

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

FILED
2015 FEB 02 PM 1:07
W. JAMES L. BAKER
REGIONAL DIRECTOR

IN THE MATTER OF § DOCKET NO. SDWA-06-2014-1106
§
Page One Plus Wholesale, Inc. §
Tulsa, OK § COMPLAINANT'S PREHEARING
§ EXCHANGE
Respondent §
§

COMPLAINANT'S PREHEARING EXCHANGE

The Complainant, the Director of the Compliance Assurance and Enforcement Division, United States Environmental Protection Agency, Region 6, through its attorney, hereby files its Prehearing Exchange pursuant to the Scheduling Order, dated November 4, 2014, issued by the Presiding Officer and pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. Part 22. In the Order, the Presiding Officer instructed the Parties to file a Prehearing Exchange containing specific information. This document contains Complainant's responses to the Presiding Officer's Order.

A. WITNESSES:

The Complainant may call the following witnesses at the hearing:

1. David Aguinaga -- Mr. Aguinaga is an Enforcement Officer in the Underground Injection Control (UIC) program in the Water Enforcement Branch of the Compliance Assurance and Enforcement Division of the U.S. Environmental Protection Agency, Region 6, in Dallas, Texas. David has 4 years of experience in regulatory enforcement under the Clean Water Act (CWA) and Safe Drinking Water Act (SDWA). Prior to his current position, Mr. Aguinaga

worked 10 additional years in the field of environmental sciences. Mr. Aguinaga is responsible for conducting inspections and investigations of regulated facilities for compliance with the SDWA, UIC permits, and other federal requirements. As part of his regular job duties, he performs pre- and post-inspection duties such as gathering and evaluating information, reviewing facility records, and developing appropriate inspection plans. In this capacity, he reviewed the inspection reports drafted by Mr. Larry M. Stephens and communicated with Respondent regarding the violation. Mr. Aguinaga also helped draft both the Administrative Order and Administrative Complaint issued to Respondent and calculated the proposed penalty contained in the Complaint. He accordingly can also testify to his calculation and the contents of those documents.

2. Larry M. Stephens - Mr. Stephens is a Field Inspector in the Underground Injection Control (UIC) department of the Environmental and Natural Resources Department for the Osage Nation in Osage County, Oklahoma. He is primarily involved in conducting Mechanical Integrity Tests on the many salt-water injection and disposal wells within the borders of the Osage Nation. His duties also include conducting routine inspections on the aforementioned injection wells on a two year rotating basis as well as responding to problems that require him to inspect a given injection well on a more frequent timetable. Since he began current job in 2009, he has conducted 1,409 Mechanical Integrity Tests, 3,163 routine inspections, and 39 pluggings of injection wells. In this capacity, he performed multiple site investigations on Respondent's property, including on August 24, 2012, November 29, 2012, and September 25, 2014. Thus, Mr. Stephens may testify as to what he observed at Respondent's property when he conducted his investigations, including the static fluid levels in the well annulus. He may also testify as to his

communications with Respondent regarding the violation.

3. Custodians of Records - EPA personnel may be called to establish the foundation for certain exhibits and the absence or receipt of certain records.

4. Any witness named by Respondent.

5. Any rebuttal witness, as required.

Although Complainant does not anticipate the need to call any additional witnesses, Complainant respectfully reserves the right to amend or supplement the witness list and to expand or otherwise modify the scope and extent of testimony of any of these potential witnesses, where appropriate, and upon adequate notice to Respondent and notice and order of this Court.

Complainant's witnesses will not need an interpreter in order to testify.

Special accommodations under the Americans with Disabilities Act will not be needed for counsel, or any witness or party representative.

B. EXHIBITS:

The Complainant may offer into evidence the following exhibits, attached to this Prehearing Exchange in digital format and contained in a compact disc:

| <u>EXHIBIT NO.</u> | <u>DESCRIPTION</u> |
|---------------------|---|
| Complainant's Ex. 1 | Administrative Complaint filed January 14, 2014 |
| Complainant's Ex. 2 | Administrative Order filed April 5, 2013 |
| Complainant's Ex. 3 | Letter from Respondent dated March 3, 2014 |
| Complainant's Ex. 4 | Letter from Respondent dated September 27, 2014 |
| Complainant's Ex. 5 | Penalty Calculation Completed by Mr. Aguinaga |

