



UNITED STATES
 ENVIRONMENTAL PROTECTION AGENCY
 BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
 SCHMITT SALES, INC.,)
)
 d.b.a. BROOKS SUPER DUPER;)
 DUTCH HOLLOW MARKET; ECHOES)
 ON THE LAKE; PARKVIEW MARKET;)
 PINE VALLEY BUSY MART;)
 TUBBY'S CORNER QUICK STOP;)
 T-BURG FOODLINE, INC.;)
 CASSADAGA SUPERMARKET;)
 SCHMITT'S ROBO MART; DUCKY'S)
)
 RESPONDENT)

DOCKET NO. RCRA-02-2011-7508

U.S. ENVIRONMENTAL
 PROTECTION AGENCY-REG. II
 2011 SEP 28 A 11: 21
 REGIONAL HEARING
 CLERK

PREHEARING ORDER

As you previously have been notified, I have been designated by the September 20, 2011 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 by various laws including the Resource Conservation and Recovery Act of 1976 and the Hazardous and Solid Waste Amendments of 1984 (collectively referred to as "RCRA"), 42 U.S.C. § 6901. 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.

^{1/} The Chief Administrative Law Judge issued this Order after Complainant did not respond to an inquiry from this office regarding the Alternative Dispute Resolution ("ADR") process that this office offers. When a party fails to respond to the invitation to participate in the ADR process by the date set forth in the invitation letter, the party is deemed to decline to participate and the case is assigned for litigation.

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.

The file before me does not reflect that the parties have engaged in settlement discussions in this case. Therefore, the parties are directed to hold a settlement conference on this matter on or before **October 19, 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 **October 27, 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 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 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. Respondent 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, 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:

- December 6, 2011 - Complainant's Initial Prehearing Exchange
- January 6, 2012 - Respondent's Prehearing Exchange, including any direct and/or rebuttal evidence
- January 20, 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, 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 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 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:

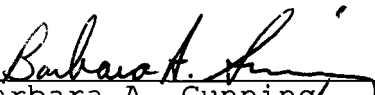
If sending by United States Postal Service (USPS):

EPA Office of Administrative Law Judges
1200 Pennsylvania Avenue, NW
Mail Code 1900L
Washington, DC 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, DC 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: September 23, 2011
Washington, DC

In the Matter of *Schmitt Sales, Inc., d/b/a Brooks Super Duper, Dutch Hollow Market; Echoes on the Lake; Parkview Market; Pine Valley Busy Mart; Tubby's Corner Quick Stop; T-Burg Foodline, Inc.; Cassadaga Supermarket; Schmitt's Robo Mart; Ducky's*, Respondent.
Docket No. RCRA-02-2011-7508

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-02-2011-7508, dated September 23, 2011, were sent to the following parties on this 26th day of September 2011, in the manner indicated:



Mary Angeles
Legal Staff Assistant

Original and One Copy by Pouch Mail to:

Karen Maples
Regional Hearing Clerk
US EPA, Region II
290 Broadway, 16th Floor
New York, NY 10007-1866
Copy by Pouch Mail to:

Stuart Keith, Esq.
Office of Regional Counsel
U.S. EPA / Region II
290 Broadway, 16th Floor
New York, NY 10007-1866

Copy by Regular Mail to:

Thomas J. Fucillo, Esq.
Menter, Rudin & Trivelpiece, P.C.
Counselors at Law
308 Maltbie Street, Suite 200
Syracuse, NY 13204-1498

Dated: September 26, 2011
Washington, DC