



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:)
)
Barrick Cortez, Inc.,) Docket No. EPCRA-09-2011-0004
)
Respondent) Dated: February 29, 2012

PREHEARING ORDER

As you were previously notified, I have been designated to preside in this proceeding, which is 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 *et seq.*, (“Rules of Practice” or “Rules”). The Rules of Practice, and for further guidance, an informal Practice Manual, and significant orders and decisions issued by the EPA Office of Administrative Law Judges, may be found on the office’s website at <http://www.epa.gov/oalj>. The parties are advised to familiarize themselves with the applicable statute(s) and the Rules of Practice.

Agency policy strongly supports settlement of a proceeding without a formal hearing. Procedures and policies regarding settlement are set forth in the Rules of Practice at 40 C.F.R. §22.18. If the parties have engaged in settlement discussions to resolve this matter, the parties are commended for taking the initiative to resolve this matter informally and expeditiously through Alternative Dispute Resolution. The parties are 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, and should consider that a settlement allows the parties to control the outcome of the case. The parties are encouraged to engage in settlement negotiations during the course of this proceeding to attempt to reach an amicable resolution of this matter.

The parties are directed to engage in a settlement conference, and Complainant shall file a **status report** as to the progress of settlement (without describing any specific terms) on or before **March 23, 2012**. If the case is settled, the Consent Agreement and Final Order (CAFO) signed by the parties should be filed no later than **April 13, 2012**, with a copy sent to the undersigned.

If a CAFO is not finalized on or before the latter date, the parties must prepare for hearing and shall strictly comply with the prehearing requirements of this Order.

I. Prehearing Exchange. Pursuant to Section 22.19(a) of the Rules, the parties are directed to engage in the following prehearing exchange:

A. Each party shall file with the Regional Hearing Clerk, and shall serve on the opposing party and on the undersigned Judge the following Prehearing Exchange:

1. The names of any witnesses the party intends to call at the hearing, identifying each as a fact witness or an expert witness, and a brief narrative summary of the expected testimony of each witness, or a statement that no witnesses will be called.
2. Copies of all documents and exhibits intended to be introduced into evidence at the hearing. A curriculum vita or resume shall be included 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 1). The copies may be printed double-sided.
3. A statement of the city or county in which the party prefers the hearing to be held, and an estimate of the time needed to present its direct case. See 40 C.F.R. §§ 22.19(d), 22.21(d). Also, a statement of whether translation services are necessary for the testimony of any anticipated witness(es), and if so, the language to be translated.

B. Complainant also shall submit the following as part of its Initial Prehearing Exchange:

1. A copy of any documents in support of the factual allegations in the Complaint which were not admitted by Respondent.
2. A statement as to all factual information Complainant deems relevant to the assessment of a penalty. The statement also must specify the total number of violations, and the number of days of each violation, for which a penalty is sought
3. A copy, or a statement of the internet address (URL), of any penalty policies and/or guidelines, and any amendment, appendix or clarification thereto, considered or intended to be considered in assessing a penalty. Complainant need not submit a copy of any penalty policy that was enclosed with the Complaint, or of the Amendments to EPA's Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule.
4. A statement as to 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.

C. Respondent shall also submit the following as part of its Prehearing Exchange:

1. If Respondent has stated any affirmative defense(s), a narrative statement explaining in detail the legal and/or factual bases for each such affirmative defense, and a copy of any documents in support.
2. A narrative statement explaining in detail the legal and/or factual bases for any other assertions in the Answer defending against factual allegation(s) in the Complaint, and/or a copy of any documents in support of such assertion(s).
3. A narrative statement explaining why the maximum penalty referenced in the Complaint should be reduced or eliminated, with a specific description of the facts and a copy of any documents in support.
4. If Respondent believes that it is unable to pay the maximum penalty referenced in the Complaint, or that payment would have an adverse effect on its ability to continue to do business, a brief statement to that effect, and a copy of documents in support, such as tax returns and/or certified copies of financial statements.

D. Complainant shall submit as part of its Rebuttal Prehearing Exchange:

1. A statement and/or any documents in response to Respondent's Prehearing Exchange submittals.
2. A statement specifying the dollar amount of the penalty Complainant proposes to assess for the violations alleged in the Complaint, and a narrative statement explaining in detail the calculation of the proposed penalty, addressing each penalty determination factor listed in the applicable statute, and describing how the specific provisions of any penalty policies and/or guidelines were applied in calculating the penalty.

The prehearing exchanges described above shall be filed in seriatim fashion, according to the following schedule:

- | | | |
|-----------------------|---|---|
| April 13, 2012 | - | Complainant's Initial Prehearing Exchange |
| May 11, 2012 | - | Respondent's Prehearing Exchange, including any direct and/or rebuttal evidence |
| May 25, 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 is advised to carefully and thoughtfully prepare its prehearing exchange.

II. Supplement to Prehearing Exchange. If a party wishes to present at the hearing any additional exhibit(s) or proposed witness(es), the party shall file a supplement to the prehearing exchange. Such supplement shall include a copy of the exhibit(s) and/or witness name and summary of testimony, as appropriate, and an accompanying motion to supplement the prehearing exchange explaining why the exhibit(s) or witness(es) were not provided in the prehearing exchange. Such supplements should be filed as soon as possible, and at least 15 days before the hearing. *See*, 40 C.F.R. § 22.22(a)(1).

