



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGIONAL HEARING CLERK U.S. EPA REGION 5

2011 JUN 15 PM 5:45

BEFORE THE ADMINISTRATOR

In the Matter of:)
Rose Real Estate Properties, Inc.,) Docket No. TSCA-05-2011-0004
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 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").

Agency policy strongly supports settlement. The procedures regarding settlements are set forth in Section 22.18 of the Rules of Practice, 40 C.F.R. § 22.18. If settlement discussions have already been undertaken, the parties are commended for taking the initiative to resolve this matter informally and expeditiously.

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

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 shall file with the Regional Hearing Clerk, serve on the opposing party, and

serve on the undersigned:

(A) the 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 their expected testimony, and a curriculum vita or resume for each identified expert witness, or a statement that no witnesses will be called;

(B) copies of all documents and exhibits intended to be introduced 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 of its views as to the appropriate place of hearing and estimated amount of time needed to present its direct case. See Sections 22.21(d) and 22.19(d) of the Rules of Practice. Also state whether translation services are necessary in regard to the testimony of any anticipated 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 copy of any documents in support of the allegations in Counts 1–10 of the Complaint;

(B) a copy or the internet address (URL) of the penalty policy referenced in Paragraph 50 of the Complaint and any other documents upon which Complainant has relied in consideration of the proposed penalty, and a detailed narrative explanation of the proposed penalty as it relates to the relevant penalty factors.

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

(A) 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));

(B) if Respondent takes the position that the proposed penalty should be reduced or eliminated on any grounds, such as inability to pay, a narrative statement explaining why the penalty should be reduced and a copy of any and all documents upon which it intends to rely in support of such position; and

(C) a narrative statement, and any documents or information supporting any defenses, in accordance with Section 22.15(b) of the Rules of Practice, 40 C.F.R. § 22.15(b).

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

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

July 22, 2011	Complainant's Initial Prehearing Exchange
August 12, 2011	Respondent's Prehearing Exchange
August 26, 2011	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 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 Hearing. The Complaint notified Respondent of the opportunity for a hearing, in accordance with Section 554 of the Administrative Procedure Act (APA), 5 U.S.C. § 554. In its response to the Complaint, Respondent appears 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, Respondent has the right to defend against 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 Respondent intends to elect only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, Respondent shall serve a statement to that effect on or before the date for filing its Initial Prehearing Exchange.

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 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 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 oaljfiling@epa.gov. A signed certificate of service must be attached to all filed documents.

Prehearing exchange information, as well as any motions or other papers to be filed in this proceeding, shall be addressed to the undersigned 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
Mail Code 1900L
1200 Pennsylvania Avenue. N.W.
Washington, D.C. 20460

Hand-delivered packages transported by Federal Express or any delivery service that x-rays its packages as part of its routine security procedures may be :

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, D.C. 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, Ed Kulschinsky, Esq., at (202) 564-4133

for other procedural questions.

Courtesy Copies. If any party wishes to receive, by e-mail or facsimile, an expedited courtesy copy of decisions and substantive orders 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 motion 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 must contact the other party or parties to determine whether the other party has any objection to the granting of the relief sought in the motion. The motion shall state the position of the other party or parties. The mere consent of the other parties 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 other 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 fifteen-day response period for motions with an additional five days added thereto if the pleading 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 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 capabilities, 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.



Susan L. Biro
Chief Administrative Law Judge

Dated: June 10, 2011
Washington, D.C.


In the Matter of Rose Real Estate Properties, Inc., Respondent
Docket No. TSCA-05-2011-0004

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CERTIFICATE OF SERVICE

I certify that the foregoing **Prehearing Order**, dated June 10, 2011, was sent this day in the following manner to the addressees listed below.



Maria Whiting-Beale
Staff Assistant

Dated: June 10, 2011

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:

John Matson, Esquire
Associate Regional Counsel
U.S. EPA
77 West Jackson Boulevard, C-14J
Chicago, IL 60604-3590

Copy By Regular Mail To:

Reverend Floyd E. Rose
1619 North Lee Street
Valdosta, GA 31602