



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY BEFORE THE ADMINISTRATOR

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In the Matter of:)
T.C. Dunham Paint Company, Inc.,) Docket No. RCRA-02-2013-7105
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 EPA Office of Administrative Law Judges, and significant decisions issued by the Office are accessible on Office's website at: http://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, 40 C.F.R. § 22.18. The record shows that this office offered the parties the opportunity to participate in an Alternative Dispute Resolution process. While Respondent, through counsel, elected to participate in this process, Complainant, through regional counsel, declined to do so. 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. The parties should realistically consider the risk of not prevailing in the proceeding despite such expenditures. A settlement allows the parties to control the outcome of the case, whereas a judicial decision takes such control away.

With these considerations in mind, the parties are directed to engage in a settlement conference on or before February 7, 2014, and to 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 February 14, 2014. If the case is settled, a fully-executed Consent Agreement and Final Order shall be filed with the Regional Hearing Clerk no later than March 7, 2014, and a copy submitted to the undersigned.

Should a Consent Agreement not be finalized on or before the latter date, the parties must prepare for hearing and shall strictly comply with the following prehearing requirements of this

Order.

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 following prehearing exchange requirements. Only the filing with the Hearing Clerk of a fully-executed Consent Agreement and Final Order, or an order of the judge, excuses noncompliance with filing deadlines.

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

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

(A) a list of names of the expert and other 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 explaining its views as to the appropriate place for the hearing and an estimate of the time needed to present its direct case. See Sections 22.21(d) and 22.19(d) of the Rules of Practice. 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) 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; and

(B) 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

(C) a detailed explanation of the factors considered and methodology utilized in calculating the amount of the proposed penalty, in accordance with the penalty factors and policies referenced in the Proposed Civil Penalty section of the Complaint.

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 the allegations in Respondent's Affirmative Defenses and an explanation of its arguments 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 *in seriatim* fashion, pursuant to the following schedule:

March 7, 2014	Complainant's Initial Prehearing Exchange
March 28, 2014	Respondent's Prehearing Exchange
April 11, 2014	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 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 contained a

request for 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 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 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 its 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.

Filing and Service. Pursuant to the Headquarters Hearing Clerk Pilot Project, rather than filing all documents with the Regional Hearing Clerk as specified in 40 C.F.R. § 22.5(a), the original and one copy of any documents filed in this proceeding, including prehearing exchange information and motions (excluding a Consent Agreement and Final Order, which must be filed with the Regional Hearing Clerk), shall be filed with the Headquarters Hearing Clerk by mail, courier, personal delivery, or e-mail at the following addresses:

If sent by regular mail via the United States Postal Service (USPS) :

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

If sent via a non-USPS courier, such as FedEx or UPS, or by hand-delivery:

Sybil Anderson, 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

If sent via e-mail:¹

OALJfiling@epa.gov

For documents submitted by mail, courier, or personal delivery, a document is “filed” when the Headquarters Hearing Clerk receives it. A document is “served” upon mailing or when placed in the custody of a reliable commercial delivery service. Additionally, the parties are encouraged to send a courtesy copy to the Office of Administrative Law Judges by email to OALJfiling@epa.gov, or by facsimile to (202) 565-0044, followed by service of a hard copy of the document.

For documents submitted by e-mail to OALJfiling@epa.gov, an e-mail and any attachments thereto are “filed” at the time and date of electronic reception as recorded by the Office of Administrative Law Judges’ e-mail system. Documents submitted by e-mail for filing shall be deemed to constitute both the original and one copy of the document, in satisfaction of the duplicate-filing requirement of Section 22.5(a)(1) of the Consolidated Rules. Documents submitted by e-mail are also deemed “served” on the Presiding Judge. To be considered timely, documents submitted by e-mail to OALJfiling@epa.gov for filing must be received by 11:59 p.m. Eastern Time on the day the document is required to be filed. The subject line of the e-mail shall include the name and docket number of the proceeding. Documents submitted by e-mail must be in Portable Document Format (“PDF”), and must contain a contact name, phone number, mailing address, and e-mail address of the filing party or its authorized representative. Electronic files exceeding 50 MB must be separated into files under 50 MB each or submitted on a compact disk (“CD”) by mail, courier, or personal delivery.

Regardless of submission method, all documents submitted for filing must be signed, accompanied by a certificate of service, and served on the Presiding Judge and on each party.

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

¹ Effective November 21, 2013, documents may be filed with the Headquarters Hearing Clerk and served on the Presiding Judge by e-mail in matters that are pending before the Office of Administrative Law Judges and governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, codified at 40 C.F.R. Part 22, subject to specific limitations. For additional details, see the Standing Order Authorizing Filing and Service by E-Mail in Proceedings Before the Office of Administrative Law Judges, available at http://www.epa.gov/oalj/orders/2013/Standing_Order_2013-11-21_E-Mail_Filing_%26_Service_Signed.pdf.

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 the court will be made publicly available. Thus, the parties are hereby advised not to file, or to redact (i.e., remove or obscure) where filing is necessary, any Confidential Business Information (“CBI”) or Personally Identifiable Information (“PII”) pertaining to any person. 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. 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.

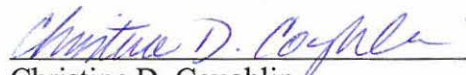
Contact Information. Contact may be made with my legal assistant, Mary Angeles, at (202) 564-6281 or Angeles.Mary@epa.gov to ask whether a document has been received or issued. For procedural questions, you may contact senior staff attorney, Roy Seidenstein, at (202) 564-9274 or seidenstein.roy@epa.gov.

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 Mary Angeles 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. Sections 22.16(b) and 22.7(c) of the Rules of Practice allow a 15-day response period for motions, with an additional 5 days added thereto if the document is served by mail. Motions not filed in a timely manner may not be considered. If either 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 (30) days after the due date for Complainant’s Rebuttal Prehearing Exchange.

Pursuant to 40 C.F.R. § 22.16(d), a party may 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.


Christine D. Coughlin
Administrative Law Judge

Dated: December 20, 2013
Washington, D.C.

In the Matter of T.C. Dunham Paint Company, Inc., Respondent
Docket No. RCRA-02-2013-7105

CERTIFICATE OF SERVICE

I certify that the foregoing **Prehearing Order**, dated December 20, 2013, was sent this day in the following manner to the addressees listed below.


Mary Angeles
Legal Staff Assistant

Dated: December 20, 2013

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 To:

Carl R. Howard, Esquire
Assistant Regional Counsel
U.S. EPA
290 Broadway, 16th Floor
New York, NY 10007-1866

Frederick Eisenbud, Esquire
Law Office of Frederick Eisenbud
The Environmental Law Firm
6165 Jericho Turnpike
Commack, NY 11725-2803