



UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

IN THE MATTER OF )  
 )  
KEVIN VAUGHAN and ) DOCKET NO. CWA-07-2010-0105  
BRYCE ANDERSEN, )  
 )  
RESPONDENTS )

PREHEARING ORDER

As you previously have been notified, I have been designated by the October 29, 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 Federal Water Pollution Control Act, commonly referred to as the Clean Water Act ("CWA"), as amended, 33 U.S.C. § 1319(g),<sup>1</sup> 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. The parties are advised to familiarize themselves with both the applicable statute(s) and the Rules of Practice.

United States Environmental Protection Agency ("EPA") policy, found in the Rules of Practice at Section 22.18(b), 40 C.F.R. § 22.18(b), encourages settlement of a proceeding without the necessity of a formal hearing. The record reflects that the parties participated in the Alternative Dispute Resolution process offered by this office for two months but that the parties have not filed a Consent Agreement and Final Order to settle this matter. Accordingly, the parties shall strictly

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<sup>1</sup> The Complaint alleges that Respondents violated Sections 301 and 404 of the CWA, 33 U.S.C. §§ 1311 and 1344. For these alleged violations, Complainant seeks a class II civil administrative penalty of up to a maximum of \$177,500 pursuant to Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B). A hearing on the record in accordance with Section 554 of Title 5 of the United States Code, 5 U.S.C. § 554, shall be held in cases in which a civil penalty is sought pursuant to Section 309(g)(2)(B) of the CWA.

comply with the requirements of this Prehearing Order and prepare for hearing.

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 party<sup>2</sup> shall submit:
  - (a) the names of any expert 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 resume for each proposed expert witness. If photographs are submitted, the photographs must be actual unretouched photographs. The documents and exhibits shall be identified as "Complainant's" or "Respondents'" exhibits,<sup>3</sup> as appropriate, and numbered with Arabic numerals (e.g., "Complainant's Exhibit 1"); and

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<sup>2</sup> Respondents Kevin Vaughan ("Vaughan") and Bryce Andersen ("Andersen") 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.

<sup>3</sup> If Respondents Vaughan and Andersen choose to file separate prehearing exchanges, the propose exhibits should be identified as "Respondent Vaughan's" or "Respondent Andersen's" exhibits.

- (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. This proceeding is for the assessment of a penalty, and Complainant has not specified a proposed penalty. Accordingly, the parties shall include in their prehearing exchange all factual information they consider relevant to the assessment of a penalty.
- 3. Within fifteen (15) days after Respondents file their prehearing information exchange, Complainant shall file a document specifying a proposed penalty and 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.
- 4. 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.
- 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:

December 31, 2010 - Complainant's Initial Prehearing Exchange

- January 28, 2011 - Respondents' Prehearing Exchange(s), including any direct and/or rebuttal evidence
- February 11, 2011 - Complainant's Rebuttal Prehearing Exchange (if necessary)

In their Answer, 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:

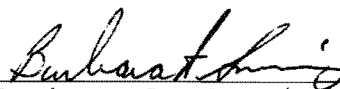
If sending by United States Postal Service (USPS):

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.



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Barbara A. Gunning  
Administrative Law Judge

Dated: November 15, 2010  
Washington, D.C.

**In the Matter of Kevin Vaughan and Bryce Andersen, Respondents.**  
**Docket No. CWA-07-2010-0105**

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Prehearing Order**, dated November 15, 2010, was sent this day in the following manner to the addressees listed below.



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Mary Angeles  
Legal Staff Assistant

Original and One Copy by Interoffice Delivery to:

Sybil Anderson  
Headquarters Hearing Clerk  
U.S. EPA / Office of Administrative Law Judges  
Mail Code 1900L  
1200 Pennsylvania Ave., NW  
Washington, DC 20460

Copy by Pouch Mail to:

Chris Muehlberger, Esq.  
Associate Regional Counsel  
ORC, U.S. EPA, Region VII  
901 North Fifth Street  
Kansas City, KS 66101

Copy by Regular Mail to:

Michael C. Cox, Esq.  
David A. Yudelson, Esq.  
Koley Jessen, PC, LLO  
Attorneys at Law  
One Pacific Place, Suite 800  
1125 South 103<sup>rd</sup> Street  
Omaha, NE 68124-1079

Dated: November 15, 2010  
Washington, DC