UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
Kama'aina Termite and Pest Control, Inc.,	)	DOCKET NO. FIFRA-09-2011-0011
	)	
	)	
RESPONDENT	)	

PREHEARING ORDER

As you previously have been notified, I have been designated by the July 5, 2011, Order of the Chief Administrative Law Judge to preside in the above captioned matter.[1] This proceeding arises under the authority of Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136*l*(a), and is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits and the Supplemental Rules Governing the Administrative Assessment of Civil Penalties Under the Federal Insecticide, Fungicide, and Rodenticide Act ("Rules of Practice"), 40 C.F.R. §§ 22.1-22.32, 22.35. The parties are advised to familiarize themselves with both the applicable statute(s) and the Rules of Practice.

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 reflects that the parties have reached an agreement in principle to settle this matter, however no Consent Agreement and Final Order ("CAFO") has been filed. The parties are directed to hold a settlement conference on this matter on or

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[1] The Chief Administrative Law Judge issued this Order after the Alternative Dispute Resolution ("ADR") process in this matter expired.

before **July 29, 2011**, to attempt to execute a CAFO. *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 **August 5, 2011**.

In the event that the parties fail to execute a CAFO by that time, they shall strictly comply with the requirements of this Prehearing Order and prepare for a hearing. The parties are, of course, free to continue 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' 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" exhibit, 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. In the Complaint, Complainant alleges that Kama'aina Termite and Pest Control, Inc. ("Respondent"), is a corporation located in Honolulu, Hawai'i. Compl. at ¶ 3. In accordance with the

Supplemental Rules Governing the Administrative Assessment of Civil Penalties Under the Federal Insecticide, Fungicide, and Rodenticide Act, 40 C.F.R. § 22.35(b), the hearing shall be held in the county, parish, or incorporated city of the residence of the Respondent, unless otherwise agreed in writing by all parties. Thus, the hearing shall be held in Honolulu, Hawai'i, unless the parties mutually designate a different city as the place of hearing in this matter.

See Sections 22.19(a),(b),(d) of the Rules of Practice, 40 C.F.R. §§ 22.19(a),(b),(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 exchanges delineated above shall be filed *in seriatim* manner, according to the following schedule:

August 24, 2011 - Complainant's Initial Prehearing Exchange

September 21, 2011 - Respondent's Prehearing Exchange,

including any direct and/or rebuttal evidence

October 5, 2011 – 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 CAFO, 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 a statement by Respondent electing 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 CAFO)* 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:[2]

[2] The parties are reminded that e-mail is not considered a proper method of filing under the current Rules of Practice.

If sending by United States Postal Service (USPS):
EPA Office of Administrative Law Judges
1200 Pennsylvania Avenue, NW
Mail Code 1900L
Washington, D.C. 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, D.C. 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: July 6, 2011
Washington, DC

In the Matter of *Kama'aina Termite and Pest Control, Inc.*, Respondent.
Docket No. FIFRA-09-2011-0011

CERTIFICATE OF SERVICE

I hereby certify that true copies of this **Prehearing Order,** issued by Barbara A. Gunning, Administrative Law Judge, in Docket No. FIFRA-09-2011-0011, were sent to the following parties on this 6th day of July 2011, in the manner indicated:

Mary Angeles
Legal Staff Assistant

Original and One Copy by Pouch Mail to:

Bryan Goodwin
Regional Hearing Clerk
U.S. EPA / Region IX
75 Hawthorne Street
San Francisco, CA 94105

Copy by Pouch Mail to:

Edgar P. Coral, Esq.
Office of Regional Counsel
U.S. EPA / Region IX
75 Hawthorne Street, ORC-2
San Francisco, CA 94105

Copy by Regular Mail to:

William J. Nagle, III, Esq.
William J. Nagle, Attorney at Law
A Law Corporation
930 Pioneer Plaza
900 Fort Street Mall
Honolulu, HI 96813

Dated: July 6, 2011
Washington, DC