



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY BEFORE THE ADMINISTRATOR

U.S. ENVIRONMENTAL PROTECTION AGENCY-REG. 11 2009 JUN 10 PM 12:38 REGIONAL HEARING CLERK

In the Matter of:)
CROP PROTECTION PROGRAM,) DOCKET NO. FIFRA-02-2008-5301
Office of the Agricultural Services)
and Development Administration,)
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 documenting settlements are set forth in Section 22.18 of the Rules of Practice, 40 C.F.R. § 22.18. If settlement discussions in this proceeding have already been undertaken, the parties are commended for taking the initiative 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 June 26, 2009 and attempt to reach an amicable resolution of this matter. The Complainant shall file a status report regarding settlement on or before July 2, 2009. If the case is settled, the Consent Agreement and Final Order ("CAFO") signed by the parties should be filed no later than August 3, 2009, 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 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 of its views on the appropriate place of 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. *State whether any translation services are necessary for testimony, and language to be translated.*

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

- (A) Copies of all documents evidencing the truth of the allegations contained in paragraph 10 of the Complaint that "respondent hires and compensates . . . persons to mix, load, transfer, and apply pesticides, handle open containers of pesticides and assist with application of pesticides;"
- (B) Copies of the report(s), if any, and any and all documents, notes, photographs and/or other records related thereto, of the March 13 and 14, 2007 inspections of Respondent's central and regional field offices referred to in paragraph 13 of the Complaint;
- (C) Copies of the correspondence (and all attachments thereto) referred to in paragraphs 14-20 of the Complaint;
- (D) Copies of the report(s), if any, and any and all documents, notes, photographs and/or other records related thereto, of the August 2007 and April 2008 inspections of Respondent's central and regional offices referred to in paragraph 21 of the Complaint;

- (E) Copies of the information provided to EPA "required by 40 CFR §170.224" referred to in paragraph 22 of the Complaint;
- (F) Copies of the report(s), if any, and any and all documents, notes, photographs and/or other records related thereto, of the April 15-16, 2008 inspections of various farms referred to in paragraphs 23-35 of the Complaint;
- (G) Copies of the correspondence (and all attachments thereto) referred to in paragraph 36 of the Complaint;
- (H) Copies of the "EPA-approved labels" in effect during the time period referred to in the Complaint for the eight (8) pesticides identified in paragraph 38 thereof;
- (I) A Sample of the letter or "Requisito Aplicacion" form referred to in paragraph 47 of the Complaint and a certified English translation of the same to the extent that the document, or any part thereof, is not in English;
- (J) Copies of Respondent's pesticide application records referred to in paragraph 48 of the Complaint;
- (K) Copies of the sworn statements referred to in paragraphs 50 and 53 of the Complaint;
- (L) Copies of all documents reflecting the truth of the allegations contained in paragraph 51-52, 54-55, 62-78 of the Complaint;
- (M) A detailed narrative statement that fully elaborates the exact factual basis, and copies of all documents in support thereof, for the allegation made in paragraph 80 of the Complaint to the effect that applying the registered pesticides identified therein by manual labor, spoon, hand or stationary pump, "will result in contact with workers or other persons, either directly or through drift," and any evidence of such contact occurring in the applications referred to in paragraphs 62-78 of the Complaint;
- (N) Copies of all documents reflecting the truth of the allegations contained in paragraphs 88-95 of the Complaint;

- (O) Copies of all documents reflecting the truth of the allegations contained in paragraphs 101-102 of the Complaint;
- (P) 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;
- (Q) Copies of any and all “penalty policies” relied upon by Complainant in consideration of a proposed penalty assessment, including the July 2, 1990 “Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act,” referenced on page 16 of the Complaint;
- (R) Copies 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
- (S) 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.

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

- (A) A detailed narrative statement that fully elaborates the exact factual basis, and copies of all documents in support thereof, for Respondent’s denial of the truth of the allegation made in paragraph 10 of the Complaint that “Respondent hires and compensates . . . persons to mix, load, transfer, and apply pesticides, handle open containers of pesticides and assist with application of pesticides,” include in your response an explanation of how such denial can be reconciled with Respondent’s admission that it “performs pesticide application services at farms located throughout Puerto Rico,” as alleged in paragraph 12 of the Complaint;
- (B) For each and every instance in its Answer where Respondent indicated in regard to the allegation made that it “denie[d] its applicability to this case” (*see e.g.* Answer paragraphs 7, 37-41, 45-46, 58, 60-61, 83, 98-99), provide a detailed narrative statement that fully elaborates on the exact factual and legal basis, and copies of all documents in support, of said assertion of inapplicability by Respondent;

