



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

U.S. ENVIRONMENTAL PROTECTION AGENCY-REG.II
2011 DEC -1 P 3:01
REGIONAL HEARING CLERK

IN THE MATTER OF)
)
PAN AMERICAN GRAIN CO, INC.,) DOCKET NO. CWA-02-2011-3451
)
RESPONDENT)

PREHEARING ORDER

As you previously have been notified, I have been designated by the November 28, 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. The

1 The Complaint alleges that Respondent violated Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342. For these alleged violations, Complainant seeks a class II civil administrative penalty of \$50,000 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. 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 does not indicate that Complainant has notified the public of the filing of this Complaint.

Complaint² in this matter was filed on September 29, 2011, and proposes a penalty of \$50,000.

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 neither party responded 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 **January 6, 2012**, 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 13, 2012**.

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:

² On November 21, 2011, Complainant submitted a Motion for Leave to File First Amended Complaint ("Motion") in which Complainant seeks leave to correct a typographical error in Paragraph 24 where Complainant refers to the storm water regulations at 40 C.F.R. § 122.26(b)(14). Complainant requests permission to file an Amended Complaint in which the reference in Paragraph 24 to Section 122.26(b)(14)(iii) be changed to (xi) in order to match subsequent references to the regulation found in Paragraphs 27 and 33. The Motion is **GRANTED** as a ministerial correction and the alteration to Paragraph 24 as set forth in the proposed Amended Complaint is accepted. Respondent shall have 20 days from the date of service of the Amended Complaint to amend its Answer. 40 C.F.R. § 22.14(c).

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'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 unretouched and unaltered photographs. The documents and exhibits shall be identified as "Complainant's" or "Respondent's" exhibits, 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. Complainant shall submit a statement 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.
3. Respondent shall submit a statement explaining why the proposed penalty should be reduced or eliminated. If 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.
4. 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 1, 2012 - Complainant's Initial Prehearing Exchange
- March 1, 2012 - Respondent's Prehearing Exchange, including any direct and/or rebuttal evidence
- March 16, 2012 - Complainant's Rebuttal Prehearing Exchange (if necessary)

In its Answer, Respondent exercised its 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, 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, then 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 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:

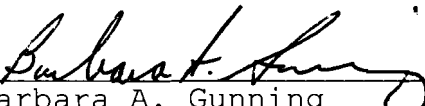
If sending by United States Postal Service (USPS):

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: November 30, 2011
Washington, D.C.

**In the Matter of Pan American Grain Co., Inc., Respondent.
Docket No. CWA-02-2011-3451**

CERTIFICATE OF SERVICE

I hereby certify that true copies of this **Prehearing Order**, issued by Barbara A. Gunning, Administrative Law Judge, in Docket No. CWA-02-2011-3451, were sent to the following parties on this 30th day of November 2011, in the manner indicated:



Mary Angeles
Legal Staff Assistant

Original and One Copy by Pouch Mail to:

Karen Maples
Regional Hearing Clerk
US EPA, Region II
290 Broadway, 16th Floor
New York, NY 10007-1866

Copy by Pouch Mail to:

Hector L. Velez-Cruz, Esq.
Office of Regional Counsel
U.S. EPA, Region II, Caribbean Field Div.
Centro Europa Building, Suite 207
1492 Ponce de Leon Avenue
San Juan, PR 00907-4127

Copy by Regular Mail to:

Gretchen Mendez-Vilella, Es w
Goldman, Antonetti & Cordova, P.S.C.
P.O. Box 70364
San Juan, PR 00936-8364

**Dated: November 30, 2011
Washington, DC**