

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

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BEFORE THE ADMINISTRATOR

ENVIRONMENTAL PROTECTION
AGENCY REGION VII
REGIONAL HEARING CLERK

IN THE MATTER OF:)

LARRY NEFF MANAGEMENT)
AND DEVELOPMENT, INC.)

DOCKET NO. TSCA-07-2007-0024

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 documentation of settlements are set forth in Section 22.18 of the Rules of Practice, 40 C.F.R. § 22.18. The record reflects that the parties have engaged in settlement discussions as part of an alternative dispute resolution process and, while those discussions to date have not been fruitful, the parties are nevertheless commended for taking the initiative to attempt 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 continue their efforts to reach a settlement of this matter while the litigation process is proceeding.

Should a Consent Agreement not be finalized on or before **March 28, 2008**, 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, 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 vitae or résumé 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.*, Complainant’s Ex. 1); and

(C) a statement of its views regarding the appropriate place of hearing and estimation of the time needed to present its direct case. *See* Sections 22.21(d) and 22.19(d) of the Rules.

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

(A) a copy of any and all documents demonstrating the truth of the allegation in paragraph 7 of the Complaint that Respondent was an “agent” as defined in the relevant statutes and regulations in regard to the subject Property at the time of leasing on June 13, 2003;

(B) a copy of the “information collected” by Complainant referred to in paragraph 10 of the Complaint showing that Respondent entered into a contract to “lease” the subject Property on or about June 13, 2003;

(C) a copy of any and all documents supporting the truth of the allegations in paragraph 11 of the Complaint that the Property referenced therein is “target housing” as defined in the relevant statutes and regulations;

(D) a copy of any and all documents demonstrating the truth of the allegations in paragraphs 13, 17, 21, 25, 29, 33, and 37 of the Complaint as to Respondent’s alleged failure to meet the various requisite regulatory requirements regarding notice as to lead-based paint hazards in regard to the lease of the subject premises it entered into on June 13, 2003;

(E) a detailed narrative statement that fully elaborates the exact factual and legal basis, and copies of all documents in support thereof, for the allegations made in the Complaint to which Respondent has not admitted the accuracy;

(F) a copy of “EPA’s Section 1018 - Disclosure Rule Enforcement Response Policy, dated February 23, 2000,” referenced in paragraph 42 of the Complaint;

(G) a copy of all other documents used in consideration of a proposed penalty in this case, and a separate Penalty Calculation Worksheet detailing exactly how the proposed penalty was calculated; and

(H) a statement regarding whether the Paper Work 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.

(I) To the extent that any sub-paragraph of this paragraph 2 of this Prehearing Order is fully addressed by material submitted in response to another subparagraph of this paragraph 2, Complainant may simply reference that material rather than duplicating material already provided;

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

(A) a narrative statement fully explaining what, if any, legal interest Respondent held in the subject “Property” on or about June 13, 2003 and a copy of any and all documents reflecting such interest including any Deed or other document evidencing Respondent’s title or interest to the same and/or any agreement between Respondent and any owner, lessor, leasee, mortgagor, mortgagee, or any other entity with any other interest in said Property;

(B) a complete copy of the “contract to ‘lease’” referred to in paragraph 10 of the Complaint, including any and all attachments thereto, which Respondent admitted to entering into in paragraph 10 of its Answer;

(C) a narrative statement fully describing the “Property” referred to in paragraph 10 of the Complaint such as whether the property was residential or commercial and if residential the number of bedrooms, etc.

(D) a detailed narrative statement that fully elaborates the exact factual and legal basis, and copies of all documents in support thereof, for Respondent’s denial of the allegations in paragraphs 13, 17, 21, 25, 29, 33, and 37 of the Complaint as to its alleged failure to meet the various requisite regulatory requirements regarding notice as to lead-based paint hazards in regard to the lease of the subject premises it entered into on June 13, 2003;

(E) a detailed narrative statement that fully elaborates the exact factual and legal basis of Respondent’s four affirmative defenses set forth in its Answer, and a copy of all documents in support of this statement;

(F) a detailed narrative statement that fully elaborates the exact factual and legal basis, and copies of all documents in support thereof, for Respondent's assertions in its Answer that the proposed civil penalty assessment is "inappropriate" and/or "excessive;"

(G) if Respondent takes the position that it is unable to pay the proposed penalty provide a narrative statement fully explaining the factual and legal basis for its position and provide a copy of any and all documents Respondent intends to rely upon in support of such position; and

(H) if Respondent takes the position that the proposed penalty should be reduced or eliminated on any other grounds, a narrative statement explaining the factual and legal basis for its position and a copy of any and all documents it intends to rely upon in support of such position.

