



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
MR. ALLEN BARRY,)
MR. TIM BARRY)
d/b/a ALLEN BARRY LIVESTOCK,)
)
RESPONDENTS)

DOCKET NO. CWA-05-2010-0008

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PREHEARING ORDER

As you previously have been notified, I have been designated by the November 5, 2010 Order of the Chief Administrative Law Judge to preside in the above captioned matter. This proceeding arises under the authority of Section 309(g) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g),¹ and is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), 40 C.F.R. §§ 22.1-22.32.

In accordance with an Order Directing Settlement Conference and Status Report, issued on March 4, 2011, the parties engaged in "brief settlement discussions on March 23, 2011," but have been unable to reach a settlement in this matter. See Settlement Status Report ("SR") at 2, filed by Complainant on March 25, 2011. Accordingly, the parties shall strictly comply with the requirements of this Prehearing Order and prepare for hearing.

¹ Sections 309(g)(4)(A) and (B) of the CWA provide that before issuing an order assessing a class II civil penalty, the Administrator shall provide public notice of and reasonable opportunity to comment on the proposed issuance of such order and that any person who comments on a proposed assessment of a class II penalty shall be given notice of any hearing and of the order assessing such penalty. See 40 C.F.R. § 22.45. Complainant states in the Complaint that it has notified the public of this action and afforded an opportunity to comment. Compl. ¶ 14. Complainant indicates that it will consider any comments filed by the public.

In its Settlement Status Report, Complainant states that "additional discussions, if held in short order, may prove productive in reaching an agreed resolution to this matter." SR at 2. The parties are free to continue to engage in settlement discussions during and after preparation of their prehearing exchange. However, the parties are advised that extensions of time will not be granted absent a showing of good cause. The pursuit of settlement negotiations or an averment that a settlement in principle has been reached will not constitute good cause for failing to comply with the requirements or to meet the schedule set forth in this Order.

The following requirements of this Order concerning prehearing exchange information are authorized by Section 22.19(a) of the Rules of Practice, 40 C.F.R. § 22.19(a). As such, it is directed that the following prehearing exchange takes place:

1. Each party² shall submit:
 - (a) the names of any expert (so identified) or other witnesses it intends to call at the hearing, together with a brief narrative summary of each witness's expected testimony, or a statement that no witnesses will be called; and
 - (b) copies of all documents and exhibits which each party intends to introduce into evidence at the hearing. The exhibits should include a curriculum vitae or professional resume for each proposed expert witness. If photographs are submitted, the photographs must be unretouched and unaltered photographs. The documents and exhibits shall be identified as "Complainant's" or "Respondents'" exhibits,³ as appropriate, and numbered with Arabic numerals (e.g., "Complainant's Exhibit 1");

² Respondents Allen Barry and Tim Barry filed a joint Answer and are represented by the same counsel. Respondents may choose to file a joint prehearing exchange, or each Respondent may file separately.

³ If Respondents Allen Barry and Tim Barry choose to file separate prehearing exchanges, the propose exhibits should be identified as "Respondent Allen Barry's" or "Respondent Tim Barry's" exhibits.

and

- (c) a statement expressing its view as to the place for the hearing and the estimated amount of time needed to present its direct case.

See Sections 22.19(a), (b), and (d) of the Rules of Practice, 40 C.F.R. §§ 22.19(a), (b), and (d). See also Section 22.21(d) of the Rules of Practice, 40 C.F.R. § 22.21(d).

2. Complainant shall submit a statement explaining in detail how the proposed penalty was determined, including a description of how the specific provisions of any Agency penalty or enforcement policies and/or guidelines were applied in calculating the penalty.
3. Respondents shall submit a statement explaining why the proposed penalty should be reduced or eliminated. If either Respondent intends to take the position that he is unable to pay the proposed penalty or that payment will have an adverse effect on his ability to continue to do business, that Respondent shall furnish supporting documentation such as certified copies of financial statements or tax returns.
4. Respondents shall submit a legal memorandum and brief, together with any supporting documents or affidavits, fully explaining their position with respect to the applicability of the Supreme Court's decision in *U.S. v. Rapanos*, 547 U.S. 715 (2006), to this matter as asserted in their Answer. Ans. at 2-3 ("Assertion of Affirmative Defenses").
5. Complainant shall submit 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.

