



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:)
)
Bluestone Coke, LLC,) Docket No. RCRA-04-2023-2106
)
Respondent.)

**ORDER IMPOSING SANCTIONS &
SCHEDULING ORDER**

I. Background

A. Case Initiation and Prehearing Order

This proceeding was initiated on April 10, 2024, when Complainant, the Director of the Enforcement and Compliance Assurance Division of the U.S. Environmental Protection Agency, Region 4, filed with the Regional Hearing Clerk a Complaint against Respondent Bluestone Coke, LLC, for alleged violations of an Administrative Order on Consent issued to Respondent on August 11, 2016, pursuant to Section 3008(h)(1) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(h)(1). Complaint, Compliance Order, and Opportunity to Request a Hearing (Apr. 10, 2024). Respondent subsequently filed an Answer to the Complaint with the Regional Hearing Clerk. Answer by Respondent to Complaint, Compliance Order, and Opportunity to Request a Hearing (June 27, 2024).

On July 11, 2024, upon being designated to preside over this proceeding, I issued a Prehearing Order wherein I established deadlines for various prehearing procedures, including a prehearing exchange of information by the parties pursuant to Section 22.19(a) of the Rules of Practice that govern this proceeding, 40 C.F.R. § 22.19(a). Prehearing Order 4 (July 11, 2024); *see also* Order of Designation (July 11, 2024) (designating Administrative Law Judge Michael B. Wright to preside over this proceeding). Specifically, I ordered Complainant to file its Initial Prehearing Exchange no later than August 23, 2024, Respondent to file its Prehearing Exchange no later than September 13, 2024, and Complainant to file its Rebuttal Prehearing Exchange no later than September 27, 2024. Prehearing Order 4.

The Prehearing Order notified the parties that, in accordance with Sections 22.5(a)(1) and (b) of the Rules of Practice, 40 C.F.R. § 22.5(1)(a), (b), “the original and one copy of each document intended to be part of the record of this proceeding . . . shall be filed with the Headquarters Hearing Clerk” of the Office of Administrative Law Judges (“OALJ”), and a copy of each document filed must be served on the presiding judge. Prehearing Order 5, 7. The Prehearing Order explained that the parties were to fulfill these filing and service requirements either by submitting documents through the OALJ E-Filing System or by sending physical copies

to the Headquarters Hearing Clerk via mail or commercial delivery service. Prehearing Order 7–8. The Prehearing Order also addressed service of filed documents upon opposing parties, stating that, pursuant to Section 22.5(b) of the Rules of Practice, “[a] copy of each document filed in this proceeding shall also be ‘served’ by the filing party on . . . all other parties,” and expressing the Tribunal’s strong preference that parties serve one another via email. Prehearing Order 7 (citing 40 C.F.R. § 22.5(b)(2) (“All documents filed by a party other than the complaint, rulings, orders, and decisions shall be served by the filing party on all other parties.”)).

B. Respondent’s Failure to File a Prehearing Exchange and the Resulting Order to Show Cause

Complainant timely filed and served its Initial Prehearing Exchange. Respondent did not.

On September 20, 2024, a staff attorney for the OALJ reached out to Respondent’s counsel Ron H. Hatfield, Jr., Esq., to inquire whether Respondent’s failure to file a Prehearing Exchange was the result of technical issues in accessing the OALJ E-filing System. Mr. Hatfield responded on September 25, 2024 and reported that Respondent had sent a copy of its Prehearing Exchange to the Regional Hearing Clerk for Region 4. Mr. Hatfield further represented that Respondent had timely served its Prehearing Exchange upon Complainant’s counsel via email. Later that day, the OALJ’s staff attorney emailed Mr. Hatfield and Respondent’s other designated counsel, James V. Seal, Esq., to confirm Respondent’s filing error, to inform Respondent’s counsel that Respondent was required to file and serve its Prehearing Exchange in the manner specified in the Prehearing Order, and to inform counsel that Respondent’s submission would now need to be accompanied by a motion for leave to file out of time.

On September 27, 2024, Complainant timely filed its Rebuttal Prehearing Exchange. Complainant’s Rebuttal was truncated, stating that because of Respondent’s failure to properly file and serve a Prehearing Exchange, “Complainant has no response to make at this time.” Complainant’s Rebuttal Prehearing Exchange 1. Respondent made no further response until October 1, 2024, when Mr. Hatfield emailed the Tribunal’s staff attorney to express his belief that Mr. Seal was “working on getting this resolved.”

On October 4, 2024, having not received Respondent’s Prehearing Exchange or any further correspondence from Respondent, I issued an Order to Respondent to Show Cause. Order to Respondent to Show Cause (Oct. 4, 2024) (“OSC”). The OSC directed Respondent to file and serve a document, on or before October 11, 2024, showing cause as to why Respondent had failed to file a Prehearing Exchange as required by Section 22.19(a) of the Rules of Practice and as directed by the Prehearing Order, and why an adverse order should not be entered against it. OSC 3.

