



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

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BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
MICHAEL AUKERMAN, d/b/a) DOCKET NO. CWA-05-2008-0004
MICHAEL AUKERMAN EXCAVATING,)
)
RESPONDENT)

PREHEARING ORDER

As you previously have been notified, I have been designated by the September 30, 2008 Order of the Chief Administrative Law Judge to preside in the above captioned matter.^{1/} 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),^{2/} and is governed by the

^{1/} In response to an inquiry from this office, Complainant declined to participate in the Alternate Dispute Resolution ("ADR") process offered by this office. Respondent did not respond to the inquiry, which is deemed to be a declination of its participation in ADR.

^{2/} The Complaint alleges violation of Section 405(e) of the CWA, 33 U.S.C. § 1345(e), and proposes the assessment of a civil administrative penalty in the amount of \$102,000 under Section 309(g)(2) of the CWA. A hearing on the record in accordance with Section 554 of Title 5 shall be held in civil penalty cases under Section 309(g)(2)(B) of the CWA (class II civil penalty). 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. The record reflects that Complainant has provided public notice of and an opportunity to
(continued...)

Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-32. The parties are advised to familiarize themselves with both the applicable statute(s) and the Rules of Practice.

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 benefits of a negotiated settlement may far outweigh the uncertainty, time, and expense associated with a litigated proceeding.

There is no indication in the file that settlement discussions have been held in this matter. The parties are directed to hold a settlement conference on this matter on or before **November 7, 2008**, to attempt to reach an amicable resolution of this matter. See Section 22.4(c)(8) of the Rules of Practice, 40 C.F.R. § 22.4(c)(8). Complainant shall file a status report regarding such conference and the status of settlement on or before **November 21, 2008**.

In the event that the parties fail to reach a settlement by that date, they shall strictly comply with the requirements of this order and prepare for a hearing. 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 failure to comply with the prehearing requirements or to meet the schedule set forth in this Prehearing Order. Of course, the parties are encouraged to initiate or continue to engage in settlement discussions during and after preparation of their prehearing exchange.

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 party 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' expected

^{2/} (...continued)
comment on the matter.

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 actual unretouched photographs. The documents and exhibits shall be identified as "Complainant's" or "Respondent's" exhibit, 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), (d) of the Rules of Practice, 40 C.F.R. §§ 22.19(a), (b), (d); see also Section 22.21(d) of the Rules of Practice, 40 C.F.R. § 22.21(d).

2. Complainant shall submit a statement 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.
3. Respondent shall submit a statement explaining why the proposed penalty should be reduced or eliminated. If Respondent intends to take the position that it is unable to pay the proposed penalty or that payment will have an adverse effect on its ability to continue to do business, Respondent shall furnish supporting documentation such as certified copies of financial statements or tax returns.
4. Complainant shall submit a statement regarding whether the Paperwork 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.

See Section 22.19(a)(3) of the Rules of Practice, 40 C.F.R. § 22.19(a)(3).

The prehearing exchanges delineated above shall be filed in *seriatim* manner, according to the following schedule:

January 9, 2009 - Complainant's Initial Prehearing Exchange

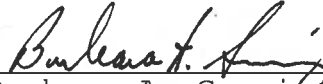
February 9, 2009- Respondent's Prehearing Exchange, including any direct and/or rebuttal evidence

February 23, 2009-Complainant's Rebuttal Prehearing Exchange(if necessary)

In its Answer to the Complaint, Respondent exercised its right to request a hearing pursuant to Section 554 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 554. 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, 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 defense. If Respondent elects only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, 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 a Respondent's statement of election only to conduct cross-examination of the 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 in 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:

Judge Barbara A. Gunning
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Ave., NW
Washington, DC 20460-2001
Telephone: 202-564-6281



Barbara A. Gunning
Administrative Law Judge

Dated: October 9, 2008
Washington, DC

**In the ADR Matter of *Michael Aukerman, d/b/a Michael Aukerman Excavating*, Respondent.
Docket No. CWA-06-2008-0004**

CERTIFICATE OF SERVICE

I certify that the foregoing **Prehearing Order**, dated October 9, 2008, was sent this day in the following manner to the addressees listed below.



Mary Angeles
Legal Staff Assistant

Original and One Copy by Pouch Mail to:

Tywanna Greene
Acting Regional Hearing Clerk
U.S. EPA, Region V, MC-13J
77 West Jackson Blvd., 13th Floor
Chicago, IL 60604-3590

One Copy by Pouch Mail to:

Richard L. Wagner, Esq.
Assistant Regional Counsel (C-14J)
U.S. EPA - Region V
77 West Jackson Boulevard
Chicago, IL 60604-3590

One Copy by Regular Mail to:

Robert B. Hollister, Esq.
Osley, Malone, Hollister and Warren, PLL
301 E. Main Cross Street
P.O. Box 1086
Findlay, OH 45839-1086

**Dated: October 9, 2008
Washington, D.C.**

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