



UNITED STATES
 ENVIRONMENTAL PROTECTION AGENCY
 BEFORE THE ADMINISTRATOR

U.S. ENVIRONMENTAL
 PROTECTION AGENCY-REG.11
 2012 JAN -5 A 9 33
 REGIONAL HEARING
 CLERK

In the Matter of: Port Authority of New York and New Jersey, Respondent.)))))	Docket No. RCRA-02-2011-7110
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PREHEARING ORDER

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 through 22.45 (“Rules of Practice” or “Rules”). The Rules of Practice, an informal Practice Manual, and significant 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 Website also links to a Citizen’s Guide that serves as an informal overview and guide to proceedings before the Office. The parties are advised to familiarize themselves with these materials and all relevant statutes.

Agency policy strongly supports settlement, and the procedures regarding documenting settlements are set forth in Rule 22.18. If settlement discussions have already been undertaken, the parties are commended for taking the initiative to resolve this matter informally and expeditiously. If settlement discussions have not yet commenced or have stalled, each party is reminded that pursuing this matter through a hearing and possible appeals will require the expenditure of significant amounts of time and financial resources. Each party should also realistically consider the risk of not prevailing in the proceeding despite such expenditures. While a negotiated settlement allows the parties to control the outcome of the proceeding, a judicial decision eliminates that control. With these considerations in mind, the parties are directed to engage in a settlement conference on or before **January 13, 2012**, and attempt to reach an amicable resolution of this matter. Complainant shall file a Status Report regarding this conference and the status of settlement, without describing any specific terms discussed, on or before **January 20, 2012**. If the case is settled, a fully-executed Consent Agreement and Final Order shall be filed no later than **February 10, 2012**, with a copy sent to the undersigned.

Should a Consent Agreement and Final Order not be finalized on or before the deadline set forth above, the parties shall prepare for hearing and strictly comply with the prehearing requirements of this Order, as set forth below.

Prehearing Exchange. This Order is issued pursuant to Rule 22.19(a). Accordingly, it is directed that the following prehearing exchange of information take place between the parties:

1. Each party shall file with the Regional Hearing Clerk, serve on the opposing party, and serve on the Presiding Judge:

(A) a list of the names of any witnesses the party intends to call at the hearing, or a statement that no witnesses will be called. The list of witnesses must identify each witness as a fact witness or an expert witness, include a brief narrative summary of their expected testimony, and be accompanied by a curriculum vitae or resume for each expert witness.

(B) copies of all documents, records, and other exhibits the party intends to introduce into evidence. Each document, record, or other exhibit must be identified as “Complainant’s” or “Respondent’s” exhibit, as appropriate, and be numbered with Arabic numerals (e.g., CX 1 or RX 1).

(C) a statement indicating where the party wants the hearing to be held, and how long the party will need to present its case. See 40 C.F.R. §§ 22.21(d), 22.19(d). The statement must also indicate whether translation services will be 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) a brief narrative statement, and copies of any supporting documents, explaining in detail the factual and/or legal bases for the allegations in Paragraphs 28–30, 36, 52, 54–57, and 68 of the Complaint, to the extent Respondent denied those allegations in its Answer;

(B) a copy of any reports, notes, or other pertinent documentation produced as a result of the inspections referred to in Paragraphs 15–18 of the Complaint;

(C) copies of the documents referred to in Paragraphs 19–23 of the Complaint; and

(D) a copy, or a statement of the internet address (URL), of any policy or guidance relied on by Complainant in calculating the proposed penalty, or intended to be relied on if that penalty is adjusted, other than EPA’s 2003 RCRA Civil Penalty Policy identified in the Complaint.

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

(A) a narrative statement, and a copy of any supporting documents, explaining in detail

the legal or factual bases for the affirmative defenses identified in pages 10–11 of its Answer; and

(B) if Respondent takes the position that the proposed penalty should be reduced or eliminated on any grounds, such as an inability to pay, 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) and (B) above.

The prehearing exchanges called for above shall be filed in seriatim fashion, pursuant to the following schedule:

February 10, 2012 Complainant’s Initial Prehearing Exchange

March 2, 2012 Respondent’s Prehearing Exchange

March 16, 2012 Complainant’s Rebuttal Prehearing Exchange

Rule 22.19(a) provides that, except in accordance with Rule 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 should thoughtfully prepare its prehearing exchange.

Supplement to Prehearing Exchange. Any addition of a proposed witness or exhibit to the prehearing exchange shall be filed with an accompanying motion to supplement the prehearing exchange.

