



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

2010 NOV 29 AM 8:07

BEFORE THE ADMINISTRATOR

FILED
EPA REGION VIII
HEARING CLERK

IN THE MATTER OF)
)
WENDY MEALER AND) DOCKET NO. FIFRA-08-2010-0017
DENNIS STOKEBRAND)
)
RESPONDENTS)

PREHEARING ORDER

As you previously have been notified, I have been designated by the November 15, 2010 Order of the Chief Administrative Law Judge to preside in the above captioned matter.¹ This proceeding arises under the authority of Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 1361(a), and is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits and the Supplemental Rules Governing the Administrative Assessment of Civil Penalties Under the Federal Insecticide, Fungicide, and Rodenticide Act ("Rules of Practice"), 40 C.F.R. §§ 22.1-22.32, 22.35. 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 settlement may far outweigh the uncertainty, time, and expense associated with a litigated proceeding.

¹ The Chief Administrative Law Judge issued this Order after Respondents did not respond to this office's letter of October 27, 2010, inviting the parties to participate in the Alternative Dispute Resolution ("ADR") process offered by this office. When a party fails to respond to the invitation to participate by the date set forth in the letter, the party is deemed to decline to participate in the ADR process and the case is assigned for litigation.

The record does not demonstrate that the parties have engaged in settlement discussions in this case. The parties are directed to hold a settlement conference on this matter on or before **January 5, 2011**, to attempt to reach an amicable resolution. See Section 22.4(c)(8) of the Rules of Practice, 40 C.F.R. § 22.4(c)(8). Complainant shall file a status report regarding such conference and the status of settlement on or before **January 14, 2011**.

In the event that the parties fail to reach a settlement, they shall strictly comply with the requirements of this Prehearing Order and prepare for a hearing. The parties are encouraged to initiate or continue to engage in settlement negotiations 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 party² 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 actual unretouched photographs. The documents and exhibits shall be identified as

² Respondents Wendy Mealer ("Mealer") and Dennis Stokebrand ("Stokebrand") filed a joint Answer and are represented by the same counsel. Respondents may choose to file a joint prehearing exchange, or each Respondent may file separately.

"Complainant's" or "Respondents'" exhibits,³ 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. In accordance with the Supplemental Rules Governing the Administrative Assessment of Civil Penalties under the Federal Insecticide, Fungicide, and Rodenticide Act, 40 C.F.R. § 22.35(b), the hearing shall be held in the county, parish, or incorporated city of the residence of Respondents, unless otherwise agreed in writing by all parties. Complainant alleges in the Complaint, and Respondents admit in the Answer, that Respondents reside in South Dakota. Each party shall identify in its prehearing exchange the county, parish, or incorporated city in South Dakota where Respondents reside. The hearing shall be held in that location, unless the parties designate a different county, parish, or city as the place of hearing in this matter.

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 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. Each Respondent 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.

³ If Respondents Mealer and Stokebrand choose to file separate prehearing exchanges, the proposed exhibits should be identified as "Respondent Mealer's" or "Respondent Stokebrand's" exhibits.

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:

- February 18, 2011 - Complainant's Initial Prehearing Exchange
- March 18, 2011 - Respondents' Prehearing Exchange(s), including any direct and/or rebuttal evidence
- April 1, 2011 - Complainant's Rebuttal Prehearing Exchange (if necessary)

In their Answer, Respondents exercised their 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, Respondents 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. Each Respondent is entitled to elect any or all three means to pursue his defense.

If a 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 his prehearing exchange. Each party is hereby reminded that failure to comply with the prehearing exchange requirements set forth herein, including a 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:

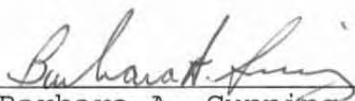
If sending by United States Postal Service (USPS):

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.



Barbara A. Gunning
Administrative Law Judge

Dated: November 22, 2010
Washington, D.C.

**In the Matter of *Wendy Mealer and Dennis Stokebrand*, Respondents
Docket No. FIFRA-08-2010-0017**

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Prehearing Order**, dated November 22, 2010, 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:

Tina Artemis
Regional Hearing Clerk
U.S. EPA / Region VIII
1595 Wynkoop Street
Denver, CO 80202-1129

Copy by Pouch Mail to:

Eduardo Quintana, Esq.
Enforcement Attorney (8ENF-L)
Legal Enforcement Program
U.S. EPA, Region VIII
1595 Wynkoop Street
Denver, CO 80202-1129

Copy by Regular Mail to:

Steven D. Sandven, Esq.
Steven D. Sandven Law Offices
Three Hundred Building, Suite 106
300 North Dakota Avenue
Sioux Falls, SD 57104

Dated: November 22, 2010
Washington, D.C.