

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION I
1 Congress Street
Suite 1100 - SES
Boston, MA 02114-2023

BY HAND

February 25, 2010

Wanda Santiago
Regional Hearing Clerk
U.S. Environmental Protection Agency - Region I
One Congress Street, Suite 1100 (RCA)
Boston, MA 02114-2023

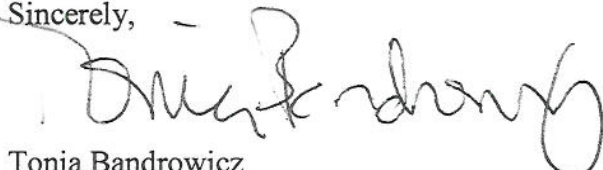
Re: In the Matter of Town of North Providence, Rhode Island
Docket No. CWA-01-2009-0093

Dear Ms. Santiago:

Enclosed for filing in the above-referenced action, please find the original and a copy of Complainant's Initial Prehearing Exchange.

Thank you for your attention to this matter.

Sincerely,


Tonia Bandrowicz
Senior Enforcement Counsel
U.S. EPA

Enclosure

cc: Barbara A. Gunning,
U.S. Administrative Law Judge
Stephen H. Burke, Esq.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

RECEIVED

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In the Matter of:)

North Providence, Rhode Island)
Respondent.)
_____)

EPA/CS
DOCKET CLERK
Docket No. CWA 01-2009-0093

COMPLAINANT'S INITIAL PREHEARING EXCHANGE

On behalf of the Complainant, attached please find the information and documentation required by the Presiding Officer's October 7, 2009 Prehearing Order, submitted in accordance with a subsequent November 25, 2009 Order Granting Motion for Extension of Time.

Respectfully submitted,



Tonia Bandrowicz
Senior Enforcement Counsel
U.S. EPA, Region 1

2/25/10
Date

COMPLAINANT'S INITIAL PREHEARING EXCHANGE

1. Pursuant to the Prehearing Order and Section 22.19(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits ("Consolidated Rules"), Complainant submits the following:

- (a) **The names of the expert and other witnesses intended to be called at hearing, identifying each as a fact witness or an expert witness, with a brief narrative summary of their expected testimony, or a statement that no witness will be called.**

Complainant anticipates that it will call the following fact witness. Copies of the witness' resume is enclosed.

- (i) David Turin,
Environmental Scientist
Water Technical Unit
Office of Environmental Stewardship
U.S. Environmental Protection Agency, Region 1

Mr. Turin will testify as to the Clean Water Act requirements applicable to this case, the facts pertaining to EPA's allegations that the town failed to submit a timely Capacity, Management, Operation & Maintenance Annual Report for its sewer system, and the additional information required by an EPA-issued information request, authorized under Clean Water Act Section 308, including the numerous oral and written requests EPA staff made for such information.

He will also testify as to the information he received regarding an unauthorized discharge that occurred in the town's sewer system, in particular the information he received from, and conversations he had with, representatives of the Rhode Island Department of Environmental Protection, in the normal course of business, pertaining to this discharge.

He will also testify to the facts relevant to the statutory penalty factors as set forth in CWA Section 309(g), and as noted below, including a previous EPA enforcement action taken for the town's failure to comply with similar reporting requirements relating to its sewer system.

Complainant anticipates that it will call the following expert witness. Copies of the witness' resume is enclosed.

- (ii) Mary Medeiros,
EPA Region 1 Financial Analyst
Office of Environmental Stewardship
U.S. EPA Region 1

Ms. Medeiros will provide testimony regarding economic benefit and, if necessary, inability to pay claims by the town.

(b) Copies of all documents and exhibits intended to be introduced into evidence. Included among the documents produced shall be a curriculum vita or resume for each identified expert witness. The documents and exhibits shall be identified as Complainant's or Respondent's exhibit, as appropriate, and numbered with Arabic numerals (e.g., COMPLAINANT'S EX. 1 or RX 1).

In addition to the Complainant's August 21, 2009 Complaint and November 2, 2009 Amended Complaint and Respondent's September 18, 2009 Answer, and February 8, 2009 Amended Answer, (copies of which have already been filed in the case, and which the Presiding Officer and parties presently possess), incorporated herein by reference, EPA intends to offer into evidence the documents below:

- (i) May 16, 2007 Section 308 Information Request (Complainant's Ex. 1)
- (ii) August 10, 2007 EPA letter to North Providence (Complainant's Ex. 2)
- (iii) October 4, 2007 Administrative Complaint, Docket No. CWA 01-2008-001 (Complainant's Ex. 3)
- (iv) April 7, 2008 Administrative Order (Complainant's Ex. 4)
- (v) January 26, 2009 Request for Information (Complainant's Ex. 5)
- (vi) March 17, 2009 Letter notification of Failure to Respond to EPA Administrative Order (Complainant's Ex.6)
- (vii) November 13, 2009 EPA letter to North Providence (Complainant's Ex. 7)

- (viii) Undated Annual Report 2008 (Complainant's Ex. 8)
- (ix) Undated Second Supplemental Response of Town of North Providence (Complainant's Ex. 9)
- (x) Undated Pump Station/Collection System Bypass Questionnaire (Complainant's Ex. 10)

In addition, Complainant may request this Court to take official notice of appropriate matters in accordance with 40 C.F.R. § 22.22(f).

