

The scheduling of consecutive exchanges is not designed to allow the respondent more time to gather evidence or to complete its exchange, as surmised by the Region. The schedule as a whole is intended to provide more than adequate time for both parties to file their initial prehearing exchanges, and to supplement their exchanges. The purpose of staggering the initial exchange is to allow the respondent to respond to the complainant's evidence in an orderly fashion, as envisioned by the Administrative Procedure Act and the EPA's procedural rules.

In this case, the Region has pointed out that the parties have engaged in extensive settlement discussions and alternative dispute resolution. They are already fully familiar with each other's potential evidence and have had ample time to prepare their cases. While these circumstances might warrant accelerating the entire prehearing exchange process and scheduling an early hearing, they do not warrant varying from the practice of scheduling consecutive prehearing exchanges. Any evidence relating to settlement is inadmissible at hearing pursuant to the Federal Rules of Evidence, Rule 408, and 40 CFR §22.22(a). Moreover, whatever took place during settlement negotiations need not have any relation to the litigation strategies pursued by either party. The hearing process is just now beginning, and the Complainant is free to produce whatever evidence it deems appropriate, regardless of what took place during prior negotiations. Nothing that took place previously between the parties can alter the parties' respective burdens of going forward and burdens of proof at the hearing.

Order

The Complainant's motion for scheduling simultaneous prehearing exchanges is denied. A prehearing order requiring staggered prehearing exchanges will be issued separately, accompanying this order. _____

Andrew S. Pearlstein
Administrative Law Judge

Dated: April 27, 1999
Washington, D.C.

1. I generally depart from this practice and require simultaneous exchanges only when the parties have reported that they have reached a settlement in principle. When the parties have thus shifted from primarily a litigation posture to a settlement posture, requiring simultaneous exchanges eliminates any disparate pressure on the parties to finalize the settlement.

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