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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR



IN THE MATTER OF)	
)	
DAVID D'AMATO,)	DOCKET NO. CWA-10-2010-0132
)	
RESPONDENT)	

ORDER SCHEDULING HEARING
ORDER ON RESPONDENT'S MOTION TO ACCEPT LATE FILING
AND MOTION TO CHANGE DOCUMENT REQUIREMENT TIME

On September 10, 2010, the undersigned issued a Prehearing Order in this matter, scheduling the required prehearing information exchange between the parties. That Prehearing Order required Complainant to submit its initial prehearing exchange ("PHE") on November 5, 2010. Respondent's PHE was then due on December 3, 2010, and Complainant's rebuttal, if any, was due on December 17, 2010. According to the Certificate of Service, Complainant's PHE was sent to Respondent on November 5, 2010, by certified mail, return receipt requested. According to Complainant, the package containing its PHE was not claimed by Respondent until December 8, 2010, when Complainant notified Respondent that the package was being held at the local post office. Complainant stated in a motion to extend the filing deadlines that Respondent confirmed receipt of the PHE on December 8, 2010.

In order to give the Respondent additional time to review Complainant's PHE and submit his own PHE, the undersigned issued an Order Granting Motion to Extend Times for Filing the Prehearing Exchange on December 15, 2010. In that Order, Respondent was given until January 7, 2011, and Complainant's Rebuttal PHE would be due 14 days after Respondent filed his PHE with the Regional Hearing Clerk ("RHC"). The Office of Administrative Law Judges and the RHC did not receive Respondent's PHE by January 7, 2011. Finding that Respondent had not communicated with either Complainant or the RHC since December 8, 2010, the undersigned's staff attorney attempted to contact Respondent directly. Respondent returned a voicemail message and stated that his PHE had been mailed before January 7,

2011, by certified mail.^{1/} The tracking number provided by Respondent was given to the RHC who then conducted a search for the package but was unable to locate any matching deliveries.

When Respondent's PHE was not received by March 4, 2011, the undersigned issued an Order to Show Cause, by March 21, 2011, why a default order should not be entered against Respondent for failing to meet the deadlines.^{2/} On March 7, 2011, Complainant received an email from Respondent stating that the PHE had been mailed. On March 15, 2011, this Tribunal received a package from Respondent containing a Motion to Accept Late Filing ("Motion to Accept"), a Motion to Change Document Requirement Time ("Motion on Timing"), a Motion to Depose Heather Dean ("Motion to Depose"), and Respondent's initial PHE. However, no certificate of service accompanied these motions and there was no evidence that they had been properly filed with the RHC. The undersigned's staff attorney contacted each party on March 15, 2011, to point out this fact and Respondent indicated that he would refile in accordance with the Rules of Practice.

On April 8, 2011, this Tribunal again received a package containing the motions listed above and Respondent's PHE^{3/} along with a certificate of service stating that Respondent had resent the documents on March 28, 2011, by U.S. Postal Service to the undersigned, the RHC, and the former EPA Counsel assigned to this matter, Ms. Jessica Barkas.^{4/} Also on April 8, 2011, this Tribunal received the following filings from Complainant: Complainant's Response to Respondent's Motion to Accept Late Filing ("Response to Motion to Accept"), Complainant's Response

^{1/} Respondent provided the following tracking number from the U.S. Postal Service ("USPS"): 70070710000182520374. The USPS Track & Confirm service indicates that a package bearing this receipt number was delivered on January 12, 2011, to Seattle, WA 98101.

^{2/} The Order to Show Cause was returned to the Office of ALJs as undeliverable mail.

^{3/} Respondent's PHE does not state the number of days he anticipates that his direct case, exclusive of cross-examination or rebuttal, will take. Therefore, the amount of time allotted for the hearing has been estimated. Respondent is instructed to file promptly a Notice with this Tribunal responding to item 1(c) of the original Prehearing Order.

^{4/} I note that Ms. Jennifer Byrne is the current counsel of record for Complainant.

to Respondent's Motion to Change Document Requirement Time ("Response to Motion on Timing"), and Complainant's Motion to Extend Time for Filing Response to Respondent's Motion to Depose Heather Dean^{5/} ("Motion to Extend").

In his Motion on Timing, Respondent states that he resides in Alaska and must mail documents to Washington, DC, and Seattle, WA. According to Respondent, "[s]hipping times to these locations varies [sic] based on a variety of factors outside of Respondents [sic] control." Motion on Timing at 1. Respondent also asserts that changing this Tribunal's definition of "timely received" to be based on the postmark date and not the filing date "would not prejudice the court or the EPA." *id.* Complainant does not explicitly oppose the Motion on Timing, but notes that Rule 22.7(c) makes special adjustments for documents sent by mail. Specifically, Rule 22.7(c) extends the response period by 5 days for all documents sent by first class mail or commercial delivery service, but not by overnight or same-day delivery. 40 C.F.R. § 22.7(c).

