

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

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BEFORE THE ADMINISTRATOR

EPA REGION VII
HEARING CLERK

IN THE MATTER OF:)	Docket No. RCRA-08-2008-0001
)	Docket No. RCRA-08-2008-0002
The Three Affiliated Tribes)	Docket No. RCRA-08-2008-0003
and Sharon Jacobs, individually,)	
Highway 8 Convenience Store,)	
)	
The Three Affiliated Tribes)	COMPLAINANT'S RESPONSE TO
and Yolanda Bears Tail, individually,)	ORDER TO SHOW CAUSE AND
White Shield Ree Store,)	MOTION FOR EXTENSION OF TIME
)	TO FILE PREHEARING EXCHANGE
The Three Affiliated Tribes)	
and Dave Williams, individually,)	
West Dakota Service,)	
)	
Respondents.)	

INTRODUCTION

Pursuant to the Order to Show Cause issued by the Honorable Susan L. Biro, Chief Administrative Law Judge, on June 2, 2008, Complainant United States Environmental Protection Agency, Region 8 (EPA), by its undersigned attorney, herein provides good cause why it failed to submit its prehearing exchange as required by the Prehearing Order and why a Default should not be entered against it. Because the Prehearing Order, including Complainant's past deadline of May 16, 2008 for filing its prehearing exchange remains pending, Complainant also moves herein for an order vacating the current deadline and setting a new date for filing Complainant's prehearing exchange thirty (30) days from the date of this filing.

STATEMENT OF CASE

Complainant filed the above-referenced three administrative actions against the Three Affiliated Tribes (Tribes) and individual facility managers on December 14, 2007, based on alleged violations of section 9006 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6991e, and the Underground Storage Tank (UST) regulations set forth at 40 C.F.R. Part 280, subpart D, at three tribally-owned facilities. These matters were referred pursuant to 40 C.F.R. § 22.21(a) of the Consolidated Rule of Practice to the Honorable Susan L. Biro, Chief Administrative Law Judge, for assignment to an Administrative Law Judge on February 8, 2008, after the Tribe filed answers to the complaints on February 1, 2008.

Three separate Orders of Designation were issued by the Chief Administrative Law Judge on February 25, 2008, notifying the parties that the Chief Judge had been designated to preside over the proceedings. The Chief Administrative Law Judge issued a Prehearing Order dated March 28, 2008, establishing the deadline of April 25, 2008, for filing a settlement status report. The Prehearing Order directed the parties to file a Consent Agreement and Final Order (CAFO) if the case settled no later than May 16, 2008. The Prehearing Order stated that if a CAFO was not finalized by May 16, 2008, the parties must strictly comply with the prehearing requirements of the Prehearing Order.

Complainant filed a Settlement Status Report with the Regional Hearing Clerk on April 28, 2008. Notably, and for which the undersigned takes full responsibility, the Report was filed the Monday after it was due. For background purposes only, and not intended as an excuse, Complainant's tardiness in filing the Settlement Status Report resulted from being unexpectedly sent to Salt Lake City during the week of April 21, 2008, delaying all other work-related

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commitments. The undersigned acknowledges in arrears that a motion requesting an extension to file the status report should have been made in lieu of the late filing and apologizes to the Presiding Judge accordingly.

Complainant noted in the Settlement Status Report that the parties had reached a settlement-in-principle based on an electronic communication received from the Tribes' attorney on April 25, 2008. Because the settlement included performance of a Supplemental Environmental Project (SEP), Complainant requested a two-week extension of the settlement filing deadline until May 30, 2008, to allow sufficient time to obtain cost estimates and other information underlying the SEP.

The Chief Administrative Law Judge stated in an Order Granting Extension of Time for Filing Consent Agreement (Order), dated April 29, 2008, that Complainant was free to file the CAFO up until the week before hearing. While in hindsight the Presiding Judge's language that it shall otherwise comply with all other prehearing filing deadlines is clear, the undersigned focused single-mindedly on the task of executing a Consent Agreement and failed to move for an extension of any other deadline set forth in the Prehearing Order. Per page 3 of the Prehearing Order, Complainant's Prehearing Exchange was due May 16, 2008.

ARGUMENT

It is not lost on the undersigned that had the Complainant simply moved for an extension of its prehearing exchange, these matters would not be in their current muddled state. A review of prior decisions addressing missed deadlines in the same administrative forum offers no relief.

These matters similarly have been dealt with by orders to show cause or dismissed due to tardiness. Complainant's show of good cause, therefore, is based on the complicating factors

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associated with settling these matters which, despite diligent and good faith efforts by Complainant, prevented the parties from meeting the CAFO filing deadline of May 30, 2008. The CAFO, drafted on May 1, 2008, would have been fully-executed and filed prior to the established deadline but for the case-specific complications including the number of actions, nature of settlement, finding of contamination, and separate forums involved.

As stated previously, this proceeding involves three separate administrative actions. As cases go, the parties have worked through a variety of issues in a collaborative fashion to prevent the noncompliance at issue from recurring. Although the parties believe that the settlement reached resolving all alleged violations is in their mutual best interest, the fact that a single settlement has been negotiated for all three actions has created some procedural irregularities that must be addressed prior to filing a CAFO.

