



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

MAR 30 2012

RECEIVED
MAR 30 2012

REPLY TO THE ATTENTION OF:

C-14J

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

REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

Re: U.S. EPA v. Joseph L. Bollig & Sons, Inc., Docket No. CWA-05-2011-0008
Filing of Complainant's Initial Prehearing Exchange

Dear Ms. Whitehead:

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

Sincerely yours,

Thomas P. Turner
Associate Regional Counsel

Enclosures

cc: Hon. M. Lisa Buschmann, ALJ (mail code: 1900L)
Greg T. Carlson, Water Division (WW-16J)
Kevin C. Chow, Esq., U.S. EPA, ORC, Region 5 (C-14J)
William T. Curran, Esq.,
Curran, Hollenbeck & Orton, S.C., Counsel for Joseph L. Bollig & Sons, Inc.



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

REPLY TO THE ATTENTION OF:

C-145

MAR 30 2012

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REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Hon. 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

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

Dear Judge Buschmann:

Enclosed please find one copy of the Complainant's Prehearing Exchange in the above referenced case. I have also filed the original and a copy with the Regional Hearing Clerk, and sent a copy to counsel for the Respondent, by certified mail, return receipt requested.

Sincerely yours,

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

cc: Joseph L. Bollig and Sons, Inc.
c/o: William T. Curran, Esq.,
Curran, Hollenbeck & Orton, S.C.

Ms. L. Whitehead,
U.S. EPA Regional Hearing Clerk
Region V

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

IN THE MATTER OF:)
)
Joseph L. Bollig and Sons, Inc.,)
New Lisbon, Wisconsin,)
)
)
)
)
)
Respondent.)

DOCKET No. CWA-05-2011-0008

**Honorable M. Lisa Buschmann
Administrative Law Judge**

RECEIVED
MAR 30 2012
REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

COMPLAINANT’S INITIAL PREHEARING EXCHANGE

In accordance with the Prehearing Order issued by this Honorable Court on February 29, 2012, Complainant, the United States Environmental Protection Agency, Region 5 (hereinafter, “EPA” or “the Agency”), through its undersigned attorney, hereby files the instant prehearing exchange pursuant to Section 22.19 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, codified at 40 C.F.R. Part 22, § 22.19.

A. COMPLAINANT’S PREHEARING EXCHANGE

I. LOCATION OF THE HEARING

Complainant believes that Madison, Wisconsin would be the appropriate location for the hearing in this matter. Respondent and most of the witnesses identified in this prehearing exchange live or engage in business in the proximity of Madison, and it would be less of a hardship upon these parties than if Complainant sought to hold the hearing in the Regional office of EPA in Chicago, Illinois. Complainant estimates that its case-in-chief to prove the specific

violations at issue in this case (Docket No. CWA-052011-0008) will be presented within 2 business days (approximately 12 hours of testimony).

II.A. The names of the expert and other witnesses intended to be called at hearing, with a brief narrative summary of their expected testimony.

Complainant may call any or all of the following individuals as expert or fact witnesses in the hearing in this matter:

- **Mr. Gregory T. Carlson, Life Scientist/Enforcement Officer, Watersheds and Wetlands Branch, U.S. Environmental Protection Agency, Chicago, IL.** Expert witness. Mr. Carlson will testify as to his preparation of a Request for Information (Request) which was issued to Respondent, on September 28, 2009, under the authority of Section 308 of the Clean Water Act (CWA), 33 U.S.C. § 1318, and Respondent's failure to answer said Request despite Mr. Carlson's subsequent issuance of a notice of noncompliance with the Request in November, 2009. Mr. Carlson will also testify about Site inspections documenting violations alleged in the Complaint. He will testify as to his knowledge and his inspection of adjacent and nearby property to establish the connectivity of Site wetlands and tributaries. He will also testify about his receipt and review of maps, aerial photographs and other materials relating to the Site and its characteristics, and to the violations alleged in the Complaint. Mr. Carlson will also testify as to his receipt of documents pertaining to the alleged violations and the characteristics of the Site from the Wisconsin Department of Natural Resources (WDNR) and the United States Army Corps of Engineers (USACE). He will further testify regarding the facts which demonstrate the appropriateness of the penalties proposed herein under the factors set forth in Section 309(g) of the CWA, 33 U.S.C. § 1319(g). If necessary, Mr. Carlson will provide testimony sufficient to authenticate certain exhibits

listed in Complainant's prehearing exchanges.

