

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

In the Matter of

Aguakem Caribe, Inc.

Respondent

Prehearing Exchange

Docket No. RCRA-02-2009-7110

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2010 NOV -3 P 12:32
REGISTRATION HEARING
CLERK

**COMPLAINANT'S OBJECTION TO RESPONDENT'S ADDITIONAL
SUPPLEMENTAL TO ITS INITIAL PREHEARING EXCHANGE**

To the Honorable Barbara A. Gunning:

COMES NOW Complainant through the undersigned attorney and very respectfully avers and prays as follows:

On July 14, 2010, a Prehearing Conference call was held between the attorneys for each party and this Honorable Court. Since the parties had not reached a settlement, the Presiding Judge issued an Order Scheduling Hearing, dated July 15, 2010, where the parties shall *strictly comply* with the requirements of the Order and prepare for the hearing.

As mentioned in the above Order, during the July 14 conference call, Respondent's counsel stated that there was the possibility that he would raise an ability to pay defense, a defense not raised in its answer to the complaint.

Regarding this particular issue, this Honorable Court ordered that:

"Counsel for Respondent is advised to raise this issue no later than September 1, 2010, and to submit documentation corroborating its claim no later than September 15, 2010." (Emphasis provided)

Respondent **failed** to comply with the September 1 and 15 deadlines.

Respondent now pretends to mend his non-compliance with an Order by this Honorable Court, via a supplemental prehearing exchange.

Counsel for Respondent states that he wishes to add to his list of witnesses, the testimony of Mr. Eduardo Guzman, Respondent's auditor, who will testify about Respondent's "...financial viability and ability to pay an EPA fine".

In addition, Respondent's Counsel wishes to add to the list of proposed exhibits a document titled "2010 Audited Financial Statement of Aguakem Caribe, Inc", to be discussed by Mr. Guzman. This is a different document from the one submitted as part of Respondent's Prehearing Exchange.

The above order set **strict** deadlines that the attorneys for the parties had to comply with. One of those deadlines established the dates by which Respondent had to raise the ability to pay defense (September 1st) and had to submit documentation corroborating its claim (September 15th).

Respondent failed to raise the ability to pay defense by September 1st. Respondent can not at this juncture indirectly raise this defense, by proposing to add as a witness Respondent's auditor, whose sole testimony is focused on the financial capacity of Respondent. Respondent also failed to submit the relevant financial documentation¹ by September 15.

During a Prehearing conference, the Presiding Officer shall ensure that the record of the proceeding includes any stipulations, agreements, rulings or orders made during the conference. Respondent's counsel is aware that the September deadlines were discussed during the July 14 Prehearing conference. Respondent's counsel had

1 In this case, the "2010 Audited Financial Statement of Aguakem Caribe, Inc".

over three months to comply with the deadlines agreed upon during the conference. Respondent's counsel decided not to comply with the deadlines, thus he failed to once more timely raise Respondent's ability to pay defense, and to timely submit the relevant documentation. Rule 22.19 (g) of the Rules of Procedure (40 C.F.R. § 22.19 (g)) governing the prehearing process, states that when a party fails to provide information within its control as required pursuant to this section, the Presiding Judge may either infer that the information would be adverse to such party, exclude the information or issue a default order.

The Respondent has had ample time and various opportunities to raise the ability to pay defense and to submit the relevant documentation. Respondent should not be allowed to bring during the hearing any information regarding its financial situation and/or ability to pay a penalty. In addition, Respondent should not be allowed to present Mr. Guzman's testimony, since it is solely for the purpose of bringing forth Respondent's financial situation. Also, Respondent should not be allowed to present any documentation regarding his financial situation nor Respondent's ability to pay the penalty.

Complainant hereby requests this Honorable Court to exclude the above defense, testimony and documentation from the scheduled hearing on this matter.

Respectfully submitted, in San Juan, Puerto Rico, on November 2, 2010.



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CERTIFICATE OF SERVICE

I certify that I have this day caused to be sent the foregoing Complainant's Objection to Respondent's Additional Supplemental to its Initial Prehearing Exchange dated November 2, 2010, and bearing the above-referenced docket number, in the following manner to the respective addressees below:

Original and copy by UPS to:

Karen Maples
Regional Hearing Clerk
Region 2
U.S. Environmental Protection Agency
290 Broadway, 17th Floor
New York, NY 10007-1866.

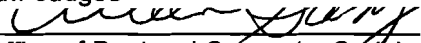
Copy by UPS to:

Attorney for Respondent:
Armando Llorens, Esq.
FURGANG & ADWAR
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New York, New York 10019
[Phone: (212) 725-1818]

Copy by UPS to:

Administrative Law Judge:
The Honorable Barbara A. Gunning
Office of Administrative Law Judges

11/2/2010
Date


Office of Regional Counsel – Caribbean Team