Specifically, the parties have grappled with whether these actions need to be consolidated prior to filing one or more CAFOs. In addition to discussing this procedural step on several occasions with Respondent's attorney, and drafting and submitting for the Respondent's review a stipulated Motion to Consolidate and supporting Memorandum, the Complainant contacted the Office of Administrative Law Judges' (OALJ) Senior Staff Attorney on May 5, 2006, to confirm whether to consolidate these actions for settlement purposes. Complainant initially understood 40 C.F.R. § 22.12 to expedite prehearing issues, but felt consolidation was appropriate for settlement where two or more actions were involved. The Senior Staff Attorney confirmed this understanding on May 5, 2008.

On May 13, 2008, after preparing the consolidation motion, the Complainant learned that former USTs at the West Dakota facility had leaked, resulting in soil and potential ground

water contamination. Unlike the other two actions, the petroleum contamination at West Dakota Service necessitates a compliance and/or corrective schedule including additional site analysis and possible remediation, which will require that the CAFO remain open for an unknown period of time. Because the other two actions have returned to compliance, the unanticipated development at West Dakota raises the question of whether or not to proceed with consolidating all three actions: While consolidation will permit the filing of a single settlement, including penalty and SEP performance, the Highway 8 and White Shield Ree actions will remain open until West Dakota satisfactorily performs its compliance obligations. Potentially, Highway 8 and White Shield Ree may be subjected to more stringent requirements and noncompliance ramifications until West Dakota returns to compliance.

Conversely, if all three actions are not consolidated, Complainant is uncertain how to structure the penalty and SEP portions of the settlement agreement(s). Pursuant to 40 C.F.R. § 22.4(b), the Regional Judicial Officer (RJO) is authorized to approve the settlement. If, for example, one CAFO including the penalty and SEP is filed for Highway 8 and White Shield Ree, the Complainant is uncertain whether the RJO will accept a separate CAFO for West Dakota Service with no penalty. Whereas it is possible to divide the cash portion of the penalty into thirds and apply the appropriate amount to West Dakota in a separate CAFO, the SEP cannot easily be divided.

Complainant has been unsuccessful in finding an administrative precedent to follow and contacted the OALJ Senior Staff Attorney for input last week. Because settlement authority for administrative actions is outside the purview of the Administrative Law Judge, the Senior Staff Attorney was unable to offer guidance. Upon discussing this matter further with the Tribe and

internally within EPA, the parties are proceeding with filing the motion to consolidate all three actions to expedite settlement. Language will be included in the CAFO to dismiss White Shield Ree and Highway 8 from the action upon payment of the penalty and performance of the SEP, leaving only West Dakota Service responsible for the corrective action order portion of the CAFO. Said motion and supporting memorandum are being filed separately.

MOTION TO FOR EXTENSION OF TIME TO FILE PREHEARING EXCHANGE

Complainant hereby moves the Presiding Judge to vacate the existing deadline for Complainant to file a Prehearing Exchange of May 16, 2008, currently set forth in the Prehearing Order, and grant an extension of time of thirty (30) days from the date of this filing for Complainant to file its Prehearing Exchange. Complainant's Response to Order to Show Cause is cited in support of this motion.

CONCLUSION


As illustrated above, the Complainant has diligently endeavored to formalize the terms of the parties' settlement agreement but has been hampered by several procedural obstacles. The parties have been able to resolve the alleged violations and reach a settlement-in-principle for three separate actions in a timely and collaborative manner. Because the Complainant has been singularly-focused on discovering an appropriate path to settlement through a myriad of procedural obstacles, Complainant lost sight of the outstanding Prehearing Order and the filing deadlines therein. As the Respondent is equally focused on settlement, Complainant maintains that Respondent will not be unduly harmed or delayed by Complainant failing to file a timely prehearing exchange. Although duly chastised, Complainant maintains that it had good cause for failing to file a CAFO on May 30, 2008, or alternatively, a prehearing exchange on May 16,

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2008. If Complainant's response to the Order to Show Cause is deemed adequate by the Presiding Judge, Complainant will endeavor to move these matters forward by filing a motion to consolidate all three proceedings, and ultimately filing a fully-executed CAFO within thirty (30) days of this filing.

Respectfully submitted this 6th day of June 2008.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 8,
Complainant.



Amy Swanson, Enforcement Attorney
Colorado Atty. Reg. No. 26488
U.S. EPA, Region 8 (8ENF-L)
1595 Wynkoop Street
Denver, CO 80202-1129
Telephone: 303/312-6906
Facsimile: 303/312-6953

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one copy of the COMPLAINTANT'S RESPONSE TO SHOW CAUSE ORDER were hand-carried to the Regional Hearing Clerk, EPA, Region 8, 1595 Wynkoop Street, Denver, Colorado, and that a true copy of the same was sent in the following manner to the addresses listed below:

Via pouch mail and facsimile to:

The Honorable Susan L. Biro, Chief Administrative Judge
Office of Administrative Law Judges (Mail Code 1900L)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460
Facsimile: (202) 565-0044

Via electronic and regular mail to:

Damon K. Williams, Esq.
Tribal Administrative Building
Legal Department
404 Frontage Road
New Town, ND 58763
damonwilliams@mhanation.com

Date: 6/6/08

By: Judith M. McTernan