

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 8

2013 MAY -2 AM 11:29

IN THE MATTER OF )

FILED  
EPA REGION VIII  
HEARING CLERK

Richard Smith, Owner )  
Lodore Supper Club and Saloon )

) Docket No. SDWA-08-2012-0056

Respondent )

) MOTION FOR SHOW CAUSE ORDER

Proceeding under section 1414(g) )  
of the Safe Drinking Water Act, )  
42 U.S.C. § 300g-3(g) )  
\_\_\_\_\_ )

Due to the failure of the Respondent Richard Smith (Respondent) to file a prehearing exchange, Region 8 of the United States Environmental Protection Agency (EPA) requests that the Regional Judicial Officer issue an order directing the Respondent to show cause why a default order assessing a penalty of \$1,200 should not be issued. In the alternative, the EPA requests an order directing the Respondent to show cause why he should not be prohibited from introducing evidence at the hearing on this matter and/or why the Regional Judicial Officer should not draw adverse inferences from the Respondent's failure to submit a prehearing exchange.

**I. BACKGROUND**

This is an administrative penalty action brought by the EPA pursuant to section 1414(g) of the Safe Drinking Water Act, 42 U.S.C. § 300g-3(g). The EPA filed a complaint on September 25, 2012, stating that on July 28, 2010, the EPA issued the Respondent an administrative compliance order (Compliance Order) directing the Respondent, as owner and/or operator of the Lodore Supper Club and Saloon public water system (System), to comply with certain requirements of the National Primary Drinking Water Regulations (NPDRWs) at 40 C.F.R. part 141. The EPA's complaint alleges that the

Respondent violated the Compliance Order by failing to monitor the System's water for total coliform, failing to report these monitoring violations to the EPA, and failing to notify the public of these violations. The EPA's complaint proposes that the Respondent pay a civil administrative penalty of \$1,200 for these violations. The Respondent filed an answer in this action admitting that he owns the "property, 6 N, Piney Rd. in Story, Wyoming, more commonly known as the Iodore," where the System is located.

On January 23, 2013, the Regional Judicial Officer issued an Order to File Dispositive Motions and Prehearing Information Exchange (Prehearing Exchange Order). The Prehearing Exchange Order directed the Respondent to file a prehearing exchange of information on or before April 12, 2013. The Prehearing Exchange Order directed the Respondent to include the following in his prehearing exchange:

- "all documents and witnesses intended to be introduced as evidence at the hearing," citing 40 C.F.R. § 22.19(a)(1)-(4);
- "all factual information [the Respondent] considers relevant to the assessment of a penalty," and
- "[a]ny financial information necessary to show an inability to pay the penalty if Respondent is claiming such."

The Respondent has not filed a prehearing exchange. Nor has the Respondent responded to or commented on the EPA's prehearing exchange, which was filed on March 15, 2013, and includes a rationale for the \$1,200 penalty that the EPA proposed in its complaint, a list of witnesses the EPA may call to testify at hearing, and copies of exhibits the EPA may introduce into evidence at hearing. The EPA's exhibits include, among other things, copies of a Water System Basic Information form signed by the Respondent as the "owner or responsible party" for the System, six yearly notifications of

monitoring requirements that the EPA mailed to the Respondent, and various letters from the EPA to the Respondent (e.g., transmitting a sanitary survey, informing the Respondent of a determination that the System's water had not been found to be ground water under the direct influence of surface water, and notifying the Respondent that he had violated the Compliance Order). Having filed nothing in response to the EPA's prehearing exchange, the Respondent has provided no evidence (1) to refute the EPA's allegations that the Respondent owns a public water system and has failed to comply with the NPDWRs and the Compliance Order, or (2) to dispute the appropriateness of the EPA's proposed penalty.

## **II. ARGUMENT**

This motion is based on 40 C.F.R. § 22.19(g), which provides:

Where a party fails to provide information within its control as required pursuant to this section, the Presiding Officer may, in his discretion:

- (1) Infer that the information would be adverse to the party failing to provide it;
- (2) Exclude the information from evidence; or
- (3) Issue a default order under [40 C.F.R.] § 22.17(c).

### **A. The Role of the Prehearing Exchange**

The prehearing exchange is critical to administrative litigation under 40 C.F.R. part 22. Because part 22 allows for far more limited discovery than provided in the Federal Rules of Civil Procedure, parties in administrative litigation rely on the prehearing exchange to evaluate each other's positions and prepare for hearings. In addition, as noted by the EPA's Environmental Appeals Board, [T]he prehearing exchange plays a pivotal function -- ensuring identification and exchange of all evidence to be used at hearing and other related information (e.g., identification of witnesses). By compelling the parties to provide this information in one

central submission, the prehearing exchange clarifies the issues to be addressed at hearing and allows the parties and the court an opportunity for informed preparation for hearing. Given the key role of the prehearing exchange to administrative practice, it is not surprising that the regulations recognize that failure to comply with an ALJ's order requiring exchange is one of the primary justifications for entry of default. In re: JHNY, Inc., a/k/a Quin-T-Technical Papers and Boards, 12 E.A.D. 372, 382 (EAB, Sept. 30, 2005).

