

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR



IN THE MATTER OF:)
)
VALLEY REALTY, INC.,) DOCKET NO. CWA-08-2009-0023
)
)
)
RESPONDENT.)

ORDER SCHEDULING HEARING

As you previously have been notified, I have been designated by the May 13, 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(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g).^{2/} The parties are reminded that this

^{1/} The Honorable William B. Moran was originally designated to preside in this case on January 21, 2010. Because of Judge Moran's subsequent departure from the Office of Administrative Law Judges, this case was reassigned to the undersigned Administrative Law Judge on May 13, 2010, as noted above.

^{2/} The United States Environmental Protection Agency, Region 8 ("Complainant"), initiated the proceeding on July 31, 2009, by filing a Penalty Complaint and Notice of Opportunity for Hearing ("Complaint") against Valley Realty, Inc. ("Respondent"). The Complaint alleges violations of Sections 301(a), 308, and 402(p) of the CWA, 33 U.S.C. §§ 1311(a), 1318, and 1342(p), and the implementing regulations. For these alleged violations, Complainant seeks a class I civil administrative penalty of \$30,000 pursuant to Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A). In civil penalty cases brought under Section 309(g)(2)(A) of the CWA, a hearing on the proposed order assessing such penalty is not subject to 5 U.S.C. § 554 or 556 but shall provide a reasonable opportunity to be heard and to present
(continued...)

proceeding is 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. §§ 22.1-22.32.

Pursuant to the Prehearing Order issued by Judge Moran on January 27, 2010, the parties have filed their initial prehearing exchanges in this case. Complainant states in its initial prehearing exchange that it reserves the right to request permission to supplement its initial prehearing exchange with any information that may subsequently become available to it. Pursuant to the Prehearing Order, the parties may file supplements to their initial prehearing exchanges, without motion, until 30 days before the hearing date. Such supplements must contain information that was unknown to the party at the time it filed its initial prehearing exchange.

In addition, Section 22.19(f) of the Rules of Practice, 40 C.F.R. § 22.19(f), requires parties to promptly supplement their initial prehearing exchanges when they learn that the information therein is incomplete, inaccurate, or outdated, and the additional information has not otherwise been disclosed to the opposing party. However, Sections 22.19(a) and 22.22(a) of the Rules of Practice, 40 C.F.R. §§ 22.19(a) and 22.22(a), provide that documents or exhibits that have not been exchanged and witnesses whose names or testimony summaries have not been exchanged at least 15 days before the hearing date shall not be admitted into evidence or allowed to testify unless good cause is shown for failing to exchange the required information. The parties are advised that the undersigned will not entertain last minute attempts to supplement prehearing exchanges absent extraordinary circumstances.

^{2/} (...continued)

evidence. Sections 309(g)(4)(A) and (B) of the CWA provide that, before issuing an order assessing a class I 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 I civil penalty shall be given at least 20 days notice of any hearing and of the order assessing such penalty. 40 C.F.R. §§ 1319(g)(4)(A) and (B). See also 40 C.F.R. § 22.45. Complainant's initial prehearing exchange contains a document entitled "Public Notice of Proposed Administrative Penalty Assessment and Opportunity to Comment on CWA Complaint." However, the file before me contains no documentary proof of the date on which this document was published or the filing of comments, if any.

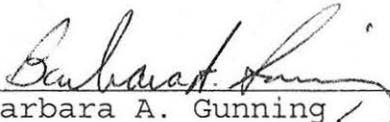
The parties are also advised that every motion filed in this proceeding must be served in sufficient time to permit the filing of a response by the non-moving party and to permit the issuance of an order on the motion before the deadlines set by this Order or any subsequent order. Section 22.16(b) of the Rules of Practice, 40 C.F.R. § 22.16(b), requires a party's response to a motion to be filed within 15 days of service of the motion, and Section 22.7(c), 40 C.F.R. § 22.7(c), provides for an additional five days to be added to that 15-day period when the motion is served by mail.

The file before me reflects that the parties have expressed a willingness to engage in settlement negotiations, but no settlement has yet been reached. United States Environmental Protection 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. However, 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 requirements or schedule set forth in this Order.

As the parties have not reached a settlement in this matter, they shall strictly comply with the requirements of this Order and prepare for a hearing. In connection therewith, on or before **August 3, 2010**, the parties shall file a joint set of stipulated facts, exhibits, and testimony. See Section 22.19(b)(2) of the Rules of Practice, 40 C.F.R. § 22.19(b)(2). The time allotted for the hearing is limited. Therefore, the parties must make a good faith effort to stipulate, as much as possible, to matters which cannot reasonably be contested so that the hearing can be concise and focused solely on those matters which can only be resolved after a hearing.

The Hearing in this matter will be held beginning at 9:30 a.m. on Tuesday, August 31, 2010, in Fargo, North Dakota, continuing if necessary through September 2, 2010. The Regional Hearing Clerk will make appropriate arrangements for a courtroom and retain a stenographic reporter. The parties will be notified of the exact location and of other procedures pertinent to the hearing when those arrangements are complete. Individuals requiring special accommodation at this hearing, including wheelchair access, should contact the Regional Hearing Clerk at least five business days prior to the hearing so that appropriate arrangements can be made.

IF ANY PARTY DOES NOT INTEND TO ATTEND THE HEARING OR HAS GOOD CAUSE FOR NOT BEING ABLE TO ATTEND THE HEARING AS SCHEDULED, IT SHALL NOTIFY THE UNDERSIGNED AT THE EARLIEST POSSIBLE MOMENT.



Barbara A. Gunning
Administrative Law Judge

Dated: May 20, 2010
Washington, DC

In the matter of *Valley Realty, Inc.*, Respondent.
Docket No. CWA-08-2009-0023

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order Scheduling Hearing**, dated May 20, 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:

Tina Artemis
Regional Hearing Clerk
U.S. EPA / Region VIII
1595 Wynkoop Street
Denver, CO 80202-1129

One Copy by Pouch Mail to:

Peggy Livingston, Esq.
Sr. Enforcement Attorney
ORC / U.S. EPA / Region VIII
1595 Wynkoop Street
Denver, CO 80202-1129

One Copy by Regular Mail to:

Tami L. Norgard, Esq.
Vogel Law Firm
218 NP Avenue
P.O. Box 1389
Fargo, ND 58107-1389

Dated: May 20, 2010
Washington, D.C.