



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
Burke Oil Company, Inc., d/b/a) DOCKET NO. CWA-08-2007-0025
Presho Oil Company) CWA-08-2007-0026
)
Burke Oil Company, Inc.,)
)
)
RESPONDENTS)

ORDER SCHEDULING HEARING

This proceeding arises under the authority of Section 311(b)(6)(B)(i)-(ii) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act ("CWA"), 33 U.S.C. § 1321(b)(6)(B)(i)-(ii). In an Order dated April 23, 2008 the two above-cited matters were consolidated pursuant to motion by all parties. The matter entitled *In the Matter of Burke Oil Company, Inc., d/b/a Presho Oil Company*, Docket No. CWA-08-2001-0025, ("*Presho Oil*") is a CWA class II civil administrative penalty proceeding that proposes administrative penalties against Respondent in the amount of \$34,948. The matter entitled *In the Matter of Burke Oil Company, Inc.*, Docket No. CWA-08-2001-0026, ("*Chamberlain*") is a CWA class I civil administrative penalty proceeding that proposes administrative penalties against Respondent in the amount of \$19,273. Since consolidating the two matters, the Class I matter (*Chamberlain*) has been resolved by a Partial Consent Agreement/Final Order ("CAFO") filed September 29, 2008.^{1/} Thus, although the two matters remain consolidated, only the Class II matter of Burke Oil Company, Inc., d/b/a Presho Oil Company, Docket No. CWA-08-2001-0025, remains for adjudication.

^{1/} The Partial Consent Agreement states that it resolves the matter of Burke Oil Company, Inc., Docket No. CWA-08-2001-0026, ("*Chamberlain*"), but the Final Order, which approves and incorporates by reference the Consent Agreement, is entitled *Burke Oil Company, Inc. d/b/a Presho Oil Company*.

The parties have filed their prehearing exchanges in the remaining matter pursuant to the undersigned's Prehearing Order entered on April 23, 2008. The parties state that they reserve the right to supplement their prehearing exchanges.

A hearing in this matter originally was set to begin on October 21, 2008. On September 26, 2008, the hearing was postponed based on the parties' representations that they had reached a settlement in the Chamberlain matter and that the parties were working diligently in resolving the Presho Oil matter. However, the parties were not able to settle claims associated with the Presho Oil facility. On January 20, 2009, Complainant filed a motion requesting that the undersigned hold a hearing on all remaining outstanding counts in this matter.⁴ Respondent has not filed a response to this motion. See 40 C.F.R. § 22.16(b).

The parties are reminded that this proceeding is governed by the 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. §§ 22.1-22.32. Sections 22.19(a) and 22.22(a) of the Rules of Practice, 40 C.F.R. §§ 22.19(a), 22.22(a), provide that documents or exhibits that have not been exchanged and witnesses whose names have not been exchanged at least fifteen (15) days before the hearing date shall not be admitted into evidence or allowed to testify unless good cause is shown for failing to exchange the required information.

Further, the parties are advised that every motion filed in this proceeding must be served in sufficient time to permit the filing of a response by the other party and to permit the issuance of an order on the motion before the deadlines set by this order or any subsequent order. Section 22.16(b) of the Rules of Practice, 40 C.F.R. § 22.16(b), allows a fifteen-day (15) period for responses to motions and Section 22.7(c), 40 C.F.R. § 22.7(c), provides for an additional five (5) days to be added thereto when the motion is served by mail. The parties are hereby notified that the undersigned will not entertain last minute motions to amend or supplement the prehearing exchange absent extraordinary circumstances.

⁴ Complainant's December 30, 2008, Motion to File Complainant's Proposed Findings of Fact, Exhibits and Testimony is Denied because the Respondent has not stipulated to this filing.

As previously noted in the Prehearing Order, 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. However, 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 requirements or schedule set forth in this Order.

As the parties have not reached a settlement in this matter, they shall strictly comply with the requirements of this order and prepare for a hearing. The parties have not yet agreed on a joint set of stipulated facts. If the parties wish to file a joint set of stipulated facts, exhibits, and testimony, they must do so on or before March 23, 2009.⁴ See Section 22.19(b)(2) of the Rules of Practice, 40 C.F.R. § 22.19(b)(2). The time allotted for the hearing is limited. Therefore, the parties must make a good faith effort to stipulate, as much as possible, to matters which cannot reasonably be contested so that the hearing can be concise and focused solely on those matters which can only be resolved after a hearing.

The Hearing in this matter will be held beginning at 9:30 a.m. on Tuesday, April 21, 2009 in Chamberlain, South Dakota, continuing if necessary on April 22, 23 and 24, 2009.⁵ The Regional Hearing Clerk will make appropriate arrangements for a courtroom and retain a stenographic reporter. The parties will be notified of the exact location and of other procedures pertinent to the hearing when those arrangements are complete. Individuals requiring special accommodation at this hearing, including wheelchair access, should contact the Regional Hearing Clerk at least five business days prior to the hearing so that appropriate arrangements can be made.

⁴ This tribunal will look unfavorably on any further requests for extensions.

⁵ The designation of Chamberlain as the site of the hearing depends upon the availability of a courtroom.

IF ANY PARTY DOES NOT INTEND TO ATTEND THE HEARING OR HAS GOOD CAUSE FOR NOT BEING ABLE TO ATTEND THE HEARING AS SCHEDULED, IT SHALL NOTIFY THE UNDERSIGNED AT THE EARLIEST POSSIBLE MOMENT.



Barbara A. Gunning
Administrative Law Judge

Dated: February 10, 2009
Washington, DC

In *Burke Oil Company, Inc., d/b/a Presho Oil Company*, Docket No. CWA-08-2007-0025;
Burke Oil Company, Inc., Docket No. CWA-08-2007-0026, Respondents.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order Scheduling Hearing**, dated February 10, 2009, was sent this day in the following manner to the addressees listed below.



Mary Angeles
Legal Staff Assistant

Original and One Copy by Facsimile and Pouch Mail to:

Tina Artemis
Regional Hearing Clerk
U.S. EPA / Region VIII
1595 Wynkoop Street
Denver, CO 80202-2466
Fx: 303.312.6859

One Copy by Facsimile and Pouch Mail:

Dana Stotsky, Esq.
U.S. EPA / Region VIII
Enforcement Attorney (MC 8ENF-L)
1595 Wynkoop Street
Denver, CO 80202-1129
Fx: 303.312.6859

One Copy Facsimile and by Regular Mail to:

Albert Steven Fox, Esq.
Larson, Sundall, Larson, Schaub & Fox, PC
P.O. Box 547
Chamberlain, SD 57325
Fx: 605.734.5669

Dated: February 10, 2009
Washington, D.C.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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FAX TRANSMITTAL PAGE

Date: Tues., 2/10/09

From the office of: Chief Judge Susan Biro Judge Barbara Gunning
Judge William Moran Judge Spencer Nissen

To: Tina Artemis, Reg. Hearing Clerk Fax: 303.312.6859
Of: U.S. EPA / Region VIII

To: Dana Stotsky, Sr. Enforcement Counsel Fax: 303.312.6953
Of: ORC / U.S. EPA / Region VIII

To: Albert S. Fox, Esq. Fax: 605.734.5669
Of: Larson, Sundall, Larson, Schaub & Fox, PC

In Re: Burke Oil Company, et al.
Dockets No. CWA-08-2007-0025

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