



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:)
)
Portsmouth Boating Center, Inc.,) Docket No. CWA-03-2011-0099
)
Respondent.)

PREHEARING ORDER

As you have been previously notified, I am designated to preside over this proceeding. This proceeding will be governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. §§ 22.1 through 22.45 ("Rules of Practice"). The parties are advised to familiarize themselves with the applicable statute(s) and the Rules of Practice. An informal Practice Manual, a Citizen's Guide to proceedings before the EPA Office of Administrative Law Judges, and significant decisions issued by the Office are accessible on the internet at: <http://www.epa.gov/oalj>.

Agency policy strongly supports settlement, and the procedures regarding documenting settlements are set forth in Section 22.18 of the Rules of Practice, 40 C.F.R. § 22.18. The parties are commended for taking the initiative to resolve this matter informally and expeditiously. Each party is reminded that pursuing this matter through a hearing and possible appeals will require the expenditure of significant amounts of time and financial resources. Each party should also realistically consider the risk of not prevailing in the proceeding despite such expenditures. While a negotiated settlement allows the parties to control the outcome of the proceeding, a judicial decision eliminates that control. With these considerations in mind, the parties are directed to engage in a settlement conference on or before **November 18, 2011**, and attempt to reach an amicable resolution of this matter. Complainant shall file a Status Report regarding this conference and the status of settlement on or before **November 30, 2011**. If the case is settled, a fully-executed Consent Agreement and Final Order shall be filed no later than **December 16, 2011**, with a copy sent to the undersigned.

Should a Consent Agreement and Final Order not be finalized on or before the deadline set forth above, the parties shall prepare for hearing and strictly comply with the prehearing requirements of this Order, as set forth below.

Prehearing Exchange. This Order is issued pursuant to Section 22.19(a) of the Rules of Practice. Accordingly, it is directed that the following prehearing exchange take place between the parties:

1. Each party shall file with the Regional Hearing Clerk, serve on the opposing party, and serve on the Presiding Judge:

(A) a list of names of the expert and other witnesses intended to be called at hearing, identifying each as a fact witness or an expert witness, a brief narrative summary of their expected testimony, and a curriculum vitae or resume for each identified expert witness, or a statement that no witnesses will be called;

(B) copies of all documents and exhibits intended to be introduced into evidence, identified as “Complainant’s” or “Respondent’s” exhibit, as appropriate, and numbered with Arabic numerals (e.g., CX 1 or RX 1); and

(C) a statement explaining the party’s views as to the appropriate place for the hearing, and an estimate of the time needed to present its direct case. See Sections 22.21(d) and 22.19(d) of the Rules of Practice. Also, state whether translation services are necessary in regard to the testimony of any witness(es), and, if so, state the language to be translated.

2. In addition, Complainant shall submit the following as part of its Initial Prehearing Exchange:

(A) a brief narrative statement, and a copy of any supporting documents, explaining in detail the factual and/or legal bases for the allegations in Paragraphs 39, 40, 43 and 45 of the Complaint, to the extent the allegations are denied in Respondent’s Answer;

(B) a copy of any reports, notes, and other pertinent documentation produced as a result of the EPA inspection referred to in Paragraphs 44 and 45 of the Complaint;

(C) a statement indicating whether Complainant has provided the public notice and opportunity to comment as described in 40 C.F.R. § 22.45; and

(D) all factual information and supporting documentation relevant to the assessment of the penalty, a detailed narrative explanation of the proposed penalty addressing relevant penalty factors, and a copy, or a statement of the internet address (URL), of any policy or guidance upon which Complainant relied or intends to rely in calculating the penalty.

3. In addition, Respondent shall submit the following as part of its Prehearing Exchange:

(A) a copy of any documents in support of the denials and assertions made in its Answer in response to the Complaint, specifically those allegations of fact on pages 1-3 and in

Paragraph 45 of the Answer;

(B) a detailed explanation and a copy of any documents in support of the affirmative defenses listed on pages 6-7 of the Answer;

(C) all factual information and supporting documentation Respondent considers relevant to the assessment of a penalty, in consideration of the factors listed at Section 311(b)(8) of the Clean Water Act, 33 U.S.C. 1321(b)(8); and

(D) if Respondent takes the position that the proposed penalty should be mitigated or eliminated because of any other considerations, such as an inability to pay, a detailed narrative statement explaining the precise factual and legal bases for its position and a copy of any and all documents upon which it intends to rely in support of such position.

4. Finally, Complainant shall submit as part of its Rebuttal Prehearing Exchange:

(A) a statement and/or any documents in response to Respondent's Prehearing Exchange as to provisions 3(A) through 3(D) above.

The prehearing exchanges called for above shall be filed in seriatim fashion, pursuant to the following schedule:

December 16, 2011 Complainant's Initial Prehearing Exchange

January 6, 2012 Respondent's Prehearing Exchange

January 20, 2012 Complainant's Rebuttal Prehearing Exchange

Section 22.19(a) of the Rules of Practice provides that, except in accordance with Section 22.22(a), **any document not included in the prehearing exchange shall not be admitted into evidence, and any witness whose name and testimony summary are not included in the prehearing exchange shall not be allowed to testify.** Therefore, each party should thoughtfully prepare its prehearing exchange.

Supplement to Prehearing Exchange. Any addition of a proposed witness or exhibit to the prehearing exchange shall be filed with an accompanying motion to supplement the prehearing exchange.

