



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:

Nelcon, Inc.,

Respondent

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Docket No. CWA-08-2012-0025

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AMENDED PREHEARING ORDER

It has come to the undersigned's attention that the Pre-Hearing Order issued on May 17, 2013, inadvertently contained incorrect filing instructions that should have been updated to reflect the current Headquarters Hearing Clerk Pilot Project. See www.epa.gov/oalj. The purpose of this Amended Prehearing Order is to provide revised filing instructions in accordance with that pilot project. This Amended Prehearing Order also reflects the revised deadlines stated in the Order Granting Motion to Amend Complaint issued July 10, 2013. No other terms of the original Prehearing Order have been changed.

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"). The parties are advised to familiarize themselves with the applicable statute(s) and the Rules of Practice. An informal Practice Manual, a recently updated Citizen's Guide to proceedings before the EPA Office of Administrative Law Judges, and significant decisions issued by the Office are accessible on the world wide web at: http://www.epa.gov/oalj.

Settlement. 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 shows that the parties participated in the Alternative Dispute Resolution process offered by this office for four months, but were unable to reach a settlement. 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 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. If the case is settled, the fully-executed Consent Agreement and Final Order should be filed with the Regional Hearing Clerk no later than August 30, 2013, 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 following prehearing requirements of this Order.

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 following 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. This Order is issued pursuant to Section 22.19(a) of the Rules of Practice. Accordingly, it is directed that the following prehearing exchange take place between the parties:

1. Each party shall file with the Headquarters Hearing Clerk, serve on the opposing party, and serve on the Presiding Judge:

(A) a list of 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 vitae 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 explaining its views as to the appropriate place for the hearing and an estimate of the 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 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 brief narrative statement, and a copy of any documents in support, explaining in detail the factual and/or legal bases for the allegations denied or otherwise not admitted in Respondent’s Answer, including but not limited to the following paragraphs of the Complaint: 3, 8-10, 14, 18, 25, and 30-41;

(B) a copy of all documents or photographs referenced in Paragraphs 17-18, 25, 32 and 38 of the Complaint;

(C) a copy of any reports, notes, photographs or other pertinent documentation produced as a result of the inspections referred to in Paragraphs 30-31 of the Complaint; and

(D) all factual information and supporting documentation relevant to the assessment of a penalty, and a copy, or a statement of the internet address (URL), of any policy or guidance intended to be relied on by Complainant in calculating a proposed penalty.

3. In addition, Respondent shall submit the following as part of its Prehearing Exchange:

(A) a copy of any documents in support of the denials, including, but not limited to those made in Paragraphs 3, 8-10, 14, 18, 25, 30-40 of the Answer;

(B) a brief explanation and copy of any documents in support of the allegations in Respondent's Affirmative Defenses;

(C) all factual information Respondent considers relevant to the assessment of a penalty and any supporting documentation; and

(D) if Respondent takes the position that the proposed penalty should be reduced or eliminated on any grounds, such as an inability to pay, provide a detailed narrative statement explaining the precise factual and legal bases for its position and a copy of any and all documents upon which it intends to rely in support of such position.

4. Finally, Complainant shall submit as part of its Rebuttal Prehearing Exchange:

(A) a statement and/or any documents in response to Respondent's Prehearing Exchange as to provisions 3(A) through 3(D) above; and

(B) a specific penalty proposal and narrative explanation of how the proposed penalty was calculated in accordance with the applicable criteria set forth in Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g).

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

August 30, 2013	Complainant's Initial Prehearing Exchange
September 20, 2013	Respondent's Prehearing Exchange
October 4, 2013	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.

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 a Hearing. The Complaint in this matter gave Respondent notice and opportunity for a hearing, in accordance with Section 554 of the Administrative Procedure Act, 5 U.S.C. §§ 554 *et seq* (“APA”). Respondent’s Answer to the Complaint contained a request for 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 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.**

Filing and Service. Under the current Headquarters Hearing Clerk Pilot Program (see www.epa.gov/oalj and 40 C.F.R. § 22.5), a document is “filed” when the Headquarters Hearing Clerk receives it at the addresses listed below. (As stated above, any Consent Agreement and Final Order shall be filed with the Regional Hearing Clerk.) A document is “served” upon mailing or when placed in the custody of a reliable commercial delivery service. A copy of each document filed in this proceeding shall be served on the Presiding Officer and on each party. A signed certificate of service must be attached to all filed documents. Additionally, 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 ojlrfiling@epa.gov.

Prehearing exchange information as well as any motions or other papers to be filed in this proceeding shall be addressed as follows if sent by regular mail:

Sybil Anderson, Headquarters Hearing Clerk
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW

Mail Code 1900R
Washington, DC 20460

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

Sybil Anderson, Headquarters Hearing Clerk
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Ronald Reagan Building, Room M1200
1300 Pennsylvania Ave., NW
Washington, DC 20004

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. For procedural questions, you may contact my senior staff attorney, Roy Seidenstein at (202) 564-9274 or seidenstein.roy@epa.gov.

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, and 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 allow a 15-day response period for motions, with an additional 5 days added thereto if the pleading is served by mail. Motions not filed in a timely manner may not be considered. **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.

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 technology, 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.

SO ORDERED.



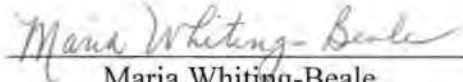
Susan L. Biro
Chief Administrative Law Judge

Dated: August 2, 2013
Washington, D.C.

In the Matter of Nelcon, Inc., Respondent
Docket No. CWA-08-2012-0025

CERTIFICATE OF SERVICE

I certify that the foregoing **Amended Prehearing Order**, dated August 2, 2013, was sent this day in the following manner to the addressees listed below:



Maria Whiting-Beale
Staff Assistant

Dated: August 2, 2013

Original And One Copy To:

Sybil Anderson
Headquarters Hearing Clerk
U.S. EPA
Mail Code 1900R
1200 Pennsylvania Avenue, NW
Washington, DC 20460-2001

Copy By Regular Mail To:

Charles Figur, Esquire
Enforcement Attorney
U.S. EPA
Mail Code 8ENF-L
1595 Wynkoop Street
Denver, CO 80202-1129

Rebecca L. Summerville, Esquire
Datsopoulos, MacDonald & Lind, P.C.
Central Square Building
201 W. Main Street, Suite 201
Missoula, MT 59802