



**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:)	
)	
New York State)	Docket No. CWA-02-2016-3403
Department of Transportation,)	
)	
Respondent.)	

PREHEARING ORDER

As you have been previously notified, I am designated to preside over this proceeding. This proceeding 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 to 22.45 (“Rules of Practice” or “Rules”). The parties are advised to familiarize themselves with the applicable statute(s) and the Rules of Practice. An informal Practice Manual, Citizen’s Guide to proceedings before the Office of Administrative Law Judges (“OALJ”) of the U.S. Environmental Protection Agency (“Agency” or “EPA”), and significant decisions issued by the Administrative Law Judges are accessible on the OALJ’s website at www.epa.gov/oalj.

Settlement. Agency policy strongly supports settlement, and the procedures regarding settlements are set forth in Section 22.18 of the Rules of Practice. *See* 40 C.F.R. § 22.18. The record shows that the OALJ offered the parties the opportunity to participate in an Alternative Dispute Resolution process. Each party is reminded that pursuing this matter through a hearing and possible appeals may require the expenditure of significant amounts of time and financial resources. With these considerations in mind, the parties are directed to engage in a settlement conference on or before **June 30, 2017**, and attempt to reach an amicable resolution of this matter. Without mentioning any specific terms of settlement, Complainant shall file a Status Report regarding this conference and the status of settlement on or before **July 7, 2017**. If the case is settled, a fully-executed Consent Agreement and Final Order shall be filed with the Regional Hearing Clerk no later than **July 28, 2017**, and a copy submitted to the undersigned.

Should a Consent Agreement not be finalized on or before **July 28, 2017**, the parties must prepare for hearing and shall strictly comply with the following prehearing requirements of this Order. *The pendency of settlement negotiations or the existence of a settlement in principle does not constitute a basis for failing to strictly comply with the following prehearing exchange requirements. Only the filing with the Regional Hearing Clerk of a fully-executed Consent*

Agreement and Final Order, or an order of the undersigned, excuses noncompliance with filing deadlines.

No later than **July 7, 2017**, each party shall file a Preliminary Statement that 1) identifies the party's preference for the location of the hearing and 2) indicates whether the party consents to service of orders and decisions issued by this Tribunal, and to service of documents filed by other parties, by email only during this proceeding.¹ If the party so consents, the party shall also provide the email address at which the party agrees to accept service.

Prehearing Exchange. This Order is issued pursuant to Section 22.19(a) of the Rules of Practice. *See* 40 C.F.R. § 22.19(a). Accordingly, the parties are hereby directed to engage in the following prehearing exchange of information:

1. Each party shall file with the Headquarters Hearing Clerk, serve on the opposing party, and serve on the undersigned:

(A) a list of names of the witnesses intended to be called at hearing, identifying each as a fact witness or an expert witness, a brief narrative summary of their expected testimony, and a curriculum vitae or resume for each identified expert witness; or a statement that no witnesses will be called;

(B) copies of all documents and exhibits intended to be introduced into evidence, identified as "Complainant's" or "Respondent's" exhibit, as appropriate, and numbered with Arabic numerals (e.g., "CX 1" or "RX 1"); and

(C) a statement specifying the amount of time needed to present its direct case. *See* 40 C.F.R. §§ 22.21(d), 22.19(d). Also, state whether translation services are necessary in regard to the testimony of any witness(es), and, if so, state the language to be translated.

2. In addition, Complainant shall submit the following as part of its Initial Prehearing Exchange:

(A) documentation showing that service of the Complaint was completed in accordance with Section 22.5(b)(1) of the Rules of Practice;

¹ The Rules of Practice authorize service of certain filed documents by electronic means. *See* 40 C.F.R. § 22.5(b)(2) (authorizing service of documents filed by a party, other than the complaint, by "electronic means, including but not necessarily limited to email, if service by such electronic means is consented to" in a written statement filed with the appropriate Clerk); 40 C.F.R. § 22.6 (authorizing service of rulings, orders, decisions, and other documents issued by this Tribunal by "electronic means (including but not necessarily limited to facsimile and email)"). To date, this Tribunal's practice has been to serve parties by both U.S. mail and email. Provided that a party consents to service by email and supplies a valid email address in its Preliminary Statement, this Tribunal will serve that party by email only henceforth in this proceeding.

