UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
ROBERT M. LOOMIS AND,	)	**DOCKET NO. CWA-10-2011-0086**
NANCY M. LOOMIS,	)	
	)	
RESPONDENTS	)	

PREHEARING ORDER

As you previously have been notified, I have been designated by the August 18, 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.

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[1] The Complaint alleges that Respondents violated Section 301 of the CWA, 33 U.S.C. §§ 1311. For these alleged violations, Complainant seeks a class II civil administrative penalty 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 class II 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. The file before me contains no documentary proof of the publication of the public notice or the filing of comments, if any, described above.

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 Complainant declined, and Respondent did not respond to, an invitation to participate in the Alternative Dispute Resolution process offered by this office. The parties are directed to hold a settlement conference on this matter on or before **September 9, 2011**, to attempt to reach an amicable resolution. *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 **September 16, 2011**.

In the event that the parties fail to reach a settlement, they shall strictly comply with the requirements of this Prehearing Order and prepare for a hearing. The parties are encouraged to initiate or continue to engage in settlement negotiations 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 party[2] 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

[2] Respondents Robert Loomis and Nancy Loomis filed a joint Answer and are represented by the same counsel. Respondents may choose to file a joint prehearing exchange, or each Respondent may file separately.

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 "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 1-4 as stated on page 10 of the

[3] If Respondents choose to file separate prehearing exchanges, the propose exhibits should be identified as "Respondent Robert Loomis'" or "Respondent Nancy Loomis'" exhibits.

Answer.

5. 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 exchange delineated above shall be filed *in seriatim* manner, according to the following schedule:

October 7, 2011	- Complainant's Initial Prehearing Exchange
November 4, 2011	- Respondents' Prehearing Exchange(s), including any direct and/or rebuttal evidence
November 18, 2011	- Complainant's Rebuttal Prehearing Exchange (if necessary)

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

If a Respondent elects only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, that Respondent shall serve a statement to that effect on or before the date for filing his prehearing exchange. Each party is hereby reminded that failure to comply with the prehearing exchange requirements set forth herein, including a Respondent's 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: August 18, 2011
Washington, D.C.

In the Matter of *Robert M. Loomis and, Nancy M. Loomis,* Respondent.
Docket No. CWA-10-2011-0086

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Prehearing Order,** dated August 18, 2011, issued by Barbara A. Gunning, Administrative Law Judge, was sent on this 19th day of August 2011, in the following manner to the addressees listed below.

Mary Angeles
Legal Staff Assistant

Original and One Copy by Facsimile and Pouch Mail to:

Carol Kennedy
Regional Hearing Clerk
U.S. EPA, Region X
1200 Sixth Avenue, ORC-158
Seattle, WA 98101
Fx: 206.553.0163

Copy by Facsimile and Pouch Mail to:

Lori Cora, Esq.
ORC, U.S. EPA / Region X
1200 Sixth Avenue, ORC-158
Seattle, WA 98101
Fx: 206.553.0163

Copy by Facsimile and Regular Mail to:

Brian J. Stibitz, Esq.
Reeves Amodio LLC
500 L Street, Suite 300
Anchorage, AK 99501-1990
Fx: 917.222.7199

Dated: August 19, 2011
Washington, DC