See Section 22.19(a)(3) of the Rules of Practice, 40 C.F.R. § 22.19(a)(3).

The prehearing exchange delineated above shall be filed in *seriatim* manner, according to the following schedule:

- May 13, 2011 - Complainant's Initial Prehearing Exchange
- June 10, 2011 - Respondents' Prehearing Exchange(s), including any direct and/or rebuttal evidence
- June 24, 2011 - Complainant's Rebuttal Prehearing Exchange (if necessary)

By statement filed March 8, 2011, by Counsel, Respondents exercised their right under Section 554 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 554, to request a hearing in this matter. If the parties cannot settle with a Consent Agreement and Final Order, a hearing will be held in accordance with Section 556 of the APA, 5 U.S.C. § 556. Section 556(d) of the APA provides that a party is entitled to present its case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. Thus, Respondents have the right to defend themselves against Complainant's charges by way of direct evidence, rebuttal evidence, or through cross-examination of Complainant's witnesses. Each Respondent is entitled to elect any or all three means to pursue his defense.

If a Respondent elects only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, that Respondent shall serve a statement to that effect on or before the date for filing his prehearing exchange. Each party is hereby reminded that failure to comply with the prehearing exchange requirements set forth herein, including a Respondent's statement electing only to conduct cross-examination of Complainant's witnesses, can result in the entry of a default judgment against the defaulting party. See Section 22.17 of the Rules of Practice, 40 C.F.R. § 22.17.

The original and one copy of all pleadings, statements, and documents (with any attachments) required or permitted to be filed by this Order (including a ratified Consent Agreement and Final Order) shall be filed with the Regional Hearing Clerk, and copies (with any attachments) shall be sent to the undersigned and all other parties. The parties are advised that e-mail correspondence with the Administrative Law Judge is not authorized. See Section 22.5(a) of the Rules of Practice, 40 C.F.R. § 22.5(a).

The prehearing exchange information required by this Order

to be sent to the Presiding Judge, as well as any other further pleadings, shall be addressed as follows:

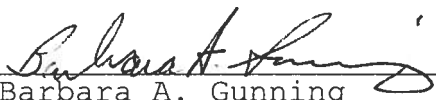
If sending by United States Postal Service (USPS):

EPA Office of Administrative Law Judges
1200 Pennsylvania Avenue, NW
Mail Code 1900L
Washington, D.C. 20460-2001

If sending by a non-USPS courier, such as UPS or Federal Express:

EPA Office of Administrative Law Judges
1099 14th Street, NW
Suite 350, Franklin Court
Washington, D.C. 20005

Telephone contact may be made with my legal staff assistant, Mary Angeles, at (202) 564-6281. The facsimile number is (202) 565-0044.



Barbara A. Gunning
Administrative Law Judge

Dated: March 30, 2011
Washington, D.C.

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**In the Matter of Mr. Allen Barry, Mr. Tim Barry d/b/a Allen Barry Livestock, Respondent.
Docket No. CWA-05-2010-0008**

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Prehearing Order**, dated March 30, 2011, was sent this day in the following manner to the addressees listed below.



Mary Angeles
Legal Staff Assistant

Original and One Copy by Pouch Mail to:

La Dawn Whitehead
Regional Hearing Clerk
U.S. EPA, Region V
77 West Jackson Boulevard, E-19J
Chicago, IL 60604-3590

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Copy by Pouch Mail to:

Luis Oviedo. Esq.
Associate Regional Counsel
ORC, U.S. EPA, Region V
77 West Jackson Boulevard, C-14J
Chicago, IL 60604-3590

Copy by Regular Mail to:

James E. Meason, Esq.
Attorney at Law
113 W. Main Street
Rockton, IL 61072-2416
Fx: 815.624.5905

Dated: March 30, 2011
Washington, DC