

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

RECEIVED
NOV 12 2009

BEFORE THE ADMINISTRATOR

REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

IN THE MATTER OF:)
)
SAUDER WOODWORKING) Docket No. CAA-05-2009-0025
COGENERATION FACILITY,)
)
Respondent.)

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 the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 ("Rules of Practice" or "Rules"). 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 documentation of settlements are set forth in Section 22.18 of the Rules of Practice, 40 C.F.R. § 22.18. The record reflects that the parties have engaged in settlement discussions as part of an alternative dispute resolution process and, while those discussions to date have not been fruitful, the parties are nevertheless commended for taking the initiative to attempt 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 continue their efforts to reach a settlement of this matter while the litigation process is proceeding.

Should a Consent Agreement not be finalized on or before **December 11, 2009**, 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 of Practice. Accordingly, it is directed that the following prehearing exchange take place between the parties:

1. Pursuant to Section 22.19(a) of the Rules of Practice, each party shall file with the Regional Hearing Clerk and shall serve on the opposing party 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 witness or an 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 Respondent's exhibit, as appropriate, and numbered with Arabic numerals (e.g., CX 1 or RX 2); and

(C) a statement as to its views as to the appropriate place of hearing and estimate of 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, Complainant shall submit the following as part of its Initial Prehearing Exchange:

- A. a detailed narrative statement that fully elaborates the exact factual and legal basis, and copies of all documents in support thereof, for the allegations made in the Complaint the truth of which was denied by Respondent in its Answer;
- B. a copy of the Permit to Install 03-05740 and any and all modifications or amendments thereto referenced in paragraph 4-5 of the Complaint;
- C. a copy of the "Final Title V permit (3745-77)" and any and all modifications or amendments thereto referenced in paragraph 6-8 of the Complaint;
- D. a complete copy of the quarterly excess emissions reports (EERs) and any and all modifications or amendments thereto referenced in paragraph 59 of the Complaint;
- E. a copy of the Notices of Violation and/or Findings of Violation referenced in paragraphs 60 and 62 of the Complaint;
- F. a detailed narrative statement that fully elaborates on the period(s) in time and the extent to which Respondent's EERs for 2003-05 disclosed that it was not in compliance with the opacity limits in its PTI and/or Title V Permit as alleged in paragraph 70 of the Complaint and a copy of all documents in support thereof. Include in your statement a response to Respondent's claim that the 20% opacity limit does not apply once per hour and during periods of startup, shutdown, or malfunction and that, taking into account such periods of inapplicability, Respondent's exceedences totaled no more than 228 minutes as alleged by Respondent in paragraph 24 of its Answer;

- G. a detailed narrative statement responding to Respondent's claim made in paragraph 24 of its Answer to the effect that Complainant's action regarding its opacity violations is barred in whole or in part by the applicable statute of limitations and a copy of all documents in support thereof;
- H. a detailed narrative statement that fully elaborates on the period(s) in time and the extent to which Respondent's EERs disclosed that it was not in compliance with the NO_x limit in its PTI and/or Title V Permit as alleged in paragraphs 76-77 of the Complaint and a copy of all documents in support thereof. Include in your statement a response to Respondent's claim in paragraph 28 of its Answer that the PTI included an incorrect boiler rating and that, taking into account the correct boiler rating, Respondent's NO_x excess emissions totaled only 6,600 and 2,340 minutes, respectively;
- I. a detailed narrative statement responding to Respondent's claim made in paragraphs 28 and 29 of its Answer to the effect that Complainant's action regarding its NO_x violations is barred in whole or in part by the applicable statute of limitations and a copy of all documents in support thereof;
- J. a detailed narrative statement that fully elaborates on the period(s) in time and the extent to which Respondent's EERs disclosed COMS and CEMS downtimes as alleged in paragraphs 90-92 of the Complaint and a copy of all documents in support thereof. Include in your statement a response to Respondent's claim in paragraphs 36-38 of its Answer that all such downtime was due to calibration checks or system breakdowns;
- K. a detailed narrative statement that fully elaborates on the allegation made in paragraph 101 of the Complaint regarding the deficiencies in Respondent's EER filings and a copy of all documents in support thereof. Include in your statement a response to Respondent's claims made in paragraph 43 of its Answer that the regulations and its Title V Permit allow for a submission of a summary report and/or Ohio EPA developed and accepted such summary reports and never notified Respondent of any deficiencies in regard thereto
- L. a copy of the "stack test" and the results thereof referenced in paragraphs 106-109 of the Complaint;
- M. A narrative statement responding to Respondent's claims made in paragraph 50 of its Answer that it corrected the malfunction causing excess VOC emissions;
- N. to the extent not previously provided with the Complaint, a separate Penalty Calculation Worksheet detailing exactly how the proposed penalty was calculated for each count of the Complaint in accordance with the factors set forth in 42 U.S.C. 7413(e) and the EPA's Clean Air Act Stationary Source Civil Penalty

