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BEFORE THE  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	)	DOCKET NO. CWA-10-2005-0081
	)	
LANDSING DEVELOPMENT	)	<b>MOTION FOR COMPEL</b>
GROUP, LLC	)	<b>PRODUCTION OF DOCUMENTS</b>
	)	<b>OR, ALTERNATIVELY,</b>
Boise, Idaho	)	<b>MOTION IN LIMINE</b>
	)	
Respondent.	)	

**INTRODUCTION**

Pursuant to 40 C.F.R. Sections 22.16 and 22.19(f) of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" ("Part 22 Rules"), Complainant U.S. Environmental Protection Agency Region 10 ("Complainant" or "EPA") moves to compel the production of Exhibit No. 1 listed in Respondent Landsing Development Group, LLC's ("Respondent" or "Landsing Development") Opening Prehearing Exchange.

**BACKGROUND**

On October 3, 2005, the Presiding Officer issued an Order Setting Prehearing Procedures ("Order") in this case. The Order required both parties to "[s]ubmit copies of exhibits intended to be introduced into evidence." Order at p. 1.

1 Subsequently, in Respondent's Opening Prehearing Exchange, dated November 23, 2005,  
2 Respondent listed one exhibit described as "[s]everal photos of the site and area." Respondent's  
3 Opening Prehearing Exchange at Section II.1. This exhibit, however, was not attached to  
4 Respondent's Opening Prehearing Exchange.

5 Shortly after receiving Respondent's Opening Prehearing Exchange, counsel for EPA  
6 received an e-mail message from Respondent that inquired whether EPA had received  
7 Respondent's Opening Prehearing Exchange. *See* Declaration of Courtney J. Hamamoto  
8 ("Hamamoto Decl.") at ¶ 4. Counsel for EPA responded to this e-mail message by requesting  
9 copies of the exhibit listed in Respondent's Opening Prehearing Exchange. *Id.* Respondent did  
10 not respond to this e-mail message. *Id.* In addition, Respondent did not file a Reply Prehearing  
11 Exchange. On January 11, 2006, counsel for EPA sent a second e-mail message to Respondent  
12 requesting copies of the exhibit. *See* Hamamoto Decl. at ¶ 5. On January 17, 2006, the  
13 discovery motion cut-off date, Respondent responded to this e-mail message by stating that it  
14 would "fax ... copies of the pictures I intend to use in court." Hamamoto Decl. at ¶ 6. At the  
15 time this motion was filed, the exhibit had not been filed and a copy of the exhibit had not been  
16 provided to EPA. As such, to meet the discovery motion cut-off date, EPA filed this motion.

## 17 ARGUMENT

### 18 I. EPA's Motion to Compel Should Be Granted.

19 40 C.F.R. Section 22.19(f) states:

20 A party who has made an information exchange ... shall promptly supplement or  
21 correct the exchange when the party learns that the information exchanged ... is  
22 incomplete, inaccurate or outdated, and the additional or corrective information  
has not otherwise been disclosed to the other party.

23 40 C.F.R. § 22.19(f). Moreover, the October 3, 2005 Order specifically required both parties to  
24 submit copies of the exhibits intended to be introduced as evidence. *See* Order at p.1.  
25

1 Although Respondent listed an exhibit in Respondent's Opening Prehearing Exchange, a  
2 copy of the exhibit was not submitted. EPA notified Respondent of the missing exhibit on two  
3 occasions. After the second notification, Respondent notified EPA that it would fax copies of  
4 the exhibit to EPA. However, at the time this motion was filed, EPA had not received the  
5 exhibit nor had the exhibit been filed with the Regional Hearing Clerk. Since the exhibit has not  
6 been submitted, EPA cannot determine what is depicted in the photographs and when the  
7 photographs were taken. EPA cannot assess the impact that the photographs will have on the  
8 litigation. As such, EPA respectfully requests that the Presiding Officer order Respondent to  
9 supplement Respondent's Opening Prehearing Exchange with the listed exhibit as well as any  
10 other documentation that Respondent intends to submit at hearing. In addition, since details in  
11 faxed photographs are difficult to see, EPA requests that the Presiding Officer require  
12 Respondent to mail the pictures or color copies of the pictures to EPA.

