



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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IN THE MATTER OF )
METRO METALS CORP., and ) DOCKET NO. RCRA-10-2011-0040
AVISTA RECYCLING, INC., )
RESPONDENTS )

PREHEARING ORDER

As you previously have been notified, I have been designated by the June 28, 2011, Order of the Chief Administrative Law Judge to preside in the above captioned matter. This proceeding arises under the authority of Section 3008(a) 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. § 6928(a)). In the Complaint, Complainant seeks a civil administrative penalty against Respondents and a Compliance 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 ("Rules of Practice"), 40 C.F.R. §§ 22.1-22.32. The parties are advised to familiarize themselves with both the applicable statute(s) and the Rules of Practice.<sup>1</sup>

1 The record before me reflects that Respondent Metro Metals Corporation ("Metro Metals") has not filed any response to the Complaint. The record also reflects that Respondent Avista Recycling, Inc. ("Avista") timely filed and Answer and requested a hearing. In the Order Terminating Alternative Dispute Resolution Process and Returning Proceeding to Chief Judge ("Termination Order"), Judge Nissen notes that counsel for Complainant "stated that the [Regional] Judicial Officer had issued an order finding Metro Metals in default for failing to file an answer." Termination Order at 2 n.2. The record contains a document entitled "Findings and Notice of Final Order as to Metro Metals" ("Notice"), in which the Regional Judicial

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 record reflects that the parties participated in the Alternative Dispute Resolution process offered by this office for approximately two months, but that the parties have not filed a Consent Agreement and Final Order to settle this matter. Accordingly, the parties shall strictly comply with the requirements of this Prehearing Order and prepare for hearing.

The parties are free to continue to engage in settlement discussions during and after preparation of their prehearing exchange. However, the parties are advised that extensions of time will not be granted absent a showing of good cause. The pursuit of settlement negotiations or an averment that a settlement in principle has been reached will not constitute good cause for failing to comply with the requirements or to meet the schedule set forth in this Order.

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 take 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's expected

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Officer finds that the Complaint was properly served on Metro Metals and that "the compliance order automatically became a final order on March 14, 2011, in accordance with 40 CFR § 22.37(b)." Notice at 3. Neither the Notice nor the underlying regulation addresses the status of the Complaint and proposed civil penalty contained therein. The Rules of Practice state that a party may be found to be in default for failure to file an answer only "after motion." 40 C.F.R. § 22.17. The record does not contain a motion for default at this time. Accordingly, the caption in this matter continues to include Metro Metals. Because Metro Metals has not yet filed an answer, however, the Regional Judicial Officer retains jurisdiction over it. 40 C.F.R. § 22.4(b). Therefore, this Order is directed **solely to Avista.**

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 "Respondent's" exhibits, as appropriate, and 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), and (d) of the Rules of Practice, 40 C.F.R. §§ 22.19(a), (b), and (d). See also Section 22.21(d) of the Rules of Practice, 40 C.F.R. § 22.21(d).

- 2. 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. If Respondent disagrees with the proposed penalty, it shall submit a statement explaining why the proposed penalty should be reduced or eliminated. If 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, then 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 exchange delineated above shall be filed in *seriatim* manner, according to the following schedule:

- August 5, 2011 - Complainant's Initial Prehearing Exchange
- September 6, 2011 - Respondent's Prehearing Exchange, including any direct and/or rebuttal evidence
- September 20, 2011 - Complainant's Rebuttal Prehearing Exchange (if necessary)

In its Answer, Respondent Avista exercised its right under Section 554 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 554, to request a hearing in this matter. 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, Respondent has the right to defend itself 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 defense.

If Respondent elects only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, then 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 Respondent's statement electing 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 by 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:

If sending by United States Postal Service (USPS):

EPA Office of Administrative Law Judges  
1200 Pennsylvania Avenue, NW  
Mail Code 1900L  
Washington, D.C. 20460-2001

If sending by a non-USPS courier, such as UPS or Federal Express:

EPA Office of Administrative Law Judges  
1099 14th Street, NW  
Suite 350, Franklin Court  
Washington, D.C. 20005

Telephone contact may be made with my legal staff assistant, Mary Angeles, at (202) 564-6281. The facsimile number is (202) 565-0044.



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Barbara A. Gunning  
Administrative Law Judge

Dated: July 1, 2011  
Washington, D.C.

**In the Matter of Metro Metals Corp., and Avista Recycling, Inc., Respondents.  
Docket No. RCRA-10-2011-0040**

CERTIFICATE OF SERVICE

I hereby certify that true copies of this **Prehearing Order**, issued by Barbara A. Gunning, Administrative Law Judge, in Docket No. RCRA-10-2011-0040, were sent to the following parties on this 1<sup>st</sup> day of July 2011, in the manner indicated:



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Mary Angeles  
Legal Staff Assistant

Original and One Copy by Pouch Mail to:

Carol Kennedy  
Regional Hearing Clerk  
U.S. EPA, Region X  
1200 Sixth Avenue, ORC-158  
Seattle, WA 98101

Copy by Pouch Mail to:

Shirin Venus, Esq.  
Assistant Regional Counsel  
U.S. EPA, Region X  
1200 Sixth Avenue, ORC-158  
Seattle, WA 98101

Copy by Regular Mail to:

David M. Anderson, Esq.  
Mahoney Anderson, LLC  
P.O. Box 44504  
Eden Prairie, MN 55344

**Dated: July 1, 2011  
Washington, DC**