C. Respondent's Response to the OSC and Continued Noncompliance with the Prehearing Exchange Process and the Prehearing Order

On October 10, 2024, Respondent electronically filed a copy of its Prehearing Exchange. Respondent's Prehearing Exchange (Oct. 10, 2024) ("Respondent's PHX"). The document addressed many of Respondent's prehearing exchange obligations. However, while the document stated that "Respondent includes with this Prehearing Exchange the [11] exhibits it intends to introduce into evidence," R's PHX 3, Respondent failed to append the exhibits to its prehearing exchange or to otherwise file or serve the exhibits on the Tribunal. Similarly, Respondent's PHX stated that certain exhibits containing confidential business information ("CBI") "have been handled and submitted according to applicable law and the procedures provided by the OALJ to Complainant for filing CBI in this matter," R's PHX 3, but Respondent failed to submit the referenced exhibits to the Tribunal in any format.

On October 11, 2024, Respondent filed a document titled Respondent's Show Cause Report, which purported to respond to the OSC. Respondent's Show Cause Report (Oct. 11, 2024) ("OSC Response"). In its OSC Response, Respondent asserted that "[o]n September 13, 2024, Respondent completed its Prehearing Report and Document Exchange by drafting that document and sending it to the Complainant's Counsel and the Regional Hearing Clerk via electronic mail, just as the Respondent did with its Answer to this Matter." OSC Resp. ¶ 5. Respondent further stated that neither Respondent nor its counsel had previously used the OALJ E-Filing system, and that "[i]t was Respondent's Counsel's understanding that the 'filing' of a document was the process of sending a document via electronic mail to the Regional Hearing Clerk to be placed in the file." OSC Resp. ¶ 6. Respondent claimed that subsequently, "by online research and peer questioning," it had obtained an understanding of the OALJ E-Filing System, and that "Respondent's Counsel has registered for an account and has filed the required Pre-Hearing Report and this document via that system." OSC Resp. ¶ 7.

Also on October 11, 2024, an OALJ staff attorney emailed Respondent's counsel, copying Complainant's counsel, to inform Respondent that its PHX filing did not include any exhibits, to offer technical assistance with the OALJ E-Filing System, and to reiterate that Respondent could submit confidential materials via secure file transfer by obtaining a link from the Headquarters Hearing Clerk. Mr. Seal responded to this email to inquire whether Respondent could submit its sealed documents via Dropbox. In addition, Complainant's counsel responded to notify the Tribunal that Complainant had not been served with any response to the OSC.

On October 15, 2024, OALJ staff emailed Respondent's counsel (1) to provide an appropriate secure electronic location for Respondent to upload its claimed confidential materials, and (2) to flag that Complainant had not received Respondent's OSC Response and to request that Respondent confirm service. Mr. Seal replied that he would double check the service issue upon his return to office the following day.

On October 18, 2024, following further clarification from Complainant's counsel that they had received neither the OSC Response nor the filed version of Respondent's PHX, staff again emailed Respondent's counsel to ask Respondent to address its failure to file copies of its

exhibits and to confirm that it had served Complainant with all case filings.

Since October 15, 2024, neither the Tribunal nor its staff have received any communication from Respondent. As a result, to date, Respondent has failed to file any proposed exhibits and has failed to confirm that it has served either the filed PHX or its OSC Response upon Complainant.

II. Discussion

The Rules of Practice require parties to engage in a prehearing exchange of information that, among other things, “shall contain . . . [c]opies of all documents and exhibits which it intends to introduce into evidence at the hearing.” 40 C.F.R. § 22.19(a)(ii). If a party fails to exchange information within its control as required by Section 22.19:

[T]he Presiding Officer may, in his discretion:

- (1) Infer that the information would be adverse to the party failing to provide it;
- (2) Exclude the information from evidence; or
- (3) Issue a default order under § 22.17(c).

40 C.F.R. § 22.19(g). As the Environmental Appeals Board has observed, the Rules’ inclusion of default as a sanction for failure to complete a prehearing exchange—or failure to comply with a prehearing order directing a prehearing exchange—confirms that the prehearing exchange is not a mere “procedural nicety,” but rather a “pivotal function” in the administrative adjudicatory process with which parties must endeavor to comply. *JHNY, Inc.*, 12 E.A.D. 372, 382–83 (EAB 2005) (citing 40 C.F.R. § 22.17(a)).

