

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

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BEFORE THE ADMINISTRATOR

REGIONAL HEARING CLERK
USEPA
REGION 5

In the Matter of:)
)
Hanson's Window and Construction, Inc.,) Docket No. TSCA-05-2010-0013
)
) Docket No. TSCA-05-2011-0006
Respondent.)

ORDER GRANTING JOINT MOTIONS TO CONSOLIDATE
AND
AMENDED PREHEARING ORDER

On June 10, 2010, the United States Environmental Protection Agency, Region 5 ("Complainant"), filed a Complaint pursuant to Section 16(a) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615(a), seeking the imposition of \$784,380 in civil penalties against Hanson's Window and Construction, Inc. ("Respondent"). Complainant filed an Amended Complaint on December 7, 2010, and Respondent filed an Amended Answer on December 28, 2010. The Amended Complaint's 542 counts allege that, in regard to 271 window replacement contracts entered into between May and December 2005, Respondent violated the Residential Property Renovation Rule, 40 C.F.R. Part 745 Subpart E ("Pre-Renovation Rule"), promulgated under Section 406(b) of TSCA. The proceeding has been designated Docket No. TSCA-05-2010-0013.

On March 28, 2011, Complainant filed a Complaint pursuant to the same Section 16(a) of TSCA, seeking the imposition of \$144,840 in civil penalties against the same Respondent. The Complaint's 102 counts allege that, in regard to 51 window replacement contracts entered into between March 31, 2006 and August 29, 2007, Respondent violated the Pre-Renovation Rule. Respondent filed an Answer on April 22, 2011. The proceeding was designated Docket No. TSCA-05-2011-0006.

In both cases, the parties filed a Joint Motion to Consolidate on April 13, 2011, seeking the consolidation of Docket Nos. TSCA-05-2010-0013 and TSCA-05-2011-0006. The Consolidated Rules of Practice governing these proceedings, 40 C.F.R. Part 22 ("Rules"), provide in pertinent part:

The Presiding Officer or the Environmental Appeals Board may consolidate any or all matters at issue in two or more proceedings subject to these [Rules] where: there exist common parties or common questions of fact or law; consolidation

would expedite and simplify consideration of these issues; and consolidation would not adversely affect the rights of parties engaged in otherwise separate proceedings.

40 C.F.R. § 22.12(a). In their Joint Motions, the parties agree that these cases both involve common parties and common questions of fact or law, and that consolidation would expedite and simplify consideration of the issues and not adversely affect the rights of the parties. Because the Joint Motions are unopposed, and for the reasons cited by the parties in accordance with the factors in 40 C.F.R. § 22.12(a), the Joint Motions to Consolidate are **GRANTED**. Docket Nos. TSCA-05-2010-0013 and TSCA-05-2011-0006 are hereby consolidated.

Because some deadlines set by the March 11, 2011, Prehearing Order have passed, and Complainant has already filed its Initial Prehearing Exchange on April 21, 2011, but only regarding Docket No. TSCA-05-2010-0013, the Prehearing Order must be amended in light of the consolidation ordered herein. Given the similarity of the issues involved in Docket Nos. TSCA-05-2010-0013 and TSCA-05-2011-0006, and that Complainant's last Status Report, filed April 1, 2011, indicated that the parties conferred as to settlement on March 25, 2011, and did not reach an agreement, no additional settlement conference or related status report is mandated.

Therefore, the March 11, 2011, Prehearing Order is hereby **AMENDED** as follows:

Prehearing Exchange.

1. Each party¹ shall file with the Regional Hearing Clerk, serve on the opposing party, and serve on the Presiding Judge:

(A) a list of names of the expert and other witnesses intended to be called at hearing, identifying each as a fact witness or an expert witness, a brief narrative summary of their expected testimony, and a curriculum vita or resume for each identified expert witness, or a statement that no witnesses will be called;

(B) copies of all documents and exhibits intended to be introduced into evidence, identified as "Complainant's" or "Respondent's" exhibit, as appropriate, and numbered with Arabic numerals (e.g., CX 1 or RX 1); and

¹ It is recognized that Complainant already filed its Initial Prehearing Exchange on April 21, 2011, and included therein documents and information in response to (A) through (C) above regarding Docket No. TSCA-05-2010-0013. Thus, Complainant need not re-submit information or documents already served, but shall produce additional information and/or documentation responsive to (A) through (C) above as to allegations in Docket No. TSCA-05-2011-0006 only. Any new exhibits included with Complainant's Second Initial Prehearing Exchange shall be numbered in sequence to follow the exhibits already served.

(C) a statement explaining its views as to the appropriate place for the hearing and an estimate of the time needed to present its direct case. See Sections 22.21(d) and 22.19(d) of the Rules of Practice. Also, state whether translation services are necessary in regard to the testimony of any witness(es), and, if so, state the language to be translated.

