



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
LAFOURCHE PARISH,) DOCKET NO. CWA-06-2007-2725
)
)
)
RESPONDENT)

PREHEARING ORDER

As you previously have been notified, I have been designated by the November 16, 2007 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/} The proceeding is

^{1/} In response to an inquiry from this office, Complainant agreed to participate in the Alternate Dispute Resolution ("ADR") process offered by this office. Respondent, however, declined to participate in ADR by failing to respond to the ADR inquiry letter.

^{2/} The Complaint alleges violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), and proposes the assessment of a civil administrative penalty in an amount up to \$157,000 under Section 309(g)(2)(B) 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. Although the Complaint states that Complainant has provided public notice of the proposed penalty and reasonable opportunity for the public to

(continued...)

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. §§ 22.1-32. The parties are again 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.

In accordance with the undersigned's Order Seeking Clarification and Directing Settlement Conference, dated November 20, 2007, the Complainant indicated in its First Status Report, dated January 24, 2008, that the parties had engaged in settlement discussions. However, since that time, I have not received any information or correspondence from either party that indicates they have reached a settlement. As such, the parties shall strictly comply with the requirements of this order and prepare for 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, the file before me contains no documentary proof of the publication of the public notice or the filing of comments, if any, described above.

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. This proceeding is for the assessment of a penalty and Complainant has not specified a proposed penalty.^{3/} Accordingly, each party shall include in its prehearing information exchange all factual information it considers relevant to the assessment of a penalty.
3. Within fifteen (15) days after Respondent files its 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 the 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.

^{3/} The Complaint states that Complainant proposes the assessment of a civil penalty of up to \$157,000 against Respondent. Complaint at ¶ 15.

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)(4) of the Rules of Practice, 40 C.F.R. § 22.19(a)(4).

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

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|------------------|---|
| April 30, 2008 - | Complainant's Initial Prehearing Exchange |
| May 30, 2008- | Respondent's Prehearing Exchange, including any direct and/or rebuttal evidence |
| June 13, 2008 - | Complainant's Rebuttal Prehearing Exchange (if necessary) |

Should Respondent desire a hearing, Section 554 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 554, provides Respondent with the right to request a hearing in its Answer. As previously discussed, Respondent did not request a hearing in its letter Answer, filed September 24, 2007, but Respondent did submit a Motion for Hearing and Motion to Enroll as Counsel, each dated December 20, 2007, in response to the undersigned's November 20, 2007 Order Seeking Clarification and Directing Settlement Conference.^{4/} See Order Granting Motion to Enroll as Counsel and Holding Ruling on Motion for Hearing in Abeyance, dated January 29, 2008 ("Order Granting Motion to Enroll and Holding Motion for Hearing in Abeyance"). I ruled that Respondent's Motion for a Hearing was premature and advised Respondent's counsel that the Rules of Practice allow for liberal amendment of pleadings should

^{4/} On January 7, 2008, Respondent proffered a document to the Regional Hearing Clerk entitled "Respondent's Answer" in which Respondent requests a hearing. As previously noted in the Order Granting Motion to Enroll as Counsel and Holding Ruling on Motion for Hearing in Abeyance, dated January 29, 2008, it appears that Respondent is attempting to amend its Answer with its January 7, 2008, submission. Order Granting Mot. to Enroll and Holding Mot. for Hr'g in Abeyance at 2, n.3.

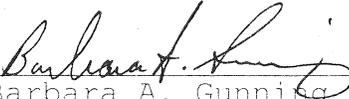
Respondent wish to move to amend its Answer.^{2/} Order Granting Mot. to Enroll and Holding Mot. for Hr'g in Abeyance at 2, n.3. To date, Respondent has not filed a motion to amend the Complaint.

If the parties cannot settle with a Consent Agreement and Final Order, and Respondent requests a hearing in an amended Answer, 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 Respondent's statement of election 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 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:

^{2/} Respondent's newly enrolled counsel was advised that this proceeding is governed by the Rules of Practice and that under 40 C.F.R. § 22.15(e), Respondent's Answer may be amended only "upon motion granted" by the ALJ. Order Granting Mot. to Enroll and Holding Mot. for Hr'g in Abeyance at 2, n.3.

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: March 20, 2008
Washington, DC

**In the Matter of *Lafourche Parish*, Respondent.
Docket No. CWA-06-2007-2725**

CERTIFICATE OF SERVICE

I certify that the foregoing **Prehearing Order**, dated March 20, 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:

Lorena Vaughn
Regional Hearing Clerk
U.S. EPA, Region VI
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733

Copy by Pouch Mail to:

John Emerson, Esq.
Assistant Regional Counsel
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Copy by Regular Mail:

Cullen Curole, JD
Parish Administrator
Lafourche Parish
P.O. Drawer 5548
Thibodaux, LA 70302

Christopher H. Riviere
P.O. Box 670
Thibodaux, LA 70302-0670

**Dated: March 20, 2008
Washington, D.C.**