**B. Default as a Sanction**

As indicated above, the Regional Judicial Officer is authorized by 40 C.F.R. § 22.19(g)(3) to issue a default order on the basis of the Respondent's failure to file a prehearing exchange.

In numerous instances, EPA administrative judges have issued default orders based on a respondent's failure to comply with an order to file a prehearing exchange. See, e.g., In re: JHNY, Inc., a/k/a Quin-T-Technical Papers and Boards, *supra* (upholding a default order assessing a \$51,700 penalty after the respondent had failed to file a prehearing exchange); In the Matter of Mr. Allen Barry, Mr. Tim Barry d/b/a Allen Barry Livestock, 2011 EPA ALJ LEXIS 17 (ALJ Gunning, September 9, 2011) (\$75,000 penalty assessed on default after failure to prehearing exchange); In the Matter of: Mardaph II, LLC, Mardaph III, LLC and Vinnie Wilson, 2010 EPA ALJ LEXIS 5 (ALJ Biro, April 15, 2010) (respondents found in default and deemed to have admitted all of the facts alleged in the complaint and to have waived their right to contest them, where respondents had not filed a prehearing exchange and the EPA had not requested a default order on penalties); In the Matter of Sargent Enterprises, Inc., 2010 EPA ALJ LEXIS 3 (ALJ Gunning, January 28, 2010) (ALJ issued default order assessing full proposed penalty, minus amount other parties had paid in settlement, after respondent had failed to file prehearing exchange or respond to motion to show cause for not having done so); In the Matter of James Bond,

Owner, Bond's Body Shop, 2005 EPA ALJ LEXIS 1, 2005 WL 116077, Docket No.

CWA-08-2004-0047 & RCRA-08-2004-0004 (ALJ Biro, January 11, 2005) (full proposed penalty of \$52,019 assessed on default, after respondent's attorney had withdrawn); In the Matter of Jack Golden, 2000 EPA ALJ LEXIS 73 (ALJ Gunning, October 6, 2000) (full proposed penalty of \$40,000 assessed on default after respondent failed to comply with ALJ's order to file a prehearing exchange); In the Matter of David Webb and Prairie Estates, 1994 EPA ALJ LEXIS 60 (ALJ Greene, May 31, 1994) (default issued in public water supply case for respondent's failure to comply with orders relating to prehearing exchange); In the Matter of Safari Heights Water System, 1991 EPA ALJ LEXIS 32 (ALJ Greene, December 12, 1991) (default issued in public water supply case for respondent's failure to comply with orders relating to prehearing exchange).

**C. Excluding Evidence**

According to 40 C.F.R. § 22.19(g)(2), if an exhibit has not been included as part of a prehearing exchange, that exhibit can be excluded from being admitted into evidence at hearing. See also In the Matter of Julie's Limousine & Coachworks, Inc., 2004 EPA ALJ LEXIS 135 (ALJ Gunning, August 26, 2004), in which a document omitted from the EPA's prehearing exchange was excluded from evidence, resulting in dismissal of the EPA's action.

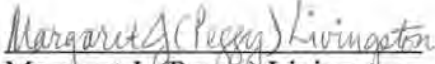
**D. Adverse Inferences**

Under 40 C.F.R. § 22.19(g)(1), if information is not submitted as part of a prehearing exchange, an administrative judge may infer that the information would be adverse to the party failing to provide it. It would, therefore, be proper for the Regional Judicial Officer to infer that because the Respondent has not provided any evidence in his prehearing exchange to dispute the allegations in the EPA's complaint, whatever information the Respondent could have supplied would support the EPA's allegations.

### III. CONCLUSION

In view of the express language of 40 C.F.R. § 22.19(g) and the numerous instances in which a default has been granted for failure to file a prehearing exchange, it would be appropriate for the Regional Judicial Officer to issue an order directing the Respondent to show cause why a default order finding the Respondent liable for the violations alleged in the EPA's complaint and assessing a penalty of \$1,200 should not be entered against him. Alternatively, it would be appropriate for the Regional Judicial Officer to issue an order directing the Respondent to show cause why he should not be precluded from introducing evidence at the hearing and/or why the Regional Judicial Officer should not draw adverse inferences from his failure to submit a prehearing exchange.

Respectfully submitted,

  
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**Certificate of Service**

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing EPA's Motion for Show Cause Order has been served upon each of the following on May 2, 2013:

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Lodore Supper Club and Saloon  
P.O. Box 6044  
Sheridan, WY 82802  
By Certified Mail, Return Receipt Requested  
No. 7009 3410 0000 2598 4464  
One copy

Tina Artemis  
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Hon. Elyana R. Sutin  
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Gayle Aldinger