(B) a brief narrative statement, and a copy of any documents in support, explaining in detail the factual and/or legal bases for the allegations denied or otherwise not admitted in Respondent's Answer;

(C) a copy, or a statement of the internet address (URL), of any EPA guidance documents and/or policies, including any updates or revisions to such guidance and/or policies, and any preambles to regulations that Complainant has relied upon with regard to the allegations set forth in the Complaint;

(D) all factual information and supporting documentation relevant to the assessment of a penalty, and a copy, or a statement of the internet address (URL), of any policy or guidance intended to be relied on by Complainant in calculating a proposed penalty; and

(E) a detailed explanation of the factors considered and methodology utilized in calculating the amount of the proposed penalty, in accordance with the criteria set forth in the particular statute authorizing this proceeding and as referenced in the Proposed Civil Penalty section of the Complaint.

(F) proof that public notice has been provided regarding the proposed assessment of a civil penalty under Section 309(g) of the Clean Water Act. *See* 33 U.S.C. § 1319(g)(4)(A); 40 C.F.R. § 22.45(b).

3. In addition, Respondent shall submit the following as part of its Prehearing Exchange:

(A) a copy of any documents in support of the denials made in the Answer;

(B) a copy of any documents in support of any affirmative defenses and an explanation of the arguments made in support of such affirmative defenses;

(C) all factual information Respondent considers relevant to the assessment of a penalty and any supporting documentation; and

(D) if Respondent takes the position that the proposed penalty should be reduced or eliminated on any grounds, such as an inability to pay, then provide a detailed narrative statement explaining the precise factual and legal bases for its position and a copy of any and all documents upon which it intends to rely in support of such position.

4. Finally, Complainant shall submit as part of its Rebuttal Prehearing Exchange:

(A) a statement and/or any documents in response to Respondent's Prehearing Exchange as to provisions 3(A) through 3(D) above.

The prehearing exchanges called for above shall be filed pursuant to the following

schedule:

July 28, 2017	Complainant's Initial Prehearing Exchange
August 18, 2017	Respondent's Prehearing Exchange
September 1, 2017	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. 40 C.F.R. § 22.19(a). Therefore, each party is advised to thoughtfully prepare its prehearing exchange.

In general, hearings are scheduled following the submission of the prehearing exchanges. The parties will be provided with adequate notice of the scheduled hearing to enable them to meet the remaining deadlines contained in this Order.

Supplement to Prehearing Exchange. Any addition of a proposed witness or exhibit to the prehearing exchange, submitted pursuant to Section 22.19(f) of the Rules of Practice, must be filed with an accompanying *motion to supplement the prehearing exchange* only when supplementation is sought within 60 days of the scheduled hearing.

Motions. Prior to filing any motion, the moving party must contact all other parties to determine whether the other parties have any objection to the granting of the relief sought in the motion, and the motion shall state the position of the other parties. However, the mere consent of the other parties to the relief sought does not assure that the motion will be granted. Furthermore, all motions must be submitted in sufficient time to permit the filing of a response, a reply, and/or the issuance of a ruling on the motion before any relevant deadline set by this or any subsequent order. *See generally* 40 C.F.R. §§ 22.16(b), 22.7(c).

Dispositive motions regarding liability, such as a motion for accelerated decision or motion to dismiss under Section 22.20(a) of the Rules of Practice, must be filed within 30 days after the due date for Complainant's Rebuttal Prehearing Exchange. *Non-dispositive motions*, such as motions for additional discovery, motions for subpoenas, and motions in limine, must be filed no later than 60 days prior to the scheduled hearing. *Motions not filed in a timely manner may not be considered.*

Pursuant to Section 22.16(d) of the Rules of Practice, a party may submit a written request for oral argument upon filing a motion, a response to a motion, or a reply. 40 C.F.R. § 22.16(d). The requesting party shall propose an appropriate location for the argument. The OALJ has access to videoconferencing technology that may be utilized for oral arguments on

motions, which may minimize the expenditure of time and monetary resources in connection with such arguments. A request for oral argument may be granted, at the undersigned's discretion, where further clarification and elaboration of arguments would be of assistance in ruling on the motion.

Default and Opportunity for a Hearing. The Complaint in this matter gave Respondent notice and opportunity for a hearing, in accordance with Section 554 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 554. Respondent's Answer to the Complaint contained a request for a hearing. [Confirm that this is true.] In this regard, Section 554(c)(2) of the APA sets out that a hearing be conducted under Section 556 of the APA. 5 U.S.C. § 554(c)(2). 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. 5 U.S.C. § 556(d). Thus, Respondent has the right to defend against Complainant's charges by way of direct evidence, rebuttal evidence, or through cross-examination of Complainant's witness(es). Respondent is entitled to elect any or all three means to pursue its defenses.

