

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

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BEFORE THE ADMINISTRATOR

ENVIRONMENTAL PROTECTION  
AGENCY-REGION VII  
REGIONAL HEARING CLERK

In the Matter of:

REVIVAL ANIMAL HEALTH, INC.,

Respondent.

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Docket No. FIFRA-07-2007-0024

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 documenting 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 engage in a settlement conference on or before **May 27, 2008**, and attempt to reach an amicable resolution of this matter. The Complainant shall file a status report regarding settlement on or before **June 2, 2008**. If the case is settled, the Consent Agreement and Final Order signed by the parties should be filed no later than **June 23, 2008**, with a copy sent to the undersigned.

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.

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, identifying each as either a fact witness or expert witness, 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 vita or resume 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., CX 1 or RX 1); and

(C) a statement as to its views as to the appropriate place of hearing and estimate of the time needed to present its direct case. See Sections 22.21(d) and 22.19(d) of the Rules. Also, state if 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, the Complainant shall submit the following as part of its Initial Prehearing Exchange:

(A) a copy of any documents and photographs in support of the allegations in Paragraphs 14-21, 24, 25, 28, 29, 34, 35, 39, 40, 45, 46, 50, 51, 56, 57, 61, 62, 67, 68, 72, 73, 78, 79, 83, 84, 89, and 90 of the Complaint;

(B) a copy of any report(s) of the inspections on September 10, 2003 and October 8, 2003 referenced in Paragraph 22 of the Complaint, and a copy of the Stop Sales, Use, Or Removal Orders (SSUROs) placed, and photographs taken, during the inspections ;

(C) a copy of the invoice, dated July 8, 2003, referenced in Paragraph 23 of the Complaint;

(D) a copy of the customer complaint, invoice, and any pesticide analysis of the pesticide product referenced in Paragraph 24 of the Complaint;

(E) a copy of any inspection report(s) and Stop Sales, Use, Or Removal Orders from the March 10, 2005 inspection referenced in Paragraph 26 of the Complaint;

(F) a copy of the invoices referenced in Paragraph 28, 34, 39, 45, 50 and 56 of the Complaint;

(G) a detailed narrative explanation of the calculation of the proposed penalty, addressing all of the penalty assessment factors set forth in Section 14 of FIFRA;

(H) a copy of any other policies or guidelines relied upon by Complainant in calculating the proposed penalty *other than* the Enforcement Response Policy for the Federal

Insecticide, Fungicide, and Rodenticide Act (FIFRA), dated July 2, 1992, and Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Rule, dated September 21, 2004; and

(I) a statement regarding whether the Paperwork 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.

3. The Respondent shall also submit the following as part of its Prehearing Exchange, except for Paragraph 3(D) which shall be filed and served as stated therein:

(A) if Respondent takes the position that it is unable to pay the proposed penalty, a copy of any and all documents it intends to rely upon in support of such position;

(B) if Respondent takes the position that the proposed penalty should be reduced or eliminated on any other grounds, a copy of any and all documents it intends to rely upon in support of such position;

(C) a detailed narrative statement explaining the factual and/or legal bases for the First, Second and Third Affirmative Defenses, and copy of any and all documents upon which Respondent intends to rely in support of each of the seven "Affirmative Defenses";

(D) if Respondent intends to pursue a ruling on its request for dismissal of the Complaint, a motion regarding such request, filed and served separately from the Prehearing Exchange and in accordance with the requirements of 40 C.F.R. § 22.5 and 22.16.

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(C) above.

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

|               |   |   |
|---------------|---|---|
| June 23, 2008 | - | Complainant's Initial Prehearing Exchange                                       |
| July 14, 2008 | - | Respondent's Prehearing Exchange, including any direct and/or rebuttal evidence |
| July 28, 200  | - | 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, the 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, the 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 their defenses. If the Respondent intends to elect only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, the 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 they are 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.

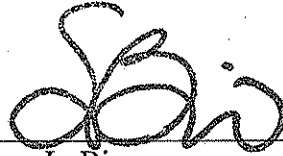
Telephone contact may be made with my legal assistant, Maria Whiting-Beale at (202) 564-6259 or my staff attorney, Lisa Knight, Esquire at (202) 564-6291. The facsimile number is (202) 565-0044.

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 not filed in a timely manner will not be considered.

The Office of Administrative Law Judges now has access to videoconferencing facilities, which facilitate oral arguments on motions. Upon the filing of a motion, a response to a motion, or a reply to a motion, any party may submit a written request for an oral argument on the motion, pursuant to 40 C.F.R. § 22.16(d). Such request shall state whether videoconferencing is desired and whether the opposing party or parties object(s) to such oral argument. Such request may be granted, in the undersigned's discretion, where further clarification and elaboration of arguments would be of assistance in ruling on the motion.

If either party intends to file any dispositive motion regarding liability, such as a motion for accelerated decision or motion to dismiss under 40 C.F.R. § 22.20(a), it shall be filed **within thirty days after the due date for Complainant's Rebuttal Prehearing Exchange.**



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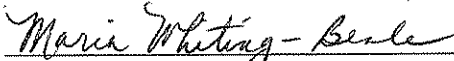
Susan L. Biro  
Chief Administrative Law Judge

Dated: May 14, 2008  
Washington, D.C.

In the Matter of Revival Animal Health, Inc., Respondent  
Docket No. FIFRA-07-2007-0024

CERTIFICATE OF SERVICE

I certify that the foregoing **Prehearing Order**, dated May 14, 2008, was sent this day in the following manner to the addressees listed below.

  
\_\_\_\_\_  
Maria Whiting-Beale  
Staff Assistant

Dated: May 14, 2008

Original And One Copy By Hand To:

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

Copy By Pouch Mail To:

Jennifer Trotter, Esquire  
Assistant Regional Counsel  
U.S. EPA  
901 North 5<sup>th</sup> Street  
Kansas City, KS 66101

Copy By Regular Mail To:

Richard L. Green, Esquire  
Stinson Morrison Hecker, LLP  
1201 Walnut, Suite 2900  
Kansas City, MO 64106