

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

2008 APR -1 PM 2:58

BEFORE THE ADMINISTRATOR

FILED
EPA REGION VIII
HEARING CLERK

IN THE MATTER OF:

THE THREE AFFILIATED TRIBES
and SHARON JACOBS, individually,

Respondents

)
)
) Docket No. RCRA-08-2008-0001
)
)
)

PREHEARING ORDER

As you have been previously notified, I am designated to preside over this proceeding. This proceeding will be governed by the Consolidated Rules of Practice Governing Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. §22.1 et seq., ("Rules of Practice"). The parties are advised to familiarize themselves with the applicable statute(s) and the Rules of Practice.

Agency policy strongly supports settlement and the procedures regarding documenting settlements are set forth in Section 22.18 of the Rules of Practice, 40 C.F.R. §22.18. If settlement discussions in this proceeding have already been undertaken, the parties are commended for taking the initiative to resolve this matter informally and expeditiously. Each party is reminded that pursuing this matter through a hearing and possible appeals will require the expenditure of significant amounts of time and financial resources. The parties should also realistically consider the risk of not prevailing in the proceeding despite such expenditures. A settlement allows the parties to control the outcome of the case, whereas a judicial decision takes such control away. With such thoughts in mind the parties are directed to engage in a settlement conference on or before **April 18, 2008**, and attempt to reach an amicable resolution of this matter. The Complainant shall file a status report regarding settlement on or before **April 25, 2008**. If the case is settled, the Consent Agreement and Final Order signed by the parties should be filed no later than **May 16, 2008**, with a copy sent to the undersigned.

Should a Consent Agreement not be finalized on or before the latter date, the parties must prepare for hearing and shall strictly comply with the prehearing requirements of this Order.

This Order is issued pursuant to Section 22.19(a) of the Rules. Accordingly, it is directed that the following prehearing exchange take place between the parties:

1. Pursuant to Section 22.19(a) of the Rules, each party shall file with the Regional

Hearing Clerk and shall serve on the opposing party or parties and on the Presiding Judge:

(A) the names of the expert and other witnesses intended to be called at hearing, identifying each as a "fact" or "expert" witness, with a brief narrative summary of their expected testimony, or a statement that no witnesses will be called;

(B) copies of all documents and exhibits intended to be introduced into evidence. Included among the documents produced shall be a curriculum vita or resume for each identified expert witness. The documents and exhibits shall be identified as "Complainant's" or "Respondents'" exhibit, as appropriate, and numbered with Arabic numerals (e.g., Complainant's Ex. 1); and

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

2. In addition, the Complainant shall include the following as part of its Initial Prehearing Exchange:

(A) a copy of any other policies or guidelines relied upon by Complainant in calculating the proposed penalty *other than* the U.S. EPA Penalty Guidance for Violations of UST Regulations (November 1990) and the associated Penalty Calculation Worksheets; and

(B) 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.

3. The Respondents shall also submit the following as part of their Prehearing Exchange(s), except for paragraph (C) below, which shall be filed and served separately in accordance with 40 C.F.R. §§ 22.5, 22.7(b) and 22.16(a):

(A) if any Respondent takes the position that Respondent is unable to pay the proposed penalty, a copy of any and all documents, *other than the documents included with the Answer*, which the Respondent intends to rely upon in support of such position;

(B) a copy of any documents, *other than the documents included with the Answer*, that Respondents intend to rely upon in support of their position that the proposed penalty should be reduced or eliminated, and

(C) pursuant to Respondents' request on page 12 of the Answer for a stay of proceedings, if the parties have reached a settlement in principle of this matter, Respondents may file a Motion for Extension of Time to file their Prehearing Exchange.¹

4. Complainant shall submit as part of its Rebuttal Prehearing Exchange a statement and/or any documents in response to Respondents' Prehearing Exchange submittals as to provisions 3(A) and (B) above.

The prehearing exchanges called for above shall be filed pursuant to the following schedule:

- | | | |
|----------------------|---|--|
| May 16, 2008 | - | Complainant's Initial Prehearing Exchange |
| June 6, 2008 | - | Respondents' Initial Prehearing Exchange, including any rebuttal |
| June 20, 2008 | - | 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, each party should thoughtfully prepare its prehearing exchange. Any supplements to prehearing exchanges shall be filed with an accompanying motion to supplement the prehearing exchange.

