

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

2009 NOV -9 PM 2:44

BEFORE THE ADMINISTRATOR

FILED
EPA REGION VIII
HEARING CLERK

IN THE MATTER OF:)
)
MERIDIAN COMMERCIAL) Docket No. CWA-08-2009-0015
CONSTRUCTION, LLC,)
)
Respondent.¹)

PREHEARING ORDER

As you have been previously notified, I am designated to preside over this proceeding. This proceeding will be governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 ("Rules of Practice" or "Rules"). The parties are advised to familiarize themselves with the applicable statute(s) and the Rules of Practice.

Agency policy strongly supports settlement, and the procedures regarding documentation of settlements are set forth in Section 22.18 of the Rules of Practice, 40 C.F.R. § 22.18. The record reflects that the parties have engaged in settlement discussions as part of an alternative dispute resolution process and, while those discussions to date have not been fruitful, the parties are nevertheless commended for taking the initiative to attempt to resolve this matter informally and expeditiously. Each party is reminded that pursuing this matter through a hearing and possible appeals will require the expenditure of significant amounts of time and financial resources. The parties should also realistically consider the risk of not prevailing in the proceeding despite such expenditures. A settlement allows the parties to control the outcome of the case, whereas a judicial decision takes such control away. With such thoughts in mind, the parties are directed to continue their efforts to reach a settlement of this matter while the litigation process is proceeding.

Should a Consent Agreement not be finalized on or before **November 30, 2009**, the parties must prepare for hearing and shall strictly comply with the prehearing requirements of this Order.

This Order is issued pursuant to Section 22.19(a) of the Rules of Practice. Accordingly, it is directed that the following prehearing exchange take place between the parties:

¹ The caption has been changed to reflect the withdrawal of a previously named Respondent.

1. Pursuant to Section 22.19(a) of the Rules of Practice, each party shall file with the Regional Hearing Clerk and shall serve on the opposing party and on the Presiding Judge:

(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 witnesses will be called;

(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., CX 1 or RX 2); and

(C) a statement as to its views as to the appropriate place of hearing and estimate of the time needed to present its direct case. See Sections 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.

2. In addition, Complainant shall submit the following as part of its Initial Prehearing:

(A) a detailed narrative statement that fully elaborates the exact factual and legal basis, and copies of all documents in support thereof, for the allegations made in paragraphs 24-26 and 31-38 of the Complaint;

(B) a copy of the report(s), if any, and any and all documents, notes, photographs, and/or other records related thereto, of the September 23, 2008 inspection referenced in paragraphs 25 and 26 of the Complaint;

(C) a copy of Respondent's Storm Water Pollution Prevention Plan for the Site or any portion thereof referenced in paragraph 31 of the Complaint;

(D) a copy of the North Dakota general NPDES permit no. NDR10-0000 referenced in paragraph 21 of the Complaint;

(E) to the extent not previously provided with the Complaint, a separate Penalty Calculation Worksheet detailing exactly how the proposed penalty was calculated and copies of all documents in support thereof;

(F) a statement regarding whether the Paper Work 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.

3. Respondent shall also submit the following as part of its Prehearing Exchange:

(A) a detailed narrative statement that fully elaborates upon the exact factual and legal bases, and copies of all documents in support thereof, for Respondent's denial in its Answer of the truth of the allegations made in paragraphs 6, 24-26, 31-38 of the Complaint;

(B) a detailed narrative statement that fully elaborates on the period(s) in time and the extent to which Respondent had any responsibility in regard to all or some portion of "the Site," as that term is defined in paragraph 4 of the Complaint. Include in your Answer a statement describing Respondent's responsibilities in regard to permit acquisition, permit compliance and/or storm water discharges from some or all portion of the Site.