13 **II. Alternatively, the Presiding Officer Should Exclude Any Evidence That**  
14 **Respondent Attempts to Submit at the Hearing.**

15 40 C.F.R. Section 22.22(a)(1) states:

16 If ... a party fails to provide any document, exhibit, witness name, or summary of  
17 expected testimony required to be exchanged under § 22.19(a), (e), or (f) to all  
18 parties at least 15 days before the hearing date, the Presiding Officer shall not  
19 admit the document, exhibit or testimony into evidence, unless the non-  
exchanging party had good cause for failing to exchange the required information  
and provided the required information to all other parties as soon as it had control  
of the information, or had good cause for not doing so.

20 40 C.F.R. § 22.22(a)(1).

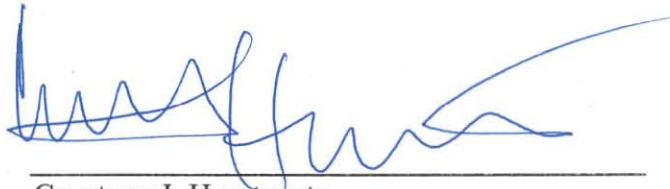
21 Here, Respondent has possession of the exhibit listed in Respondent's Opening  
22 Prehearing Exchange. As such, if Respondent fails to produce the exhibit, Respondent should  
23 be precluded from introducing the exhibit at the hearing. Moreover, EPA respectfully requests  
24 the Presiding Officer to exclude any other evidence Respondent attempts to submit at the  
25

1 hearing unless Respondent produces the evidence at least fifteen (15) days prior to the hearing  
2 pursuant to 40 C.F.R. Section 22.22(a)(1).

3 **CONCLUSION**

4 For the foregoing reasons, EPA respectfully requests that the Presiding Officer grant  
5 EPA's Motion to Compel Production of Documents and order Respondent to produce the exhibit  
6 listed in Respondent's Opening Prehearing Exchange as well as all documents that Respondent  
7 intends to use at the hearing. Alternatively, EPA respectfully requests that the Presiding Officer  
8 grant EPA's motion in limine to exclude the exhibit listed in Respondent's Opening Prehearing  
9 Exchange as well as any other documents submitted within fifteen (15) days of the hearing.

10  
11 DATED: January 17, 2006

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14 \_\_\_\_\_  
15 Courtney J. Hamamoto  
16 Assistant Regional Counsel  
17 U.S. EPA Region 10  
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1 **CERTIFICATE OF SERVICE**

2 I certify that the foregoing "Motion to Compel Production of Documents Or,  
3 Alternatively, Motion in Limine," "Declaration of Courtney J. Hamamoto Supporting Motion to  
4 Compel Production Or, Alternatively, Motion in Limine," and "Motion for Additional Discovery  
on Ability to Pay," was sent to the following persons, in the manner specified, on the date below:

5 Original plus one copy, by hand delivery:

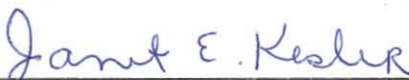
6 Carol Kennedy  
7 Regional Hearing Clerk  
8 U.S. EPA Region 10  
1200 Sixth Avenue, ORC-158  
Seattle, WA 98101

9 A true and correct copy, by U.S. Mail:

10 Judge Carl C. Charneski  
11 U.S. EPA  
Office of Administrative Law Judges  
12 Mail Code 1900L  
Ariel Rios Building  
13 1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

14 Bruce Hessing  
15 Landsing Development Group, LLC  
16 5800 South Cole Road  
Boise, ID 83709

17 DATED: January 17, 2006

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19 \_\_\_\_\_  
20 Janet Kesler  
21 U.S. EPA, Region 10  
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23  
24  
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