



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
ARK FISHERIES, Inc., and) DOCKET NO. CWA-10-2010-0239
LYNN BABINGTON)
)
RESPONDENTS)

PREHEARING ORDER

As you previously have been notified, I have been designated by the November 19, 2010 Order of the Chief Administrative Law Judge to preside in the above captioned matter.¹ This proceeding arises under the authority of Section 309 of the Clean Water Act ("CWA"), 33 U.S.C. § 1319,² 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

¹ The Chief Administrative Law Judge issued this Order after Complainant declined to participate in the Alternative Dispute Resolution ("ADR") process offered by this office.

² The November 19, 2010 Order of the Chief Administrative Law Judge designates the undersigned to preside in this proceeding under both the CWA and the Clean Air Act. However, the pleadings reflect that this proceeding arises under the authority of the CWA alone. Specifically, the Complaint alleges that Respondents violated Section 301(a) of the CWA, 33 U.S.C. § 1311(a); Section 308 of the CWA, 33 U.S.C. § 1318; and permits issued under Section 402 of the CWA, 33 U.S.C. § 1342. For these alleged violations, Complainant seeks a class II civil administrative penalty of 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 civil penalty is sought pursuant to Section 309(g)(2)(B) of the CWA.

applicable statute(s) and the Rules of Practice.

United States Environmental Protection Agency ("EPA" or "Agency") 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.

While Respondents request an informal settlement conference in a letter they filed simultaneously with their *pro se* Answer, the record does not demonstrate that the parties have in fact engaged in settlement discussions in this case. The parties are directed to hold a settlement conference on this matter on or before **January 11, 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 **January 21, 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 party³ shall submit:
 - (a) the names of any expert or other witnesses it

³ Respondents ARK Fisheries, Inc. ("ARK Fisheries"), and Lynn Babington ("Babington") filed a joint Answer. Respondents may choose to file a joint prehearing exchange, or each Respondent may file separately.

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 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,⁴ 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 exchange(s), 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 it is unable to pay the proposed penalty or that payment will have an adverse effect on its ability to continue to do business, that Respondent shall furnish

⁴ If Respondents ARK Fisheries and Babington choose to file separate prehearing exchanges, the proposed exhibits should be identified as "Respondent ARK Fisheries'" or "Respondent Babington's" exhibits.

supporting documentation such as certified copies of financial statements or tax returns.

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:

- February 18, 2011 - Complainant's Initial Prehearing Exchange
- March 18, 2011 - Respondents' Prehearing Exchange(s), including any direct and/or rebuttal evidence
- April 1, 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 undersigned, as well as any other further pleadings, shall be addressed as follows:

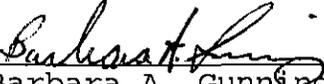
If sending by United States Postal Service (USPS):

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: November 30, 2010
Washington, D.C.

**In the Matter of ARK Fisheries, Inc., and Lynn Babington, Respondents.
Docket No. CWA-10-2010-0239**

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Prehearing Order**, dated November 30, 2010, 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:

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

Copy by Pouch Mail to:

Mark Ryan, Esq.
Assistant Regional Counsel
U.S. EPA
1435 North Orchard Street
Boise, ID 83706

Copy by Regular Mail to:

Lynn Babington, President
ARK Fisheries, Inc.
2825 South 1050 East
Hagerman, ID 83332

Dated: November 30, 2010
Washington, DC