- (C) A sample of the form titled "Requisito de Aplicación" referred to in paragraph 47 of the Answer and a certified English translation of the same to the extent that the document, or any part thereof, is not in English;
- (D) Copies of the signed "Requisito de Aplicación" forms referred to by Respondent in paragraphs 49 and 50 of its Answer;
- (E) Copies of any signed "Requisito de Aplicación" form relating to the pesticide applications on January 8, 2008 and April 1, 2008 at the Hacienda Del Fina farm referred to in paragraphs 53 of the Complaint and/or describe any evidence indicating that Respondent instructed someone associated with the farm regarding incorporating the pesticide applied on those dates and/or that such incorporation occurred;
- (F) Sample of the "Informe de Visita," "Registro de Aplicaciones de Pesticidas - WPS," and "Autorización para la Aplicación de Plaguicidas," forms referred to by Respondent in paragraph 53 of its Answer and a certified English translation of the same to the extent that the document, or any part thereof, is not in English;
- (G) Copies of the signed "Informe de Visita," "Registro de Aplicaciones de Pesticidas - WPS," and "Autorización para la Aplicación de Plaguicidas," forms referred to by Respondent in paragraph 53 of its Answer;
- (H) Copies of any signed "Requisito de Aplicación" form relating to the pesticide applications on January 16 and 17, 2008 referred to in paragraph 53 of the Complaint, and/or describe any evidence that Respondent instructed someone associated with the farm regarding incorporating the pesticide applied on those dates and/or that such incorporation occurred;
- (I) Copies of the pesticide labels upon which Respondent relies in denying the truth of the allegations contained in paragraphs 59 and 79 of the Complaint;
- (J) If Respondent denies applying pesticides indicated, on the dates and/or by the methods as indicated in paragraphs 62-78, and 81 of the Complaint, provide copies of any and all documents supporting its denial, including those documents reflecting the method of pesticide application it asserts was utilized, the correct date of application, and/or the pesticide Respondent alleges was actually applied;

- (K) A detailed narrative statement that fully elaborates the exact factual and legal basis, and copies of all documents in support thereof, for Respondent's statement in paragraph 79 of its Answer denying that "all the pesticides described in Paragraphs 62-78 of the Complaint were applied using prohibited application methods;"
- (L) Copies of all documents in Respondent's possession reflecting the crops to which the pesticides were applied on the dates and at the locations indicated in paragraphs 88-96 of the Complaint;
- (M) A detailed narrative statement that fully elaborates the exact factual and legal basis, and copies of all documents in support thereof, evidencing that Respondent provided all the pesticide application information set forth in 40 C.F.R. § 170.224 to the "agricultural employer," in regard to the pesticide applications referred to in paragraphs 101 and 102 of the Complaint, including copies of the "Registro de Aplicaciones de Pesticidas - WPS," forms referred to by Respondent in paragraph 101 of its Answer;
- (N) A detailed narrative statement that fully elaborates the exact factual and legal bases, and copies of all documents in support thereof, for Respondent's assertions on page 14 of its Answer that the proposed penalty of \$263,980 "has no basis in law or in fact," and "is excessive, unwarranted, burdensome, and fails to take into account the factors identified in Section 14(a)(4) of [FIFRA]."
- (O) For each of the 8 "Affirmative Defenses" set forth by Respondent in its Answer at pages 15-16, provide a detailed narrative statement that fully elaborates upon the exact factual and legal bases therefor, and provide copies of all documents in support thereof;
- (P) If Respondent takes the position that it is unable to pay the proposed penalty, a narrative statement explaining the precise 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; and
- (Q) If Respondent takes the position that the proposed penalty should be reduced or eliminated on any other grounds, a narrative statement explaining the precise 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.

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 2(A) through 2(O) above.

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

- August 3, 2009** - Complainant's Initial Prehearing Exchange
- September 4, 2009** - Respondent's Prehearing Exchange, including any direct and/or rebuttal evidence
- September 25, 2009** - 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 its 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 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, Ben Wakefield, Esquire at (202) 564-6278. The facsimile number is (202) 565-0044.

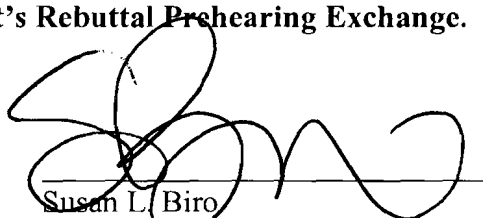
If any party wishes to receive, by e-mail or by facsimile, an expedited courtesy copy of decisions and substantive orders issued in this proceeding, the party shall submit a request for expedited courtesy copies by letter addressed to Maria Whiting-Beale, Legal Staff Assistant, Office of Administrative 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 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 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.

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.**



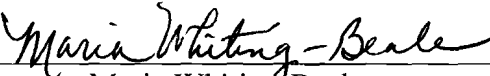
Susan L. Biro
Chief Administrative Law Judge

Dated: June 8, 2009
Washington, D.C.

In the Matter of Crop Protection Program, Office of the Agricultural Servicios and Development
Administration, Respondent
Docket No. FIFRA-02-2008-5301

CERTIFICATE OF SERVICE

I certify that the foregoing **Prehearing Order**, dated June 8, 2009, was sent this day in the following manner to the addressees listed below.



Maria Whiting-Beale
Staff Assistant

Dated: June 9, 2009

Original And One Copy By Pouch Mail To:

Karen Maples
Regional Hearing Clerk
U.S. EPA
290 Broadway, 16th Floor
New York, NY 10007-1866

Copy By Pouch Mail To:

Bruce Aber, Esquire
Assistant Regional Counsel
U.S. EPA
290 Broadway, 16th Floor
New York, NY 10007-1866

Copy By Regular Mail To:

Patricio Martinez-Lorenzo, Esquire
Martinez-Lorenzo Law Offices
Union Plaza Building - Suite 1200
416 Ponce de Leon Avenue
Hato Rey, PR 00918-3424