Policy as alleged in paragraph 111 of the Complaint, and provide a copy of said penalty policy; and

- O. a statement regarding whether the Paper Work 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. Respondent shall also submit the following as part of its Prehearing Exchange:

- A. a detailed narrative statement that fully elaborates the exact factual and legal basis, and copies of all documents in support thereof, for the allegations made in the Complaint the truth of which Respondent denied in whole or part in its Answer;
- B. a copy of the Title V Permit Renewal Application and any and all modifications or amendments thereto referenced in paragraph 3 of the Answer;
- C. a detailed narrative statement that fully elaborates on Respondent's assertion that its Permit to Install (PTI) as initially issued included an "incorrect boiler rating" as alleged in paragraph 17 of the Answer and a copy of all documents in support of the truth of this allegation including the documentation submitted by Respondent to Ohio EPA requesting a modification to the PTI and/or the Title V Permit to correct this error;
- D. a detailed narrative statement that fully elaborates on Respondent's denial made in paragraph 24 of its Answer that its EERs disclosed that it was not in compliance with the opacity limits in its PTI or Title V Permit as to B008 and B009 to the extent alleged in the Complaint and a copy of all documents in support thereof including those provided to U.S. EPA as alleged therein. Include in your response a statement describing exactly how Respondent calculated how its exceedences from the third quarter of 2004-2005 as to B008 and B009 totaled no more than 228 and 108 minutes out of a total operating time of 21,946 and 13,162 hours, respectively;
- E. a detailed narrative statement that fully elaborates on the factual and legal basis for the assertion made by Respondent in paragraph 24 of its Answer to the effect that the action for opacity violations is barred in whole or in part by the applicable statute of limitations and a copy of all documents in support thereof;
- F. a detailed narrative statement that fully elaborates on Respondent's denial made in paragraphs 28 and 29 of its Answer that its EERs disclosed that it was not in compliance with the No_x limits in its PTI and/or Title V Permit as to B008 and B009 to the extent alleged in the Complaint and a copy of all documents in

support thereof including those provided to U.S. EPA as alleged therein. Include in your response a statement describing exactly how Respondent calculated how its excess NO_x emissions as to B008 and B009 as totaling no more than 6,660 minutes and 2,340 minutes out of a total operating time of 20,372 and/or 20,216, respectively;