(I) To the extent that any sub-paragraph of this paragraph 3 of this Prehearing Order is fully addressed by material submitted in response to another subparagraph of this paragraph 3, Respondents may simply reference that material rather than duplicating material already provided;

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(I) above.

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

- | | | |
|-----------------------|---|---|
| March 28, 2008 | - | Complainant's Initial Prehearing Exchange |
| April 16, 2008 | - | Respondent's Prehearing Exchange, including any direct and/or rebuttal evidence |
| April 30, 2008 | - | 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, 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, 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 Respondent intends to elect only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, then 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.**

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

Hand-delivered packages transported by Federal Express or another delivery service which x-rays their packages as part of their routine security procedures may be delivered directly to the Offices of the Administrative Law Judges at 1099 14th Street, N.W., Suite 350, Washington, D.C. 20005.

Telephone contact may be made with my legal assistant, Maria Whiting-Beale at (202) 564-6259 or my staff attorney, Lisa Knight, Esquire at (202) 564-6291. The facsimile number is (202) 565-0044.

If any party wishes to receive, by e-mail or by facsimile, an expedited courtesy copy of decisions and substantive orders issued in this proceeding, the party shall submit a request for expedited courtesy copies by letter addressed to Maria Whiting-Beale, Legal Staff Assistant, Office of Administrative Law Judges, U.S. Environmental Protection Agency, Mail Code 1900L, 1200 Pennsylvania Ave. N.W., Washington, D.C. 20460. The letter shall include the case docket number, the e-mail address or facsimile number to which the copies are to be sent, and a statement as to whether the party requests: (A) expedited courtesy copies of the initial decision and/or any orders on motion for accelerated decision or dismissal, or (B) expedited courtesy copies of 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.

Prior to filing any motion, the moving party is directed to 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 then 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 and no reliance should be placed on the granting of an unopposed motion. Furthermore, all motions which do not state that the other party has no objection to the relief sought must be submitted in sufficient time to permit the filing of a response by that party and 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 and responses not filed in a timely manner will not be considered without motion for leave to file the document and a showing of good cause.

Furthermore, upon the filing of a motion, a response to a motion, or a reply to a motion, a party may submit a written request for an oral argument on the motion pursuant to 40 C.F.R. § 22.16(d). Included in the request for oral argument shall be a statement as to the proposed appropriate location(s) for the argument to take place. The Office of Administrative Law Judges recently acquired access to state of the art videoconferencing capabilities, and strongly encourages the parties to consider utilizing such technology for oral arguments on motions in order to minimize the expenditure of time and 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.

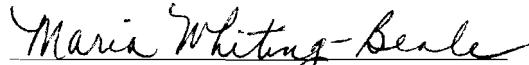
Susan L. Biro
Chief Administrative Law Judge

Dated: March 6, 2008
Washington, D.C.

In the Matter of Larry Neff Management and Development, Inc., Respondent
Docket No. TSCA-07-2007-0024

CERTIFICATE OF SERVICE

I certify that the foregoing **Prehearing Order**, dated March 6, 2008, was sent this day in the following manner to the addressees listed below.


Maria Whiting-Beale
Legal Staff Assistant

Dated: March 6, 2008

Original And One Copy By Pouch Mail To:

Kathy Robinson
Regional Hearing Clerk
U.S. EPA
901 North 5th Street
Kansas City, KS 66101

Copy By Pouch Mail To:

Jonathan Meyer, Esquire
Assistant Regional Counsel
U.S. EPA
901 North 5th Street
Kansas City, KS 66101

Copy By Regular Mail To:

Teresa A. Woody, Esquire
The Woody Law Firm, PC
1044 Main Street, Suite 500
Kansas City, MO 64105