



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

RECEIVED

OCT 21 A 11:59

EPA ORC OFFICE OF REGIONAL HEARING CLERK

In the Matter of:

STEPHEN LOWE,

Respondent.

)
Docket No. CWA-01-2008-0048

ORDER OF REMAND

This proceeding was initiated on April 14, 2008 by the filing of an Administrative Complaint. On May 13, 2008, the Regional Hearing Clerk forwarded the file to the Office of Administrative Law Judges (OALJ) pursuant to Rule 22.21(a) of the Consolidated Rules of Practice (Rules) (40 C.F.R. § 22.21(a)). Subsequently, the parties were offered and accepted the opportunity to participate in OALJ's Alternative Dispute Resolution (ADR). The ADR process did not produce an amicable settlement and so on September 12, 2008, the undersigned was designated to preside over a hearing to resolve this matter. Thereafter, on September 18, 2008, a Prehearing Order was issued, directing the Complainant to submit a report on the status of settlement and directing the parties to file prehearing exchanges. On October 6, Respondent's counsel submitted a Notice of Withdrawal of Appearance, indicating that Respondent wished to proceed in this matter pro se.

On October 10, 2008, Complainant filed a status report, noting that it filed the Complaint as a Class I action under the Clean Water Act (CWA or Act), for which the presiding officer is a Regional Judicial Officer (RJO) under 40 C.F.R. § 22.51, rather than an Administrative Law Judge. Complainant notes further that Respondent's Answer did not request a hearing before an Administrative Law Judge under Section 554 of the Administrative Procedure Act, but that Complainant nevertheless accepted OALJ's invitation to engage in ADR without considering the jurisdictional issue. Complainant states that it would not object to OALJ retaining jurisdiction, and that it seeks a determination on whether its proposed motion for accelerated decision should be filed with the RJO or with the undersigned.

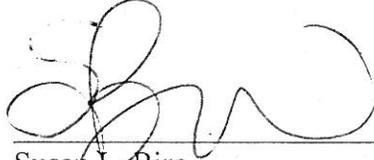
The first page of the Complaint merely references the authority of "Section 309(g)" of the CWA, but the second page references "Class I administrative penalties" and specifically

Subsection 309(g)(2)(A) of the CWA, and proposes a penalty “up to a maximum of \$32,500.”¹ Subsection 309(g)(2)(A) of the Act provides for Class I penalty assessment proceedings in which a “hearing shall not be subject to section 554 or 556 of Title 5 [of the Administrative Procedure Act]” and in which the penalty shall not exceed \$25,000 (increased to \$32,500 under 40 C.F.R. § 19). Moreover, Rule 22.50 (40 C.F.R. §§ 22.50) provides that Subpart I “applies to all adjudicatory proceedings for . . . assessment of a penalty under sections 309(g)(2)(A) . . . of the Clean Water Act” and that in such proceedings “[t]he Presiding Officer shall be a Regional Judicial Officer.” 40 C.F.R. §§ 22.50(a)(1) and 22.50.

Therefore, the Regional Judicial Officer has jurisdiction over this proceeding and it should not have been forwarded to OALJ.

Accordingly, this matter is hereby **REMANDED** to the Regional Judicial Officer of EPA Region 1 to conduct proceedings under 40 C.F.R. part 22 subpart I.

The Order of Designation dated September 12, 2008, and the Prehearing Order dated September 18, 2008, are hereby **VACATED**.



Susan L. Biro
Chief Administrative Law Judge

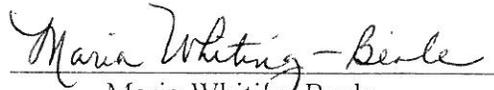
Dated: October 20, 2008
Washington, D.C.

¹ Providing the specific statutory authority for the proceeding, *i.e.*, “Class I administrative penalty under Section 309(g)(2)(A) of the Clean Water Act” on the first page of a complaint may avoid such problems in the future.

In the Matter of Stephen Lowe Respondent
Docket No. CWA-01-2008-0048

CERTIFICATE OF SERVICE

I certify that the foregoing **Order On Remand**, dated October 20, 2008, was sent this day in the following manner to the addressees listed below:



Maria Whiting-Beale
Staff Assistant

Dated: October 20, 2008

Original And One Copy By Pouch Mail To:

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

Copy By Pouch Mail To:

Michael Wagner, Esquire
Enforcement Counsel (SEL)
U.S. EPA
One Congress Street, Suite 1100
Boston, MA 02114-2023

Copy By Regular Mail To:

Stephen Lowe
P.O. Box 479
Hubbardston, MA 01452

Stephen Lowe
5 Warren Avenue
Westborough, MA 01581