

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

IN THE MATTER OF:)
)
Service Oil, Inc.,) **Docket No. CWA-08-2005-0010**
)
.Respondent)

**ORDER ON MOTIONS FOR LEAVE
TO SUPPLEMENT PREHEARING EXCHANGE**

I. Background

The Complaint in this matter, filed on February 22, 2005 by the United States Environmental Protection Agency Region 8 under Section 309 of the Clean Water Act (CWA), alleges in Count 1 that Respondent failed to obtain, on or before the date it commenced construction activities at its facility, a North Dakota Pollutant Discharge Elimination System (NDPDES) permit authorizing storm water discharges from its facility, in violation of Section 301(a) and 402(p) of the CWA and the implementing regulations at 40 C.F.R Section 122.26(c). The Complaint alleges in Count 2 that after Respondent obtained the permit, it failed to conduct storm water inspections at the frequency required by the permit, and/or to maintain inspection records on-site. By Order dated March 7, 2006, Respondent has been found liable for Count 2. The parties have filed prehearing exchange documents and are preparing for the hearing in this matter, scheduled to commence on April 25, 2006, on the issues of Respondent's liability for Count 1 and the penalty to assess for the violations.

On March 23, 2006, Complainant filed a Motion for Leave to File Supplemental Prehearing Exchange and to Correct Previous Prehearing Exchange (Complainant's Motion), seeking to add an expert witness, Sandra G. Doty, and several documents, designated as Complainant's proposed Prehearing Exhibits 32 to 42, to its Prehearing Exchange. On April 6, 2006, Respondent submitted an Opposition to the Motion, to which Complainant filed a Reply on April 11, 2006. Also on that date Complainant filed a Motion for Leave to Amend Prehearing Exchange to add two sentences to the proposed testimony of one of its witnesses, and to delete two other proposed witnesses.

On April 7, 2006, Respondent submitted a Motion for Leave to Supplement its

Prehearing Exchange (Respondent's Motion).

II. Complainant's Motion to Supplement Prehearing Exchange

A. Arguments of the Parties

Complainant files its Motion under authority of Rule 22.19(f) of the Consolidated Rules of Practice (Rules), 40 C.F.R. § 22.19(f), which provides that "A party who has made an information exchange . . . shall promptly supplement or correct the exchange when th party learns that the information exchanged . . . is incomplete, inaccurate or outdated"

Complainant asserts that Respondent only recently raised as a defense that prior to storm water discharging into the Red River, dirt and sediment in the storm water flows into and settles to the bottom of the detention pond connected to the City of Fargo's Municipal Separate Storm Water Sewer System (MS4). Complainant asserts that the defense was first raised in Respondent's January 5, 2006 Opposition to the Motion for Accelerated Decision, and was discussed again in Respondent's Prehearing Brief and Addendum Re: Total Discovery Failure, dated February 16, 2006. Upon such new assertions, Complainant states, it found that none of its existing witnesses were qualified to testify as an expert witness regarding the detention pond, so it searched for and found a new expert, Ms. Doty, who is an expert in engineering and functions of storm drains and detention ponds. She will testify to drainage runoff from Respondent's facility draining into the MS4, and hydrology of the Fargo area, including impacts on the Red River from storm water runoff that drained from Respondent's facility. Complainant intends to establish that storm water runoff does not settle out in the detention pond and collect all drainage from the site.

Complainant also seeks to include in its Prehearing Exchange Ms. Doty's resume and report (Complainant's proposed Prehearing Exchange Exhibits (C's Exs. 40 and 42), an EPA list of impaired waters and Red River Basin: Conventional Parameters, 2006 Impaired Waters Requiring a TMDL (C's Exs. 32 and 33), a demonstrative exhibit Table of Precipitation Events April-October 2002 which is a compilation of data stipulated to by Respondent (C's Ex. 34), photographs of the detention pond and lift station (C's Exs. 35, 36 and 37), lift station maintenance manual and detention pond model (C's Exs. 38 and 39), and Respondent's Prehearing Exchange Exhibits 9 and 12 (remarked C's Ex. 41(a)-(d)). Complainant asserts that C's Exs. 32 and 33 are new evidence from the State of Minnesota regarding water quality of the Red River, not known at the time Complainant submitted its Prehearing Exchange, but similar to C's Ex. 24, which is North Dakota Standards of Water Quality.

