



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

U.S. ENVIRONMENTAL PROTECTION AGENCY-REGULATORY CLERK 2011 JUL 14 A 11:12

In the Matter of: )
Andrew B. Chase, a/k/a Andy Chase, )
Chase Services, Inc., Chase Convenience )
Stores, Inc., and Chase Commercial )
Land Development, Inc., )
Respondents. )

Docket No. RCRA-02-2011-7503

PREHEARING ORDER

As you were 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 et seq. ("Rules of Practice"). The parties are advised to familiarize themselves with the applicable statute(s) and the Rules of Practice. An informal Practice Manual, a Citizen's Guide to proceedings before the EPA Office of Administrative Law Judges, and significant decisions issued by the Office are accessible on the world wide web at http://www.epa.gov/oalj.

U.S. Environmental Protection Agency ("EPA" or "Agency") policy strongly supports settlement, and the procedures governing the documentation of settlement agreements are set forth in Section 22.18 of the Rules of Practice, 40 C.F.R. § 22.18. The record shows that neither party responded to an invitation to participate in the Alternative Dispute Resolution process offered by this office. If settlement discussions in this proceeding have already 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 appeal will require the expenditure of significant amounts of time and financial resources. Each party should also realistically consider the risk of not prevailing in the proceeding despite such expenditures. While a negotiated settlement allows the parties to control the outcome of the proceeding, a judicial decision eliminates that control. With these considerations in mind, the parties are directed to engage in a settlement conference on or before July 22, 2011, and attempt to reach an amicable resolution of this matter. Complainant shall file a Status Report regarding this conference and the status of settlement on or before July 29, 2011. If the case is settled, a fully-executed Consent Agreement and Final Order shall be filed no later than August 19, 2011, with a copy sent to 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.** Pursuant to Section 22.19(a) of the Rules of Practice, 40 C.F.R. § 22.19(a), the parties are directed to engage in the following prehearing exchange:

1. Each party<sup>1</sup> shall file with the Regional Hearing Clerk, serve on the opposing party, and serve on the undersigned as part of its Initial Prehearing Exchange:

(A) a list of names of the expert and other witnesses intended to be called at 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 identified expert witness, or a statement that no witnesses will be called;

(B) copies of all documents and other exhibits intended to be introduced into evidence, identified as Complainant's or Respondents' exhibits,<sup>2</sup> as appropriate, and numbered with Arabic numerals (e.g., "CX 1"); and

(C) a statement explaining its views as to the appropriate place for the hearing and the estimated amount of time needed to present its direct case. See Sections 22.21(d) and 22.19(d) of the Rules of Practice, 40 C.F.R. §§ 22.21(d) and 22.19(d). Also, state whether 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 file the following as part of its Initial Prehearing Exchange:

(A) a copy of any report(s) of the inspection referenced in Paragraphs 55-62 of the Complaint, and a copy, as relevant to the allegations in the Complaint, of any photographs, videos, site maps, illustrations, analytical results, field notes, and/or other records created or taken by the inspector(s) during the inspection;

(B) a copy of any documents in support of those factual allegations denied or otherwise not admitted in Respondent's Answer, including but not limited to the following

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<sup>1</sup> Respondents may choose to file a joint Prehearing Exchange, or each Respondent may file separately.

<sup>2</sup> If Respondents choose to file separate prehearing exchanges, the proposed exhibits should be identified as "Respondent Andrew Chase's," "Respondent Chase Services, Inc.'s," "Respondent Chase Convenience Stores, Inc.'s," or "Chase Commercial Land Development, Inc.'s" exhibits.

paragraphs in the Complaint: 32-34, 36-37, 40-41, 43-44, 47-48, 51-52, 54, 61-63, 70, 77, 85, 93, 102, 104, 112-13, 115, 121-23, 132-34, 145-46, 155, 166-67, 178-79, 186, 201, 212-13, 225-26, 237-38, 259-60, 273-75, 286-87; 298-300, and 803-04.

(C) a narrative statement explaining in detail how the proposed penalty was calculated, along with a copy of any EPA policy or guidance document upon which Complainant has relied, or intends to rely, in determining the proposed penalty; and

(D) a statement regarding whether the Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3501 et seq. (“PRA”), 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. In addition, Respondents shall submit the following as part of their Initial Prehearing Exchange(s):

(A) a copy of any documents in support of the denials of factual allegations made in the following paragraphs of Respondent’s Answer: 3, 5, 8, 10, 13, 16, 18, 25, 27, 31, 34, 38, 41, 43, 45, 53, 56, 62, 63, 67, 71, 74, 78, 84, 85, 88, 89, 95, 98, 99, 103, 109, 114, 117, and 122;

(B) a narrative statement, and a copy of any documents in support, explaining in detail the factual and/or legal bases for each of Respondents’ affirmative defenses in Paragraphs 124-30 of the Answer;

(C) if Respondents intend to take the position that they are unable to pay the proposed penalty or that payment will have an adverse effect on their ability to continue to do business, a copy of any and all documents they intend to rely upon in support of such position; and

(D) if Respondents intend to take the position that the proposed penalty should be reduced or eliminated on any other grounds, a copy of any and all documents they intend to rely upon in support of such position.