Respondent is hereby notified that its failure to comply with the prehearing exchange requirements set forth herein may result in the entry of a default judgment against it. Complainant is notified that its failure to file its prehearing exchange in a timely manner can result in a dismissal of the case with prejudice.

Filing and Service. Consistent with Section 22.5 of the Rules of Practice, the original and one copy of all documents intended to be part of the record in this proceeding (excluding a Consent Agreement and Final Order, which must be filed with the Regional Hearing Clerk), shall be filed with the Headquarters Hearing Clerk.² Documents may be filed electronically.³ Documents may also be filed 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 service, and served on the undersigned and on each party.

Documents filed electronically should be submitted using the OALJ E-Filing System, which can be accessed online at https://yosemite.epa.gov/OA/EAB/EAB-ALJ_Upload.nsf.⁴ Parties must first register to use the OALJ E-Filing System. Registration is not automated. There may be a delay of one to two business days between when a party applies for registration

² Pursuant to the Headquarters Hearing Clerk Pilot Project, the OALJ 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 OALJ's website at www.epa.gov/oalj.

³ Electronic filing is the preferred method of submitting documents to the OALJ in cases assigned to litigation (as opposed to those participating in Alternative Dispute Resolution).

⁴ More information about electronic filing may be found in the Standing Order Authorizing Electronic Filing in Proceedings before the Office of Administrative Law Judges, which is available on the OALJ's website at www.epa.gov/oalj.

and when that party will be able to upload documents into the system. Documents filed electronically must be in Portable Document Format (“PDF”), must be signed, and must contain the contact name, phone number, mailing address, and email address of the filing party or its authorized representative. Documents filed electronically are deemed to constitute both the original and one copy of the document. 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.

Documents filed by mail via the U.S. Postal Service should be addressed to:

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

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

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

A document submitted by U.S. mail, personal delivery, courier, or commercial delivery service is considered “filed” when the Headquarters Hearing Clerk receives it. A document submitted through 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 through 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 the undersigned. 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 between document submission and transmission of the electronic receipt.⁵

A copy of each document filed in this proceeding shall also be served on the undersigned and on each party. 40 C.F.R. § 22.5(b). Documents may be served by U.S. mail, personal delivery, reliable commercial delivery service, or email if the party being served has consented in

⁵ The Hearing Clerk may not be able to confirm receipt of the document earlier than one hour after the transmission of the electronic receipt.

writing to service by email and provided a valid email address. 40 C.F.R. § 22.5(b)(2). Documents filed through the OALJ E-Filing System are also deemed to have been “served” on the undersigned. A document is considered “served” upon mailing, when placed in the custody of a reliable commercial delivery service, or upon electronic transmission. 40 C.F.R. § 22.7(c).

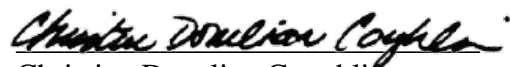
The parties are advised NOT to include, attach, or refer to any terms of settlement offers or agreements in any document submitted to the undersigned, and no copies of Consent Agreements and Final Orders shall be submitted, or attached to any document submitted, to the undersigned except those that are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

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 this Tribunal 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 email will also be considered a waiver of confidentiality. To protect such information against public disclosure, parties must follow the procedures specified on the OALJ’s website at www.epa.gov/oalj.

Contact Information. Any questions about this Order, the Rules, or any other procedural, scheduling, or logistical issues, you may contact Kelly Nishikawa, Attorney-Advisor, at (202) 564-4469 or nishikawa.kelly@epa.gov

SO ORDERED.

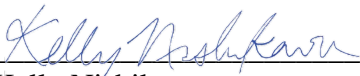

Christine Donelian Coughlin
Administrative Law Judge

Dated: June 13, 2017
Washington, D.C.

In the Matter of *New York State Department of Transportation*, Respondent.
Docket No. CWA-02-2016-3403

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Prehearing Order**, dated June 13, 2017, and issued by Administrative Law Judge Christine Donelian Coughlin, was sent this day to the following parties in the manner indicated below.



Kelly Nishikawa
Attorney-Advisor

Original and One Copy by Hand Delivery to:

Mary Angeles
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

Copy by Electronic and Regular Mail to:

Timothy Murphy, Esq.
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 2
Water and General Law Branch
Office of General Counsel
290 Broadway, 16th Floor
New York, NY 10007-1866
Email: murphy.tim@epa.gov
For Complainant

Alicia McNally, Esq.
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Division of Legal Affairs
New York State Department of Transportation
50 Wolf Road, 6th Floor
Albany, NY 12232
Email: alicia.mcnally@dot.ny.gov
For Respondent

Dated: June 13, 2017
Washington, D.C.