Default and Opportunity for a Hearing. The Complaint in this matter gave Respondent notice and opportunity for a hearing, in accordance with Section 554 of the Administrative Procedure Act, 5 U.S.C. § 554 ("APA"). Respondent's Answer to the Complaint contains a request for a hearing. In this regard, Section 554(c)(2) of the APA sets out that a hearing be conducted under Section 556 of the APA. Section 556(d) 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 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 defenses. If Respondent intends to elect 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.

Respondent is hereby notified that a failure to either comply with the prehearing exchange requirements set forth herein or to state that it is electing only to conduct cross-examination of Complainant's witnesses can result in the entry of a default judgment against it. Complainant is notified that its failure to file its prehearing exchange in a timely manner can result in a dismissal of the case with prejudice.

The mere pendency of settlement negotiations or even the existence of a settlement in principle does not constitute a basis for failing to strictly comply with the prehearing exchange requirements. Only the filing with the Regional Hearing Clerk of a fully-executed Consent Agreement and Final Order, or an order of the judge, excuses noncompliance with filing deadlines.

Filing and Service. A document is "filed" when the Regional Hearing Clerk receives it. A document is "served" upon mailing or when placed in the custody of a reliable commercial delivery service. The parties are encouraged to send a courtesy copy to the Office of Administrative Law Judges by facsimile or email, in addition to the mailed hard copy, as physical mail delivery is often subject to significant delay. The facsimile number for the Office of Administrative Law Judges is (202) 565-0044, and the email address is oaljfiling@epa.gov. A signed certificate of service must be attached to all filed documents.

Any document sent to the undersigned in this proceeding shall be addressed as follows:

If sent by the U.S. Postal Service (USPS):

The Honorable Susan L. Biro, Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W., Mail Code 1900I
Washington, DC 20460

If hand-delivered or sent by a non-USPS delivery service, such as Federal Express or UPS, that x-rays their packages as part of its routine security procedures*:

The Honorable Susan L. Biro, Chief Administrative Law Judge

Office of Administrative Law Judges
U.S. Environmental Protection Agency
1099 14th Street, N.W., Suite 350
Washington, DC 20005

* (For commercial delivery service only)

The parties are advised NOT to include, attach, or refer to any terms of settlement offers or agreements in any document submitted to the undersigned, and no copies of Consent Agreements and Final Orders shall be submitted, or attached to any document submitted, to the undersigned except those that are fully executed and filed with the Regional Hearing Clerk.

Contact Information. Telephone contact may be made with my legal assistant, Maria Whiting-Beale, at (202) 564-6259 to ask whether a document has been received or issued. Email or telephone contact may be made with my staff attorney, Adrienne Fortin, Esq., at (202) 564-7862 (fortin.adrienne@epa.gov), for procedural questions.

Courtesy Copies. If any party wishes to receive, by e-mail or facsimile, an expedited courtesy copy of decisions and substantive orders issued in this proceeding, the party shall submit a request for such copies by letter addressed to Maria Whiting-Beale at one of the addresses above. The letter shall include the case docket number, the party's e-mail address or facsimile number, and a statement as to whether the party requests expedited courtesy copies of (a) the initial decision and/or any orders on motion for accelerated decision or dismissal, or (b) all decisions and substantive orders. The undersigned's office will endeavor to comply with such requests, but does not guarantee the party's receipt of expedited courtesy copies.

Motions. Prior to filing any motion, the moving party must contact the non-moving party to determine whether the non-moving party has any objection to the granting of the relief sought in the motion, and the motion shall state the position of the non-moving party. The mere consent of the non-moving party to the relief sought does not assure that the motion will be granted. All motions must be submitted in sufficient time to permit the filing of a response by the non-moving party and/or the issuance of a ruling on the motion before any relevant deadline set by this or any subsequent order. Sections 22.16(b) and 22.7(c) of the Rules of Practice allow a 15-day response period for motions, with an additional 5 days added thereto if the motion is served by mail. Motions not filed in a timely manner may not be considered. **If any party intends to file any dispositive motion regarding liability, such as a motion for accelerated decision or motion to dismiss under 40 C.F.R. § 22.20(a), it shall be filed within 30 days after the due date for Complainant's Rebuttal Prehearing Exchange.**

Oral Argument. Pursuant to 40 C.F.R. § 22.16(d), a party may submit a written request for oral argument upon filing a motion, a response to a motion, or a reply. The requesting party shall propose an appropriate location for the argument. The Office of Administrative Law Judges has

access to videoconferencing technology, and strongly encourages the parties to consider utilizing such technology for oral arguments on motions so as to minimize the expenditure of time and monetary resources in connection with such arguments. A request for oral argument may be granted, in the undersigned's discretion, where further clarification and elaboration of arguments would be of assistance in ruling on the motion.



Susan E. Biro
Chief Administrative Law Judge

Dated: November 3, 2011
Washington, D.C.

In the Matter of Portsmouth Boating Center, Inc., Respondent
Docket No. CWA-03-2011-0099

CERTIFICATE OF SERVICE

I certify that the foregoing **Prehearing Order**, dated November 3, 2011, was sent this day in the following manner to the addressees listed below:



Maria Whiting-Beale
Staff Assistant

Dated: November 3, 2011

Original And One Copy By Pouch Mail To:

Lydia A. Guy
Regional Hearing Clerk (3RC00)
U.S. EPA
1650 Arch Street
Philadelphia, PA 19103-2029

Copy By Pouch Mail To:

Suzanne M. Parent, Esquire
Assistant Regional Counsel (3RC42)
U.S. EPA
1650 Arch Street
Philadelphia, PA 19103-2029

Copy By Regular Mail To:

Daniel J. Van Orman, Esquire
1028 Naval Avenue
Portsmouth, VA 23704