

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR



U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG.11
2008 NOV 26 PM 12:14
REGIONAL HEARING
CLERK

IN THE MATTER OF)
)
Puerto Rico Army National Guard) DOCKET NO. RCRA-02-2008-7502
and the Army and Air Force)
Exchange Service,)
)
)
)
RESPONDENTS)

PREHEARING ORDER

As you previously have been notified, I have been designated by the November 21, 2008 Order of the Chief Administrative Law Judge to preside in the above captioned matter.^{1/} This proceeding arises under the authority of Section 9006 of the Solid Waste Disposal Act, as amended, commonly referred to as the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (collectively referred to as RCRA ("RCRA"), 42 U.S.C. § 6991e, and is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-32. The parties are advised to familiarize themselves with both the applicable statute(s) and the Rules of Practice.

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

^{1/} The file reflects that the parties have participated in the Alternative Dispute Resolution ("ADR") process offered by this office. Pursuant to the Administrative Law Judges' November 21, 2008 Order terminating the ADR process, the above-cited matter has been reassigned to the undersigned to proceed with the litigation process.

settlement may far outweigh the uncertainty, time, and expense associated with a litigated proceeding.

Although Complainant and Respondents have participated in ADR, they have not reached a settlement. As such, the parties shall strictly comply with the requirements of this order and prepare for a hearing. The parties are advised that extensions of time will not be granted absent a showing of good cause. See Section 22.7(b) of the Rules of Practice, 40 C.F.R. § 22.7(b). 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 prehearing requirements or to meet the schedule set forth in this Prehearing Order. Of course, the parties are encouraged to initiate or continue to engage in settlement discussions during and after preparation of their prehearing exchange.

The following requirements of this Order concerning prehearing exchange information are authorized by Section 22.19(a) of the Rules of Practice, 40 C.F.R. § 22.19(a). As such, it is directed that the following prehearing exchange takes place:

1. Each party shall submit:
 - (a) the names of any expert or other witnesses it intends to call at the hearing, together with a brief narrative summary of each witness' expected testimony, or a statement that no witnesses will be called; and
 - (b) copies of all documents and exhibits which each party intends to introduce into evidence at the hearing. The exhibits should include a curriculum vitae or resume for each proposed expert witness. If photographs are submitted, the photographs must be actual unretouched photographs. The documents and exhibits shall be identified as "Complainant's" or "Respondents'" exhibit^{2/} as appropriate, and

^{2/} Respondents filed separate Answers and are represented by different counsel. Respondents may file joint statements or documents, including a prehearing exchange, if they choose. If Respondents choose to file separate joint prehearing exchanges, the proposed exhibits should be identified as "Respondent Puerto Rico National Guard's" or "Respondent Army and Air Force Exchange Service's" exhibit.

numbered with Arabic numerals (e.g., "Complainant's Exhibit 1"); and

- (c) a statement expressing its view as to the place for the hearing and the estimated amount of time needed to present its direct case.

See Sections 22.19(a), (b), (d) of the Rules of Practice, 40 C.F.R. §§ 22.19(a), (b), (d); see also Section 22.21(d) of the Rules of Practice, 40 C.F.R. § 22.21(d).

2. Complainant seeks a penalty of \$168,650 from Respondent Puerto Rico Army National Guard and \$40,614 from Respondent Army and Air Force Exchange Service, as well as a Compliance Order for both parties. Complainant shall submit a statement explaining in detail how the proposed penalty was determined, including a description of how the specific provisions of any Agency penalty or enforcement policies and/or guidelines were applied in calculating the penalty.
3. Respondents shall submit a statement explaining why the proposed penalty should be reduced or eliminated. If either Respondent intends to take the position that it is unable to pay the proposed penalty or that payment will have an adverse effect on its ability to continue to do business, that Respondent shall furnish supporting documentation such as certified copies of financial statements or tax returns.
4. Complainant shall submit a statement regarding whether the Paperwork Reduction Act of 1980 ("PRA"), 44 U.S.C. §§ 3501 et seq., applies to this proceeding, whether there is a current Office of Management and Budget control number involved herein and whether the provisions of Section 3512 of the PRA are applicable in this case.

See Section 22.19(a)(3) of the Rules of Practice, 40 C.F.R. § 22.19(a)(3).

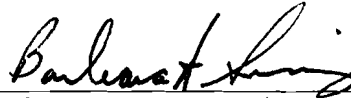
The prehearing exchanges delineated above shall be filed in *seriatim* manner, according to the following schedule:

- January 12, 2009 - Complainant's Initial Prehearing Exchange
- February 17, 2009 - Respondents' Prehearing Exchange, including any direct and/or rebuttal evidence
- March 3, 2009 - Complainant's Rebuttal Prehearing Exchange (if necessary)

In their respective Answers to the Complaint, Respondents exercised their right to request a hearing pursuant to Section 554 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 554. If the parties cannot settle with a Consent Agreement and Final Order, a hearing will be held in accordance with Section 556 of the APA, 5 U.S.C. § 556. Section 556(d) of the APA 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, Respondents each have the right to defend themselves against Complainant's charges by way of direct evidence, rebuttal evidence, or through cross-examination of Complainant's witnesses. Respondents are entitled to elect any or all three means to pursue its defense. If either Respondent elects only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, that Respondent shall serve a statement to that effect on or before the date for filing its prehearing exchange. Each party is hereby reminded that failure to comply with the prehearing exchange requirements set forth herein, including a Respondent's statement of election only to conduct cross-examination of Complainant's witnesses, can result in the entry of a default judgment against the defaulting party. See Section 22.17 of the Rules of Practice, 40 C.F.R. § 22.17.

The original and one copy of all pleadings, statements and documents (with any attachments) required or permitted to be filed in this Order (including a ratified Consent Agreement and Final Order) shall be filed with the Regional Hearing Clerk, and copies (with any attachments) shall be sent to the undersigned and all other parties. The parties are advised that E-mail correspondence with the Administrative Law Judge is not authorized. See Section 22.5(a) of the Rules of Practice, 40 C.F.R. § 22.5(a). The prehearing exchange information required by this Order to be sent to the Presiding Judge, as well as any other further pleadings, shall be addressed as follows:

Judge Barbara A. Gunning
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Ave., NW
Washington, DC 20460-2001
Telephone: 202-564-6281



Barbara A. Gunning
Administrative Law Judge

Dated: November 25, 2008
Washington, DC

In the Matter of Puerto Rico Army National Guard and the Army and Air Force Exchange Service, Respondents.
Docket No. RCRA-02-2008-7502

CERTIFICATE OF SERVICE

I certify that the foregoing **Prehearing Order**, dated November 25, 2008, was sent this day in the following manner to the addressees listed below.



Mary Angeles
Legal Staff Assistant

Original and One Copy by Pouch Mail to:

Karen Maples
Regional Hearing Clerk
U.S. EPA / Region II
290 Broadway, 16th Floor
New York, NY 10007-1866

Copy by Pouch Mail to:

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

Copy by Regular Mail to:

William E. O'Connor, CPT, JA
Joint Forces Headquarters
The Adjutant General's Office
P.O. Box 9023786
San Juan, PR 00902-3786

and

Michael C. Whittington, Esq.
Associate General Counsel
Army and Air Force Exchange
3911 S. Walton Walker Boulevard
Dallas, TX 75236-2267

Dated: November 25, 2008
Washington, D.C.