2. In addition, Complainant shall submit the following as part of its Second Initial Prehearing Exchange²:

(A) a copy of any documents in support of the allegations in Paragraph 37, and in Paragraphs 49 through 99 (Counts 1 through 51) of the Complaint filed March 28, 2011;

(B) a copy of any documents in support of the allegations in Paragraphs 103 through 153 (Counts 52 through 102) of the Complaint filed March 28, 2011;

(C) a copy of any documents in support of the penalty proposed in the Complaint filed March 28, 2011, and a narrative statement explaining in detail how the proposed penalty was calculated, including a discussion of each of the penalty assessment factors in Section 16 of TSCA, 15 U.S.C. § 2615; and

(D) a copy, or a statement of the internet address (URL), of the Response Policy referred to on page 34 of the Complaint filed March 28, 2011, and any other penalty policy upon which Complainant has relied, or intends to rely, in consideration of the proposed penalty assessment.

3. In addition, Respondent shall submit the following as part of its Prehearing Exchange, except for the motion described in Paragraph (F) below, which, if made, shall be filed as a separate document:

(A)(1) a copy of any supporting documents and a narrative statement explaining in detail the factual and legal bases for the denials in Paragraphs 48 through 318 of the Amended Answer in Docket No. TSCA-05-2010-0013 (denying Counts 1 through 271);

(A)(2) a copy of any supporting documents and a narrative statement explaining in detail the factual and legal bases for the denials in Paragraphs 49 through 99 of the Answer filed April 22, 2011 in Docket No. TSCA-05-2011-0006 (denying Counts 1 through 51);

(B)(1) a copy of any supporting documents and a narrative statement explaining in detail

² Again, Complainant is not asked to re-submit information or documents already served, but to produce any additional information and/or documentation necessary to respond to (A) through (D) above regarding the allegations in Docket No. TSCA-05-2011-0006 only. Any new exhibits included with Complainant's Second Initial Prehearing Exchange shall be numbered to follow the exhibits already served, in sequence.

the factual and legal bases for the denials in Paragraphs 322 through 592 of the Amended Answer in Docket No. TSCA-05-2010-0013 (denying Counts 272 through 542);

(B)(2) a copy of any supporting documents and a narrative statement explaining in detail the factual and legal bases for the denials in Paragraphs 103 through 153 of the Answer filed April 22, 2011 in Docket No. TSCA-05-2011-0006 (denying Counts 52 through 102);

(C) a narrative statement, and copy of any documents in support, explaining in detail the factual and/or legal bases for Affirmative Defenses 1 and 2 stated in the Amended Answer and in the Answer filed April 22, 2011;

(D) a copy of any and all documents Respondent intends to rely upon in support of its inability to pay the proposed penalty as alleged in Paragraph 45 of the Amended Answer and as alleged in Paragraph 46 of the Answer filed April 22, 2011;

(E) if Respondent takes the position that the total proposed penalty in this case as consolidated should be reduced or eliminated on any other grounds, a copy of any and all documents it intends to rely upon in support such position; and

(F) if Respondent intends to pursue accelerated decision or dismissal of any allegations in this case as consolidated, on grounds Complainant has no right to relief and/or any other grounds, a motion for such in accordance with 40 C.F.R. §§ 22.16(a) and 22.20(a).

4. Finally, Complainant shall submit as part of its Rebuttal Prehearing Exchange a statement and/or any documents in response to Respondent's Prehearing Exchange as to provisions 3(A) through 3(E) above.

The prehearing exchanges called for above shall be filed in seriatim fashion, pursuant to the following schedule:

May 27, 2011	Complainant's Second Initial Prehearing Exchange
June 17, 2011	Respondent's Prehearing Exchange
July 1, 2011	Complainant's Rebuttal Prehearing Exchange

Section 22.19(a) of the Rules of Practice provides that, except in accordance with Section 22.22(a), **any document not included in the prehearing exchange shall not be admitted into evidence, and any witness whose name and testimony summary are not included in the prehearing exchange shall not be allowed to testify.** Therefore, the parties are advised to very carefully and thoughtfully prepare their prehearing exchanges.

Supplement to Prehearing Exchange. Any addition of a proposed witness or exhibit to the

prehearing exchange shall be filed with an accompanying motion to supplement the prehearing exchange.

Default and Opportunity for a Hearing. The Complaints in this matter as consolidated gave Respondent notice and opportunity for a hearing, in accordance with Section 554 of the Administrative Procedure Act, 5 U.S.C. §§ 554 et seq (“APA”). Respondent’s Answers to the Complaints contained requests for a hearing. In this regard, Section 554(c)(2) of the APA sets out that a hearing be conducted under Section 556 of the APA. Section 556(d) 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 against Complainant’s charges by way of direct evidence, rebuttal evidence or through cross-examination of Complainant’s witness. Respondent is entitled to elect any or all three means to pursue its defenses. If Respondent intends to elect 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. **Respondent is hereby notified that its failure to either comply with the prehearing exchange requirements set forth herein or to state that it is electing only to conduct cross-examination of Complainant’s witnesses, can result in the entry of a default judgment against it. Complainant is notified that its failure to file its prehearing exchange in a timely manner can result in a dismissal of the case with prejudice.**

The mere pendency of settlement negotiations or even the existence of a settlement in principle does not constitute a basis for failing to strictly comply with the prehearing exchange requirements. Only the filing with the Hearing Clerk of a fully-executed Consent Agreement and Final Order, or an order of the judge, excuses noncompliance with filing deadlines.

