

BEFORE THE ENVIRONMENTAL APPEALS BOARD
ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:

Dave Erlanson, Sr., Individual,

Docket No. CWA-10-2016-0109

CWA Appeal No. 20-03

**EPA’S REPLY TO APPELLANT’S
RESPONSE TO THE ORDER TO SHOW
CAUSE**

Pursuant to the Environmental Appeals Board’s (“EAB” or the “Board”) Order Vacating Decision to Decline Sua Sponte Review, Docketing Appeal, and Order to Show Cause (“Order to Show Cause”) and in accordance with 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” (“Part 22 Rules”), the U.S. Environmental Protection Agency, Region 10 (“EPA”) submits this Reply to Appellant’s Response to the EAB’s Order to Show Cause. Dave Erlanson, Sr. (“Appellant”), has failed to show cause in response to the EAB’s Order, and EPA respectfully requests an order dismissing his appeal.

PROCEDURAL HISTORY

On October 7, 2020, Administrative Law Judge Christine Donelian Coughlin issued and served on the parties an Initial Decision and Order (Docket No. 1) in the above-captioned case, assessing a civil monetary penalty in the amount of \$6,600 for Appellant’s violation of Section 301(a) of the Clean Water Act (“CWA”), 33 U.S.C. § 1311(a). On November 12, 2020, after the time by which appeals must be filed had passed, the EAB issued an Order Declining to

Exercise Sua Sponte Review (Docket No. 2) on the mistaken belief that neither party had filed an appeal. On November 20, 2020, Appellant submitted a Motion to Reconsider the EAB's Order Declining to Exercise Sua Sponte Review (Docket No. 8) and an "Appellate Brief" (Docket No. 9). Later the same day, after discovering that Appellant had mailed an appeal from the Initial Decision and Order and that his filing was received by the EPA mailroom on November 3, 2020, the EAB vacated its Order Declining to Exercise Sua Sponte Review; however, because Appellant failed to comply with the Part 22 Rules governing the content of appeals, the EAB ordered Appellant to show cause as to why his appeal should not be dismissed. Order Vacating Decision to Decline Sua Sponte Review, Docketing Appeal, and Order to Show Cause (November 20, 2020) ("Order to Show Cause") (Docket No. 5). Specifically, the Board noted that Appellant failed to present any issues for review, argument on those issues, or identify the relief sought. Order to Show Cause at 2.

By email dated November 20, 2020, Appellant inquired whether his "motion for appeal of sua sponte review" would suffice as a response to the EAB's Order to Show Cause. In an email response dated November 24, 2020, the Clerk of the Board explained to Appellant that the EAB was requiring him "to 'show cause' or explain 'why [his] appeal should not be dismissed for failing to comply with the requirements for appeals in 40 C.F.R. 22.30(a)(1),' " and that if Appellant would like his Motion to Reconsider to serve as his response to the Board's Order to Show Cause, "then [he] must file a notice informing the Board of that intent." On November 30, 2020, Appellant submitted an email titled "materials to show cause, as requested" to which he attached a portion of the appellate brief previously submitted on November 20 (*compare* Docket Nos. 9 and 13), the post-hearing briefs he submitted before ALJ Coughlin (*see*

OALJ Docket Nos. 76 and 78), and proposed Exhibits 1 through 15 (collectively, “Appellant’s Response”).

ARGUMENT

The EAB should dismiss the instant appeal because Appellant failed to comply with the requirements for appeals in 40 C.F.R. 22.30(a)(1) and the Board’s Order to Show Cause. The Part 22 Rules require that Appellant file a notice of appeal and an accompanying appellate brief. 40 C.F.R. § 22.30(a)(1)(ii). The notice of appeal must summarize the order or ruling appealed from and the brief must contain (1) a table of contents and authorities, (2) a statement of the issues presented for review, (3) a statement of the nature of the case and the facts relevant to the issues presented for review, (4) argument on the issues presented, and (5) a short conclusion stating, among other things, the precise relief sought. 40 C.F.R. § 22.30(a)(1)(ii)-(iii). The EAB typically requires strict compliance with the procedural rules for appeals and excuses noncompliance only when “special circumstances” exist. *See e.g., In re Gary Dev. Co.*, 6 E.A.D. 526, 529 (EAB 1996); *In re Outboard Marine Corp.*, 6 E.A.D. 194, 196 (EAB 1995). In dismissing appeals that fail to comply with procedural requirements, the Board has explained that the appeals requirements in 40 C.F.R. § 22.30 are “not merely procedural niceties.” *In re Tri-County Builders Supply*, CWA Appeal No. 03-04, at 7 (EAB May 24, 2004). Rather the requirements “serve an important role in helping to bring repose and certainty to the administrative enforcement process” and “ensure that the Board’s resources are reserved for those cases involving both important issues and serious and attentive litigants.” *Id.* The purpose of the requirements dictates that even *pro se* litigants, while sometimes afforded leniency, are not excused from complying with the procedural rules. *In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 320-

21 (EAB 1999); *In re Rybond Inc.*, 6 E.A.D. 614, 626-28 (EAB 1996); *In re Gary Dev. Co.*, 6 E.A.D. 526, 530-31 (EAB 1996); *see also* 40 C.F.R. § 22.5(c)(5).

In the present case, the EAB has already afforded leniency in providing Appellant the opportunity to demonstrate why his appeal should not be dismissed for failure to adhere to procedural requirements. Appellant failed to provide any explanation and therefore failed to comply with the Board's Order to Show Cause. Appellant's Response to the Order to Show Cause, dated November 30, 2020, failed to cite any reason for failing to comply with Part 22, nor did it identify special circumstances that warrant allowing his appeal to proceed. Instead, Appellant resubmitted his Post-Hearing Brief (OALJ Docket No. 76) and Reply Post-Hearing Brief (OALJ Docket No. 78), a "Brief in Support of Oral Arguments," and fifteen proposed exhibits, through which Appellant simply restated his defenses in their entirety.

Finally, Appellant's Response failed to cure the procedural defects that the Board noted in its Order to Show Cause. Appellant has not amended his appeal and has failed to clearly identify any issue for review or request precise relief. Moreover, it remains unclear which of Appellant's various submissions he intended to satisfy the filing requirements of 40 C.F.R. § 22.30(a)(1)(ii) and (iii). Consequently, EPA would be unable to respond substantively to Appellant's appeal without directing the Board to EPA's Initial Post-Hearing Brief (OALJ Docket No. 75) and Reply Post-Hearing Brief (OALJ Docket No. 77) and restating its case before the ALJ in full.

CONCLUSION

Based on the foregoing, EPA contends that Appellant failed to comply with the procedural requirements of 40 C.F.R. § 22.30 and the Board's Order to Show Cause. Therefore,

EPA respectfully requests that the Board dismiss this appeal. Should the Board allow the appeal to proceed, EPA requests that the EAB allow EPA sufficient time to submit a substantive response brief pursuant to 40 C.F.R. § 22.30(a)(2).

Dated this 11th day of December, 2020.

Respectfully submitted,

/s/ J. Matthew Moore

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **EPA'S REPLY TO APPELLANT'S RESPONSE TO THE EAB'S ORDER TO SHOW CAUSE**, dated December 11, 2020, was filed electronically with the Environmental Appeals Board's electronic filing system.

The undersigned also certifies that on this date she served the foregoing **EPA'S REPLY TO APPELLANT'S RESPONSE TO THE EAB'S ORDER TO SHOW CAUSE** on Appellant via email at tapawingoinc@msn.com.

Dated this 11th day of December 2020.

/s/ Shannon K. Connery

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