- **Ms. Simone Kolb, Project Manager, USACE, St. Paul District, Regulatory Branch, Waukesha, Wisconsin.** Fact witness. If called, Ms. Kolb may testify regarding her knowledge of the Site, its wetland characteristics, its proximity to the Site's flowing stream waters and connection to the downstream Lemonweir and Wisconsin Rivers, the alleged Site violations, and her preparation of a USACE wetlands Jurisdictional Determination Form (JD). Further, Ms. Kolb may testify as to the Respondent's post-violation efforts to comply with USACE directives. Ms. Kolb may also provide testimony sufficient to describe her communications with Respondent and to authenticate certain exhibits listed in Complainant's prehearing exchanges.
- **Mr. Chris Knotts, Project Manager, USACE, St. Paul District, Regulatory Branch, Plover, Wisconsin.** Fact witness. If called, Mr. Knotts may testify in support of Complainant's factual assertions regarding the Site and his history of regulatory involvement with Respondent, in support of Complainant's overall proposed penalty determination, and specifically with regard to the 'culpability' factor within the penalty determination. Mr. Knotts may also provide testimony sufficient to describe his communications with Respondent and to authenticate certain exhibits listed in Complainant's prehearing exchanges.
- **Mr. Will Stites, Project Manager, WDNR, Wisconsin Rapids, Wisconsin.** Fact witness. If called, Mr. Stites may testify in support of Complainant's determination of wetlands at the Site, and about his inspections of the Site and his communications with Respondent. Mr. Stites may also testify about his involvement with and knowledge of the WDNR permit process involving Respondent. If necessary, Mr. Stites may provide

testimony sufficient to authenticate certain documents included in Complainant's prehearing exchanges.

- **Ms. Deborah Dix, Environmental Enforcement Specialist, WDNR, Wisconsin Rapids, Wisconsin.** Fact witness. If called, Ms. Dix may testify in support of Complainant's determination of culpability in the proposed penalty, based upon Ms. Dix's communications with Respondent concerning the prior restoration of another wetland site (the Wonderly property) and indicating awareness of the CWA 404 program by Respondent prior to its actions at the Site.
- **Mr. Thomas Davenport, National Nonpoint Source Expert, EPA, Chicago, Illinois.** Expert witness. If called to testify, Mr. Davenport will testify as to his expertise in the scientific field of hydrogeology, and his professional opinion concerning the wetlands areas of the Site, the effects of Respondent's alleged unpermitted filling activities, and the overall potential damage to the ecology, water chemistry, biology and other significant factors involving the alleged unpermitted filling by Respondent.
- **Mr. Bradley Johnson, Stormwater Specialist, WDNR, Wisconsin Rapids, Wisconsin.** Fact witness. If called to testify, Mr. Johnson will testify as to his findings with regard to stormwater management at the Site, compliance with State law and his professional opinion with regard to the movement of sediments off-site and their effect on downstream waters. If necessary, Mr. Johnson may provide testimony sufficient to authenticate certain documents included in Complainant's prehearing exchanges.
- **Mr. Terrence Kafka, Waste and Nonpoint Source Water Specialist, WDNR, Wausau, Wisconsin.** Fact witness. If called to testify, Mr. Kafka will testify regarding his regulatory interactions with Respondent, and as to his specific knowledge of the

Respondent's lack of a CWA Section 404 permit at all times relevant to the violations charged herein.

- **Mr. Doug Wells, Manager, Mauston-New Lisbon Union Airport, Mauston, Wisconsin.** Fact witness. If called to testify, Mr. Wells may be called as a witness in support of Complainant's determination of the existence of wetlands at the Site, prior to the alleged unpermitted filling by Respondent. Mr. Wells would testify concerning the hiring of a private wetlands delineation company (MSA Professional Services) by the Mauston-New Lisbon Union Airport, and his receipt and later submission to EPA of the MSA wetland delineation report for the Site.
- **Mr. Bret Hillyer, Co-Owner of Respondent Company, New Lisbon, Wisconsin.** Fact witness. If called to testify by EPA, Mr. Hillyer may testify regarding his knowledge of and experience with WDNR and USACE wetland regulations; his company's failure to obtain a CWA Section 404 or WDNR permit for Site actions in 2008 and 2009; matters relevant to his credibility; and such other matters as deemed relevant and allowed by this Court. Given Mr. Hillyer's position as a co-owner of Joseph L. Bollig and Sons, Inc., Complainant requests the right to treat this witness as an adverse or hostile witness and to examine him through the use of leading questions.

II.B. Copies of all documents and exhibits intended to be introduced into evidence.

