



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:)
)
Dr. Daniel J. McGowan,) Docket No. CWA-07-2014-0060
)
)
Respondent.) Dated: December 19, 2014

PREHEARING ORDER

As you were previously notified, I have been designated to preside in this proceeding, which is 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 et seq., (“Rules of Practice” or “Rules”). The Rules of Practice, and for further guidance, an informal Practice Manual and significant orders and decisions issued by the EPA Office of Administrative Law Judges, may be found on the office’s website at <http://www.epa.gov/oalj>. The parties are advised to familiarize themselves with the applicable statute(s) and the Rules of Practice.

Agency policy strongly supports settlement of a proceeding without a formal hearing. Procedures and policies regarding settlement are set forth in the Rules of Practice at 40 C.F.R. §22.18. If the parties have engaged in settlement discussions to resolve this matter, the parties are commended for taking the initiative to resolve this matter informally and expeditiously. The parties are reminded that pursuing this matter through a hearing and possible appeals will require the expenditure of significant amounts of time and financial resources. The parties should also realistically consider the risk of not prevailing in the proceeding despite such expenditures, and should consider that a settlement allows the parties to control the outcome of the case. The parties are encouraged to engage in further settlement negotiations during the course of this proceeding, to attempt to reach an amicable resolution of this matter.

The parties are directed to engage in a settlement conference, and Complainant shall file a **status report** as to the progress of settlement (without describing any specific terms or offers of settlement) on or before **January 30, 2015**. If the case is settled, the Consent Agreement and Final Order (CAFO) signed by the parties should be filed no later than **February 13, 2015**, with a copy sent to the undersigned.

If a CAFO is not finalized on or before the latter date, the parties must prepare for hearing and shall strictly comply with the prehearing requirements of this Order.

I. Prehearing Exchange. Pursuant to Section 22.19(a) of the Rules, the parties are directed to engage in the following prehearing exchange:

A. Each party shall file with the Headquarters Hearing Clerk an original and one copy, and shall serve a copy on the undersigned Administrative Law Judge and a copy on opposing party, the following Prehearing Exchange:

1. The names of any witnesses the party intends to call at the hearing, identifying each as a fact witness or an expert witness, and a brief narrative summary of the expected testimony of each witness, or a statement that no witnesses will be called.
2. Copies of all documents and exhibits intended to be introduced into evidence at the hearing. Included among the documents produced shall be a curriculum vita or resume for each identified expert witness. The documents and exhibits shall be identified as Complainant's or Respondent's exhibit, as appropriate, and numbered with Arabic numerals (e.g., CX 1, or RX 1). The copies may be printed double-sided or may be provided on compact disc or flash drive.
3. A statement of the city or county in which the party prefers the hearing to be held, and an estimate of the time needed to present its direct case. See 40 C.F.R. §§ 22.19(d), 22.21(d). Also, a statement of whether translation services are necessary for the testimony of any anticipated witness(es), and if so, the language to be translated.

B. Complainant also shall submit the following as part of its Initial Prehearing Exchange:

1. A copy of any documents in support of the factual allegations in the Complaint which were not admitted by Respondent.
2. A copy, or a statement of the internet address (URL), of any EPA guidance documents, policies, and/or any preambles to regulations which support Complainant's application of regulations to particular alleged facts and findings of violation in the Complaint that were not admitted by Respondent in his Answer(s) to the Complaint.
3. A narrative statement explaining in detail how the proposed penalty was calculated, addressing each penalty factor set forth in the applicable statute, and describing how the specific provisions of any penalty policies and/or guidelines were applied in calculating the penalty. A penalty worksheet with supporting narrative statement may be submitted.
4. A copy, or a statement of the internet address (URL), of any penalty policies and/or guidelines, and any amendment, appendix or clarification thereto, considered by Complainant in calculating the proposed penalty. Complainant need not submit a hard copy of any penalty policy that was enclosed with the Complaint, or of the Amendments to EPA's Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule.

C. Respondent shall also submit the following as part of his Prehearing Exchange:

1. If Respondent has stated any affirmative defense(s) in the Answer, Respondent shall submit with respect to each such affirmative defense:

(a) a narrative statement explaining in detail the legal and/or factual bases for such affirmative defense, and a copy of any documents in support; or

(b) a statement that Respondent intends that the affirmative defense be considered only in mitigation of a penalty; or

(c) a statement that Respondent is withdrawing the affirmative defense.

2. A narrative statement explaining in detail the legal and/or factual bases for any other assertions in the Answer defending against factual allegation(s) in the Complaint, and/or a copy of any documents in support of such assertion(s).

3. A narrative statement explaining why the proposed penalty should be reduced or eliminated, and a copy of any documents in support.

4. If Respondent believes that he is unable to pay the proposed penalty or that payment would have an adverse effect on its ability to continue to do business, a brief statement to that effect, and a copy of documents in support, such as tax returns and/or certified copies of financial statements.

D. Complainant shall submit as part of its Rebuttal Prehearing Exchange a statement and/or any documents in response to Respondent's Prehearing Exchange submittals.

