by the record, and asserts that Respondent has misconstrued the actual submissions in Complainant's Prehearing Exchange.

As to Respondent's assertion at Section IIB, paragraph B, that EPA has stated that "any effect on the environment in the subject parcel or waters of the United States was 'small and temporary'", Complainant notes that this is also supposition and is not grounded in any general

or specific reference to the existing record. Again, no part of the record supports Respondent's assertion at paragraph B. And, again Respondent has misconstrued the actual submissions in Complainant's Prehearing Exchange.

As to Respondent's assertions concerning the responsibility and goals of the wetland filling "project", in terms of the responsibility of the Mauston-New Lisbon Union Airport, in paragraphs C and D of Section IIB, Complainant would note that these are irrelevant statements with regard to the matter of Respondent's liability or the proposed penalty. No portion of the record has been identified by Respondent as supportive of this assertion. Respondent seeks to again misconstrue the 2010 issuance by the U.S. Army Corps of Engineers (Corps) of a CWA Section 404 after-the-fact permit as justification for its 2008-2009 activities, or to justify its violation of Section 404 of the CWA as a necessary part of following other separate state or federal mandates.

As to Respondent's assertions concerning the matter of riparian connection between the Mauston-New Lisbon Union Airport wetland Site and the Lemonweir River, and the purported enforcement decisions of the Wisconsin Department of Natural Resources and the Corps, in paragraphs E and F of Section IIB, Complainant also notes that these are essentially meaningless statements and irrelevant to the issues of fact and law of this case. Additionally, once more Respondent has offered no reference to any document or portion of the record (as required by this Court's Prehearing Order) in support of its assertions.

ARGUMENT

Complainant, on behalf of the Administrator, has issued a "notice" to Respondent, informing it of a $60,000 penalty being proposed to be assessed by the Administrator for its violations of Section 404 of the Clean Water Act. Respondent has requested a hearing, pursuant

to the Administrative Procedure Act and the Administrator's Rules. To conduct such a hearing, an Administrative Law Judge must travel from Washington, D.C. to southern or south central Wisconsin; the Administrator's enforcement staff must travel from Chicago to the same location; a room must be secured for some period of time, and a court reporter retained. Private citizens must be called from their work and their daily routines interrupted so as to be available at the site of the hearing, to testify. At a hearing, a record must be taken by the reporter, and, copies be made and paid for; briefs must then be prepared, copied and filed. While these are necessary costs of any hearing, and the price to be paid for resolving disputes by legal process, the Administrator has clearly crafted her rules with the intent to eliminate unnecessary hearings, and eliminate the waste of public resources in conducting such hearings. Toward this end, the Administrator has provided that hearings are to be "upon the issues raised by the complaint and answer." 40 CFR 22.15(c). She requires that each party provide to the other a list of witnesses and a "brief narrative summary of their expected testimony," 40 CFR 22.19(a)(2)(i), thereby enabling counsel, prior to hearing, to evaluate the strength or weakness of the case, appropriately responding to what the evidence produced at hearing is likely to reveal. And, consistent with long standing principles of American law, she has provided that "if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law," an accelerated decision can be entered in favor of a moving party.[2]

[2]Newell Recycling Company, Inc. v. U.S. EPA, No. 99-60694, 2000 U.S. App. LEXIS 27865, at 20 (5th Cir. 2000) (in upholding the Administrator's assessment of a $1.345 million civil penalty without conducting an oral evidentiary hearing, the Court said "constitutional due process doctrine requires that the person claiming the benefit of due process protections place some relevant matter into dispute"); and Puerto Rico Aqueduct & Sewer Authority v. U.S. EPA, 35 F.3d 600, at 606 (1st Cir. 1994) ("[d]ue process simply does not require an agency to convene an evidentiary hearing when it appears conclusively from the papers that on the available evidence, the case only can be decided one way.")

When a respondent is allowed to satisfy the Administrator's requirement to provide a "brief narrative summary" of an identified witness' testimony by providing nothing more than an identification of the subject matter of the witness' testimony (or failing to specifically identify a witness), the Administrator's delegated complainant has no knowledge of what respondent's evidence will disclose at any hearing. No opportunity will be provided for the Administrator's enforcement staff to evaluate the strength or weakness of the case, based upon the testimony expected to be presented at hearing. No opportunity will be provided for staff, prior to the actual hearing, to evaluate the relevancy and probative value of the testimony of a respondent's witnesses. Depending upon the outcome of that evaluation, the Administrator's enforcement staff might consider identifying new evidence to challenge what a witness would say in his or her testimony, or, if the circumstances warrant, amend the complaint, or, perhaps, even dismiss the case. Settlement positions of the respondent and complainant might also be impacted, if they know who will testify to what at the hearing.[3]

Moreover, without knowing what a particular witness will testify to at hearing, counsel cannot prepare for cross-examination. This circumstance can seriously affect the integrity of the fact-finding process.

A review of the Respondent's Initial Prehearing Exchange would leave any reasonable reader without any idea of the identities of some of the witnesses, of what some of the witnesses therein identified will be saying at any hearing regarding the condition of the specific Site property which is the subject matter of this proceeding, or of what "work" Respondent

[3]It should be emphasized that the same considerations should apply when the Administrator's delegated complainant, in any particular case, fails to identify for respondent what a witness it has identified will say in his or her testimony at hearing.

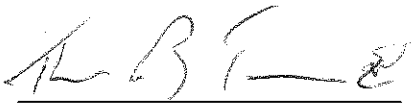
performed at that property. The identified witnesses and/or assertions of useful testimony proffered by Respondent, as previously noted above, are lacking in support from the documentary record. Equally, Respondent's Initial Prehearing Exchange is deficient in providing adequate and acceptable narratives in support of the affirmative defenses sought to be raised by Respondent. This is especially true of the specific portions of Respondent's Initial Prehearing Exchange that are noted in this Motion to Strike as irrelevant, lacking in probative value and without any direct foundation in the overall record. See Sections 22.15 and 22.19 of the Consolidated Rules of Practice, 40 C.F.R. §§ 22.15 and 22.19. Respondent's current submission, as is, is not in conformance with the Administrator's Rules, nor in conformance with the Prehearing Order of this Court.

CONCLUSION

Respondent's Initial Prehearing Exchange should be stricken at the specific sections noted in Complainant's Motion to Strike, as not in conformance with applicable law and the February 29, 2012 Prehearing Order.

Pursuant to this Court's February 29, 2012, Prehearing Order (at Section VI, pp. 5-6, "Procedures for Motions and Extensions of Time"), on May 10, 2012, Complainant contacted Respondent and sought to inquire as to whether Respondent would object to this Motion. Respondent has stated that he is not in agreement, and reserves the right to review and reply to this Motion.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the original and one copy of the attached Complainant's Motion to Strike Portions of Respondent's Initial Prehearing Exchange was filed with the Regional Hearing Clerk, U.S. EPA, Region 5, and that true, accurate and complete copies of Complainant's Motion to Strike Portions of Respondent's Initial Prehearing Exchange were served by Certified Mail, Return Receipt Requested, on Administrative Law Judge M. Lisa Buschmann and Mr. William Curran, Counsel for Respondent, on the date indicated below.

Administrative Law Judge

The Honorable M. Lisa Buschmann
Office of the Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

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Thomas P. Turner
Associate Regional Counsel
U.S. EPA - Region 5

Dated in Chicago, Illinois, this 11 day of May, 2012.