- G. a detailed narrative statement that fully elaborates on the factual and legal basis for the assertion made by Respondent in paragraph 29 of its Answer to the effect that this action for NO_x emissions is barred in whole or in part by the applicable statute of limitations and a copy of all documents in support thereof;
- H. a detailed narrative statement that fully elaborates on Respondent's denial made in paragraphs 36 and 37 of its Answer that its EERs disclosed that its COMS and CEMS had downtimes to the extent alleged in the Complaint and a copy of all documents in support thereof. Include in your response a statement describing exactly how Respondent determined that all such downtime was due to either calibration checks or system breakdowns;
- I. a detailed narrative statement that fully elaborates on Respondent's claim made in paragraph 39 of its Answer that it continuously monitors opacity and emissions and that its "COMS and CEMS systems were in continuous operation during calendar years 2003 through 2005, except as authorized by regulation,"
- J. denial made in paragraphs 36 and 37 of its Answer that its EERs disclosed that its COMS and CEMS had downtimes to the extent alleged in the Complaint and a copy of all documents in support thereof. Include in your response a statement describing exactly how Respondent determined that all such downtime was due to either calibration checks or system breakdowns;
- K. a complete copy of Respondent's semi-annual excess emissions and monitoring system reports for the period at issue in the Complaint as referenced in paragraphs 41-43 of its Answer along with all documentation evidencing that such reports "were developed in consultation with Ohio EPA," and were "accepted by Ohio EPA without question;"
- L. a detailed narrative statement that fully elaborates on Respondent's claims made in paragraph 50 of its Answer regarding the actions it took in response to the results of the stack test and a copy of all documents in support thereof;
- M. a separate and detailed narrative statement that fully elaborates on the factual and legal basis for each of Respondent's five Affirmative defenses as set forth in paragraph 50s 54-58 of its Answer and a copy of all documents in support thereof;
- N. if Respondent takes the position that it is unable to pay the proposed penalty, a narrative statement explaining the precise factual and legal basis for its position

and a copy of any and all documents it intends to rely upon in support of such position; and

- O. if Respondent takes the position that the proposed penalty should be reduced or eliminated on any other grounds, a narrative statement explaining the precise factual and legal basis for its position and a copy of any and all documents it intends to rely upon in support of such position.

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

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

- December 11, 2009** - Complainant's Initial Prehearing Exchange
- December 31, 2009** - Respondent's Prehearing Exchange, including any direct and/or rebuttal evidence
- January 8, 2010** - 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.

Complaint in the present case gave Respondent notice and opportunity for a hearing, in accordance with Section 554 of the Administrative Procedure Act (APA), 5 U.S.C. § 554. In its Answer to the Complaint, Respondent 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, 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 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, then 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.

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, Ben Wakefield, at (202) 564-6278. 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 other party or parties to determine whether the other party has 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 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, 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 and responses not filed in a timely manner will not be considered without motion for leave to file the document and a showing of good cause.

Furthermore, upon the filing of a motion, a response to a motion, or a reply to a motion, a party may submit a written request for an oral argument on the motion pursuant to 40 C.F.R. § 22.16(d). Included in the request for oral argument shall be a statement as to the proposed appropriate location(s) for the argument to take place. The Office of Administrative Law Judges recently acquired access to state of the art videoconferencing capabilities, and strongly encourages the parties to consider utilizing such technology for oral arguments on motions in order to minimize the expenditure of time and 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.

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.**



Susan L. Biro
Chief Administrative Law Judge

Dated: November 10, 2009
Washington, D.C.

RECEIVED
NOV 12 2009

**REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY.**

In the Matter of Sauder Woodworking Cogeneration Facility, Respondent
Docket No. CAA-05-2009-0025

CERTIFICATE OF SERVICE

I certify that the foregoing **Prehearing Order**, dated November 10, 2009, was sent this day in the following manner to the addressees listed below.



Maria Whiting-Beale
Staff Assistant

Dated: November 10, 2009

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

RECEIVED
NOV 12 2009

REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

Copy By Pouch Mail To:

Padmavati Bending, Esquire
Associate Regional Counsel
U.S. EPA
77 West Jackson Boulevard, C-14J
Chicago, IL 60604-3590

Copy By Regular Mail To:

William D. Hayes, Esquire
Summer J. Koladin Plantz, Esquire
Vorys, Sater, Seymour & Pease LLP
211 East Fourth Street, Suite 2000
Cincinnati, OH 45202