The prehearing exchanges described above shall be filed in seriatim fashion, according to the following schedule:

February 13, 2015	Complainant's Initial Prehearing Exchange
March 6, 2015	Respondent's Prehearing Exchange, including any direct and/or rebuttal evidence
March 20, 2015	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 is advised to carefully and thoughtfully prepare its prehearing exchange.

II. Supplement to Prehearing Exchange. If a party wishes to present at the hearing any additional exhibit(s) or proposed witness(es), the party shall file a supplement to the prehearing exchange. Such supplement shall include a copy of the exhibit(s) and/or witness name and summary of testimony, as appropriate, and an accompanying motion to supplement the prehearing exchange explaining why the exhibit(s) or witness(es) were not provided in the prehearing exchange. Such supplements should be filed as soon as possible, and at least 15 days before the hearing. See, 40 C.F.R. § 22.22(a)(1).

III. Default and Opportunity for Hearing. The Complaint gave the Respondent notice and opportunity for a hearing, in accordance with Section 554 of the Administrative Procedure Act (APA), 5 U.S.C. § 554. In the Answer(s) to the Complaint, the Respondents exercised their right to request such 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 the Complainant's charges by way of direct evidence, rebuttal evidence or through cross-examination of Complainant's witness. Respondent is entitled to elect any or all three means to pursue its defenses. If Respondent intends only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, it shall file a statement to that effect on or before the date for filing its prehearing exchange.

Respondent is hereby notified that if he fails to timely submit either a prehearing exchange as set forth herein, or a statement that he has chosen only to conduct cross-examination of the Complainant's witnesses, a default judgment may be issued against him. The Complainant is notified that if it fails to file its prehearing exchange in a timely manner, this case can be dismissed with prejudice. **Active settlement negotiations or even a settlement in principle is NOT an excuse for failing to submit a timely prehearing exchange. Each party MUST comply with the filing deadlines UNLESS a fully executed CAFO is filed with the Hearing Clerk OR the Administrative Law Judge has granted that party an extension of time to file.**

IV. Filing and Service. Consistent with 40 C.F.R. § 22.5, the original and one copy of all documents intended to be part of the record in this proceeding, shall be "filed" with the Headquarters Hearing Clerk.¹ **The preferred method for filing documents with the Office of Administrative Law Judges is via the OALJ E-Filing System.** Parties may also file by U.S. mail, personal delivery, courier, or commercial delivery service. Regardless of submission method, all documents submitted for filing must be signed, accompanied by a "certificate of

¹ Pursuant to the Headquarters Hearing Clerk Pilot Project, the Office of Administrative Law Judges and Headquarters Hearing Clerk shall keep the official record and be the proper filing location for all contested cases in which an answer was filed after May 1, 2012. For more information, see the Office of Administrative Law Judges' website at www.epa.gov/oalj.

service,” and “served” on each party and on the undersigned. 40 C.F.R. § 22.5(a)(3), (b).

Documents filed electronically should be submitted online using the OALJ E-Filing System, which can be found on OALJ’s website at <http://www.epa.gov/oalj>.² Documents filed electronically must be in Portable Document Format (“PDF”), must be signed, and must contain the contact name, phone number, mailing address, and e-mail address of the filing party or its authorized representative. Documents filed electronically through the OALJ E-Filing System are deemed to constitute both the original and one copy of the document, and are deemed to have been “served” on the undersigned.

NOTE: The OALJ E-Filing System is not designed to protect the privacy of any Confidential Business Information (“CBI”) or Personally Identifiable Information (“PII”), and whenever a document is filed electronically, the undersigned will consider all confidentiality claims waived.

A document submitted to the OALJ E-Filing System is considered “filed” at the time and date of electronic reception as recorded by the OALJ E-Filing System. To be considered timely, documents submitted by e-mail to the OALJ E-Filing System must be received by 11:59 p.m. Eastern Time on the date the document is due, unless another time is specified by order. The OALJ E-Filing system will generate an electronic receipt of the submission that will be sent by email to both the party submitting the document and the Headquarters Hearing Clerk. There may be a delay of approximately one half hour between document submission and transmission of the electronic receipt. The use of the OALJ E-Filing System constitutes consent to the service of orders by electronic mail to the email address used to register for the OALJ E-Filing System.

A document submitted by U.S. mail, personal delivery, courier, or commercial delivery service is considered “filed” when the Headquarters Hearing Clerk receives it. 40 C.F.R. § 22.5(a).

Documents filed by mail via the United States Postal Service (“USPS”) should be addressed to:

Sybil Anderson, Headquarters Hearing Clerk
U.S. Environmental Protection Agency
Office of Administrative Law Judges
1200 Pennsylvania Ave., NW
Mail Code 1900R
Washington, DC 20460

² The specific URL is https://yosemite.epa.gov/OA/EAB/EAB-ALJ_Upload.nsf. More information about electronic filing may be found in the Standing Order Authorizing Electronic Filing in Proceedings Before the Office of Administrative Law Judges, available on the Office of Administrative Law Judges’ website at www.epa.gov/oalj.