(C) a detailed narrative statement that fully elaborates on Respondent's position as to whether the Site, or the portions thereof as to which it admits involvement or responsibility, "disturbed more than 5 acres;"

(D) a copy of all documents evidencing the request for authority to discharge storm water from the Site, or any portion thereof, and/or relating or referring to such requests, and any documents evidencing the granting thereof;

(E) a copy of all Storm Water Pollution Prevention Plans (SWPPP) for the Site and a statement as to the effective date of each such Plan and/or amendments thereto;

(F) a detailed narrative statement that fully describes the extent to which the SWPPP in effect for the Site on or before November 4, 2008 included the information described in Paragraph 30 of the Complaint;

(G) copies of any and all agreements between Respondent and Agassiz Land Management or any other person or entity regarding acquiring storm water permits for the Site or any portion thereof, and/or providing Best Management Practices or other compliance activities in connection therewith;

(H) copies of any and all documents, including monitoring reports, activity logs, invoices, photographs, plans, diagrams, *etc.* evidencing the implementation of any measures or practices to reduce the discharge of pollutants in the stormwater from the Site or any portion thereof;

(I) if Respondent takes the position that it is unable to pay the proposed penalty, a narrative statement explaining the precise factual and legal basis for its position and a copy of any and all documents it intends to rely upon in support of such position; and

(J) if Respondent takes the position that the proposed penalty should be reduced or eliminated on any other grounds, a narrative statement explaining the precise factual and legal basis for its position and a copy of any and all documents it intends to rely upon in support of such position.

4. Complainant shall submit as part of its Rebuttal Prehearing Exchange a statement and/or any documents in response to Respondent's Prehearing Exchange submissions as to provisions 3(A) through 3(J) above.

The prehearing exchanges called for above shall be filed *in strictum* fashion, pursuant to the following schedule:

- November 30, 2009 - Complainant's Initial Prehearing Exchange
- December 21, 2009 - Respondent's Prehearing Exchange, including any direct and/or rebuttal evidence
- December 31, 2009 - Complainant's Rebuttal Prehearing Exchange

Section 22.19(a) of the Rules of Practice provides that, except in accordance with Section 22.22(a), any document not included in the prehearing exchange shall not be admitted into evidence, and any witness whose name and testimony summary are not included in the prehearing exchange shall not be allowed to testify. Therefore, each party should thoughtfully prepare its prehearing exchange. Any supplements to prehearing exchanges shall be filed with an accompanying motion to supplement the prehearing exchange.

Complaint in the present case gave Respondent notice and opportunity for a hearing, in accordance with Section 554 of the Administrative Procedure Act (APA), 5 U.S.C. § 554. In its Answer to the Complaint, Respondent requested such a hearing. In this regard, Section 554(e)(2) of the APA sets out that a hearing be conducted under Section 556 of the APA. Section 556(d) 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, Respondent has the right to defend itself against Complainant's charges by way of direct evidence, rebuttal evidence or through cross-examination of Complainant's witnesses. Respondent is entitled to elect any or all three means to pursue its defenses. If Respondent intends to elect only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, then Respondent shall serve a statement to that effect on or before the date for filing its prehearing exchange. Respondent is hereby notified that its failure to either comply with the prehearing exchange requirements set forth herein or to state that it is electing only to conduct cross-examination of Complainant's witnesses can result in the entry of a default judgment against it. Complainant is notified that its failure to file its prehearing exchange in a timely manner can result in a dismissal of the case with prejudice. **THE MERE PENDENCY OF SETTLEMENT NEGOTIATIONS OR EVEN THE EXISTENCE OF A SETTLEMENT IN PRINCIPLE DOES NOT CONSTITUTE A BASIS FOR FAILING TO STRICTLY COMPLY WITH THE PREHEARING EXCHANGE REQUIREMENTS. ONLY THE FILING WITH THE HEARING CLERK OF A FULLY EXECUTED**

**CONSENT AGREEMENT AND FINAL ORDER, OR AN ORDER OF THE JUDGE,
EXCUSES NONCOMPLIANCE WITH FILING DEADLINES.**

Prehearing exchange information required by this Order to be sent to the Presiding Judge, as well as any other further pleadings, if sent by mail, shall be addressed as follows:

The Honorable Susan L. Bira
Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Hand-delivered packages transported by Federal Express or another delivery service which x-rays their packages as part of their routine security procedures may be delivered directly to the Offices of the Administrative Law Judges at 1099 14th Street, N.W., Suite 350, Washington, D.C. 20005.