Complainant expects to offer the following documents into evidence:

1. COMPLAINANT'S EXHIBIT 1: USACE Approved Jurisdictional Determination Form (Re: Mauston-New Lisbon Union Airport wetland property), dated November 24, 2009 (Office Determination).

2. COMPLAINANT'S EXHIBIT 2: Invoices of Joseph L. Bollig and Sons, Inc. for work performed at Mauston-New Lisbon Union Airport in March and April, 2009. (Supplied by Airport).
3. COMPLAINANT'S EXHIBIT 3: WDNR Notice of Noncompliance-Wisconsin Wetland Law issued to Mauston-New Lisbon Union Airport, dated May 28, 2009 (copy to Mr. Brett Hillyer, Joseph L. Bollig and Sons, Inc.)
4. COMPLAINANT'S EXHIBIT 4: EPA Site Inspection Report, dated November 6, 2009 (with minor edits March 12, 2010).
5. COMPLAINANT'S EXHIBIT 5: EPA Site Inspection Report, dated March 23 and April 6, 2011.
6. COMPLAINANT'S EXHIBIT 6: EPA request to USACE for Joseph L. Bollig and Sons, Inc. file involving Airport and Wonderly properties and Clean Water Act Section 404 violations, dated September 28, 2009.
7. COMPLAINANT'S EXHIBIT 7: (Undated) USACE letter reply to September 28, 2009 EPA file request letter (See Complainant's Exhibit (CE) # 6) for Joseph L. Bollig and Sons, Inc. Clean Water Act Section 404 violation file, including spreadsheet of Bollig's name in USACE database.
8. COMPLAINANT'S EXHIBIT 8: EPA Clean Water Act Section 308 Information Request to Joseph L. Bollig and Sons, Inc.

(regarding work performed by Bollig at Airport),
dated September 28, 2009.

9. COMPLAINANT'S EXHIBIT 9: EPA Clean Water Act Section 308 Information
Request follow-up letter (to original CWA Section
308 September 28, 2009, Information Request) to
Joseph L. Bollig and Sons, Inc., dated
November 27, 2009.

10. COMPLAINANT'S EXHIBIT 10: March 12, 2010, Greg Wonderly response to EPA
Request for Information including a copy of private
litigation deposition transcript of Mr. Bret J. Hillyer
(co-owner of Respondent), dated February 3, 2010.

11. COMPLAINANT'S EXHIBIT 11: USACE Notice and After-the-Fact CWA Section
404 permit to Mauston-New Lisbon Union Airport
for Site wetlands filling violation, subject to proper
Site restoration, dated March 11, 2010.

12. COMPLAINANT'S EXHIBIT 12: (Undated) USACE "Report on the Navigable Status
of Major Waterways Within the Wisconsin River
Basin" with appendices A-M (including the
Lemonweir River).

13. COMPLAINANT'S EXHIBIT 13: EPA wetlands jurisdictional determination
memorandum of Greg Carlson, dated March 22,
2012.

14. COMPLAINANT'S EXHIBIT 14: EPA Notice of Intent to File/Small Business Reform Act letter to Joseph L. Bollig and Sons, Inc., dated January 26, 2011, and EPA state notice letter to WDNR alleging CWA Section 404 violation by Respondent and potential penalty, dated January 27, 2011.
15. COMPLAINANT'S EXHIBIT 15: USACE (S. Kolb) e-mail communication and photos to EPA (G. Carlson) concerning Site restoration work by Respondent, dated February 1, 2012.
16. COMPLAINANT'S EXHIBIT 16: February 9, 2011 letter from counsel for Respondent replying to EPA's January 26, 2011 (see CE # 14) NOI/SBREFEA Notice letter, and attached documents from Respondent in partial response to EPA September and November, 2009 CWA Section 308 Information Request and follow-up letters (see CE #s 8 and 9).
17. COMPLAINANT'S EXHIBIT 17: Respondent's March 25, 2011, letter to EPA enclosing a Supplemental Response to EPA's September, 2009 Request for Information.
18. COMPLAINANT'S EXHIBIT 18: USACE letter to Mauston-New Lisbon Union Airport declaring Site restoration incomplete, dated December 20, 2011.