- (c) **A statement of an appropriate city or county in which to conduct the hearing and an estimate of the time needed to present its direct case See §§ 22.21(d) and 22.19(d) of the Rules. Also state if translation services are necessary in regard to the testimony of any anticipated witness(es), and, if so, state the language to be translated.**

Pursuant to 40 C.F.R. §§ 22.21(d) and 22.19(d), the hearing should be held in the county where the Respondent conducts business which the hearing concerns, in the city in which the relevant Environmental Protection Agency Regional office is located, or in Washington, D.C. Complainant proposes that the hearing be held in Providence, Rhode Island, which is the neighboring city to North Providence, and where appropriate federal or state courthouse space should be available.

It is the Complainant's view that a length of time of no more than one day is needed to present its direct case.

Translation services are not needed.

- (d) **Complainant shall submit a statement explaining in detail how the proposed penalty was determined, including a description of how the specific provision of any Agency penalty or enforcement policies and/or guidelines were applied in calculating the penalty.**

Below is a narrative statement of all factual information Complainant considers relevant to the assessment of the penalty. Pursuant to 40 C.F.R. 22.19(a)(4), Complainant will file within 15 days after respondent files its prehearing information exchange, a document specifying a proposed penalty and explaining how the proposed penalty was calculated in accordance with any criteria set forth in the Act.

There is no Clean Water Act penalty policy for calculating a proposed penalty to plead in the complaint.¹ At the hearing, EPA intends to put on witnesses, as identified in this Prehearing Exchange, who will present facts relating to the statutory penalty factors in Section 309(g) of the Act, and then argue in the post-trial brief what the appropriate penalty should be in light of the facts that were put into evidence.

(i) Nature, circumstances, extent and gravity of the violations

The Complainant will present testimony and exhibits on how North Providence is required to comply with regulatory requirements for Clean Water Act, and how the Respondent's noncompliance with the Act's requirements, as evidenced by its continued failure to submit required information, and in having at least one overflow incident, represent significant

¹ The March 1, 1995 *Interim Clean Water Act Settlement Penalty Policy* ("CWA Penalty Policy") is designed to establish how the Agency expects to calculate the minimum penalty for which it would be willing to settle a case and is not intended for use by EPA, violators, courts, or administrative judges in determining penalties at hearing or trial. See CWA Penalty Policy, p. 3 and Section VI.

violations of the Act because failure to fully comply with all sewage collection system Capacity, Management, Operation, and Maintenance requirements, including submission of annual reports, leaves a facility unprepared to prevent problems, such as the September, 2009 overflow incident. Testimony will also show that the failure to comply with reporting requirements, such as those at issue in this case, undermines the integrity of EPA's program and makes it less effective overall.

(ii) Ability to Pay

Based on the information available to date, there is no basis to believe that the Respondent cannot pay a penalty up to the statutory maximum in a Clean Water Act Class II administrative penalty action (\$177,500). If Respondent raises and submits documentation pertaining to ability to pay issues, EPA is prepared to have its Financial Analyst, Mary Medeiros review such documentation and present testimony.

(iii) Prior History of Such Violations

The record will show that EPA has previously taken an enforcement action, and the town has paid a penalty, for related non-reporting violations.

(iv) Degree of Culpability

EPA will present evidence showing that the town has consistently been untimely in its legal obligations relating federal requirements relating to its sewage collection system, despite repeated efforts by EPA to bring the town into compliance.

(v) Economic Benefit or Savings

EPA will present evidence regarding the economic benefit or savings to the town by its noncompliance, which potentially includes the cost of hiring staff to adequately develop and oversee its Capacity Management Operations & Maintenance program for its sewage collection system.

(vi) Such Other Matters as Justice May Require

None were identified so Complainant will not be presenting any evidence relating to this factor.

- (e) **Complainant shall submit a statement regarding whether the Paperwork Reduction Act of 1980 ("PRA"), 44 U.S.C. 33501 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.**

Under 44 U.S.C. § 3518(c), the Paperwork Reduction Act does not apply to the collection of information during, among other things, the conduct of investigation involving an agency against specific individuals or entities. EPA issued the September 13, 2007, request for information to Respondent, and individual, while conducting an investigation. Consequently, 44 U.S.C. § 3512 is inapplicable to this matter.

In the Matter of
North Providence, RI
Docket No. CWA 1-2009-0093
Complainant's Initial
Prehearing Exchange
Page 8

In the Matter of Town of North Providence, RI
EPA Docket No. CWA-01-2009-0093

CERTIFICATE OF SERVICE

I certify that the foregoing Complainant's Initial Prehearing Exchange was transmitted to the following persons, in the manner specified, on the date below:

Original and one copy
hand-delivered:

Wanda Santiago
Regional Hearing Clerk
U.S. EPA - Region I
One Congress Street, Suite 1100 (RAA)
Boston, MA 02114-2023

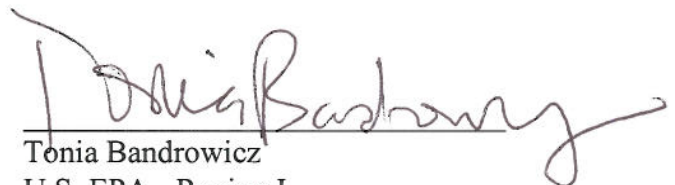
Copy by Overnight Mail

Barbara A. Gunning,
U.S. Administrative Law Judge
U.S. EPA
Office of Administrative Law Judges
Franklin Court Building
1099 14th Street, NW, Suite 350
Washington, DC 20460

Copy by certified mail,
return receipt requested:

Stephen H. Burke, Esq.
Ratcliffe Burke Haren & Elias, LLP
1600 Financial Plaza
Providence, RI 02903

Dated: 2/25/10



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