

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 FEB -5 PM 12: 05  
REGIONAL HEARING  
CLERK

**COMPLAINANT'S REPLY TO RESPONDENT'S PREHEARING EXCHANGE**

To the Honorable William B. Moran:

Pursuant to the Prehearing Order issued on November 25, 2009 by the Presiding Judge, the parties in the case filed their prehearing exchanges. Respondent's Prehearing Exchange does not fully comply with the requirements of the Order and with Section 22.20 of the Consolidated Rules of Practice, 40 C.F.R. Part 22.

**Respondent failed to comply fully with the Prehearing Order**

The Respondent did not submit all the documents it intends to present at the hearing with the excuse that a supplemental submission will be made within 10 days, allegedly in accordance with the Order.

The Order specifically requires that the parties submit in its initial prehearing exchange "...copies of all documents and exhibits it intends to introduce into evidence..." The order also states that after the initial prehearing, the parties may "...file supplements to their prehearing exchanges..." Respondent has interpreted this requirement, to its sole advantage, as if it meant that you could submit all the documents and exhibits **you have always intended to submit**, by piecemeal. This action by Respondent's counsel should not be tolerated. Respondent forces

Complainant to wait ten additional days in order to review the rest of the documents and determine if Complainant needs to file supplements to its initial prehearing exchange.

In a decision by the Chief Administrative Law Judge, Hon. Susan L. Biro, *In the Matter of: 99 CENTS ONLY STORES*, Docket No. FIFRA-9-2008-0027 decided on June 18, 2009, the parties had requested permission for filing several supplemental exchanges. As described in the decision, 40 C.F.R. § 22.19, [as well as the Order issued in the present case] requires:

“...that a party who has submitted its prehearing exchange ‘shall promptly supplement . . . the exchange when the party learns that the information exchanged . . . is incomplete . . . , and the additional . . . information has not otherwise been disclosed to the other party pursuant to this section [22.19].’ 40 C.F.R. § 22.19(f). The Rules state in addition that if a party fails to provide information within its control as required in the prehearing exchange or to promptly supplement its prehearing exchange when it learns that information therein is incomplete, outdated or inaccurate, the Presiding Officer may, in his discretion infer that the information would be adverse to the party failing to provide it, exclude the information from evidence, or issue a default order. 40 C.F.R. § 22.19(g). Thus, where the supplement is not prompt or where the existing information is not incomplete, inaccurate or outdated, and particularly where there is evidence of bad faith, delay tactics, or undue prejudice, supplements to prehearing exchanges may be denied.”

In the present case, it is obvious that the Respondent’s counsel knows what exhibits he will submit. However, he does not include them in its Initial Prehearing Exchange, he does not list the exhibits he is withholding and he offers no excuse or reason as to why he is not submitting such documents with his initial prehearing exchange. Respondent’s action constitutes evidence of bad faith. Since Respondent’s counsel fails to even list those exhibits and/or documents he plans to submit, his submittal should be considered as his Supplemental Prehearing Exchange.

Each party was required to submit its views on the place for the hearing pursuant to §§ 22.21(d) and 22.19(d) of the Rules.

Rule 22.21(d) states that the location of a hearing shall be determined by the method described under section 22.19(d) of the Rules. Section 22.19(d) provides that a hearing may be held: either in the county where the respondent resides or conducts the business which the hearing concerns, in the city where the relevant EPA office is located, or in Washington DC, unless otherwise determined by the Presiding Officer.

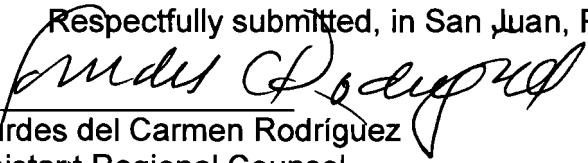
Respondent's prehearing exchange turns a very simple request into an unsupported discussion of the place the hearing should be held, alleging that it is only up to the Respondent to determine its location. We are surprised by Respondent's counsel interpretation of the above provisions where he goes as far as to state that **"The convenience of individuals of EPA is not a proper basis for the designation of the place of hearing."** He goes on to use a respondent's right to a hearing under Section 22.15 of the Consolidated Rules of Practice, as to imply that a respondent has that same exclusive right as to where the hearing should be held.

Complainant in the present case is the Director of the Caribbean Environmental Protection Division ("CEPD"), of the U.S. Environmental Protection Agency, Region 2 located in San Juan, Puerto Rico. The witnesses announced by Complainant in its Initial Prehearing Exchange, as well as Complainant's counsel, are all located in San Juan, Puerto Rico. Counsel for Respondent argues that San Juan is not "...eligible to be the site of the hearing, as it is not 'in the county where the Respondent conducts business which the hearing concerns[.]' Complainant's has proposed San Juan, Puerto Rico for the reasons discussed above.

Respondent's place of business is in the Municipality of Ponce, Puerto Rico, one of the alternate places Complainant suggested. A drive from San Juan to Ponce usually takes approximately an hour to an hour and a half. As far as EPA knows, the only individual residing in New York is Respondent's counsel, and such reason is not contemplated in the cited provisions of the Consolidated Rules of Practice.

Complainant moves that for the reasons stated above that the hearing is held either in San Juan or Ponce, Puerto Rico.

Respectfully submitted, in San Juan, Puerto Rico, on February 4, 2010.

  
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#### CERTIFICATE OF SERVICE

I certify that I have this day caused to be sent the foregoing **Complainant's reply to Respondent's Prehearing Exchange**, dated February 4, 2010, and bearing the above-referenced docket number, in the following manner to the respective addressees below:

Original and copy, **Federal Express** to:

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

**Copy by Federal Express to:**

Attorney for Respondent:  
Armando Llorens, Esq.  
FURGANG & ADWAR  
1325 Avenue of the Americas, 28<sup>th</sup> Floor  
New York, New York 10019  
[Phone: (212) 725-1818]

**Copy by Federal Express to:**

Administrative Law Judge:  
The Honorable William B. Moran  
Office of Administrative Law Judges  
U.S. Environmental Protection Agency  
Franklin Court Building  
1099 14<sup>th</sup> Street, N.W., Suite 350  
Washington, D.C. 20005  
[Phone: (202) 564-6255 Att: Knolyn R. Jones, Legal Staff Assistant]

2/4/2010  
Date