| | |
|----------------------|--|
| Complainant's Ex. 6 | Well Inspection Report from August 24, 2012 visit |
| Complainant's Ex. 7 | Well Inspection Report from November 29, 2012 visit |
| Complainant's Ex. 8 | Annual Report from Respondent dated August 12, 2010 |
| Complainant's Ex. 9 | Annual Report from Respondent dated October 27, 2010 |
| Complainant's Ex. 10 | Annual Report from Respondent dated September 20, 2011 |
| Complainant's Ex. 11 | Letter from EPA to Respondent dated September 28, 2011 |
| Complainant's Ex. 12 | Follow-up Letter from EPA to Respondent dated January 18, 2012 |
| Complainant's Ex. 13 | Annual Report from Respondent dated August 21, 2012 |
| Complainant's Ex. 14 | Letter from EPA to Respondent dated September 17, 2012 |
| Complainant's Ex. 15 | Letter from EPA to Respondent dated April 2, 2013 |
| Complainant's Ex. 16 | Record of Communication between Ron Van Wyk and Terrance Lewis dated April 30, 2013 |
| Complainant's Ex. 17 | Letter from EPA to Respondent dated June 24, 2013 |
| Complainant's Ex. 18 | Record of Communication between Ron Van Wyk and Terrance Lewis dated September 18, 2013 |
| Complainant's Ex. 19 | Correspondence from Mr. Stephens to Mr. Aguinaga following site visit dated September 25, 2014 |
| Complainant's Ex. 20 | Photos of Well from September 25, 2014 site visit by Larry M. Stephens |
| Complainant's Ex. 21 | Underground Injection Control Permit: November 24, 1993 |
| Complainant's Ex. 22 | Underground Injection Control Permit Modification: June 29, 1994 |
| Complainant's Ex. 23 | Underground Injection Control Permit Modification: May 24, 2004 |

| | |
|----------------------|---|
| Complainant's Ex. 24 | Underground Injection Control Permit Modification: February 28, 2008 |
| Complainant's Ex. 25 | Mr. Aguinaga's Resume |
| Complainant's Ex. 26 | Mr. Stephens' Resume |
| Complainant's Ex. 27 | UIC Program Judicial and Administrative Order Settlement Penalty Policy (September 1993) |
| Complainant's Ex. 28 | Record of Communication between Mr. Aguinaga and Terrance Lewis dated September 18, 2014 |

Complainant respectfully reserves the right to amend its prehearing exchange to add or subtract exhibits and/or documents.

C. PLACE FOR HEARING AND ESTIMATED TIME NEEDED:

Pursuant to 40 C.F.R. §§ 22.19(d) and 22.21(d), Complainant requests that the hearing be held in Dallas, Texas. Complainant estimates two (2) days at most will be needed to present its direct case.

D. ASSESSMENT OF CIVIL PENALTY:

STATUTORY FACTORS

Pursuant to Section 1423(c)(2) of the SDWA, 42 U.S.C. § 300h-2(c)(2), and 40 C.F.R. § 19.4, EPA has the authority to assess against Respondent an administrative civil penalty not to exceed \$7,500 for each day of violation and up to a maximum administrative penalty of \$187,500. Based upon the facts alleged in the Complaint, and in accordance with the statutory penalty factors enumerated under Section 1423(c)(4)(B) of the SDWA, 42 U.S.C. § 300h-2(c)(4)(B), Complainant is seeking a penalty of \$7,000 against Respondent for failure to

plug the relevant injection well and for failure to comply with the April 5, 2013 Administrative Order.

The statutory penalty factors deal with both the violation itself and the violator. The first two factors instruct EPA to consider the seriousness of the violation and the economic benefit (if any) derived from the violation. The next three factors include Respondent's history of similar violations, any good-faith efforts by Respondent to comply with applicable requirements, and the economic impact the penalty would have on Respondent. The final factor considered is "such other matters as justice may require." 42 U.S.C. § 300h-2(c)(4)(B).

PENALTY CALCULATION

The penalty assessed is to promote the goals of fair and equitable treatment among the regulated community and to deter further noncompliance, and follows EPA enforcement guidance for penalty assessment.

