



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:

Juan Hernandez,

Respondent.

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Docket No. TSCA-01-2012-0029

PREHEARING ORDER

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. §§ 22.1–22.45 (“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 Citizen’s Guide to proceedings before the EPA Office of Administrative Law Judges, and significant decisions issued by the Office are available through the Office’s website at <http://www.epa.gov/oalj>.

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 commended for their initiative in attempting 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 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 **January 11, 2013**, and attempt to reach an amicable resolution of this matter. Complainant shall file a status report regarding settlement on or before **January 18, 2013**. If the case is settled, the fully-executed Consent Agreement and Final Order should be filed no later than **February 1, 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 prehearing requirements of this Order.

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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 all 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) a statement indicating whether translation services will be necessary in regard to the testimony of any witness(es), and if so, indicating the language to be translated;

(C) 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

(D) 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* 40 C.F.R. §§ 22.19(d), 22.21(d).

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 in Paragraphs 11–12, 15–18, 21, 26–29, 33, 37, and 43 of the Complaint, to the extent Respondent denied those allegations in its Answer;

(B) a copy of all documents referenced in Paragraphs 14–18 of the Complaint; and

(C) 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 relied on or intended to be relied on by Complainant in calculating or modifying the 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 and assertions made in Paragraphs 11, 21, 26–29, 33, 37, and 43 of the Answer;

(B) a brief explanation and copy of any documents in support of the allegations in Respondent's Special 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.

The prehearing exchanges shall be filed pursuant to the following schedule:

February 1, 2013	Complainant's Initial Prehearing Exchange
February 22, 2013	Respondent's Prehearing Exchange
March 8, 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.

Opportunity for a Hearing and Default. 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 ("APA"). Respondent's Answer to the Complaint contained a request for a hearing. In this regard, Section 554(c)(2) of the APA requires that a hearing be conducted under Section 556 of the APA, 5 U.S.C. § 556. 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. Information concerning the time and location of hearing will be provided after the parties have filed their prehearing exchanges.

Respondent is hereby notified that its failure to comply with the prehearing exchange requirements set forth herein 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 an order of the judge, excuses noncompliance with filing deadlines.

Filing. Pursuant to the Headquarters Hearing Clerk Pilot Project, rather than filing all documents with the Regional Hearing Clerk as specified in 40 C.F.R. § 22.5(a), **the ORIGINAL and one copy of each document filed in this proceeding shall be filed with the Headquarters Hearing Clerk by mail, courier, or personal delivery at the addresses provided below.** A document is “filed” when the Headquarters Hearing Clerk *receives* it. All documents submitted for filing must be signed in accordance with 40 C.F.R. § 22.5(c)(3).

If filing by United States Postal Service (USPS), address your document(s) to:

Sybil Anderson
Headquarters Hearing Clerk
EPA Office of Administrative Law Judges
1200 Pennsylvania Avenue, NW
Mail Code 1900L
Washington, DC 20460-2001

If filing by UPS/FedEx/DHL or other courier, address your document(s) to:

Sybil Anderson
Headquarters Hearing Clerk
EPA Office of Administrative Law Judges
1099 14th Street, NW
Suite 350W, Franklin Court
Washington, DC 20005

The parties are encouraged to send a courtesy copy of each filed document to the Office of Administrative Law Judges by facsimile or e-mail, because 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 e-mail address is oaljfiling@epa.gov.

Service. COPIES of each document submitted for filing must be served on the undersigned and on each party, or if a party is represented (e.g., by an attorney), on that party's representative. Service may be made by mail, courier, or personal delivery. A document is "served" upon mailing or placement in the custody of a reliable commercial delivery service. Documents served on the undersigned should be directed to The Honorable Susan L. Biro, Chief Administrative Law Judge, and addressed in the same manner as documents submitted for filing.

Every document that is filed or served must be accompanied by a Certificate of Service showing the time and manner in which the document was submitted for filing, and the time and manner in which the document was served on the undersigned and each party. An example of a Certificate of Service is attached to this Order. 40 C.F.R. § 22.5(a)(3).

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 Headquarters 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. E-mail or telephone contact may be made with my staff attorney, Edward Kulschinsky, Esq., at (202) 564-4133 (kulschinsky.edward@epa.gov) for procedural questions.

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 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 any 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 motion "is served by first class mail or commercial delivery service, but not by overnight or same-day delivery" 40 C.F.R. § 22.6(c). 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.



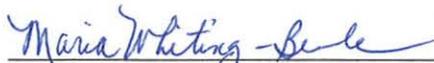
Susan L. Biro
Chief Administrative Law Judge

Dated: December 11, 2012
Washington, D.C.

In the Matter of Juan Hernandez, Respondent
Docket No. TSCA-01-2012-0029

CERTIFICATE OF SERVICE

I certify that the foregoing **Prehearing Order**, dated December 11, 2012, was sent this day in the following manner to the addressees listed below.



Maria Whiting-Beale
Staff Assistant

Dated: December 11, 2012

Original And One Copy To:

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

Copy By Regular Mail To:

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Senior Enforcement Counsel
U.S. EPA
Mail Code ORA18-1
5 Post Office Square
Boston, MA 02109-3912

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