Filing and Service. A document is “filed” when the Regional Hearing Clerk *receives* it. Also, the parties must serve the Presiding Judge so that she *receives* it on or before the due date. To ensure that the Presiding Judge receives a document in a timely manner, a courtesy copy may be sent by facsimile or email to the Office of Administrative Law Judges, but a hard copy must be mailed also. The facsimile number for the Office of Administrative Law Judges is (202) 565-0044, and the email address is oaljfilng@epa.gov. A signed certificate of service must be attached to all filed documents.

Prehearing exchange information as well as any motions or other papers to be filed in this proceeding shall be addressed as follows if sent by mail:

The Honorable Susan L. Biro, Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W., Mail Code 1900L
Washington, DC 20460

Hand-delivered packages transported by Federal Express or any delivery service that x-rays their packages as part of its routine security procedures may be delivered directly to:

The Honorable Susan L. Biro, Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1099 14th Street, N.W., Suite 350
Washington, DC 20005

(*For delivery service only; mail sent to the above address will be returned.)

The parties are advised NOT to include, attach or refer to any terms of settlement offers or agreements in any document submitted to the Presiding Judge, and no copies of Consent Agreements and Final Orders shall be submitted, or attached to any document submitted, to the Presiding Judge except those that are fully executed and filed with the Regional Hearing Clerk.

Contact Information. Telephone contact may be made with my legal assistant, Maria Whiting-Beale at (202) 564-6259 to ask whether a document has been received or issued. Email or telephone contact may be made with my staff attorneys, Lisa Knight, Esq., at (202) 564-6291 (knight.lisa@epa.gov), or Adrienne Fortin, Esq., at (202) 564-7862 (fortin.adrienne@epa.gov), for procedural questions.

Courtesy Copies. If any party wishes to receive, by e-mail or facsimile, an expedited courtesy copy of decisions and substantive orders issued in this proceeding, the party shall submit a request for such copies by letter addressed to Maria Whiting-Beale at one of the addresses above. The letter shall include the case docket number, the party's e-mail address or facsimile number, and a statement as to whether the party requests expedited courtesy copies of (a) the initial decision and/or any orders on motion for accelerated decision or dismissal, or (b) all decisions and substantive orders. The undersigned's office will endeavor to comply with such requests, but does not guarantee the party's receipt of expedited courtesy copies.

Motions. Prior to filing any motion, the moving party must contact the other party or parties to determine whether the other party has any objection to the granting of the relief sought in the motion, and the motion shall state the position of the other party or parties. The mere consent of the other parties to the relief sought does not assure that the motion will be granted. Furthermore, all motions must be submitted in sufficient time to permit the filing of a response by the other party and/or the issuance of a ruling on the motion before any relevant deadline set by this or any subsequent order. Sections 22.16(b) and 22.7(c) of the Rules of Practice allow a 15-day response period for motions, with an additional 5 days added thereto if the pleading is served by mail. Motions not filed in a timely manner may not be considered. **If either party intends to file any dispositive motion regarding liability, such as a motion for accelerated decision or motion to dismiss under 40 C.F.R. § 22.20(a), it shall be filed within thirty days**

after the due date for Complainant's Rebuttal Prehearing Exchange.

Pursuant to 40 C.F.R. § 22.16(d), a party may submit a written request for oral argument upon filing a motion, a response to a motion, or a reply. The requesting party shall propose an appropriate location for the argument. The Office of Administrative Law Judges has access to videoconferencing technology, and strongly encourages the parties to consider utilizing such technology for oral arguments on motions so as to minimize the expenditure of time and monetary resources in connection with such arguments. A request for oral argument may be granted, in the undersigned's discretion, where further clarification and elaboration of arguments would be of assistance in ruling on the motion.



Susan L. Biro
Chief Administrative Law Judge

Dated: May 5, 2011
Washington, D.C.

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In the Matter of Hanson's Window and Construction, Inc., Respondent
Docket No. TSCA-05-2010-0013 & Docket No. TSCA-05-2011-0006

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Granting Joint Motions To Consolidate And Amended Prehearing Order**, dated May 5, 2011, was sent this day in the following manner to the addressees listed below.



Maria Whiting-Beale
Staff Assistant

Dated: May 5, 2011

Original And One Copy By Pouch Mail To:

La Dawn Whitehead
Regional Hearing Clerk
U.S. EPA
77 West Jackson Boulevard, E-19J
Chicago, IL 60604-3590

Copy By Pouch Mail And Facsimile To:

Mary McAuliffe, Esquire
Mark Palermo, Esquire
Associate Regional Counsel
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Chicago, IL 60604-3590

Copy By Regular Mail And Facsimile To:

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