Under Section 1423(c)(4)(B) of the SDWA, 42 U.S.C. § 300h-2(c)(4)(B), EPA must consider the **seriousness of the violation**. In the case at hand, Respondent failed to plug well number D54 within one year after termination of injection as required by 40 C.F.R. § 147.2905. Mr. Stephens visited the site on both August 24, 2012, and November 29, 2012, and observed that the static fluid level in the annulus of the well was above the base of Underground Sources of Drinking Water ("USDWs") in the area. As a result, Respondent's failure to plug its well places nearby USDWs at risk due to the possibility that contaminated fluids could move through the well into a USDW. Respondent also violated EPA's April 5, 2013 Administrative Order directing Respondent to plug the well. In assessing seriousness of the violation, EPA took into account the potential of the contaminated fluids to contaminate the nearby USDWs. Were the

nearby USDWs to become contaminated, residents of the area could be deprived of their source of drinking water. EPA also considered that Respondent's failure to comply with the Administrative Order undermined the SDWA regulatory program and placed Respondent at an advantage over other members of the regulated community who invested the time and resources to comply with the program.

Under Section 1423(c)(4)(B) of the SDWA, 42 U.S.C. § 300h-2(c)(4)(B), EPA must consider the **economic benefit**, if any, resulting from the violation. Had Respondent complied with the Administrative Order, Respondent would have been required to complete appropriate corrective actions to prevent contaminated fluids from moving through the well bore into USDWs. Respondent's delay in doing so, has resulted in an economic benefit, which EPA conservatively calculated to be \$195.

Under Section 1423(c)(4)(B) of the SDWA, 42 U.S.C. § 300h-2(c)(4)(B), EPA must consider **any history of such violations**. In calculating its penalty, EPA looked to Respondent's failure to comply with the April 5, 2013 Administrative Order and the violations for which it was cited therein. EPA did not take into account any other similar violations.

Under Section 1423(c)(4)(B) of the SDWA, 42 U.S.C. § 300h-2(c)(4)(B), EPA must consider **any good-faith efforts to comply with the applicable requirements**. Respondent has not completed any good-faith efforts to comply. Respondent has not taken any substantive steps to comply with SDWA and has often been slow to respond to EPA's attempts to discuss the violation. Therefore, while EPA did consider this factor, it did not apply this factor in the calculation of the penalty in this matter.

Under Section 1423(c)(4)(B) of the SDWA, 42 U.S.C. § 300h-2(c)(4)(B), EPA must

consider the **economic impact of the penalty on the violator**. Respondent has made no assertion as to its inability to pay the penalty proposed, and EPA has no reason to believe that the proposed penalty will imperil Respondent's business. Nonetheless, in light of the relatively small size of Respondent's business, EPA has reduced its penalty under this statutory factor, in accordance with EPA's *UIC Program Judicial and Administrative Order Settlement Penalty Policy* (September 1993).

Finally, under Section 1423(c)(4)(B) of the SDWA, 42 U.S.C. § 300h-2(c)(4)(B), the EPA will consider **such other matters as justice may require**. This catch-all provision can be used to increase or mitigate the penalty. The EPA did consider this factor; however, the Agency did not apply this factor in the calculation of the penalty in this matter.

All of the statutory factors were considered together to determine the total penalty of \$7,000.

E. PAPERWORK REDUCTION ACT APPLICABILITY

The Paperwork Reduction Act of 1980 (PRA), 44 U.S.C. §§ 3501 *et seq.*, as amended, does not apply in this case. Also, there is not an Office of Management and Budget Control Number herein and the Provisions of Section 3512 of the PRA are not applicable.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Russell Murdock", written over a horizontal dotted line.

Russell Murdock
Assistant Regional Counsel (6RC-EW)
Office of Regional Counsel
U.S. EPA, Region 6
1445 Ross Ave., Ste. 1200
Dallas, TX 75202-2733
Murdock.russell@epa.gov
Tel.: (214) 665-3189
Fax.: (214) 665-3177

CERTIFICATE OF SERVICE

I certify that the original of the foregoing Complainant's Prehearing Exchange was hand-delivered to and filed with the **Regional Hearing Clerk**, U.S. Environmental Protection Agency, Region 6, 1445 Ross Avenue, Dallas, Texas 75202-2733, and a true and correct copy was sent to the following on this 9th day of February, 2015, in the following manner:

**Copy by certified mail
return receipt requested:**

Mr. Terrance L. Lewis
Page One Plus Wholesale, Inc.
P.O. Box 691335
Tulsa, OK 74169

A handwritten signature in cursive script, reading "Lupe Arzola", is written over a horizontal line.