



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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MAY 13 2009

REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:)
)
SUPERCLEAN BRANDS, INC.,) Docket No. EPCRA-05-2009-0016
)
Respondent.)

PREHEARING ORDER

As you have been previously notified, I am designated to preside over this proceeding. This proceeding will be governed by the Consolidated Rules of Practice Governing Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. § 22.1 et seq., ("Rules of Practice"). The parties are advised to familiarize themselves with the applicable statute(s) and the Rules of Practice.

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. If settlement discussions in this proceeding have been undertaken, the parties are commended for taking the initiative to resolve this matter informally and expeditiously. Each party is 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. A settlement allows the parties to control the outcome of the case, whereas a judicial decision takes such control away. With such thoughts in mind the parties are directed to engage in a settlement conference on or before **May 26, 2009**, and attempt to reach an amicable resolution of this matter. The Complainant shall file a status report regarding settlement on or before **May 29, 2009**. If the case is settled, the Consent Agreement and Final Order signed by the parties should be filed no later than **June 26, 2009**, with a copy to the undersigned.

Should a Consent Agreement not be finalized on or before that date, the parties must prepare for hearing and shall strictly comply with the prehearing requirements of this Order.

This Order is issued pursuant to Section 22.19(a) of the Rules. Accordingly, it is directed that the following prehearing exchange take place between the parties:

1. Pursuant to Section 22.19(a) of the Rules, each party shall file with the Regional Hearing Clerk and shall serve on the opposing party and on the Presiding Judge:

(A) the names of the expert and other witnesses intended to be called at hearing, identifying each as a fact witness or expert witness, with a brief narrative summary of their expected testimony, or a statement that no witnesses will be called;

(B) copies of all documents and exhibits intended to be introduced into evidence. Included among the documents produced shall be a curriculum vita or resume 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); and

(C) a statement of its views on the appropriate place of hearing and an estimate of the time needed to present its direct case. See Sections 22.21(d) and 22.19(d) of the Rules. *State whether any translation services are necessary for testimony, and language to be translated.*

2. In addition, the Complainant shall submit the following as part of its Initial Prehearing Exchange:

(A) a copy of any reports of the inspections referenced in Paragraph 19 of the Complaint, and copies of any photographs, videos, field notes, site maps, illustrations or diagrams taken or provided during the inspections;

(B) copies of the EPA Form Rs submitted by Respondent for methanol for calendar years 2003-2005 and any and all documentation in Complainant's possession reflecting the date such forms were "submitted" to EPA;

(C) copies of the EPA Form Rs submitted by Respondent for ethylene glycol for calendar years 2004-2005 and any and all documentation in Complainant's possession reflecting the date such forms were "submitted" to EPA;

(D) a copy of the Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA) (1986), and a copy of any other penalty policy upon which Complainant has relied upon, or intends to rely upon, in calculating the proposed penalty;

(E) a narrative statement explaining in detail the methodology regarding Complainant's calculation of the proposed penalty; and

(F) 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.

3. The Respondent shall also submit the following as part of its Prehearing Exchange, except for Paragraph (F) which should be filed as a separate motion in accordance with 40 C.F.R. Sections 22.5 and 22.16:

(A) a narrative statement, and a copy of any documents in support, explaining in detail the factual and/or legal bases for Respondent's denial of the truth of the allegation contained in paragraph 26 of the Complaint;

(B) a narrative statement, and a copy of any documents in support, explaining in detail the factual and/or legal bases for its First Defense, regarding the "unique circumstances" resulting in the failure to report, set forth on page 11 of the Answer. Include in the response a copies of the affidavit and "confirmation of filing" referred to therein and any and all other evidence supporting Respondent's assertions that it submitted its Form R for 2003 on "multiple occasions" and "pursued diligent efforts to file requisite reports with appropriate authorities;"

(C) a narrative statement, and a copy of any documents in support, explaining in detail the factual and/or legal bases for its Second Defense raising the "doctrines of accord and satisfaction, settlement and waiver, lack of jurisdiction, equitable estoppel and laches," set forth on page 11 of the Answer;

(D) if Respondent takes the position that it is unable to pay the proposed penalty, a copy of any and all documents it intends to rely upon in support of such position;

(E) if Respondent takes the position that the proposed penalty should be reduced or eliminated on any other grounds, a detailed statement of such position, and a copy of any and all documents it intends to rely upon in support of such position; and

(F) if Respondent intends to pursue its request for dismissal of the Complaint, a motion filed in accordance with the requirements of 40 C.F.R. § 22.16.

4. Complainant shall submit as part of its Rebuttal Prehearing Exchange a statement and/or any documents in response to Respondent's Prehearing Exchange submittals as to provisions 3(A) through 3(E) above.

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

- | | | |
|----------------------|---|---|
| June 26, 2009 | - | Complainant's Initial Prehearing Exchange |
| July 17, 2009 | - | Respondent's Prehearing Exchange, including any direct and/or rebuttal evidence |
| July 31, 2009 | - | 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. Any supplements to prehearing exchanges shall be filed with an accompanying motion to supplement the prehearing exchange.

The Complaint herein 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 its Answer to the Complaint, the Respondent requested 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 itself against the Complainant's charges by way of direct evidence, rebuttal evidence or through cross-examination of the Complainant's witnesses. Respondent is entitled to elect any or all three means to pursue its defenses. If the Respondent intends to elect only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, the Respondent shall serve a statement to that effect on or before the date for filing its prehearing exchange. **The Respondent is hereby notified that its 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 the Complainant's witnesses, can result in the entry of a default judgment against it.** The 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 Hearing Clerk of a fully executed Consent Agreement and Final Order, or an Order of the Judge, excuses noncompliance with filing deadlines. The parties are advised **NOT** to include, attach or refer to any terms of settlement offers or agreements in any document submitted to the Presiding Judge, and no copies of Consent Agreements and Final Orders shall be submitted, or attached to any document submitted to the Presiding Judge except those that are fully executed and filed with the Regional Hearing Clerk.

Prehearing exchange information required by this Order to be sent to the Presiding Judge, as well as any other further pleadings, if sent by mail, shall be addressed as follows:

The Honorable Susan L. Biro
Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Ave. N.W.
Washington, D.C. 20460

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The Honorable Susan L. Biro
Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Ave. N.W.
Washington, D.C. 20460

If either 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.**



Susan L. Biro
Chief Administrative Law Judge

Dated: May 11, 2009
Washington, D.C.

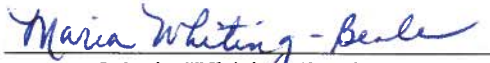
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In the Matter of SuperClean Brands, Inc., Respondent
Docket No. EPCRA-05-2009-0016

CERTIFICATE OF SERVICE

I certify that the foregoing **Prehearing Order**, dated May 11, 2009, was sent this day in the following manner to the addressees listed below.



Maria Whiting-Beale
Staff Assistant

Dated: May 12, 2009

Original And One Copy By Pouch Mail To:

La Dawn Whitehead
Regional Hearing Clerk
U.S. EPA
77 West Jackson Boulevard, E-19J
Chicago, IL 60604-3590



Copy By Pouch Mail To:

Terence Stanuch, Esquire
Assistant Regional Counsel
U.S. EPA
77 West Jackson Boulevard, C-14J
Chicago, IL 60604-3590

Copy By Regular Mail To:

Sherry L. Stenerson
General Counsel
SuperClean Brands, Inc.
1380 Corporate Center Curve, Suite 200
Eagan, MN 55121