19. COMPLAINANT'S EXHIBIT 19: December 7, 2009, Mauston-New Lisbon Union Airport Wetland Delineation from Airport's January 6, 2010, response to EPA's September, 2009 CWA Section 308 Information Request.
20. COMPLAINANT'S EXHIBIT 20: EPA Watershed map of Mauston-New Lisbon Union Airport site (Undated).
21. COMPLAINANT'S EXHIBIT 21: April, 1988 (revised June 26, 1991) Wisconsin Wetland Inventory (WWI) Map (excerpt) and WDNR WWI map from website: "<http://dnrmaps.wi.gov/imf/imfMainMap.jsp>".
22. COMPLAINANT'S EXHIBIT 22: January, 2010, Mauston-New Lisbon Union Airport contractor (MSA) memo/map on soil piles and excavated pits in site wetlands.
23. COMPLAINANT'S EXHIBIT 23: WDNR letter to Respondent and Greg Wonderly regarding wetland violation at Wonderly property, dated June 1, 2009.
24. COMPLAINANT'S EXHIBIT 24: WDNR Notice of Violation letter to Mauston-New Lisbon Union Airport for failing to obtain stormwater permit coverage at Site, dated November 6, 2009.
25. COMPLAINANT'S EXHIBIT 25: EPA Conversation Record between Mr. Greg Carlson (EPA) and Mr. Bret Hillyer (Respondent), dated December 15, 2009.

26. COMPLAINANT'S EXHIBIT 26: Joseph L. Bollig and Sons, Inc. website page [www.joebollig.com] excerpt (with EPA annotations), printed June 9, 2009.
27. COMPLAINANT'S EXHIBIT 27: (undated) EPA Corrected Public Notice for Joseph L. Bollig & Sons, Inc. August, 2010, administrative complaint.
28. COMPLAINANT'S EXHIBIT 28: WDNR Case Activity Report For Regulators documenting enforcement conference with Respondent's Bret Hillyer, dated September 24, 2009.
29. COMPLAINANT'S EXHIBIT 29: Excerpts from "Juneau County – The First 100 Years".
30. COMPLAINANT'S EXHIBIT 30: Webpages titled "Wisconsin Attractions: Wisconsin Canoeing and Kayaking Rivers", printed November 23, 2010. [www.wisconline.com/attractions/canoerivers].
31. COMPLAINANT'S EXHIBIT 31: EPA Office of Research and Development (ORD) June, 2007, Fact Sheet on Riparian Buffers and Aquatic Health, printed October 13, 2010.
32. COMPLAINANT'S EXHIBIT 32: Elroy Head Light newspaper article entitled, "Early Explorations in the Lemonweir Valley" by J. Kingston, dated March 25, 1875.

33. COMPLAINANT’S EXHIBIT 33: Excerpt from City of Mauston, WI website
[www.mauston.com], printed December 4, 2007.
34. COMPLAINANT’S EXHIBIT 34: Excerpt from Juneau County, Wisconsin, USA –
Juneau County Adventures – Historical Adventures
website [www.juneaucounty.com/Tourism], printed
November 18, 2010.
35. COMPLAINANT’S EXHIBIT 35: Excerpt from Wisconsin Historical Society’s Odd
Wisconsin Archive website
[www.wisconsinhistory.org], printed July 6, 2007.
36. COMPLAINANT’S EXHIBIT 36: Excerpt from “The Wisconsin Magazine of
History”, December, 1921, Volume V, Number 2.
37. COMPLAINANT’S EXHIBIT 37: Excerpt from “State of the Lower Wisconsin River
Basin - Report of the Lower Lemonweir River
Watershed”.
38. COMPLAINANT’S EXHIBIT 38: Westlaw’s Allaby et al. v. Mauston Electric Service
Co., 135 Wis. 345, 116 N.W. 4 (April 17, 1908).
39. COMPLAINANT’S EXHIBIT 39: Westlaw’s Burkman et al. v. City of New Lisbon,
246 Wis. 547, 191 N.W. 2d 311 (June 15, 1945).
40. COMPLAINANT’S EXHIBIT 40: Hunt Fish Camp Wisconsin Outdoor Directory
website’s [www.huntfishcampwisconsin.com]
excerpt for “Canoeing the Lemonweir River,
Wisconsin”, printed December 4, 2007.