Telephone contact may be made with my legal assistant, Maria Whiting-Beale at (202) 564-6259 or my staff attorney, Ben Wakefield, at (202) 564-6278. The facsimile number is (202) 565-0044.

If any party wishes to receive, by e-mail or by facsimile, an expedited courtesy copy of decisions and substantive orders issued in this proceeding, the party shall submit a request for expedited courtesy copies by letter addressed to Maria Whiting-Beale, Legal Staff Assistant, Office of Administrative Law Judges, U.S. Environmental Protection Agency, Mail Code 1900L, 1200 Pennsylvania Ave., N.W., Washington, D.C. 20460. The letter shall include the case docket number, the e-mail address or facsimile number to which the copies are to be sent, and a statement as to whether the party requests: (A) expedited courtesy copies of the initial decision and/or any orders on motion for accelerated decision or dismissal, or (B) expedited courtesy copies of all decisions and substantive orders. The undersigned's office will endeavor to comply with such requests but does not guarantee the party's receipt of expedited courtesy copies.

Prior to filing any motion, the moving party is directed to contact the other party or parties to determine whether the other party has any objection to the granting of the relief sought in the motion. The motion shall then state the position of the other party or parties. The mere consent of the other parties to the relief sought does not assure that the motion will be granted and no reliance should be placed on the granting of an unopposed motion. Furthermore, all motions must be submitted in sufficient time to permit the filing of a response by the other party and/or the issuance of a ruling on the motion before any relevant deadline set by this or any subsequent order. Sections 22.16(b) and 22.7(c) of the Rules of Practice, 40 C.F.R. §§ 22.16(b) and 22.7(c), allow a fifteen-day response period for motions with an additional five days added thereto if the pleading is served by mail. Motions and responses not filed in a timely manner will not be considered without motion for leave to file the document and a showing of good cause.

Furthermore, upon the filing of a motion, a response to a motion, or a reply to a motion, a party may submit a written request for an oral argument on the motion pursuant to 40 C.F.R. § 22.16(d). Included in the request for oral argument shall be a statement as to the proposed appropriate location(s) for the argument to take place. The Office of Administrative Law Judges recently acquired access to state of the art videoconferencing capabilities, and strongly encourages the parties to consider utilizing such technology for oral arguments on motions in order to minimize the expenditure of time and resources in connection with such arguments. A request for oral argument may be granted, in the undersigned's discretion, where further clarification and elaboration of arguments would be of assistance in ruling on the motion.

If either party intends to file any dispositive motion regarding liability, such as a motion for accelerated decision or motion to dismiss under 40 C.F.R. § 22.20(a), it shall be filed **within thirty days after the due date for Complainant's Rebuttal Prehearing Exchange.**



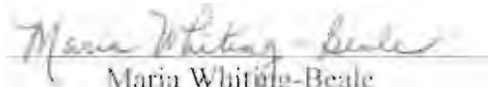
Susan L. Birds
Chief Administrative Law Judge

Dated: November 5, 2009
Washington, D.C.

In the Matter of Meridian Commercial Construction, LLC, Respondent
Docket No. CWA-08-2009-0015

CERTIFICATE OF SERVICE

I certify that the foregoing **Prehearing Order**, dated November 5, 2009, was sent this day in the following manner to the addressees listed below:



Maria Whiting-Beale
Staff Assistant

Dated: November 5, 2009

Original And One Copy By Pouch Mail To:

Tina Artemis
Regional Hearing Clerk
U.S. EPA
1595 Wynkoop
Denver, CO 80202-1129

Copy By Pouch Mail To:

Margaret "Peggy" Livingston, Esquire
Enforcement Counsel (8ENF-L)
U.S. EPA
1595 Wynkoop Street
Denver, CO 80202-1129

Copy By Regular Mail To:

James R. Bullis, Esquire
Kyle G. Pender, Esquire
Montgomery Goff & Bullis, PC
4650 38th Avenue S, Suite 110
P.O. Box 9199
Fargo, ND 58106-9199