UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**	
	)	
JAXON ENTERPRISES,	**)**	**DOCKET No. CWA-09-99-0005**
	)	
Respondent.	**)**	

ORDER ON MOTIONS REQUESTING HEARING SCHEDULE AND FOR EXTENSION OF TIME

The Complaint initiating this proceeding was issued on September 30, 1999. Respondent filed its Answer over four months later, on January 2, 2000, having been granted extensions of time to file by the Regional Judicial Officer. The case was then forwarded to the Office of Administrative Law Judges for hearing. Subsequently, the parties were offered an opportunity to participate in Alternative Dispute Resolution (ADR) with a Neutral Judge, an offer they accepted. On May 8, 2000, after three months of ADR, the parties represented to the Neutral Judge that they had reached an agreement in principle to settle this case. By Initial Prehearing Order dated June 19, 2000, the parties were required to file their fully executed Consent Agreement and Final Order (CAFO) *no later than July 10, 2000*. In anticipation that the deadline would not be met, on July 6, 2000, Complainant filed a Motion Requesting Order Setting a Hearing Schedule and Hearing Date, or in the alternative, an Order Granting an Extension of Time to file a Consent Agreement and Final Order (Complainant's Motion), along with documents in support of the motion. Also on that date, and also in anticipation of missing the deadline, Respondent filed a Motion for Extension of Time to File Consent Decree (Respondent's Motion).[1]

[1] The Consolidated Rules of Practice state that "[s]ettlement positions and information regarding their development (such as penalty calculations for purposes of settlement based upon Agency settlement policies) shall not be discoverable" and that "evidence relating to settlement which would be excluded in federal courts under Rule 408 of the Federal Rules of Evidence (28 U.S.C.) is not admissible" in evidence. 40 C.F.R.§§ 22.19(e)(2), 22.22(a). Derived from those rules is the practice of not disclosing the parties' settlement positions in pleadings filed with the presiding judge, because such disclosures could be later alleged to have affected or prejudiced the judge's adjudication of the penalty assessment if the case goes to hearing. Nevertheless, Respondent's Motion includes a statement of the amount of penalty agreed upon by the parties in settlement of this case. However, the inclusion of such information was noticed by the undersigned's staff before the pleading was presented to the undersigned for review and the staff deleted the information from the pleading by striking it out with a black marker. **The parties are hereby advised that no further documents containing the proposed terms of settlement shall be filed in this action**.

Complainant's Motion states that on May 25, 2000, it forwarded a draft CAFO to Respondent's attorney. On June 30, 2000, Respondent responded by sending a 15-page letter proposing a series of changes to the draft CAFO. Complainant asserts further that the proposed changes were substantial and required extensive discussion among the parties and their counsel.

Complainant therefore requests in its Motion that an order be issued setting a prehearing exchange schedule and hearing date, or in the alternative, an order granting 30-day extension of time to file the CAFO. Complainant proposes a prehearing schedule starting with a deadline of August 30, 2000 for Complainant's Initial Prehearing Exchange, and deadline of September 30, 2000 for Respondent's Prehearing Exchange. Respondent, on the other hand, requests only a two-week extension of time to file the CAFO, until July 24, 2000.

Experience suggests that, even if all the terms of settlement were agreed upon by both parties and the draft CAFO already executed by the Respondent, the two week extension of time requested by Respondent would be inadequate in light of the extent of review, and time required, on the part of the Region before a CAFO is fully executed by the Complainant. Moreover, this case has already been pending for nine months without the first step towards hearing, that of the prehearing exchange, be taken. Staying this case for an additional significant period of time awaiting a settlement is not appropriate.

THEREFORE, IT IS HEREBY ORDERED:

Complainant's Motion requesting Order Setting a Hearing Schedule and Hearing Date and both parties' Motions for Extension are **GRANTED,** to the extent indicated below.

If a fully executed CAFO is not filed **ON OR BEFORE JULY 31, 2000**, the parties are ordered to comply with the following simultaneous prehearing exchange:

Pursuant to Section 22.19(a) of the Rules, each party shall file and serve upon opposing counsel and the Presiding Judge, **ON OR BEFORE JULY 31, 2000**:

(A) the names of the expert and other witnesses intended to be called at hearing, 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 estimate the time needed to present its direct case. See Sections 22.21(d) and 22.19(d) of the Rules.

Section 22.19 of the Rules of Practice provides that except in accordance with Section 22.22(a), documents and witnesses identities which have not been exchanged shall not be introduced into evidence at the hearing. Therefore, each party should thoughtfully prepare its prehearing exchange.

The Complaint herein gave the 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, the 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, the 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. Respondent is entitled to elect any or all three means to pursue its defenses. If the Respondent intends to elect only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, the Respondent shall serve a statement to that effect on or before the date for filing its prehearing exchange. **The 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 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. THE MERE PENDENCY OF SETTLEMENT NEGOTIATIONS DOES NOT CONSTITUTE A BASIS FOR FAILING TO STRICTLY COMPLY WITH THE PREHEARING EXCHANGE REQUIREMENTS.

Prehearing exchange information required by this Order to be sent to the Presiding Judge, as well as any other further pleadings, if sent by mail, 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 1900**L**
1200 Pennsylvania Ave. N.W.
Washington, D.C. 20460

Hand-delivered packages transported by Federal Express or another delivery service which x-rays their packages as part of their routine security procedures, may be delivered directly to the Offices of the 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 at (202) 564-6259 or my staff attorney, Lisa Knight, Esquire at (202) 564-6291. The facsimile number is (202) 565-0044.

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 which do not state that the other party has no objection to the relief sought must be submitted in sufficient time to permit the filing of a response by that party and 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 will not be considered. In this regard, 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 Prehearing Exchange.**

Susan L. Biro
Chief Administrative Law Judge

Dated: July 10, 2000
Washington, D.C.