Complainant seeks to correct its Prehearing Exchange to withdraw Diane Sipe as a witness and C's Exs. 27, 28, and 29, which were proposed to show that EPA had consulted with the North Dakota Department of Health, as required under Section 309(g)(1)(A) of the CWA. Complainant seeks this correction in response to the exclusion of testimony relating to the consultation requirement, by Order dated March 17, 2006.

Respondent's position is that it will be unduly prejudiced if Complainant's Motion is

granted and that the proposed evidence is not admissible. Respondent contests Complainant's argument that it was surprised by or not aware of the detention pond issue, pointing out that Complainant referred in its September 20, 2005 Prehearing Exchange (C's Ex. 23) to storm water runoff flowing into the detention pond. Further, Respondent points out that Complainant in its Motion for Subpoena summarized the proposed testimony of its engineering expert, Mark Bittner as including the discharge from Respondent's site to "waters of the United States" (here the Red River), and "his knowledge of detention ponds." Respondent asserts that Complainant already proposed Mr. Bittner to testify to the detention pond, and that Respondent will be prejudiced by having to spend an extensive amount of time to prepare additional cross examination for the new witness, Ms. Doty, which includes calculations of the potential discharge of sediment from Respondent's construction site. In addition, Respondent argues that Ms. Doty's testimony would be unduly repetitious of Mr. Bittner's testimony and will not assist a determination of whether a discharge occurred and the potential environmental effect of such discharge.

Respondent argues further that Ms. Doty's calculations of potential discharge from Respondent's site (C's Ex. 42) are inadmissible for being based on insufficient facts, and therefore her expert testimony is not competent under *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the "spirit" of which is to be used in administrative hearings, as held in *Lobsters, Inc. v. Evans*, 346 F. Supp. 2d 340, 344 (D. Mass. 2004), and under Federal Rule of Evidence 702, which requires expert testimony to be "based upon sufficient facts or data." In support, Respondent states that her calculations are not the product of any test performed on storm water collected from the site at the time of the alleged violations, but that her calculations are based on a map dated May 2, 2002, that the site's topography would change as construction advanced, that a single aerial photo has low reliability for calculating these changes, and that the calculation does not take into account impervious surfaces, changing soil conditions, intensity of rainfall, soil permeability, or weather conditions. If Complainant can use Ms. Doty's testimony, Respondent argues, then it should be allowed to present rebuttal testimony.

Respondent also argues that when Complainant initiated this case and proposed the penalty, it did not rely upon the new impaired water studies (C's Exs. 32, 33) or evaluate potential harm from Respondent's activities, that they are from 2004 and not the year (2002) of the alleged violations, and do not include authenticating data and methodology. Respondent argues that the pictures of the Lift Station (C's Ex. 36) are incomplete as not depicting the entire area surrounding it and the portion of the MS4 at issue, Cass County Drain No. 10. Respondent requests that if these photos are admitted, that it be permitted to present photos showing Drain No. 10.

In its Reply, Complainant asserts that Mr. Bittner will not be called as an expert, and is expected to testify as to how the storm drains are connected to the Red River, but not as to details of erosion from the site or sediment transport from the site through the MS4. Complainant asserts that Respondent's objections are relevant to the weight of testimony and evidence, rather than admissibility.

B. Discussion and Conclusions

Complainant has submitted its Motion to Supplement more than fifteen days prior to the hearing, and thus does not need to show good cause for failing to supply the documents sooner under the Rules, 40 C.F.R. § 22.22(a)(1).¹ However, filing supplements to prehearing exchanges more than fifteen days prior to hearing does not guarantee that they will be accepted into the prehearing exchange. Such a guarantee may allow parties to unfairly disadvantage their opponent by holding back significant information until a couple of weeks prior to the hearing, when opposing counsel may not have sufficient opportunity to review it, respond, and prepare rebuttal testimony and exhibits. Such a guarantee would in effect make the prehearing exchange deadlines meaningless. Indeed, 40 C.F.R. § 22.19(f) requires a party to supplement a prehearing exchange “*promptly . . . when the party learns that the information exchanged . . . is incomplete, inaccurate or outdated*” unless it has been otherwise disclosed (emphasis added). Thus, where the supplement is not prompt or where the existing information is not incomplete, inaccurate or outdated, and particularly where there is evidence of bad faith, delay tactics, or undue prejudice, supplements to prehearing exchanges may be denied. Consequently, the undersigned requires parties to file motions to supplement prehearing exchanges, in which they can provide reasons for filing the supplement and failing to supply the information sooner. A party failing to file such motion or provide such reasons, although not necessarily in violation of the Rules, simply runs the risk of being considered to be acting in bad faith or engaging in delay tactics.