41. COMPLAINANT’S EXHIBIT 41: EPA CWA Section 404 Interim Penalty Policy
Penalty Calculation for Respondent (Bollig’s) case,
dated March 22, 2012.
42. COMPLAINANT’S EXHIBIT 42: Dun and Bradstreet Financial Report on Respondent
(Joseph L. Bollig and Sons, Inc.), dated March 8,
2012.
43. COMPLAINANT’S EXHIBIT 43: Excerpt from “Soil Survey of Juneau County,
Wisconsin”.
44. COMPLAINANT’S EXHIBIT 44: Curriculum vitae of EPA’s identified expert
witnesses – Mr. Greg T. Carlson and Mr. Thomas
Davenport.
45. COMPLAINANT’S EXHIBIT 45: Website of EPA CWA Section 404 Interim
Settlement Penalty Policy:
[http://water.epa.gov/type/wetlands/outreach/upload/
404pen.pdf](http://water.epa.gov/type/wetlands/outreach/upload/404pen.pdf)
46. COMPLAINANT’S EXHIBIT 46 “Small Wetlands and the Cumulative Impacts of
Small Wetland Losses: A Synopsis of the
Literature”, Wisconsin Department of Natural
Resources (May 1998).
47. COMPLAINANT’S EXHIBIT 47 “Where Rivers Are Born: The Scientific Imperative
for Defending Small Streams and Wetlands”,
American Rivers and Sierra Club (February 2007).

Copies of these exhibits are attached to this Prehearing Exchange.

II.C By Complainant (Documents in Support of Factual Allegations in the Complaint Not Admitted By Respondent)

1. State the factual basis for the allegations in paragraphs 1-13, 15 of the Complaint.

Specific documents which support this allegation include Complainant's Exhibits 13, 14, 16, and 17. Otherwise, judicial notice of the applicable portions of the CWA statute and underlying regulations support the above mentioned allegations.

2. Provide any documents which support the assertion in paragraph 14 that "Joseph L. Bollig and Sons, Inc." is a corporation located in and doing business in Wisconsin.

Specific documents which support this allegation include Complainant's Exhibits 26 and 42.

3. Provide any documents which support the allegations in paragraphs 16-18 of the Complaint.

Specific documents which support these allegations include Complainant's Exhibits 1-5, 11, 13, 18-19, and 22.

4. State the factual basis which supports the allegation in paragraph 19 that "unnamed tributary number 1 is a relatively permanent water which flows into the Lemonweir River", and that "the Lemonweir River is historically a Traditional Navigable Water."

Specific documents which support this allegation include Complainant's Exhibits 4-5, 12-13, 19-22, and 29-40.

5. State the factual basis which supports the allegation in paragraph 20 that the Lemonweir River "is a tributary to the Wisconsin River, an interstate water body."

Specific documents which support this allegation include Complainant's Exhibits 12, 19-21, and 29-40.

6. State the factual basis which supports the allegation in paragraph 21 that prior to Respondent's filling activities, unnamed tributary number 1 exhibited seasonal characteristics of water flow.

Specific documents which support this allegation include Complainant's Exhibits 1, 4-5, 13, 19, and 22.

7. **State the factual basis which supports the allegation in paragraph 22 that unnamed tributary number 1 is a water of the United States.**

Specific documents which support this allegation include Complainant's Exhibits 1, 4-5, 13, 19, and 22.

8. **State the factual basis which supports the allegation in paragraph 24 that between approximately February, 2008 and March, 2009 Respondent Bollig performed or directed the discharge of dredged and fill material and organic debris from excavators and bulldozers into approximately 7 acres of forested and scrub/shrub wetland occupying a portion of Airport property.**

Specific documents which support this allegation include Complainant's Exhibits 2-4, 11, 14-19, and 22.

9. **State the factual basis which supports the allegation in paragraph 25 that at no time prior to or during the filling actions at the Site (Airport) in 2008-2009, did Respondent Bollig have a CWA Section 404 permit.**

Specific documents which support this allegation include Complainant's Exhibits 3, 11, 14-17.

10. **State the factual basis which supports the allegation in paragraph 26 that the dredge material and organic debris discharged into the unnamed tributary (unnamed tributary number 1) on the Site (Airport) property constitute "pollutants" as defined by CWA Section 502(6), 33 U.S.C. § 1362(6).**

Specific documents which support this allegation include Complainant's Exhibits 4-5, 13, 19 and 22, and Complainant would seek to request the court take judicial notice of the CWA statute at the above referenced section.

11. **State the factual basis which supports the allegation in paragraph 27 that excavators and bulldozers are discernible, confined and discrete conveyances, specifically rolling stock, and constitute "point sources" as defined by CWA Section 502(14), 33 U.S.C. § 1362(14).**

Specific documents which support this allegation include Complainant's Exhibits 4-5, 13, 19, and 22, and Complainant would seek to request the Court take judicial notice of the CWA statute at the above referenced section.

