



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
DAVIS PAINT COMPANY,) DOCKET NO. CAA-07-2011-0013
)
RESPONDENT)

PREHEARING ORDER

As you previously have been notified, I have been designated by the December 16, 2011 Order of the Chief Administrative Law Judge to preside in the above-captioned matter. This proceeding arises under the authority of Section 113(d) of the Clean Air Act ("CAA"), 42 U.S.C. § 7413(d), and 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.

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 four months but that the parties have not filed a Consent Agreement and Final Order ("CAFO") 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 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's 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 unretouched and unaltered 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. Complainant shall specifically submit a brief narrative statement, and a copy of any supporting documents, explaining in detail the factual and/or legal bases for the allegations in Paragraphs 16 and 17 of the Complaint.
4. 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.

5. 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:

- February 10, 2012 - Complainant's Initial Prehearing Exchange
- March 9, 2012 - Respondent's Prehearing Exchange, including any direct and/or rebuttal evidence
- March 30, 2012 - Complainant's Rebuttal Prehearing Exchange (if necessary)

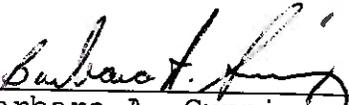
In its Answer, Respondent exercised its right under Section 554 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 554, to request a hearing in this matter. If the parties cannot settle with a Consent Agreement and Final Order, a hearing will be held in accordance with Section 556 of the APA, 5 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 **Headquarters Hearing Clerk** in accordance with procedures set forth in the Order of Designation, and copies (with any attachments) shall be sent to all other parties. The parties are advised that e-mail correspondence with the undersigned is not authorized. See Section 22.5(a) of the Rules of Practice, 40 C.F.R. § 22.5(a).

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



Barbara A. Gunning
Administrative Law Judge

Dated: December 19, 2011
Washington, D.C.

**In the Matter of *Davis Paint Company*, Respondent.
Docket No. CAA-07-2011-0013**

CERTIFICATE OF SERVICE

I certify that the foregoing **Prehearing Order**, dated December 19, 2011, was sent this day in the following manner to the addressees listed below.



Mary Angeles
Legal Staff Assistant

Original and One Copy by Interoffice Hand-Delivery to:

Sybil Anderson
Headquarters Hearing Clerk
U.S. EPA / Office of Administrative Law Judges
Mail Code 1900L
1200 Pennsylvania Ave., NW
Washington, DC 20460

Copy by Pouch Mail to:

Sara Hertz, Esq.
Assistant Regional Counsel
U.S. EPA, Region 7
Office of Regional Counsel
901 N. 5th Street
Kansas City, KS 66101

Copy by Regular Mail to:

Lindsay L. Wood, Esq.
Law Offices of Lindsay L. Wood
P.O. Box 2512
Lee's Summit, MO 64063

**Dated: December 20, 2011
Washington, D.C.**