



**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:)	
)	Docket No. CAA-03-2010-0408
Thomas Caracio)	
P.O. Box 218)	
Wind Gap, PA 18091)	
)	
and)	
)	
Leonard N. Zito, Trustee)	
641 Market Street)	
Bangor, PA 18013)	
)	
and)	
)	
Scotta Equipment & Materials Sales, LLC)	
HC #1 P.O. Box 70)	
Saylorsburg, PA 18353)	
)	
Respondents.)	
)	
Former Sandt's Market)	
1021 South Broadway)	
Wind Gap, PA 18091)	
)	
Facility.)	

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 the Administrative Assessment of Civil Penalties and the Revocation/Termination 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. An informal Practice Manual, a recently updated Citizen's Guide to proceedings before the EPA Office of Administrative Law Judges, and significant decisions issued by the EPA Office of Administrative Law Judges are accessible on the world wide web 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. 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 **May 27, 2011**, and attempt to reach an amicable resolution of this matter. The Complainant shall file a status report regarding settlement on or before **June 3, 2011**. If the case is settled, the Consent Agreement and Final Order signed by the parties should be filed no later than **June 24, 2011**, 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.

PREHEARING EXCHANGE. Pursuant to Section 22.19(a) of the Rules of Practice, 40 C.F.R. § 22.19(a), the parties are directed to engage in the following prehearing exchange:

1. Each party shall file with the Regional Hearing Clerk, serve on the opposing party, and serve on the undersigned as part of its Initial Prehearing Exchange:

(A) the names of the expert and other 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 vita or resume for each identified expert witness, or a statement that no witnesses will be called;

(B) 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

(C) a statement of its views as to the appropriate place of hearing and estimated amount of time needed to present its direct case. See Sections 22.21(d) and 22.19(d) of the Rules. 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, the 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 17, 22, 24 and 25 of the Complaint, including any inspection reports and test results;

(B) a copy of the Asbestos Abatement and Demolition/Renovation Notification

Form referenced in paragraph 31 of the Complaint; and

(C) a copy of any “penalty policy” or any amendment, appendix or clarification thereto upon which Complainant has relied upon in consideration of a proposed penalty assessment, *including* the EPA’s Clean Air Act Stationary Source Civil Penalty Policy, *but not* the Modification to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Adjustment Rule.

3. Respondent Thomas Caracio shall also submit, as part of his Prehearing Exchange, a copy of any documents in support of the assertions in Paragraphs 31-35 of his Answer.
4. If any Respondent takes the position that it is unable to pay the proposed penalty or that proposed penalty should be reduced or eliminated on any other grounds, that Respondent shall submit a copy of any and all documents it intends to rely upon in support of such position.
5. 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 3 and 4 above.
6. If any Respondent intends to pursue dismissal of the action, an appropriate motion, such as a motion to dismiss or motion for accelerated decision that includes detailed legal arguments and any supporting documents, shall be submitted. See 40 C.F.R. §§ 22.5 and 22.16.

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

- | | |
|----------------------|---|
| June 24, 2011 | Complainant’s Initial Prehearing Exchange |
| July 15, 2011 | Respondent’s Prehearing Exchange, including any direct and/or rebuttal evidence |
| July 29, 2011 | 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 is advised to prepare very carefully and thoughtfully 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.

DEFAULT AND OPPORTUNITY FOR HEARING. The Complaint notified Respondents of the opportunity for a hearing, in accordance with Section 554 of the Administrative Procedure Act (APA), 5 U.S.C. § 554. In their Answers to the Complaint, the Respondents 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 Respondents have the right to defend against the Complainant's charges by way of direct evidence, rebuttal evidence or through cross-examination of the Complainant's witness. Respondents are entitled to elect any or all three means to pursue its defenses. If the Respondents intend to elect only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, the Respondents shall serve a statement to that effect on or before the date for filing its Prehearing Exchange.

The Respondents are 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 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.

FILING AND SERVICE. A document is "filed" when the Regional Hearing Clerk receives it. A document is "served" upon mailing or when placed in the custody of a reliable commercial delivery service. However, the parties are encouraged to send a courtesy copy to the Office of Administrative Law Judges by facsimile or email, in addition to the mailed hard copy, as 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 email address is oaljfiling@epa.gov. A signed certificate of service must be attached to all filed documents.. 40 C.F.R. § 22.5(a)(3).

Prehearing exchange information, as well as any motions or other papers to be filed in

this proceeding, shall be addressed to the undersigned as follows:

If sent by the U.S. Postal Service (USPS):

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

If hand-delivered or sent by a non-USPS delivery service, such as Federal Express or UPS, that x-rays their packages as part of its routine security procedures:

The Honorable Susan L. Biro, Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1099 14th Street, N.W., Suite 350
Washington, DC 20005

CONTACT INFORMATION. Telephone contact may be made with my legal assistant, Maria Whiting-Beale at (202) 564-6259 or my staff attorney, Michael Wright, Esquire at (202) 564-3247. The facsimile number is (202) 565-0044.

COURTESY COPIES. 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, this 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 1900 L, 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.

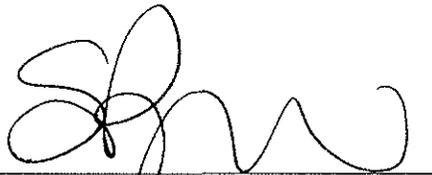
MOTIONS. Prior to filing any motion, the moving party is directed to contact the other party or parties to determine whether the other party has any objection to the granting of the relief sought in the motion. The motion shall then state the position of the other party or parties. The mere consent of 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.

If any party intends to file any dispositive motion regarding liability, such as a motion for accelerated decision or motion to dismiss under Section 22.20(a) of the Rules of Practice, 40 C.F.R. § 22.20(a), it shall be filed within thirty days after the due date for Complainant's Rebuttal Prehearing Exchange.

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 the 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.

SO ORDERED.

A handwritten signature in black ink, appearing to read 'Susan L. Bito', written over a horizontal line.

Susan L. Bito
Chief Administrative Law Judge

Dated: May 9, 2011
Washington, D.C.

In the Matter of Thomas Caracio, Leonard N. Zito, Trustee, and Scott Equipment & Materials Sales, LLC, Former Sandt's Market, Respondents.
Docket No. CAA-03-2010-0408

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Prehearing Order**, issued by Susan Bio, Chief Administrative Law Judge, dated May 9, 2011, was sent this 9th day of May 2011, in the following manner to the addressees listed below.



Mary Angeles
Legal Staff Assistant

Original and One Copy by Pouch Mail to:

Lydia A. Guy
Regional Hearing Clerk
U.S. EPA, Region III (3RC00)
1650 Arch Street
Philadelphia, PA 19103-2029

Copy by Pouch Mail to:

Benjamin M. Cohan, Esq.
Assistant Regional Counsel
U.S. EPA, Region III (3RC10)
1650 Arch Street
Philadelphia, PA 19103-2029

Copy by Regular Mail to:

Leonard N. Zito, Judge
Commonwealth of Pennsylvania
Northampton County Courthouse
669 Washington Street
Easton, PA 18042

Matthew J. Goodrich, Esq.
Martino, Karasek, Martino & Lopiano-Reilly, LLP
641 Market Street
Bangor, Northampton County, PA 18013

Tighe Scott
Scotta Equipment & Materials Sales, LLP
HC 1, Box 70
Saylorsburg, PA 18353

Mr. Thomas Caracio
Post Office Box 218
Wind Gap. PA 18091

Dated: May 9, 2011
Washington, DC