



**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

**U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2011 OCT -7 P 2:27
REGIONAL HEARING
CLERK**

**IN THE MATTER OF)
)
DEPENDABLE TOWING & RECOVERY,) DOCKET NO. CWA-02-2011-3601
INC., AND DAVID A. WHITEHILL,)
)
RESPONDENTS)**

PREHEARING ORDER

As you previously have been notified, I have been designated by the September 28, 2011 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),¹ 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.

¹ 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. Sections 309(g)(4)(A) and (B) of the CWA provide that before issuing an order assessing a class II civil penalty, the Administrator shall provide public notice of and reasonable opportunity to comment on the proposed issuance of such order and that any person who comments on a proposed assessment of a class II penalty shall be given notice of any hearing and of the order assessing such penalty. See 40 C.F.R. § 22.45. In the Complaint, EPA states that it has given public notice. Compl. ¶ 28.

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 three months but that the parties have not filed a Consent Agreement and Final Order to settle this matter. Accordingly, the parties shall strictly 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 party² 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 unretouched and unaltered photographs. The documents and exhibits shall be identified as

² Respondents, Dependable Towing & Recovery, Inc. ("Dependable Towing") and David A. Whitehill ("Whitehill"), filed a joint Answer and Amended Answer and are represented by the same counsel. Respondents may choose to file a joint prehearing exchange, or each Respondent may file separately.

"Complainant's" or "Respondents'" exhibits,³ as appropriate, and numbered with Arabic numerals (e.g., "Complainant's Exhibit 1"); and

- (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 or she is unable to pay the proposed penalty or that payment will have an adverse effect on his or her ability to continue to do business, that Respondent shall furnish supporting documentation such as certified copies of financial statements or tax returns.
5. Respondents shall submit a narrative statement, and a copy of any documents in support, explaining in detail the factual and/or legal bases for Respondents' alleged Affirmative Defenses 1-5 as stated on pages 5 and 6 of the Amended Answer.
6. Complainant shall submit a statement regarding whether the Paperwork Reduction Act of 1980 ("PRA"), 44 U.S.C.

³ If Respondents, Dependable Towing and Whitehill, choose to file separate prehearing exchanges, the proposed exhibits should be identified as "Respondent Dependable Towing's" or "Respondent Whitehill's" exhibits.

§§ 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:

- November 14, 2011 - Complainant's Initial Prehearing Exchange
- December 14, 2011 - Respondents' Prehearing Exchange, including any direct and/or rebuttal evidence
- December 28, 2011 - Complainant's Rebuttal Prehearing Exchange (if necessary)

In its 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, each Respondent has the right to defend themselves against Complainant's charges by way of direct evidence, rebuttal evidence, or through cross-examination of Complainant's witnesses. Respondents are entitled to elect any or all three means to pursue their defense.

If either Respondent elects only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, then that Respondent shall serve a statement to that effect on or before the date for filing its prehearing exchange. Each party is hereby reminded that failure to comply with the prehearing exchange requirements set forth herein, including Respondents' 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:

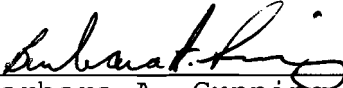
If sending by United States Postal Service (USPS):

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.



Barbara A. Gunning
Administrative Law Judge

Dated: October 5, 2011
Washington, D.C.

**In the Matter of Dependable Towing & Recovery, Inc., and David A. Whitehill, Respondent.
Docket No. CWA-02-2011-3601**

CERTIFICATE OF SERVICE

I hereby certify that true copies of this **Prehearing Order**, issued by Barbara A. Gunning, Administrative Law Judge, in Docket No. CWA-02-2011-3601, were sent to the following parties on this 5th day of October 2011, in the manner indicated:



Mary Angeles
Legal Staff Assistant

Original and One Copy by Pouch Mail to:

Karen Maples
Regional Hearing Clerk
US EPA, Region II
290 Broadway, 16th Floor
New York, NY 10007-1866

Copy by Pouch Mail to:

Eduardo J. Gonzalez, Esq.
Office of Regional Counsel
U.S. EPA / Region II
290 Broadway, 16th Floor
New York, NY 10007-1866

Copy by Regular Mail to:

Deborah J. Chadsey, Esq.
Kavinoky Cook, LLP
Attorneys at Law
726 Exchange Street, Suite 800
Buffalo, NY 14210

**Dated: October 5, 2011
Washington, DC**