12. **State the factual basis which supports the allegation in paragraph 28 that the addition of dredge material and organic debris from excavators and bulldozers, or earth moving equipment, into wetlands and/or waters of the United States constitutes a "discharge of a pollutant" as defined by CWA Section 502(12), 33 U.S.C. § 1362(12).**

Specific documents which support this allegation include Complainant's Exhibits 4-5, 13, 19 and 22, and Complainant would seek to request the Court take judicial notice of the CWA statute at the above referenced section.

- 13. State the factual basis which supports the allegations in paragraphs 29 and 30 that Respondent Bollig is a person who discharged pollutants from a point source into waters of the United States, without a permit, and that each day that the pollutants remain in the waters of the United States constitutes a continuing violation (and additional day of violation) of CWA Sections 301 and 404, 33 U.S.C. §§ 1311 and 1344.**

Specific documents which support this allegation include Complainant's Exhibits 3-5, 11, 13, 19, and 22. Further, should this Court take judicial notice of the statute, and affirms Complainant's allegations at Complaint paragraphs 15, 17, and 25, then Complaint paragraphs 29 and 30 should also be affirmed.

- 14. State the factual basis which supports the allegations in Complainant's Proposed Civil Penalty section of the Complaint.**

Specific documents which support this allegation include Complainant's Exhibit 20, and the further explanation of Complainant's application of CWA Section 309(g), 33 U.S.C. §1319(g) below.

III. PROPOSED PENALTY EXPLANATION

Nature, Circumstances, Extent and Gravity of the Violations

The following is an explanation of the \$60,000 civil penalty calculated by the Water Division, U.S. EPA, pursuant to Section 309(g) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g). After January 12, 2009, EPA is authorized to assess a Class II penalty of \$16,000 per day of violation up to a maximum of \$177,500 (and \$11,000 per day of violation up to a maximum of \$157,500 after March 14, 2004 and up to January 11, 2009). The subject penalty was calculated by the U.S. EPA Water Division in consideration of the factors listed in Section 309(g)(3) of the CWA, 33 § U.S.C 1319(g)(3), as discussed below.

Nature and Extent of Violations

The alleged violation, at the Mauston-New Lisbon Union Airport, was for the purpose of meeting Federal Aviation Administration and State regulations regarding the appropriate

vegetation adjacent to airport runways. In other words, the Airport believed it necessary to remove trees and shrubs off the southwest edge of its single, northwest to southeast oriented runway. The Airport hired Joseph L. Bollig & Sons, Inc. to complete this type of work without a written contract specifying the conditions of that work. Thenceforth, the basic nature of the alleged violation consisted of repeated and prolonged discharges of pollutants (i.e., organic debris and soil) into approximately seven (7) acres of forested and shrub-scrub wetlands (i.e., waters of the United States) from back hoes and front end loaders (i.e., point sources) without obtaining permits issued under Section 404 of the CWA prior to commencing the work. Thus, the alleged violations resulted from the mechanized land clearing of trees and shrubs and land leveling throughout the entire seven (7) acres, and then the excavation of numerous holes in which the accumulated organic debris were to be buried. The hole excavations resulted in numerous spoil piles of excavated soil adjacent to the holes – covering approximately 0.52 acres scattered throughout the site. The alleged violations began in the winter of 2008, occurring on multiple days, and were reportedly completed on multiple days in the winter of 2009 (February and March, 2009).

After discovery of the alleged violations in May, 2009, the Airport agreed to restore the Site wetlands, minus the trees and shrubs, and in March, 2010 a Section 404 Letter of Permission to control the parameters of site restoration - not to permit fill to remain in place – was issued. The Section 404 Letter of Permission applied to the Airport's approximately seven (7) acres of former forested and shrub-scrub wetlands. These wetlands abutted a relatively permanent, though unnamed, waterway straightened for drainage purposes which flows for about one mile to the Lemonweir River - a historically navigable stream. The Lemonweir River subsequently flows about 13 miles and empties into the Wisconsin River – a water of the United

States. The earth moving aspects of the Site restoration were completed in late 2010 and the vegetation seeding and planting was completed in Spring 2011.

1. Circumstances

Since 1958, according to the Respondent's company website, Bollig has been in the earth moving business. In the course of time, it is common for such businesses to work in or near waters. Operators, as well as landowners, are considered liable parties under the regulatory framework of the Clean Water Act. EPA believes Bollig displays a high degree of culpability for undertaking the Airport work without a Section 404 permit based on its prior work history in the Section 404 regulatory program. The USACE, who issues the Section 404 permits, maintains a database tracking permit applicants. The USACE database contains six (6) permit actions that predate the Airport work in which Bollig was involved as an "Agent" or "Contractor" of the permittee (i.e., usually involved in constructing landowner permitted work). A USACE Project Manager in the central Wisconsin area in which Bollig conducts business, will testify to his discussions with Mr. Bret Hillyer, Bollig's President, regarding the Section 404 permitting regulations – all prior to his Airport work.