The Complaint herein gave the Respondents notice and opportunity for a hearing, in accordance with Section 554 of the Administrative Procedure Act (APA), 5 U.S.C. § 554. In their Answer to the Complaint, the Respondents requested such 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, the Respondents have the right to defend against the Complainant's charges by way of direct evidence, rebuttal evidence or through cross-examination of the Complainant's witnesses. Respondents are entitled to elect any or all three means to pursue their defenses. If the Respondents intend to elect only to conduct

¹ The pendency of settlement negotiations does not constitute a basis for failure to file a prehearing exchange, or for a stay of proceedings, and therefore the request for a stay is denied at this time.

cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, the Respondents shall serve a statement to that effect on or before the date for filing their prehearing exchange. The Respondents are hereby notified that the failure to either comply with the prehearing exchange requirements set forth herein or to state that they are electing only to conduct cross-examination of the Complainant's witnesses, can result in the entry of a default judgment against them. The 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.**

Prehearing exchange information required by this Order to be sent to the Presiding Judge, as well as any other further pleadings, if sent by mail, shall be addressed as follows:

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

Hand-delivered packages transported by Federal Express or another delivery service which x-rays their packages as part of their routine security procedures, may be delivered directly to the Offices of the Administrative Law Judges at 1099 14th Street, N.W., Suite 350, Washington, D.C. 20005.

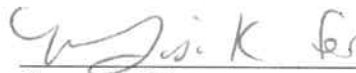
Telephone contact may be made with my legal assistant, Maria Whiting-Beale at (202) 564-6259 or my staff attorney, Lisa Knight, Esquire at (202) 564-6291. The facsimile number is (202) 565-0044.

If any party wishes to receive, by e-mail or by facsimile, an expedited courtesy copy of decisions and substantive orders issued in this proceeding, the party shall submit a request for expedited courtesy copies by letter addressed to Maria Whiting-Beale, Legal Staff Assistant, Office of Administrative Law Judges, U.S. Environmental Protection Agency, Mail Code 1900L, 1200 Pennsylvania Ave. N.W., Washington, D.C. 20460. The letter shall include the case docket number, the e-mail address or facsimile number to which the copies are to be sent, and a statement as to whether the party requests: (A) expedited courtesy copies of the initial decision and/or any orders on motion for accelerated decision or dismissal, or (B) expedited courtesy copies of 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.

Prior to filing any motion, the moving party is directed to contact the opposing party or parties to determine whether there is any objection to the granting of the relief sought in the motion. The motion shall then 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 and no reliance should be placed on the granting of an unopposed motion. Furthermore, all motions which do not state that there is no objection to the relief sought must be submitted in sufficient time to permit the filing of a response by the opposing party or parties and 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, 40 C.F.R. §§22.16(b) and 22.7(c), allow a fifteen-day response period for motions with an additional five days added thereto if the pleading is served by mail. Motions or responses not filed in a timely manner may not be considered.

The Office of Administrative Law Judges now has access to videoconferencing facilities, which facilitate oral arguments on motions. Upon the filing of a motion, a response to a motion, or a reply to a motion, any party may submit a written request for an oral argument on the motion, pursuant to 40 C.F.R. § 22.16(d). Such request shall state whether videoconferencing is desired and whether the opposing party or parties object(s) to such oral argument. Such request may be granted, in the undersigned's discretion, where further clarification and elaboration of arguments would be of assistance in ruling on the motion.

If any 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 Rebuttal Prehearing Exchanges.**



Susan L. Biro

Chief Administrative Law Judge

Dated: March 28, 2008
Washington, D.C.

In the Matter of The Three Affiliated Tribes and Sharon Jacobs, individually
Docket No. RCRA-08-2008-0001

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the **Pre-Hearing Order**, dated March 28, 2008 was sent this day in the following manner to the addressees listed below:

Original + 1 Copy by Regular Mail to:

Tina Artemis
Regional Hearing Clerk
US-EPA, Region 8
1595 Wynkoop Street
Denver, CO 80202-1129

Copy by Regular Mail to:

Amy Swanson, Esq.
U.S. EPA
Enforcement Attorney
1595 Wynkoop Street
Denver, CO 80202-1129

Damon K. Williams, Esq.
Tribal Administrative Building
Legal Dept.
404 Frontage Road
New Town, ND 58763


Knolyn R. Jones
Legal Staff Assistant

Dated: March 28, 2008