Although Complainant’s Prehearing Exchange indicates that any discharge of stormwater from Respondent’s site would flow into the detention pond before flowing into the Red River, there is no indication in the case file that at the time of the Prehearing Exchange Complainant was aware of Respondent’s argument that dirt and sediment in the storm water runoff *settles to the bottom* of the detention pond. Therefore, Complainant is not acting in bad faith or engaging in delay tactics by its request to add Ms. Doty as an expert witness and to include her report and resume (C’s Exs. 40 and 42), photographs of the detention pond and lift station (C’s Exs. 35, 36 and 37), lift station maintenance manual (C’s Ex. 38) and detention pond model (C’s Ex. 39) in the Prehearing Exchange.

As to whether Respondent would suffer undue prejudice from including these exhibits in the Prehearing Exchange, and adding the expert witness testimony of Ms. Doty, the question is whether Respondent would have a reasonable opportunity to review the new exhibits and prepare cross examination and any rebuttal testimony and evidence. The proposed new exhibits and expert testimony were submitted with Complainant’s Motion one month before the hearing

¹ “If . . . a party fails to provide any document, exhibit, witness name or summary of expected testimony required to be exchanged under § 22.19(a), (e) or (f) to all parties at least 15 days before the hearing date, the Presiding Officer shall not admit the document, exhibit or testimony into evidence, unless the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information, or had good cause for not doing so.” 40 C.F.R. § 22.22(a)(1).

date. Respondent has requested to supplement its Prehearing Exchange with testimony and evidence apparently in rebuttal to Ms. Doty's testimony and related proposed exhibits. Specifically, Respondent has requested to add an expert witness to testify about Cass County Drain No. 10 and the flow of water and sediment in it, a City of Fargo engineer to testify as a fact witness regarding drainage of storm water from the area of Respondent's site, and several documents regarding, and photographs of, Cass County Drain No. 10. In these circumstances, it is concluded that Respondent would not be unduly prejudiced by the Complainant's request to supplement its Prehearing Exchange to add testimony of Ms. Doty and proposed exhibits, C's Exs. 35 through 40 and 42.

The Rules provide as to admissibility of evidence that "The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value . . ." 40 C.F.R. § 22.22(a)(1). As Complainant has clarified Mr. Bittner's testimony, Ms. Doty's proposed testimony does not appear to be unduly repetitious of Mr. Bittner's proposed testimony.

As to Respondent's claim that her testimony and report are inadmissible for being based on insufficient facts under Federal Rule of Evidence 702 and *Daubert*, such a claim prior to the hearing that evidence is inadmissible would be considered as a motion in limine, which "should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose." *Noble v. Sheahan*, 116 F.Supp. 2d 966, 969 (N.D. Ill. 2000). Respondent cited to a case which held that "'the spirit of *Daubert*' does apply to administrative proceedings because 'junk science' has no more place in administrative proceedings than in judicial ones." *Lobsters, Inc. V. Evans*, 346 F. Supp. 2d 340, 344 (D. Mass. 2004)(quoting, *Niam v. Ashcroft*, 354 F.3d 652, 660 (7th Cir. 2004). The court stated that it is the reliability requirement in the procedural rule of evidence applicable in that case², which is almost identical to that of 40 C.F.R. § 22.22(a)(1), which "adopts the 'spirit of *Daubert*' as the standard to be used in connection with administrative hearings." While that court also stated that the *Daubert* factors can be used by an ALJ to exclude testimony from a hearing if he finds it to be unreliable,³ the Environmental Appeals

² The rule applicable in *Lobsters, Inc.* is "All evidence that is relevant, material, reliable, and probative, and not unduly repetitious or cumulative, is admissible at the hearing. Formal rules of evidence do not necessarily apply to the proceedings, and hearsay evidence is not inadmissible as such." 15 C.F.R. § 904.251(b).