In addition, Bollig was the earth moving contractor at the Greg Wonderly site in New Lisbon, Wisconsin, between 2005 and 2006. Mr. Wonderly received a cease and desist letter from the USACE in February 2007 for site wetland fill violations where Bollig, as a contractor, had completed the cited work. In 2009-10, Bollig agreed, under the auspices of a WDNR action, to restore approximately six (6) acres of forested wetland disturbed at this site, including a County ditch. Mr. Wonderly has stated that he does not remember whether he told Bollig about the USACE's cease and desist letter in 2007. Mr. Wonderly would not to identify Bollig to the USACE. Also, Mr. Wonderly and Mr. Bret Hillyer, a representative of Bollig, were disputants

in a related state legal action over money allegedly owed to Bollig for its work involving Mr. Wonderly's alleged wetland violation site. Mr. Bret Hillyer is the current owner of the Wonderly parcel – an apparent result of the resolution of the legal dispute between Mr. Wonderly and Mr. Hillyer. In light of the amount involved with regard to the dispute between Mr. Wonderly and Mr. Hillyer, reported to be between \$80,000 and \$148,000, EPA believes it is likely that Mr. Hillyer was aware of the wetlands issue on Mr. Wonderly's property because it was the genesis of the dispute between them over lack of payment to Bollig for the alleged wetland violation on-site. This view is buttressed by the deposition of Mr. Bret Hillyer taken in the Wonderly-Bollig legal matter in which he talks about his knowledge of wetlands and whether wetlands existed on the former Wonderly parcel. Similar views were expressed by Mr. Bret Hillyer in his WDNR enforcement meeting over restoring the Wonderly wetlands.

The Mauston-New Lisbon Union Airport Commission (Commission) received a bid from Bollig in 2007 regarding the clearing of trees and shrubs from lands adjacent to its runway. In that bid, Bollig acknowledged the “wetness” of the site affected the scheduling of the work. The Commission, for its part, subsequently hired Bollig to complete the work in early 2008 and early 2009. There is no written contract describing the job specifications or need for any type of permit. There is no further information regarding the work relationship between the two parties in the record other than the payments the Airport made to Bollig for the work.

2. Ability to Pay

EPA has reviewed a Dun & Bradstreet report on Bollig that shows that it has existed since 1961, and is in the excavation and logging business. Further, Bollig has a good credit rating, maintains many loans from different financial institutions, and pays its suppliers nearly on time. Bollig, even after receipt of EPA's January 2011 pre-filing Notice Letter, which

specifically asked about its ability to pay a penalty, has not formally raised an “ability to pay” issue.

3. Prior History of Violations

Bollig has no prior history of CWA Section 404 violations, however, EPA notes that Respondent was involved in the Wonderly violation in 2005-2006 and 2009-2011. When asked by the USACE, Mr. Wonderly refused to name Bollig as the contractor, presumably given the dispute between Bollig and Mr. Wonderly. The USACE sent Mr. Wonderly a cease and desist letter in February 2007, prior to Bollig’s Airport work.

4. Culpability

EPA believes Bollig’s culpability is high regarding its filling work for the Airport. Bollig has been in the earth moving business since at least 1961. Earthmovers, as demonstrated below by Bollig, sometimes work in waters. Bollig is listed in the USACE permit tracking database for six permit actions and is listed as the “Agent” or “Contractor”. According to the USACE, it has discussed its Section 404 regulatory program with Mr. Bret Hillyer directly and prior to the Airport’s alleged violation. Further, given that USACE permits are required to be posted at jobsites and that permits control job scheduling, it is likely that Bollig was aware of the need for earth moving permits related to its professional work. Because of the institutional knowledge and regular interaction of entities such as Bollig with state and federal regulators, EPA considers professional earth moving contractors, such as Bollig, to serve as essentially a “second line of defense” for the CWA wetlands and watersheds protection programs. In addition, Bollig exhibited knowledge that wetlands are a regulatory issue that earth moving firms must address in Mr. Brett Hillyer’s deposition regarding the Wonderly-Bollig dispute and in Bollig’s enforcement meeting with the WDNR and the USACE in September, 2009.