Initially, I note that the timeliness of documents submitted in this proceeding is determined by the filing date stamp affixed by the RHC to incoming filings. 40 C.F.R. § 22.5(a). Mail delays to this Tribunal do not affect the timeliness of parties' filings. Therefore, the only mail delays of concern are those that might occur between Anchorage, AK, and Seattle, WA. Given that the Rules of Practice allocate an additional five days to the response time for first class mail, Respondent's Motion on Timing is considered unnecessary. 40 C.F.R. § 22.7(c). If Respondent experiences significant mail-system related delays that render Rule 22.7(c) insufficient, it may come forth with evidence at that time. The Motion on Timing is **DENIED** at this time.

In his Motion to Accept, Respondent sets forth a timeline of events that he asserts will explain that any delay in the timely

^{5/} In its Motion to Extend, EPA states that it has voluntarily made Ms. Heather Dean available to Respondent for informal questioning. Motion to Extend at 1-2. EPA also states that Respondent has agreed to withdraw the Motion to Depose promptly, but in the event that withdrawal is not immediate and given EPA Counsel's planned work absence, EPA requests an extension to file any response to the Motion to Depose, if necessary, until May 11, 2011. Respondent has filed no response to this Motion. The Motion to Depose and the Motion to Extend are **DEFERRED** and are not resolved by this Order.

filing of the initial PHE was beyond his control. Complainant responds with a lengthy Declaration laying out a broader case timeline in an effort to demonstrate that Respondent has repeatedly failed to abide by the Rules of Practice, particularly where they relate to filing. Complainant argues that although it believes a default order would be justified, it requests the "lesser sanction" of precluding Respondent from calling any witnesses at hearing. Response to Motion to Accept at 5. Such a sanction is inappropriate at this time.

With respect to the Respondent's initial PHE, the record before me reflects that something was sent to EPA Region 10 and something was received, but neither party is able to demonstrate its position conclusively. Complainant's rebuttal PHE has already been received so there is no undue prejudice in allowing Respondent to submit the list of identified witnesses for hearing. Respondent's Motion to Accept is therefore **GRANTED**. I note, however, that the Rules of Practice as they relate to filing have now been explained to the Respondent by this office and future oversights will not be tolerated.

ORDER SCHEDULING HEARING

Also included in Complainant's April 8th package containing the above-listed Responses, was Complainant's Rebuttal PHE, marking the completion of the Prehearing Exchange process. This matter will therefore be set for hearing. The parties retain the right to make a motion to supplement their prehearing exchanges, but should do so as soon as possible and in any event no later than fifteen (15) days before the hearing date. Sections 22.19(a) and 22.22(a) of the Rules of Practice, 40 C.F.R. §§ 22.19(a), 22.22(a), provide that documents or exhibits that have not been exchanged and witnesses whose names have not been exchanged at least fifteen (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.

Further, the parties are advised that every motion filed in this proceeding must be served in sufficient time to permit the filing of a response by the other 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), allows a fifteen-day (15) period for responses to motions and Section 22.7(c), 40 C.F.R. § 22.7(c), provides for an additional five (5) days to be added thereto when the motion is served by mail. The parties are hereby notified that the undersigned will not entertain last minute motions to amend or supplement the prehearing exchange absent extraordinary circumstances.

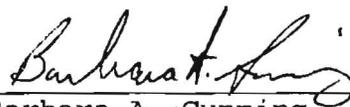
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The file before me reflects that the parties have engaged in settlement negotiations, but no settlement has been reached. United States Environmental Protection Agency ("EPA") policy, found in the Rules of Practice at Section 22.18(b), 40 C.F.R. § 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 22, 2011**, the parties shall file a joint set of stipulated facts. 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, September 20, 2011, in or around Anchorage, Alaska, continuing as necessary through September 23, 2011. 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 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 ten 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: April 21, 2011
Washington, DC

**In the Matter of *David D'Amato*, Respondent.
Docket No. CWA-10-2010-0132**

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing **Order Scheduling Hearing, Order on Respondent's Motion to Accept Late Filing, and Motion to Change Document Requirement Time**, issued by Barbara Gunning, Administrative Law Judge, dated April 21, 2011, was sent this day in the following manner to the addressees listed below.



Mary Angeles
Legal Staff Assistant

Original and One Copy by Facsimile and Pouch Mail to:

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Copy by Facsimile and Pouch Mail to:

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Copy by Regular and Email to:

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Dated: April 21, 2011
Washington, DC