Documents filed by personal delivery, courier, or a commercial delivery service such as FedEx or UPS should be addressed to:

Sybil Anderson, Headquarters Hearing Clerk
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Ronald Reagan Building, Room M1200
1300 Pennsylvania Ave., NW
Washington, DC 20004

A copy of each document filed in this proceeding shall also be “served” on each party, and shall be served on the undersigned where not done via OALJ E-Filing System. 40 C.F.R. § 22.5(b). Documents may be served by first-class (including certified) or priority mail, personal delivery, reliable commercial delivery service, or upon a party by e-mail if it has provided an e-mail address in the record. A document is considered “served” upon mailing, when placed in the custody of a reliable commercial delivery service, or upon electronic transmission, per 40 C.F.R. § 22.7(c).

Documents served on the undersigned by United States Postal Service (USPS) should be addressed to:

M. Lisa Buschmann, Administrative Law Judge
U.S. Environmental Protection Agency
Office of Administrative Law Judges
1200 Pennsylvania Avenue, NW
Mailcode 1900R
Washington, DC 20460

Documents served on the undersigned by a non-USPS courier, such as UPS or FedEx, or hand-delivering should be addressed to:

M. Lisa Buschmann, Administrative Law Judge
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Ronald Reagan Building, Room M1200
1300 Pennsylvania Avenue, NW
Washington, DC 20004

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

CAFOs must be filed with the Regional Hearing Clerk rather than the Headquarters

Hearing Clerk.

V. Privacy Act Statement; Notice of Disclosure of Confidential and Personal Information; Waiver of Confidentiality and Consent to Public Disclosure. The parties are cautioned that, unless redacted, all information filed with the court will be made publicly available. Thus, the parties are hereby advised not to file any Confidential Business Information (“CBI”) or Personally Identifiable Information (“PII”) pertaining to any person. Where filing of such information is necessary, the parties are hereby advised to redact (i.e., remove or obscure) the CBI or PII present in the materials filed. This may include information that, if disclosed to the public, would constitute an unwarranted invasion of personal privacy, such as Social Security numbers, medical records and personal financial information.

To the extent that any person files or submits any un-redacted CBI or PII pertaining to themselves or their client, that person thereby waives any claims to confidentiality and thereby consents to public disclosure by EPA, including posting on the Internet, of all such information they submit. Submission of such information via e-mail will also be considered a waiver of confidentiality. To protect such information against public disclosure, parties must follow the procedures specified on the Office of Administrative Law Judges website at www.epa.gov/oalj.

VI. Procedures for Motions and Extensions of Time. A party intending to file a motion (other than a dispositive motion regarding liability) is directed to contact the other party or parties to inquire whether it has any objection to the relief sought in the motion. The motion shall then state whether or not the other party objects to the relief sought. A party must not assume that an unopposed motion will be granted.

All motions must be submitted in sufficient time to allow the other party or parties to file a response and/or to allow time for a ruling on the motion before the hearing or any relevant deadline set by this or any subsequent order. The Rules of Practice, 40 C.F.R. § 22.16(b) and 22.7(c), allow a 15-day response period for motions with an additional five days if the pleading is served by mail. Any party requesting an extension of time to file a document must file a written motion in accordance with 40 C.F.R. §§ 22.5, 22.7(b) and 22.16, which should be filed and received by the undersigned at least one day prior to the due date if unopposed, and at least a week prior to the due date if opposed. Motions not filed in a timely manner may not be considered.

VII. Dispositive Motions. If Respondent in his Answer has requested dismissal of the Complaint, Respondent is advised that such request does not constitute a motion under 40 C.F.R. § 22.16(a) as it does not state the grounds for a motion with particularity. If Respondent seeks dismissal of the Complaint, or any portion thereof, he may file a motion for dismissal in accordance with 40 C.F.R. §§ 22.5, 22.16 and 22.20.

If a 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 thirty days after the due date for Complainant’s Rebuttal Prehearing Exchange.**

VIII. Contact Information. To inquire whether a document has been received or issued, contact my legal assistant, Maria Whiting-Beale, at (202) 564-6259 or whiting-beale.maria@epa.gov. For procedural questions, contact my staff attorney, Roy Seidenstein, at (202) 564-9274 or seidenstein.roy@epa.gov. The facsimile number is (202) 565-0044.

SO ORDERED.


A handwritten signature in black ink that reads "Lisa Buschmann" with a long horizontal flourish extending to the right.

M. Lisa Buschmann
Administrative Law Judge

In the Matter of Dr. Daniel J. McGowan, Respondent
Docket No. CWA-07-2014-0060

CERTIFICATE OF SERVICE

I certify that the foregoing **Prehearing Order**, dated December 19, 2014, was sent this day in the following manner to the addressees listed below:



Maria Whiting-Beale
Staff Assistant

Dated: Dovenber 19, 2014

Original And One Copy To:

Sybil Anderson
Headquarters Hearing Clerk
U.S. EPA
Mail Code 1900R
1200 Pennsylvania Avenue, NW
Washington, DC 20460-2001

Copy By Regular Mail And E-Mail To:

Christopher Muehlberger, Esquire
Assistant Regional Counsel
U.S. EPA
11201 Renner Boulevard
Lenexa, KS 66219
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