³ But see, *U.S. Steel Mining Co. v. Director, Office of Worker's Compensation Programs, Dep't of Labor*, 187 F.3d 384, 389 (4th Cir. 1999):

[In] an agency proceeding the gatekeeping function to evaluate evidence occurs when the evidence is considered in decisionmaking rather than when the evidence is admitted. Even though it arises later in the administrative process than it does in jury trials, the ALJ's duty to screen evidence for reliability, probativeness, and substantiality similarly ensures that agency decisions will be based on evidence of

Board has held that the *Daubert* factors are not controlling in administrative hearings. *Solutia, Inc.* CERCLA App. No. 00-1 (EAB, Nov. 6, 2001). In any event, Complainant has not yet laid the foundation for Ms. Doty's testimony and report, and Respondent has not provided any specific challenge to the reliability of anything in Ms. Doty's report, so at this point in the proceeding there is no basis upon which to rule that her testimony or report are inadmissible.

As to the new impaired water studies, C's Exs. 32 and 33, there is no requirement that evidence be considered and relied upon by Complainant when it calculated the proposed penalty for it to be admissible as to the penalty at the hearing. Complainant is not required to present authenticating data or methodology of the studies in the prehearing exchange. Such information may be presented at the hearing. Any lack of such information at this point in the proceeding, and any issue as to the date of the studies, does not make them "clearly inadmissible for any purpose."

III. Respondent's Motion to Supplement

Respondent's Motion seeks to add as a proposed expert and fact witness John Wirres, a Cass Water Resource District engineer, to testify as to Cass County Drain No. 10, and to add proposed fact witnesses Josh Roaldson, Mark Bittner and April Walker to its Prehearing Exchange. Respondent also seeks to add documents marked as R's Exs. 21 through 35 to its Prehearing Exchange.

Respondent did not state whether or not Complainant objects to Respondent's Motion, but Complainant stated that it is not objecting to Respondent's proposed amendments to its Prehearing Exchange. Complainant's Reply, dated April 11, 2006, n. 1. Accordingly, as Complainant does not object, and Respondent has filed its Motion to Supplement at least 15 days before the hearing date, Respondent's Motion to Supplement will be **granted**.

IV. Complainant's Motion to Amend Prehearing Exchange

Complainant seeks to withdraw its proposed penalty witness, Melanie Pallman, who was to testify as to the economic benefit of Respondent's noncompliance, and to substitute testimony of a proposed witness who is currently listed in Complainant's Prehearing Exchange, Aaron Urdiales, as to economic benefit. Complainant asserts that the testimony will be the same as that in its initial Prehearing Exchange, and that Mr. Urdiales' testimony is being offered for purposes of efficiency and judicial economy at the hearing.

Complainant also seeks to add to Mr. Urdiales' testimony the subject of harm to the

requisite quality and quantity.

environment caused by discharges of sediment from Respondent's site. Complainant asserts that it was an oversight not to include this in the summary of his testimony, that it first noticed the oversight on April 10th, and that Complainant has always made clear that the harm to the environment is an issue in this case.

Complainant also seeks to withdraw Patricia Ochoa from its witness list as her testimony is not required.

Given the nature of this Motion, the volume of motions that have been recently filed, and the fact that the hearing is to commence within just a few days, it is deemed unnecessary to wait until any response is filed by Respondent before ruling on the Motion. The subject of environmental harm is clearly at issue in this case, and the Initial Prehearing Exchange stated that Mr. Urdiales would testify as to the drainage pattern forcing water off-site, so there is no surprise that he would testify to environmental harm. There is no reason for Respondent to be prejudiced or disadvantaged by the Complainant's proposed amendments to its Prehearing Exchange. Accordingly, the Motion to Amend will be **granted**.

ORDER

1. Complainant's Motion for Leave to File Supplemental Prehearing Exchange and to Correct Previous Prehearing Exchange is **GRANTED**.

2. Respondent's Motion for Leave to Supplement its Prehearing Exchange is **GRANTED**.

3. Complainant's Motion for Leave to Amend Prehearing Exchange is **GRANTED**.

Susan L. Biro
Chief Administrative Law Judge

Dated: April 12, 2006
Washington, D.C.

In the Matter of Service Oil, Inc., Respondent
Docket No. CWA-08-2005-0010

CERTIFICATE OF SERVICE

I certify that the foregoing **Order On Motions For Leave To Supplement Prehearing Exchange**, dated April 12, 2006, was sent this day in the following manner to the addressees listed below:

Maria Whiting-Beale
Legal Staff Assistant

Dated: April 12, 2006

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