



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY 2012 JUN -8 P 2:44

U.S. ENVIRONMENTAL PROTECTION AGENCY-REG.II

BEFORE THE ADMINISTRATOR

REGIONAL HEARING CLERK

In the Matter of:
U.S. Department of Veterans Affairs,
Respondent.
Docket No. RCRA-02-2012-7502

PREHEARING ORDER AND ORDER ON JOINT MOTION

As you have been previously notified, I am designated to preside over the above-captioned matter. 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. §§ 22.1 through 22.45 ("Rules of Practice").

On May 31, 2012, this office received the parties Joint Motion to Hold the Case in Advance ("Joint Motion"). In their Joint Motion, the parties state their belief that this case will settle within a relatively short period of time without the need to follow the usual Court schedule.

Agency policy strongly supports settlement, and the procedures regarding documenting settlements are set forth in Section 22.18 of the Rules of Practice, 40 C.F.R. § 22.18. As the parties are currently pursuing settlement negotiations, they are commended for taking the initiative to resolve this matter informally and expeditiously.

1 On May 30, 2012, counsel for Complainant had informed a staff attorney of this Tribunal that the parties are involved in settlement negotiations, and the filing of a motion to stay or to hold the proceeding in abeyance was discussed.

in a timely fashion. Therefore, the parties' Joint Motion is hereby **GRANTED IN PART** to the extent outlined below.

Complainant shall file a Status Report regarding the status of the parties' settlement, without mentioning any specific terms, on or before **June 21, 2012**. If the case is settled, a fully-executed Consent Agreement and Final Order shall be filed no later than **July 6, 2012**, and a copy shall be submitted contemporaneously to the office of the undersigned.

Should a Consent Agreement and Final Order not be finalized on or before the deadline set forth above, the parties shall prepare for hearing and strictly comply with the prehearing requirements of this Order, as set forth below.

Prehearing Exchange. 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. **Each party** shall file with the Regional Hearing Clerk, serve on the opposing party, and serve on the Presiding Judge:

(A) a list of the names of all witnesses it intends to call at the hearing, identifying each as a fact witness or an expert witness, a brief narrative summary of each witness's expected testimony, and a curriculum vitae or resume for each expert witness; or a statement that no witnesses will be called;

(B) a copy of each document and exhibit it intends to introduce into evidence, identified as "Complainant's" or "Respondent's" exhibit, as appropriate, and numbered with Arabic numerals (e.g., CX 1 or RX 1); and

(C) a statement including an estimate of the time needed to present its direct case, and an explanation as to which location is the most appropriate place to hold the hearing. See Sections 22.21(d) and 22.19(d) of the Rules of Practice. Also, state whether interpretation or translation services are necessary in regard to the testimony of any 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 brief narrative statement, and a copy of any supporting documents, explaining in detail the factual bases for the allegations in the Complaint, to the extent the allegations therein are denied in Respondent's Answer;

(B) any documents in support of Complainant's proposed penalty; and

(C) a copy or URL of any EPA policy or guidance document upon which Complainant has relied, or intends to rely, in determining the proposed penalty.

3. In addition, Respondent shall submit the following as part of its Prehearing Exchange:

(A) a statement indicating whether Respondent requests a hearing on the allegations in the Complaint or the appropriateness of the proposed penalty;

(B) a **clear** admission, denial, or explanation for each of the factual allegations in the Complaint to which Respondent has any knowledge, pursuant to 40 C.F.R. § 22.15(b) **(failure to admit, deny, or explain any material factual allegation contained in the Complaint constitutes an admission of the allegation under 40 C.F.R. § 22.15(d))**;

(C) copies of any documents supporting each of Respondent's denials in its Answer of factual allegation in the Complaint;

(D) a list of any defenses to the allegations in the Complaint, and a copy of any documents supporting those defenses; and

(E) if Respondent takes the position that the proposed penalty should be mitigated or eliminated because of any consideration, a detailed narrative statement explaining the precise factual and legal bases for its position and a copy of any and all documents upon which it intends to rely in support of such position.

4. Finally, Complainant shall submit as part of its Rebuttal Prehearing Exchange:

(A) a statement and/or any documents in response to Respondent's Prehearing Exchange as to provisions 3(B) through 3(E) above.

