

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of

HAVILAND ENTERPRISES, INC.;
MEIJER, INC.; AND
AHQ ASSOCIATES,

DOCKET NO. 5-IFFRA-97-001
DOCKET NO. 5-IFFRA-97-002
DOCKET NO. 5-IFFRA-97-003

RESPONDENTS

ORDER GRANTING MOTION TO CONSOLIDATE PROCEEDINGS
AND REESTABLISHMENT OF PREHEARING ORDER

The Complainant's April 22, 1997, motion to consolidate the above captioned proceedings is Granted.

On April 2, 1997, the Acting Chief Administrative Law Judge designated the undersigned to preside in the matter of AHQ Associates, Docket Number 5-IFFRA-97-003. In my Prehearing Order issued on April 7, 1997, I directed the parties in that proceeding to submit their prehearing exchanges in seriatim manner, commencing with the Complainant's initial submission on June 24, 1997.

The remaining two above captioned proceedings had been assigned to two other Administrative Law Judges, who entered prehearing orders on March 11, 1997, and March 20, 1997, respectively. In the matter of Haviland Enterprises, Inc., the Complainant's initial prehearing exchange was ordered to be submitted by May 22, 1997, and in the matter of Meijer, Inc., the Complainant's initial prehearing exchange was ordered to be submitted by June 2, 1997.

In a motion to the Acting Chief Administrative Law Judge filed on April 11, 1997, the Complainant, with the concurrence of the three above cited Respondents, moved to have the three above captioned proceedings consolidated and assigned to one judge for a hearing. On April 16, 1997, the undersigned was redesignated as the Administrative Law Judge to preside in the matters of Haviland Enterprises, Inc. and Meijer, Inc. In a motion to the undersigned filed on April 22, 1997, the Complainant renewed its motion for consolidation of the three proceedings.

In the April 22, 1997, motion, counsel for the Complainant states that the three Respondents in the above cited proceedings are represented by the same attorney, Steven D. Weyhing, and that counsel concurs with the motion for consolidation. The Complainant points out that all three actions arise under the authority of Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. § 136 l(a), and that the factual allegations in each action arise from the same inspection or inspections. The Complainant maintains that consolidation of these three actions would meet each of the elements of Section 22.12 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. § 22.12, concerning consolidation of proceedings. In this regard, the Complainant asserts that there are common issues of fact or law, and that no parties' rights would be prejudiced and judicial economy would be served by consolidation. Counsel for the Complainant further notes that the parties have agreed that they can stipulate to most facts which would shorten the length of the hearing. Motion to Consolidate Actions for Hearing dated April 22, 1997, at ¶ 8. Based on these representations by the Complainant, its motion for consolidation of the three above captioned proceedings is granted.

Pursuant to this order of consolidation, the Prehearing Order issued by Judge Pearlstein on March 11, 1997, the Order Establishing Procedures issued by Judge Bullock on March 20, 1997, and the Prehearing order issued by the undersigned on April 7, 1997, are vacated.

United States Environmental Protection Agency ("EPA") policy, found in the Rules of Practice at Section 22.18 (a) , encourages settlement of a proceeding without the necessity of a formal hearing. The benefits of a negotiated settlement may far outweigh the uncertainty, time and expense associated with a litigated proceeding. The file reflects that settlement discussions in this proceeding already have been undertaken, and the parties are commended for taking the initiative to resolve this matter informally and expeditiously. See April 22, 1997, Motion to Consolidate Actions for Hearing at ¶8. To keep me apprised of the parties' settlement efforts, counsel for the Complainant is directed to file on or before **June 24, 1997**, a statement with respect to the status of settlement negotiations.

If the case is not settled, the parties shall strictly comply with the requirements of this order and prepare for a hearing. The parties are advised that extensions of time will not be granted absent a showing of good cause. The pursuit of settlement negotiations or an averment that a settlement in

principle has been reached will not constitute good cause for failure to comply with the prehearing requirements or to meet the schedule set forth in this Prehearing Order. Of course, the parties are encouraged to continue to engage in settlement discussions during and after preparation of their prehearing exchange.

