

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:)

CHEM-WAY CORPORATION,)

Respondent)

) Docket No. EPCRA-04-2010-2015

2010 MAR 17 AM 10:55
HEARING CLERK
EPA HEADQUARTERS

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 parties are encouraged to continue attempts to settle this matter. 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 **March 26, 2010**, and attempt to reach an amicable resolution of this matter. The Complainant shall file a status report regarding settlement on or before **April 2, 2010**. If the case is settled, the Consent Agreement and Final Order signed by the parties should be filed no later than **April 16, 2010**, 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 of Practice. Accordingly, it is directed that the following prehearing exchange take place between the parties:

1. Pursuant to Section 22.19(a) of the Rules of Practice, 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., Complainant's Ex. 1); and

(C) a statement as to its views as to 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 of Practice. Also, state whether 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, Complainant shall submit the following as part of its Initial Prehearing Exchange:

(A) a copy of any documents in support of the allegations in Paragraphs 10, 15 and 20 of the Complaint that during some time in 2005, 2006, and 2007, acetone, acetic acid, potassium hydroxide, sodium hydroxide, sodium hydrosulfide, hydrochloric acid, and phosphoric acid were present at Respondent's facility at 1816 Parker Drive in Charlotte, North Carolina, in an amount equal to or greater than 10,000 pounds;

(B) a copy of any documents in support of the allegations in Paragraph 11 that Respondent failed to submit completed emergency and hazardous chemical inventory forms documenting the presence of hydrogen peroxide, sulfuric acid, acetone, acetic acid, potassium hydroxide, sodium hydroxide, sodium hydrosulfide, hydrochloric acid, and phosphoric acid to the designated local emergency planning committee (LEPC), the State emergency response commission (SERC), and the fire department with jurisdiction over the facility by March 1, 2008, for calendar year 2007;

(C) a copy of any documents in support of the allegations in Paragraph 16 that Respondent failed to submit completed emergency and hazardous chemical inventory forms documenting the presence of hydrogen peroxide, sulfuric acid, acetone, acetic acid, potassium hydroxide, sodium hydroxide, sodium hydrosulfide, hydrochloric acid and phosphoric acid to the designated LEPC, the SERC, and the fire department with jurisdiction over the facility by March 1, 2007 for calendar year 2006;

(D) a copy of any documents in support of the allegations in Paragraph 21 that Respondent failed to submit completed emergency and hazardous chemical inventory forms documenting the presence of hydrogen peroxide, sulfuric acid, acetone, acetic acid, potassium hydroxide, sodium hydroxide, sodium hydrosulfide, hydrochloric acid and phosphoric acid to the

designated LEPC, the SERC, and the fire department with jurisdiction over the facility, by March 1, 2006 for calendar year 2005;

(E) a narrative explanation of the calculation of the proposed penalty, addressing in detail each relevant factor for determining a penalty in EPCRA Section 325 in accordance with the Enforcement Response Policy for Sections 304, 311 and 312 of EPCRA, dated September 30, 1999;

(F) a copy of any documents, including penalty policies and/or guidance documents, used by Complainant to calculate the proposed penalty;

(G) 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. Respondent shall also submit the following as part of its Prehearing Exchange:

(A) any supporting documentation and a narrative statement explaining in detail the factual and legal bases for the denials of the allegations in Paragraphs 10, 15, and 20 of the Complaint, which assert that acetone, acetic acid, potassium hydroxide, sodium hydroxide, sodium hydrosulfide, hydrochloric acid and phosphoric acid were present at Respondent's facility in an amount equal to or greater than 10,000 pounds during 2005, 2006, and 2007;

(B) any supporting documentation and a narrative statement explaining in detail the factual and legal bases of the defenses in Paragraphs 11, 16, and 21 of the Answer that involve 1) Respondent's reports to the local fire department in Charlotte (regarding its annual permit), and 2) an EPA inspection of Respondent's facility;

(C) any supporting documentation and a narrative statement explaining in detail the factual and legal bases for each of Respondent's five Affirmative Defenses, with citations to authorities and a copy of all supporting documents;

(D) a copy of the "local law requirements" Respondent implies are more burdensome than Tier 1 reporting requirements on page 3 of the Answer;

(E) 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; and

(F) 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.

4. Complainant shall submit as part of its Rebuttal Prehearing Exchange a statement and/or any documents in response to Respondent's Prehearing Exchange submissions as to provisions 3(A) through 3(F) above.

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

- April 16, 2010** - Complainant's Initial Prehearing Exchange
- April 30, 2010** - Respondent's Prehearing Exchange, including any direct and/or rebuttal evidence
- May 14, 2010** - 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 a prehearing exchange shall be filed with an accompanying motion to supplement the prehearing exchange.

The Complaint herein gave 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 against Complainant's charges by way of direct evidence, rebuttal evidence or through cross-examination of Complainant's witness. Respondents are 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.

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 ON AN ORDER OF THE JUDGE, EXCUSES NONCOMPLIANCE WITH FILING DEADLINES.

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.

Prehearing exchange information required by this Order to be sent to the Presiding Judge, as well as any other further pleadings, and if sent by mail, they 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 Avenue, N.W.
Washington, D.C. 20460

Hand-delivered packages transported by Federal Express or any delivery service that x-rays its packages as part of its routine security procedures may be delivered directly to the Office of 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, that 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 Avenue, 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 not filed in a timely manner may not be considered.

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 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 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.

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.**



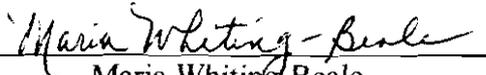
Susan L. Biro
Chief Administrative Law Judge

Dated: March 9, 2010
Washington, D.C.

In the Matter of Chem-Way Corporation, Respondent
Docket No. EPCRA-04-2010-2015

CERTIFICATE OF SERVICE

I certify that the foregoing **Prehearing Order**, dated March 9, 2010, was sent this day in the following manner to the addressees listed below.



Maria Whiting-Beale
Staff Assistant

Dated: March 10, 2010

Original And One Copy By Pouch Mail To:

Patricia Bullock
Regional Hearing Clerk
U.S. EPA
Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA 30303-8960

Copy By Pouch Mail To:

Jennifer Lewis, Esquire
Associate Regional Counsel
U.S. EPA
Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA 30303-8960

Copy By Regular Mail To:

James W. Potter, Esquire
Nexsent Pruet, LLC
1230 Main Street, Suite 700
Columbia, SC 29201