5. Economic Benefit

EPA believes that Bollig, in its normal business operations, prices its services so as to earn a profit and did so when invoicing the Airport for clearing and filling forested and shrub scrub wetlands that underlie the current action.

6. Other Matters as Justice May Require

In 2009, Bollig refused to submit information to EPA under a valid CWA Section 308 Request for Information even after receiving a follow-up letter emphasizing the enforceability of the Request. Only after receiving EPA's 2011 pre-filing letter, did Bollig respond to the 2009 Request for Information. However, EPA believes that Respondent's response remains incomplete because it failed to produce requested and relevant information regarding its work at the Wonderly site which was being investigated simultaneously by EPA. EPA believes an increase in the penalty is warranted by Bollig's obstruction of EPA's other investigation. Further, neither the Airport nor Bollig received a stormwater permit under Section 402 of the Clean Water Act prior to performing land disturbing activities (at the Airport property) on greater than one acre. While EPA has not included a Section 402 count in its complaint, this fact contributes to the potential harm from the mechanized land clearing and excavation by allowing sediments an easier path to receiving waters. EPA's Site inspection found evidence of sediments entering surface waters on the Site. The Site was unprotected for over two years before a permit was issued to restore the Site.

The Water Division of EPA Region 5 has arrived at the proposed penalty of \$60,000 based on the facts of this case. While there may have only been indirect and potential harm to human health or welfare and the environment, Respondent's degree of culpability is great, and the need has arisen, as a result of their unauthorized actions, to deter Bollig specifically and the

regulated community generally from future violations of this nature as these activities may cause adverse cumulative impacts on a watershed scale. Based on consideration of the factors set forth in Section 309(g) of the CWA, the Water Division of EPA Region 5 deems a penalty of \$60,000 to be an appropriate initial calculated penalty for the violations alleged against Bollig.

Conclusion

For the reasons set forth above, Complainant proposes that EPA assess a penalty of \$60,000.00. However, Complainant may reduce the proposed penalty should Respondents provide the necessary financial information relevant to an assessment of each Respondent's ability to pay, and should Complainant's review of such information demonstrate that a reduction is warranted.

IV. PAPERWORK REDUCTION ACT OF 1980

A statement regarding whether the Paperwork Reduction Act of 1980 (PRA), 44 U.S.C. § 3501, *et seq.*, applies to this proceeding, whether there is a current Office of Management and Budget control number involved herein, and whether the provisions of Section 3512 of the PRA are applicable in this case.

The Paperwork Reduction Act of 1980, 44 U.S.C. § 3501, *et seq.*, is not applicable to this proceeding. The Complaint alleges substantive violations of the Clean Water Act (i.e., discharges of pollutants into waters of the United States without a permit), and does not involve the collection of information. EPA did issue a request for information (and a follow-up request) to the Respondent pursuant to Section 308(a) of the Act, 33 U.S.C. § 1318(a). (See Complainant's Exhibits 8 and 9). The request for information did require Respondent to submit certain information to EPA, however, the request for information was not subject to the Paperwork Reduction Act because it sought collection of information in an investigation involving U.S. EPA and specific individuals or entities. See 44 U.S.C. § 3518(c).

Complainant respectfully reserves the right to refer to other documents which may

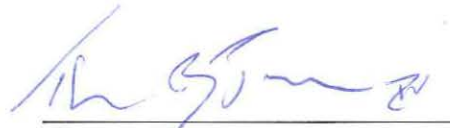
support the allegations of paragraphs 1-30 of the Complaint in subsequent pleadings or at hearing.

B. RESERVATION OF RIGHTS

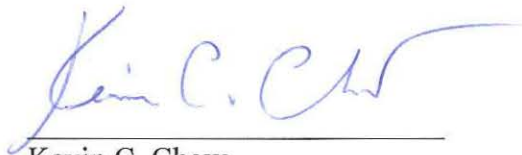
Complainant respectfully reserves the right to file a motion in the future seeking leave to supplement its list of witnesses and/or its list of exhibits upon reasonable notice to Respondent, and by concurrence and order of this Honorable Court.

Complainant's Prehearing Exchange for In the Matter of Joseph L. Bollig and Sons, Inc. is hereby respectfully submitted.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the original and one copy of the attached Complainant's Initial Prehearing Exchange, for In the Matter of Joseph L. Bollig and Sons, Inc., Docket No. CWA-05-2011-0008, was filed with the Regional Hearing Clerk, U.S. EPA, Region 5, and that true, accurate and complete copies of Complainant'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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MAR 30 2012
REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

Dated in Chicago, Illinois, this 30 day of March, 2012.



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