

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)

KEITH MIRMAN,)

Respondent)

DOCKET NO. TSCA-05-2011-0012)

2011 OCT -4 AM 10:00
COMMUNICATIONS SECTION
U.S. EPA REGION 5

MOTION FOR LEAVE TO FILE STATUS REPORT OUT OF TIME

Comes now Complainant, the United States Environmental Protection Agency, Region 5, by and through its counsel, pursuant to Section 22.16(a) of the Rules of Practice, 40 C.F.R. Section 22.16(a), and respectfully requests that the Administrative Law Judge grant it leave to file its belated Status Report and as grounds therefore states as follows:

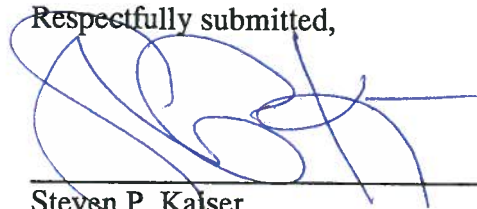
1. On August 18, 2011, a Prehearing Order was issued. The Order directed the parties to hold a settlement conference on or before September 14, 2011. Complaint was required to file a status report regarding such conference and the status of settlement on or before September 21, 2011.
2. The parties held a settlement conference on or before September 14, 2011, and have subsequently exchanged written offers of settlement and continue to seek an amicable resolution. Thus far, however, such resolution has eluded the parties.
3. Complainant's failure to file a Status Report regarding the conference was an oversight by counsel.
4. Counsel offers the following statement not as an excuse but by way of explanation. Counsel for complainant was very aware of the requirement to confer before September 14, 2011, and to file the Initial Prehearing Exchange no later than October 14, 2011. He failed, however, to docket or calendar the September 21, 2011, deadline

for filing the Status Report. The deadline passed without his notice. On October 3, 2011, counsel spoke with a representative of the Office of the Administrative Law Judge who advised him that the Status Report was tardy.

5. Failing to file the Status Report is not indicative of a lack of attention to this matter. Following the settlement conference and in the days immediately preceding and following the September 21, 2011, filing deadline, counsel for complainant and a student intern located and reviewed virtually every opinion issued by an Administrative Law Judge or the Environmental Board of Appeals pertaining to the prosecution of lead-based paint violations. We made an effort to identify the factors that determined the size of the civil penalty and the basis for departing from EPA's penalty policy. In the midst of this case law review, on September 20, 2011, Respondent provided Complaint with its first offer of settlement that included facts and arguments in favor of the offer. During the ensuing days, counsel for complainants reviewed Complainant's arguments and wrote a four-page memorandum analyzing the arguments. He then briefed his management in connection with the arguments raised by counsel taking into consideration the lessons learned from his review of the relevant ALJ and EAB opinions.
6. Once alerted to his failure to file the Status Report, counsel immediately suspended work on the Initial Pretrial Exchange. He immediately drafted this Motion and the related Status Report.
7. Respondent has not been prejudiced by Complainants failure to file a status report.
8. The Status Report is attached hereto as Exhibit A.

Prior to filing this Motion, the undersigned contacted the opposing party as to the relief requested herein and said opponent indicated that he does oppose the Motion.

Respectfully submitted,



Steven P. Kaiser
Associate Regional Counsel

October 4, 2011

CERTIFICATE OF SERVICE

I certify that the foregoing Motion For Leave To File Status Report Out Of Time, dated October 2, 2011, was sent this day in the following manner to the addresses listed below:

Original by Hand Delivery to:

LaDawn Whitehead
Regional Hearing Clerk
U.S. EPA – Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Copy by Regular Mail and facsimile to:

Attorney for Complainant:

David W. Hilkert, Esquire
Buckingham, Doolittle & Burroughs, LLP
3800 Embassy Parkway
Akron, Ohio 44333

Presiding Judge:

The Honorable Barbara A. Gunning
U.S. Environmental Protection Agency
Office of Administrative Law Judges
1200 Pennsylvania Ave. NW
Mail Code 1900L
Washington, D.C. 2005



Elizabeth Rosado
Office of Regional Counsel
U.S. EPA – Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Dated: 10-4-11

2011 OCT -4 AM 10:00

EXHIBIT A

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

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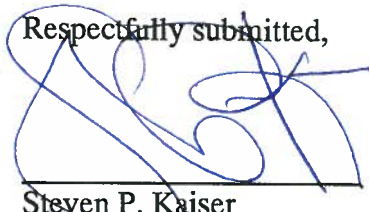
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ENVIRONMENTAL PROTECTION AGENCY
U.S. EPA REGION 5

COMPLAINANT'S FIRST STATUS REPORT

As required by the Prehearing Order dated August 18, 2011, the parties held a settlement conference on or before September 14, 2011. Following the conference, the parties have exchanged written information pertaining to settlement and conferred regarding settlement as recently as October 3, 2011. Thus far, the parties have not reached settlement. The parties will continue settlement discussions while also preparing to file in a timely fashion the previously ordered Prehearing Exchanges.

Respectfully submitted,



Steven P. Kaiser

Dated: 10-04-11

Steven P. Kaiser
Associate Regional Counsel
U.S. Environmental Protection Agency
77 West Jackson Boulevard
Chicago, Illinois 60604
312-353-3804

CERTIFICATE OF SERVICE

I certify that the foregoing Status Report, dated October 4, 2011, was sent this day in the following manner to the addresses listed below:

Original by Hand Delivery to:

LaDawn Whitehead
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77 West Jackson Boulevard
Chicago, Illinois 60604

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3800 Embassy Parkway
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Elizabeth Rosado

Office of Regional Counsel
U.S. EPA – Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Dated: 10-4-11

2011 OCT 4 AM 9:00
U.S. EPA - REGION 5