

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:)
)
American Consumer Products,) Docket No. FIFRA-04-2009-3023
)
Respondent)

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 Administrative Assessment of Civil Penalties and the Revocation 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.

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. 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. 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 **January 29, 2010**, and attempt to reach an amicable resolution of this matter. The Complainant shall file a status report regarding settlement on or before **February 5, 2010**. If the case is settled, the Consent Agreement and Final Order signed by the parties should be filed no later than **February 26, 2010**, with a copy to the undersigned.

Should a Consent Agreement not be finalized on or before **February 26, 2010**, the parties must prepare for hearing and shall strictly comply with the prehearing requirements of this Order.

This Order is issued pursuant to Section 22.19(a) of the Rules. Accordingly, it is directed that the following prehearing exchange take place between the parties:

1. Pursuant to Section 22.19(a) of the Rules, each party shall file with the Regional Hearing Clerk and shall serve on the opposing party and on the Presiding Judge:

(A) the names of the expert and other witnesses intended to be called at hearing, identifying each as a fact witness or expert witness, 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., CX 1 or RX 1); and

(C) a statement of its views on the appropriate place of hearing and an estimate of the time needed to present its direct case. See Sections 22.21(d) and 22.19(d) of the Rules. *State whether any translation services are necessary for testimony, and language to be translated.*

2. In addition, the Complainant shall submit the following as part of its Initial Prehearing Exchange, except for the portions of Paragraph A and G below, as indicated to be filed as a separate motion:

(A) a copy of any records from the Georgia Secretary of State and Illinois Secretary of State indicating the current correct name(s) and address(es) of the Respondent, and, if appropriate, a separate motion to amend the Complaint to correct the name of the Respondent in the Complaint;

(B) a copy of any documents in support of the allegations in Paragraph 5 of the Complaint;

(C) a copy of any reports of the inspections referenced in Paragraphs 6 and 9 of the Complaint, and a copy of any photographs, maps, illustrations, field notes, or videos received or taken during the inspections, in support of the allegations in the Complaint;

(D) a copy of the photographs and shipping records referenced in Paragraphs 8 and 10 of the Complaint;

(E) a copy of any documents in support of the allegations in Paragraphs 11 and 14 of the Complaint;

(F) a copy of any documents in support of the allegations in Paragraphs 12, 15 and 18 of the Complaint;

(G) a narrative explanation of which inspection Paragraphs 12 and 14 refer to, and whether the product referenced in Paragraph 12 is the same product as that referenced in Paragraph 11, and, if appropriate, a separate motion to amend the Complaint to specify which inspection(s) and product Paragraph 12 refers to;

(H) a copy of the Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), July 2, 1990, and a copy of any other penalty policy upon which Complainant has relied upon, or intends to rely upon, in consideration of the proposed penalty, *other than* the Civil Monetary Inflation Adjustment Rule;

(I) a narrative statement explaining in detail the calculation of the proposed penalty, addressing each factor listed in Section 14(a)(4) of FIFRA; and

(J) 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.

3. The Respondent shall also submit the following as part of its Prehearing Exchange, except for Paragraph (J) which should be filed as a separate document in accordance with 40 C.F.R. §§ 22.5 and 22.16:

(A) a copy of any documents in support of Affirmative Defense 1 and Respondent's assertion in Paragraph 3 of the Answer that "their corporations are separate and distinguished corporations";

(B) a narrative statement, and a copy of any documents in support, explaining in detail the assertions in Paragraphs 11 and 12 of the Answer;

(C) a statement admitting or denying the allegation in Paragraph 12 of the Complaint that "Respondent *distributed* 'Anti-Bacterial Formula 24-7 All Purpose Cleaner'" (emphasis added);

(D) a copy of any documents in support of Affirmative Defense 2;

(E) a narrative statement, and a copy of any documents in support, explaining in detail the factual and/or legal bases for Affirmative Defense 3;

(F) a narrative statement, and a copy of any documents in support, explaining in detail the factual and/or legal bases for Affirmative Defense 4;

(G) a copy of any documents in support of Affirmative Defense 5;

(H) if Respondent takes the position that Respondent is unable to pay the proposed penalty of \$6,500, a copy of any and all documents it intends to rely upon in support of such position;

(I) if Respondent takes the position that the penalty should be reduced or eliminated on any other grounds, a copy of any and all documents it intends to rely upon in support of such position; and

(J) if Respondent intends to pursue its request for dismissal of the Complaint, a motion filed in accordance with the requirements of 40 C.F.R. § 22.16.

4. Complainant shall submit as part of its Rebuttal Prehearing Exchange any documents in response to Respondent's Prehearing Exchange submittals as to provisions 3(A) through 3(I) above.

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

- February 26, 2010** - Complainant's Initial Prehearing Exchange
- March 19, 2010** - Respondent's Prehearing Exchange, including any direct and/or rebuttal evidence
- April 2, 2010** - 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. Any supplements to prehearing exchanges shall be filed with an accompanying motion to supplement the 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 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. 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.

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 1900L
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-Beale at (202) 564-6259 or my staff attorney, Lisa Knight, Esquire at (202) 564-6291. The facsimile number is (202) 565-0044.

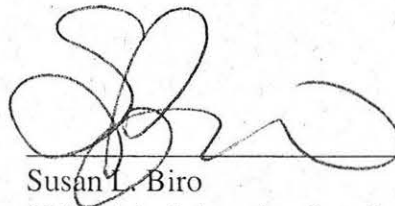
If any party wishes to receive, by e-mail or by facsimile, an expedited courtesy copy of decisions and substantive orders issued in this proceeding, the party shall submit a request for expedited courtesy copies by letter addressed to Maria Whiting-Beale, Legal Staff Assistant, Office of Administrative Law Judges, U.S. Environmental Protection Agency, Mail Code 1900L, 1200 Pennsylvania Ave. 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.

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 and responses not filed in a timely manner may not be considered without motion for leave to file the document and a showing of good cause.

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 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.

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.**



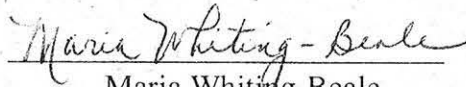
Susan L. Biro
Chief Administrative Law Judge

Dated: January 19, 2010
Washington, D.C.

In the Matter of American Consumer Products, Respondent
Docket No. FIFRA-04-2009-3023

CERTIFICATE OF SERVICE

I certify that the foregoing **Prehearing Order**, dated January 19, 2010,
was sent this day in the following manner to the addressees listed below.



Maria Whiting-Beale
Staff Assistant

Dated: January 19, 2010

Original And One Copy By Pouch Mail To:

Patricia Bullock
Regional Hearing Clerk
U.S. EPA
Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA 30303-8960

Copy By Pouch Mail To:

Jennifer Lewis, Esquire
Associate Regional Counsel
U.S. EPA
Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA 30303-8960

Copy By Regular Mail To:

Robin Zahran
American Consumer Products
1301 W. 22nd Street, Suite 815
Oakbrook, IL 60523