The requirements of this Order meet some of the purposes of a prehearing conference, as authorized by Section 22.19 (a) of the Rules of Practice. Accordingly, it is directed that the following prehearing exchange takes place:

1. Each party shall submit:

(a) the names of all the expert and other witnesses it intends to call at the hearing, together with a brief narrative summary of each witness' expected testimony; and

(b) copies of all documents and exhibits which each party intends to introduce into evidence. The exhibits should include a curriculum vitae or resume for each proposed expert witness. If photographs are submitted, the photographs must be actual unretouched photographs. The documents and exhibits shall be identified as "Complainant's" or "Respondent Meijer's" exhibit, as appropriate, and numbered with Arabic numerals (e.g., "Complainant's Exhibit 1"); and

(c) a statement estimating the amount of time needed to present its direct case at the hearing. In their Answers to the Complaints, the Respondents admit that they have places of business in Sussex, Wisconsin, (Respondent AHQ Associates) and Grand Rapids, Michigan (Respondents Meijer Inc. and Haviland Enterprises, Inc.) . In accordance with the Supplemental Rules of Practice Governing the Administrative Assessment of Civil Penalties Under the Federal Insecticide, Fungicide, and Rodenticide Act, 40 C.F.R. § 22.35 (b) , the hearing shall be held in the city of the residence of the respondent, unless otherwise agreed in writing by all parties. The Respondents shall designate which city of residence they choose for the hearing.

See Sections 22.19(a), (b) and (d) of the Rules of Practice; see also Section 22.21(d).

2 . The Complainant shall submit a statement explaining in detail how the proposed penalty was determined, including a description of how the specific provisions of any Agency penalty or enforcement policies and/or guidelines were applied in calculating the penalty.

3. If any Respondent intends to take the position that it is unable to pay the proposed penalty or that payment will have an adverse effect on its ability to continue to do business, that Respondent shall furnish supporting documentation such as certified copies of financial statements or tax returns.

4. The Complainant shall submit 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.

The prehearing exchanges delineated above shall be filed in seriatim manner, according to the following schedule:

July 17, 1997 - Complainant's Initial Prehearing Exchange

August 17, 1997 - Respondents' Prehearing Exchange, including any direct and/or rebuttal evidence

August 31, 1997 - Complainant's Rebuttal Prehearing Exchange (if necessary)

In their Answers to the Complaints, the Respondents exercised their right to request a hearing pursuant to Section 554 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 554. If the parties cannot settle with a consent order, a hearing will be conducted in accordance with Section 556 of the APA. Section 556(d) of the APA 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, each Respondent has the right to defend itself against the Complainant's charges by way of direct evidence, rebuttal evidence, or through cross-examination of the Complainant's witnesses. Each Respondent is entitled to elect any or all three means to pursue its defense. If any Respondent elects only to conduct cross-examination of the Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, that Respondent shall serve a statement to that effect on or before the date for filing its prehearing exchange. Each party is hereby reminded that failure to comply with the prehearing exchange requirements set forth herein, including a Respondent's statement of election only to conduct cross-examination of the Complainant's witnesses, can result in the entry of a default judgment against the defaulting party. See Section 22.17 of the Rules of Practice.

The original of all pleadings, statements and documents (with any attachments) required or permitted to be filed in this Order (including a ratified Consent Agreement and Final Order) shall be sent to the Regional Hearing Clerk and copies (with any attachments) shall be sent to the undersigned and all other parties. The prehearing exchange information required by this Order to be sent to the Presiding Judge, as well as any other further pleadings, shall be addressed as follows:

Judge Barbara A. Gunning

Office of Administrative Law Judges

U.S. Environmental Protection Agency

Mail Code 1900

401 M Street, SW

Washington, DC 20460

Telephone: 202-260-6703

Barbara A. Gunning

Administrative Law Judge

Dated: 5/8/97

Washington, DC

CERTIFICATE OF SERVICE

I hereby certify that the original of this **ORDER GRANTING MOTION TO CONSOLIDATE PROCEEDINGS AND REESTABLISHMENT OF PREHEARING ORDER**, dated May 8, 1997, **in re:HAVILAND ENTERPRISES, INC.; MEIJER, INC.; AND AHQ ASSOCIATES**, DKT. NOS. V-IFRA-97-001, 002, AND 003, was mailed to the Regional Hearing Clerk, Reg. V, and a copy was mailed by certified mail, return receipt requested to Respondents and Complainant (see list of addressees).

Helen F. Handon

Legal Staff Assistant

Date: May 8, 1997

ADDRESSEES:

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

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