4. Finally, Complainant shall submit as part of its Rebuttal Prehearing Exchange a statement and/or any documents in response to Respondents’ Initial Prehearing Exchange(s) as to provisions 3(A) through 3(D) above.

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

- August 19, 2011** Complainant's Initial Prehearing Exchange
- September 9, 2011** Respondents' Prehearing Exchange(s)
- September 23, 2011** Complainant's Rebuttal Prehearing Exchange

Section 22.19(a) of the Rules of Practice, 40 C.F.R. § 22.19(a), 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 very carefully and 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 notified Respondents of the opportunity to request a hearing, in accordance with Section 554 of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 554 *et seq.* In their Answer to the Complaint, Respondents request a hearing. Pursuant to Section 554(c)(2) of the APA, 5 U.S.C. § 554(c)(2), a hearing will be conducted in accordance with Section 556 of the APA, 5 U.S.C. § 556. Section 556(d) of the APA, 5 U.S.C. § 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, Respondents have the right to defend against Complainant's charges by way of direct evidence, rebuttal evidence, or through cross-examination of Complainant's witnesses. Each Respondent is entitled to elect any or all three means to pursue his defense. If a Respondent intends to elect only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, that Respondent shall serve a statement to that effect on or before the date for filing his Initial Prehearing Exchange. **Respondents are hereby notified that the failure either to comply with the prehearing exchange requirements set forth herein or to state that they are electing only to conduct cross-examination of Complainant's witnesses can result in the entry of a default judgment against the defaulting party. 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. However, 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 email address is oaljfilings@epa.gov. A signed certificate of service must be attached to all filed documents.

All documents served on the undersigned shall be addressed as follows if sent by regular mail:

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

All documents served on the undersigned via Federal Express or any delivery service that x-rays its packages as part of its routine security procedures may be delivered directly to:

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

(\*For commercial delivery service only)

**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.**

**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. Email or telephone contact may be made with my staff attorney, Roy Seidenstein, Esq., at (202) 564-9274 (seidenstein.roy@epa.gov) for other procedural questions.

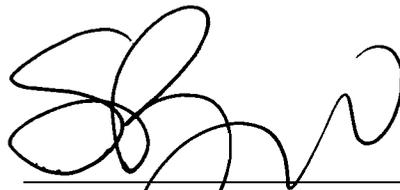
**Courtesy Copies.** If any party wishes to receive, by e-mail or facsimile, an expedited courtesy copy of substantive orders and decisions issued in this proceeding, the party shall submit a

request for such copies by letter addressed to Maria Whiting-Beale at one of the addresses above. The letter shall include the case docket number, the party's e-mail address or facsimile number, and a statement as to whether the party requests expedited courtesy copies of (a) the initial decision and/or any orders on motions for accelerated decision or dismissal, or (b) 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.

**Motions.** Prior to filing any motion, the moving party is required to 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. 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. Furthermore, 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, 40 C.F.R. §§ 22.16(b) and 22.7(c), allow a 15-day response period for motions, with an additional five 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 Section 22.20(a) of the Rules of Practice, 40 C.F.R. § 22.20(a), it shall be filed within thirty days after the due date for Complainant's Rebuttal Prehearing Exchange.**

Pursuant to Section 22.16(d) of the Rules of Practice, 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 financial 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.**



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Susan L. Biro  
Chief Administrative Law Judge

Dated: July 12, 2011  
Washington, D.C.

**In the Matter of Andrew B. Chase a/k/a Andy Chase, Chase Services, Inc., and Chase Convenience Stores, Inc., and Chase Commercial Land Development, Inc., Respondent.  
Docket No. RCRA-02-2011-7503**

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Prehearing Order**, dated July 12, 2011, issued by Susan Biro, Chief Administrative Law Judge, was sent on this 12<sup>th</sup> day July 2011, in the following manner to the addressees listed below.



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Mary Angeles  
Legal Staff Assistant

Original and One Copy by Facsimile and Pouch Mail to:

Karen Maples  
Regional Hearing Clerk  
U.S. EPA / Region II  
290 Broadway, 16<sup>th</sup> Floor  
New York, NY 10007-1866  
Fx: 212.637.3199

Copy by Facsimile and Pouch Mail to:

Lee Spielmann, Esq.  
Assistant Regional Counsel  
U.S. EPA / Region II  
290 Broadway, 16<sup>th</sup> Floor  
New York, NY 10007-1866  
Fx: 212.637.3115

Copy by Facsimile and Regular Mail to:

Thomas W. Plimpton, Esq.  
Stafford, Piller, Murnane, Plimpton,  
Kelleher & Trombley, PLLC  
One Cumberland Avenue  
P.O. Box 2947  
Plattsburgh, NY 12901-0269  
Fx: 518.561.4848

Dated: July 12, 2011  
Washington, DC