III. Default and Opportunity for Hearing. The Complaint gave the Respondent notice and opportunity for a hearing, in accordance with Section 554 of the Administrative Procedure Act (APA), 5 U.S.C. § 554. In the Answer to the Complaint, the Respondent exercised its right to request 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, the Respondent has the right to defend against the Complainant's charges by way of direct evidence, rebuttal evidence or through cross-examination of Complainant's witness. Respondent is entitled to elect any or all three means to pursue its defenses. If the Respondent intends only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, the Respondent shall file a statement to that effect on or before the date for filing its prehearing exchange.

The Respondent is hereby notified that if it fails to timely submit either a prehearing exchange as set forth herein, or a statement that it has chosen only to conduct cross-examination of the Complainant's witnesses, a default judgment may be issued against it. The Complainant is notified that if it fails to file its prehearing exchange in a timely manner, this case can be dismissed with prejudice. Active settlement negotiations or even a settlement in principle is NOT an excuse for failing to submit a timely prehearing exchange. Each party MUST comply with the filing deadlines UNLESS a fully executed CAFO is filed with the Hearing Clerk OR the Administrative Law Judge has granted that party an extension of time to file.

III. Filing and Service. Each document that is "filed" must also be "served" on the undersigned and on the opposing party. A certificate of service must be attached to all filed documents. 40 C.F.R. § 22.5(a)(3). According to the Rules, 40 C.F.R. § 22.5(a), a document is "filed" on the date the Regional Hearing Clerk receives it. Therefore, the parties should send a document in enough time before it is due so that the Regional Hearing Clerk will receive it by the

due date. To ensure that the undersigned receives a document on time, a courtesy copy may be sent to the Office of Administrative Law Judges by email, at oyaljfilings@epa.gov, or by facsimile, at (202) 565-0044. A hard copy of all filings, except for status reports and motions merely requesting an extension of time, also must be sent by mail to the undersigned.

Prehearing exchange information required by this Order to be sent to the undersigned, as well as any motions or other documents to be filed in this proceeding, shall be addressed as follows:

If sending by United States Postal Service:

The Honorable M. Lisa Buschmann
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

If sending by a non-USPS courier, such as UPS or Federal Express:

The Honorable M. Lisa Buschmann
Office of the Administrative Law Judges
U.S. Environmental Protection Agency
1099 14th Street, N.W., Suite 350
Washington, D.C. 20005

The parties are advised NOT to include, attach or refer to any terms of settlement offers or agreements in any document sent 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.

IV. Contact Information. Telephone contact may be made with my legal assistant, Knolyn Jones, at (202) 564-6262 to ask whether a document has been received or issued. For procedural questions, email or telephone contact may be made with staff attorney Michael Wright, Esq., at wright.michael@epa.gov or (202) 564-3247, or Ed Kulschinsky, Esq., at kulschinsky.edward@epa.gov or (202) 564-4133. The facsimile number is (202) 565-0044.

V. Courtesy Copies. 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 Knolyn Jones, Legal Staff Assistant, Office of Administrative Law Judges, U.S. Environmental Protection Agency, Mail Code 1900 L, 1200 Pennsylvania Avenue, N.W. Washington, D.C. 20460 or sent to her by email at oyaljfilings@epa.gov. 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.


VI. Procedures for Motions and Extensions of Time. A party intending to file a motion is directed to contact the other party or parties to inquire whether it has any objection to the relief sought in the motion. The motion shall then state whether or not the other party objects to the relief sought. A party must not assume that an unopposed motion will be granted.

All motions must be submitted in sufficient time to allow the other party or parties to file a response and/or to allow time for a ruling on the motion before the hearing or any relevant deadline set by this or any subsequent order. The Rules of Practice, 40 C.F.R. §§ 22.16(b) and 22.7(c), allow a 15-day response period for motions with an additional five days if the pleading is served by mail. Any party requesting an extension of time to file a document must file a written motion in accordance with 40 C.F.R. §§ 22.5, 22.7(b) and 22.16, which should be received by the undersigned at least one day prior to the due date if unopposed, and at least a week prior to the due date if opposed. Motions not filed in a timely manner may not be considered.

VII. Dispositive Motions. If Respondent in its Answer has requested dismissal of the Complaint, Respondent is advised that such request does not constitute a motion under 40 C.F.R. § 22.16(a) as it does not state the grounds for a motion with particularity. If the Respondent seeks dismissal of the Complaint, or any portion thereof, it may file a motion for dismissal in accordance with 40 C.F.R. §§ 22.5, 22.16 and 22.20.

If a 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.**

SO ORDERED.



M. Lisa Buschmann
Administrative Law Judge

**In the Matter of *Barrick Cortez, Inc.*, Respondent.
Docket No. EPCRA-09-2011-0004**

CERTIFICATE OF SERVICE

I hereby certify that true copies of this **Prehearing Order**, dated February 29, 2012, were sent to the following parties in the manner indicated:



Knolyn R. Jones
Legal Staff Assistant

Original and One Copy by Hand-Delivery to:

Sybil Anderson
Headquarters Hearing Clerk
U.S. EPA / Office of Administrative Law Judges
Mail Code 1900L
1200 Pennsylvania Ave., NW
Washington, DC 20460

Copy by Regular Mail to:

David Kim, Esq.
Office of Regional Counsel
U.S. EPA, Region IX, ORC-2
75 Hawthorne Street
San Francisco, CA 94105

Copy by Regular Mail to:

Steven G. Barringer, Esq.
Holland & Hart, LLP
975 F Street, N.W. Suite 900
Washington, DC 20004