

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 10

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HEARINGS CLERK  
EPA -- REGION 10

IN THE MATTER OF: )  
)  
BLACK DIAMOND ENGINEERING ) Proceedings under Section 309(g)  
Sandpoint, Idaho ) Clean Water Act  
) 33 U.S.C. §1319(g)  
)  
Respondent ) DOCKET NO: CWA-10-2007-0147  
)

PREHEARING ORDER

This action, initiated by the Director of the Office of Compliance and Enforcement, United States Environmental Protection Agency Region 10 ("EPA" or "Complainant"), seeks to assess an administrative penalty under section 309(g) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g). This penalty action brought pursuant to section 309(g) of the CWA is governed by procedures set forth in Subpart I of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties* (Consolidated Rules). See 40 C.F.R. Part 22, Subpart I, published at 64 Fed. Reg. 40138 (July 23, 1999).

In accordance with the Prehearing Exchange Order issued by the undersigned on October 16, 2007, the Parties each submitted a prehearing exchange by December 17, 2007 and participated in a conference call on January 8, 2008, in which the Parties agreed to the following:

1. The Parties will arrange for **settlement discussions** to be held before February 5, 2008.
2. EPA will **destroy** all copies of Exhibit No. C-14 to Complainant's Opening Prehearing Exchange, which is a confidential agreement for sale and assignment of membership interest in Cedars at Sand Creek, LLC.

During the conference call on January 8, 2008, I informed Respondent that I am **denying** Respondent's request for documents and information described in Paragraph 4.8 of Black Diamond Engineering Response to EPA's Complaint. The Consolidated Rules at 40 C.F.R. § 22.19(e) provide for additional discovery of information after the initial prehearing exchange,

and § 22.19(e)(5) clarifies that nothing in that section limits a party's right to request Agency records under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA). However, the Consolidated Rules at 40 C.F.R. § 22.52 specifically state that for Subpart I administrative proceedings, discovery under § 22.19(e) shall not be authorized, except for discovery of information concerning the respondent's economic benefit and ability to pay. Since this action is a Subpart I proceeding and the Respondent's request for documents and information does not fall within those categories of information allowed by § 22.52, I will not order additional discovery of the information the Respondent has requested. Respondent may choose to submit to EPA a request for information under the FOIA as a separate matter, and Complainant will respond in accordance with FOIA and EPA rules promulgated to implement FOIA.

In order to discuss further proceedings in this matter, a **telephone conference call** is hereby ordered on **February 5, 2008 at 9 am**. Ms. Kennedy, Regional Hearing Clerk for EPA Reg. 10, whose telephone number is 206-553-0242, Fax No. is 206-553-0163, e-mail address is [kennedy.carol@epa.gov](mailto:kennedy.carol@epa.gov), will contact the parties to provide call-in information. At the beginning of the telephone conference, each party shall advise me of those on their side participating in the conference call. The parties shall have their calendars available for the telephone conference to schedule further proceedings in this matter, and to establish a time and location for the hearing if this matter has not been settled. During the conference call, the parties may request the opportunity to file responses to the opposing party's prehearing exchange and to file motions prior to a hearing.

**SO ORDERED this 11<sup>th</sup> Day of January 2008.**



Richard G. McAllister  
Regional Judicial Officer


## CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **PREHEARING ORDER** in the matter of **BLACK DIAMOND ENGINEERING, DOCKET NO: CWA-10-2007-0147** was filed with the Regional Hearing Clerk on January 11, 2008.

Further, the undersigned certifies that a true and correct copy of the document was delivered to Courtney Hamamoto, Assistant Regional Counsel, U.S. EPA - Region 10, 1200 Sixth Avenue, Seattle, Washington 98101. A true and correct copy of the aforementioned document was placed in the United States mail certified/return receipt on January 11, 2008, to:

Joel W. Petty, P.E.  
Black Diamond Engineering  
1555 W. Ontario St.  
Sand Point, Idaho 83864

January 11, 2008

  
\_\_\_\_\_  
Carol Kennedy  
Regional Hearing Clerk