

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
Region 2**

U.S. ENVIRONMENTAL  
PROTECTION AGENCY-REG. II  
2007 DEC 21 AM 11:45  
REGIONAL HEARING  
PLEIN

-----X  
In the Matter of: :  
 :  
Niagara Ceramics Corporation, : Docket No. RCRA-02-2007-7114  
 :  
Respondent. :  
 :  
Proceeding Under Section 3008 of the : Honorable William B. Moran,  
Solid Waste Disposal Act, as amended. : Presiding Officer  
 :  
-----X

MOTION FOR AN EXTENSION OF TIME TO FILE PREHEARING EXCHANGE

Complainant in this proceeding, the Director of the Division of Enforcement and Compliance Assistance, EPA, Region 2 (EPA), through her attorney, requests this Court grant a three-month extension of time for the parties to file their initial prehearing exchanges, an extension concurred in by Respondent. For the reasons set forth below, EPA submits that good cause exists for granting this motion.

This is a case administratively prosecuted under Section 3008 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928, in which EPA seeks a civil penalty of \$131,350 for violations allegedly occurring at Respondent's facility in Buffalo, New York. The prehearing order of this Court, dated November 16, 2007, directs that the parties "must simultaneously submit their initial prehearing exchanges by **Tuesday, January 15, 2008**" (bolded emphasis in original). On December 4<sup>th</sup>, the parties held a settlement conference. During that conference, Respondent raised the issue of an inability to pay the proposed

penalty/financial hardship.<sup>1</sup>

Subsequent to the December 4<sup>th</sup> conference, Complainant has retained an outside financial analyst. After speaking with the analyst, the undersigned, on December 13<sup>th</sup>, requested via e-mail that Respondent produce documentation to support its assertion of financial hardship; this request consisted of eight separately enumerated items.

Given the nature of Complainant's request for supporting documentation, it will inevitably require some time for Respondent to gather and provide this information; the undersigned estimates that it will likely take at least a few weeks to produce most of these items, especially with the end-of-year holidays rapidly approaching. Once these documents are submitted to EPA, the Agency will forward them to the outside consultant, and, based on prior experience with such matters, the undersigned anticipates that it will take her at least two weeks to thoroughly analyze the documents and produce a report thereon. It thus appears virtually impossible for the parties to have completed the financial review by the time the initial prehearing exchanges become due (some three weeks from this date).

EPA accordingly seeks a three-month extension of time to allow a sufficient opportunity for Respondent to produce the requested financial documents and concomitantly to allow EPA a reasonable opportunity to have them properly analyzed and evaluated. If such review demonstrates that indeed such an inability to pay in fact exists, in all likelihood that would

---

<sup>1</sup> Although Respondent has not set forth in its answer an affirmative defense of inability to pay/financial hardship, in a telephone conversation between its counsel and the undersigned, the former has stated he has no objections to Complainant informing this Court of Respondent having raised this issue. Moreover, the parties also discussed the possibility of Respondent moving to amend its answer to assert this issue as an additional affirmative defense. As stated during this discussion, Complainant will not oppose Respondent's efforts to do so.

become the basis for settlement; under this scenario, that would pre-empt the necessity of the parties engaging in prehearing exchange. Thus, EPA seeks this extension of time to exhaust the very real possibility that settlement will be premised on financial hardship grounds. The Agency wishes to be granted a sufficient and reasonable opportunity to explore whether this ground constitutes a legitimate and *bona fide* basis for reaching a settlement, and it wishes to do so without having to be concerned with complying with an imminent litigation deadline. Counsel for Respondent has informed the undersigned that his client consents to EPA's request for this three-month extension.

Complainant submits the above considerations demonstrate that the good cause requirement of 40 C.F.R. § 22.7(b) exists for the granting of this motion. Moreover, other factors militate for this Court to grant the relief herein sought. This is the first such extension of time requested. To date, no hearing has been scheduled and no dispositive or other substantive motions have been filed. Neither party would be prejudiced by this additional period of time, and the Court should not be prejudiced either, if only because this proceeding remains inchoate, with this proceeding having commenced only in early October..

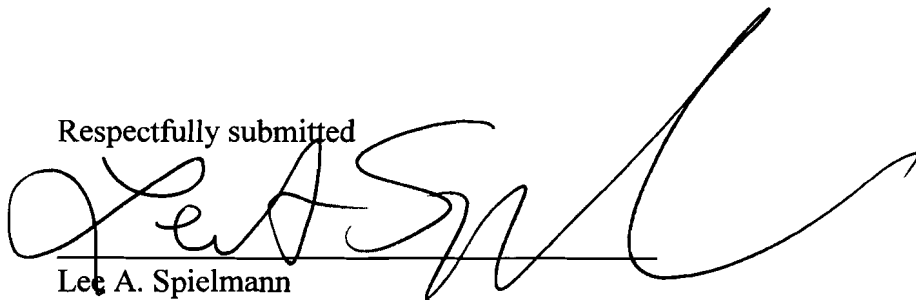
Therefore, EPA respectfully moves this Court, pursuant to 40 C.F.R. §§ 22.4(c)(2), 22.7(b), 22.16(a) and 22.19(a), for an order: **a)** vacating so much of the November 16<sup>th</sup> order as directed the parties to serve their initial prehearing exchanges by January 15, 2008 and **b)** extending the deadline set forth in said order by a period of three months (to April 15, 2008).<sup>2</sup>

---

<sup>2</sup> If this Court is unable to grant the requested extension, then EPA respectfully requests that it grant an extension of two months, until March 15, 2008.

Dated: December 20, 2007  
New York, New York

Respectfully submitted

A handwritten signature in black ink, appearing to read 'Lee A. Spielmann', written over a horizontal line.

Lee A. Spielmann  
Assistant Regional Counsel  
Office of Regional Counsel  
U.S. Environmental Protection Agency, Region 2  
290 Broadway, 16<sup>th</sup> floor  
New York, New York 10007-1866  
212-637-3222  
FAX: 212-637-3199

TO: Honorable William B. Moran  
Administrative Law Judge  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Mail Code 1900L  
Washington, DC 20005

Office of Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 2  
290 Broadway, 16<sup>th</sup> floor  
New York, New York 10007-1866

Michael C. Murphy, Esq.  
David P. Flynn, Esq.  
Phillips Lytle LLP  
3400 HSBC Center  
Buffalo, New York 14203

***In re Niagara Ceramics Corporation***  
**Docket No. RCRA-02-2007-7114**

CERTIFICATE OF SERVICE

I certify that I have this day caused to be sent the foregoing Motion For An Extension of Time To File Prehearing Exchange, dated December 20, 2007 in the following manner to the respective addressees listed below:

Original and One Copy  
By Inter-Office Mail:

Office of Regional Hearing Clerk  
U.S. Environmental Protection  
Agency - Region 2  
290 Broadway, 16th floor  
New York, New York 10007-1866

Copy by Pouch Mail:

Honorable William B. Moran  
Administrative Law Judge  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Mail Code 1900 L  
Washington, DC 20005

Copy by First Class Mail:

Michael C. Murphy, Esq.  
David P. Flynn, Esq.  
Phillips Lytle LLP  
3400 HSBC Center  
Buffalo, New York 14203-2887

Dated: December 20, 2007  
New York, New York

  
\_\_\_\_\_  
Lee A. Spielmann