Here, Respondent delayed for a month before attempting to properly file and serve its PHX on the Tribunal. Respondent has presented no plausible explanation for this lapse. Respondent’s counsel’s claimed belief that they were required to make all filings with the Regional Hearing Clerk, OSC Resp. ¶ 6, is not credible. Two procedural orders issued in this matter explained Respondent’s filing and service obligations, including that Respondent was required to file and serve documents with the *Headquarters* Hearing Clerk. Order of Designation 1–2; Prehearing Order 5–7. I likewise do not credit Respondent’s claim that “Respondent and its Counsel did not have access to the EPA OALJ E-Filing system, nor has ever had access to that system.” OSC Resp. ¶ 6. The OALJ E-Filing System is readily accessible at a public web address provided in the same pair of initial orders referenced above. Order of Designation 1; Prehearing Order 6. The Tribunal’s orders have also provided (1) an alternative, physical service address of which Respondent could avail itself, and (2) multiple points of contact to whom Respondent could reach out for technical assistance or procedural guidance. Order of Designation 2–3, 4; Prehearing Order 7–9.¹

¹ If Respondent instead meant to argue that it was delayed by the OALJ E-Filing System’s requirement for parties

Having set aside Respondent's implausible excuses for its filing delay, the most straightforward explanation for Respondent's misfiling is that its counsel failed to read the orders issued to the parties in this case. This oversight does not constitute good cause for Respondent's delay, and I encourage counsel to reconsider this practice going forward.

Furthermore, Respondent's noncompliance has persisted past the OSC. Respondent did ultimately attempt to file a Prehearing Exchange. R's PHX. When it did so, however, Respondent again disregarded the Prehearing Order and the Rules of Practice by neglecting to file copies of any of the exhibits referenced therein. *See* 40 C.F.R. § 22.19(a)(2)(ii) ("Each party's prehearing information exchange *shall* contain: . . . Copies of all documents and exhibits which it intends to introduce into evidence at the hearing."); *see also* 40 C.F.R. § 22.19(f) ("A party who has made an information exchange . . . shall promptly supplement or correct the exchange when the party learns that the information exchanged or response provided is incomplete."). Respondent exacerbated these lapses by failing to serve its filed PHX upon Complainant—an action necessary not only to comply with Respondent's procedural obligations, 40 C.F.R. § 22.5(b)(2), but also to allow Complainant an opportunity to determine whether the exchange Respondent previously provided to Complainant's counsel matched the document subsequently filed with the Tribunal.

In sum, Respondent has repeatedly failed to comply with the Procedural Rules' Prehearing Exchange requirements and with the Prehearing Order. Six weeks have now passed since Respondent's Prehearing Exchange deadline and three since the OSC, and Respondent has yet to file a complete Prehearing Exchange. Respondent not only has failed to show good cause for its belated and deficient PHX, but also has, from all appearances, elected to cease communication with the Tribunal and its staff.

In light of the foregoing, I find that Respondent's conduct warrants sanctions. Indeed, in similar circumstances, the Environmental Appeals Board has upheld the entry of a default order. *JHNY*, 12 E.A.D. at 388–89 (upholding entry of default order where respondent "did file a belated 'Prehearing Exchange' in response to the ALJ's Order to Show Cause," but "once again disregarded the Prehearing Order by filing its prehearing exchange *without* copies of any documents or exhibits"). *However*, applying my discretion, I will permit Respondent one final opportunity to remedy its errors.

Accordingly, it is hereby **ORDERED** that Respondent shall file and serve the exhibits referenced in its Prehearing Exchange no later than **Monday, October 28, 2024**. If Respondent fails to do so, Respondent shall be precluded from entering the exhibits, including any part or alternative form thereof, into evidence at hearing. 40 C.F.R. § 22.19(g).

to register with the system, that argument is likewise unavailing. Respondent received early and repeated notice of the need to register with the OALJ E-Filing System, and registration takes no more than two business days—not enough to account for the month by which Respondent's filing was delayed. Order of Designation 2 (discussing need and means to register with OALJ E-Filing System); Prehearing Order 6 (same).

In addition, the parties' prehearing deadlines are hereby revised as follows:

- Complainant may file a Revised Rebuttal Prehearing Exchange no later than December 8, 2024.
- *Joint motions for the appointment of a neutral* will not be entertained prior to the deadline for Complainant's Revised Rebuttal Prehearing Exchange and shall be filed no later than seven days after that deadline.
- *Dispositive motions* must be filed within 28 days after the deadline for Complainant's Revised Rebuttal Prehearing Exchange.

To facilitate these submissions and to correct Respondent's failure to serve Complainant with its PHX or its OSC Response, copies of those filings have been appended to this Order.

SO ORDERED.



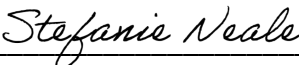
Michael B. Wright
Administrative Law Judge

Dated: October 24, 2024
Washington, D.C.

In the Matter of *Bluestone Coke, LLC*, Respondent.
Docket No. RCRA-04-2023-2106

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order Imposing Sanctions and Scheduling Order**, dated October 24, 2024, and issued by Administrative Law Judge Michael B. Wright, was sent this day to the following parties in the manner indicated below.



Stefanie Neale
Attorney Advisor

Original by OALJ E-Filing System to:
Mary Angeles, Headquarters Hearing Clerk
Office of Administrative Law Judges
U.S. Environmental Protection Agency
https://yosemite.epa.gov/OA/EAB/EAB-ALJ_Upload.nsf

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Dated: October 24, 2024
Washington, D.C.