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, 5 U.S.C. §§ 554 et seq (“APA”). Respondent’s Answer to the Complaint contains a request for a hearing. Therefore, Section 554(c)(2) of the APA requires a hearing to be conducted in accordance with 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 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 defenses. If Respondent intends to elect 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.

Respondent is hereby notified that failure to either comply with the prehearing exchange requirements set forth herein, or to state that it is electing only to conduct cross-examination of Complainant's witnesses, can 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.

The mere pendency of settlement negotiations, or even the existence of a settlement in principle, does not constitute a basis for failing to strictly comply with the prehearing exchange requirements of this Order. Only the filing with the Regional Hearing Clerk of a fully-executed Consent Agreement and Final Order, or an order of the judge, excuses noncompliance with filing deadlines.

Filing and Service. A document is "filed" when the Regional Hearing Clerk receives it. A document is "served" upon mailing or when placed in the custody of a reliable commercial delivery service. The parties are encouraged to send a courtesy copy of each document to the Office of Administrative Law Judges by facsimile or email, in addition to the mailed hard copy, as physical mail delivery is often subject to significant delay. The facsimile number for the Office of Administrative Law Judges is (202) 565-0044, and the email address is oaljfilng@epa.gov. A signed certificate of service must be attached to all filed documents.

Any document sent to the undersigned in this proceeding shall be addressed as follows:

If sent by the U.S. Postal Service (USPS):

The Honorable Susan L. Biro, Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W., Mail Code 1900L
Washington, DC 20460

If hand-delivered or sent by a non-USPS delivery service that x-rays its packages as part of its routine security procedures, such as Federal Express or UPS:

The Honorable Susan L. Biro, Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1099 14th Street, N.W., Suite 350
Washington, DC 20005

The parties are advised NOT to include, attach, or refer to the 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.

Contact Information. Telephone contact may be made with my legal assistant, Maria Whiting-Beale, at (202) 564-6259 to ask whether a document has been received or issued. Email or telephone contact may be made with my staff attorney, Ed Kulschinsky, Esq., at (202) 564-4133 (kulschinsky.edward@epa.gov), for procedural questions.

Courtesy Copies. If any party wishes to receive, by e-mail or facsimile, an expedited courtesy copy of decisions and substantive orders issued in this proceeding, the party shall submit a request for such copies by letter addressed to Maria Whiting-Beale at one of the addresses above. The letter shall include the case docket number, the party's e-mail address or facsimile number, and a statement as to whether the party requests expedited courtesy copies of (a) the initial decision and/or any orders on motion for accelerated decision or dismissal, or (b) all decisions and substantive orders. The undersigned's office will endeavor to comply with such requests, but does not guarantee the party's receipt of expedited courtesy copies.

Motions. Prior to filing any motion, the moving party must contact the other party or parties to determine whether the other party has any objection to the granting of the relief sought in the motion, and the motion shall state the position of the other party or parties. 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 by the other party and/or the issuance of a ruling on the motion before any relevant deadline set by this or any subsequent order. Rules 22.16(b) and 22.7(c) allow a 15-day response period for motions, with an additional 5 days added thereto if the motion is served by mail. Motions not filed in a timely manner may not be considered. **If any party intends to file any dispositive motion regarding liability, such as a motion for accelerated decision or motion to dismiss under Rule 22.20(a), it shall be filed within 30 days after the due date for Complainant's Rebuttal Prehearing Exchange.**

Rule 22.16(d) allows a party to submit a written request for oral argument upon filing a motion, a response to a motion, or a reply. The requesting party shall propose an appropriate location for the argument. The Office of Administrative Law Judges has access to videoconferencing technology, and strongly encourages the parties to consider utilizing such technology for oral arguments on motions so as to minimize the expenditure of time and monetary resources in connection with such arguments. A request for oral argument may be granted, in the undersigned's discretion, where further clarification and elaboration of arguments would be of assistance in ruling on the motion.

SO ORDERED.



Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency

Dated: December 22, 2011
Washington, D.C.

**In the Matter of Port Authority of New York and New Jersey, Respondent.
Docket No. RCRA-02-2011-7110**

CERTIFICATE OF SERVICE

I hereby certify that true copies of this **Prehearing Order**, issued by Susan Biro, Chief Administrative Law Judge, in Docket No. RCRA-02-2011-7110, were sent to the following parties on this 23rd day of December 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:

Stuart Keith, Esq.
Assistant Regional Counsel
U.S. EPA / Region II
290 Broadway, 16th Floor
New York, NY 10007-1866

Copy by Regular Mail to:

Lawrence A. Estrada, Esq.
Port Authority of NY & NJ
Litigation and Corporate Security
Law Department
225 Park Avenue South, 13th Floor
New York, NY 10003

**Dated: December 23, 2011
Washington, DC**