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

July 6, 2012	Complainant's Initial Prehearing Exchange
July 27, 2012	Respondent's Prehearing Exchange
August 10, 2012	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.

Supplement to Prehearing Exchange. Any addition of a proposed witness or exhibit to the prehearing exchange shall be filed with an accompanying motion to supplement the prehearing exchange.

Default and Opportunity for a Hearing. The Complaint in this matter gave Respondent notice and opportunity for a hearing, in accordance with Section 554 of the Administrative Procedure Act, 5 U.S.C. § 554 (“APA”). 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, if Respondent requests a hearing, it will have the right to defend against Complainant’s charges by way of direct evidence, rebuttal evidence or through cross-examination of Complainant’s witnesses. Respondent will be 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 forego 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.

Respondent is hereby notified that a 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 Regional Hearing Clerk of a fully-executed Consent Agreement and Final Order or an order of the judge excuses noncompliance with filing deadlines.

Filing and Service. A document is “filed” when the Regional Hearing Clerk receives it. A document is “served” upon mailing or when placed in the custody of a reliable commercial delivery service. The parties are encouraged to send a courtesy copy to the Office of Administrative Law Judges by facsimile or email, in addition to the mailed hard copy, as physical mail delivery is often subject to significant delay. The facsimile number for the Office of Administrative Law Judges is (202) 565-0044, and the e-mail address is oaljfiling@epa.gov. A signed certificate of service must be attached to all filed documents.

Any document sent to the undersigned in this proceeding shall be addressed as follows:

If sent by the U.S. Postal Service (USPS):

The Honorable Susan L. Biro, Chief Administrative Law Judge
Office of Administrative Law Judges

U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W., Mail Code 1900L
Washington, DC 20460

If hand-delivered or sent by Federal Express or UPS:

The Honorable Susan L. Biro, Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1099 14th Street, N.W., Suite 350
Washington, DC 20005

The parties are advised NOT to include, attach, or refer to any terms of settlement offers or agreements in any document submitted to the undersigned, and no copies of Consent Agreements and Final Orders shall be submitted or attached to any document submitted to the undersigned except those that are fully executed and filed with the Regional Hearing Clerk.

Contact Information. Telephone contact may be made with my legal assistant, Maria Whiting-Beale, at (202) 564-6259 to ask whether a document has been received or issued. E-mail or telephone contact may be made with my staff attorney, Adrienne Fortin, at (202) 564-7862 or fortin.adrienne@epa.gov, for any procedural questions.

Motions. Prior to filing any motion, the moving party must contact the non-moving party to determine whether the non-moving party has any objection to the granting of the relief sought in the motion, and the motion shall state the position of the non-moving party. The mere consent of the non-moving party to the relief sought does not assure that the motion will be granted. All motions must be submitted in sufficient time to permit the filing of a response by the non-moving 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 allow a 15-day response period for motions, with an additional 5 days added thereto if the motion is served by mail. Motions not filed in a timely manner may not be considered. **If any 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 30 days after the due date for Complainant's Rebuttal Prehearing Exchange.**

Oral Argument. Pursuant to 40 C.F.R. § 22.16(d), a party may submit a written request for oral argument upon filing a motion, a response to a motion, or a reply. The requesting party shall propose an appropriate location for the argument. The Office of Administrative Law Judges has access to videoconferencing technology, and strongly encourages the parties to consider utilizing such technology for oral arguments on motions so as to minimize the expenditure of time and monetary 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.

SO ORDERED.




Susan L. Biro
Chief Administrative Law Judge

Dated: June 6, 2012
Washington, D.C.

In the Matter of U.S. Department of Veterans Affairs, Respondent
Docket No. RCRA-02-2012-7502

CERTIFICATE OF SERVICE

I certify that the foregoing **Prehearing Order And Order On Joint Motion**, dated June 6, 2012, was sent this day in the following manner to the addressees listed below.



Maria Whiting-Beale
Staff Assistant

Dated: June 6, 2012

Original And One Copy By Regular Mail To:

Karen Maples
Regional Hearing Clerk
U.S. EPA
290 Broadway, 16th Floor
New York, NY 10007-1866

Copy By Regular Mail To:

Rudolph Perez, Esquire
Assistant Regional Counsel
U.S. EPA
290 Broadway, 16th Floor
New York, NY 10007-1866

Jack P. DiTeodoro, Esquire
Department of Veterans Affairs
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