



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:)
)
THE COMMUNITY BUILDERS, INC., ET AL.) Docket No. TSCA-01-2008-0079
)
Respondents.)

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. The record reflects that the parties have retained an outside mediator and they are commended by this Tribunal for taking the initiative to attempt 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 the mediation conferences currently scheduled for the week of October 20, 2008, and attempt to reach an amicable resolution of this matter. The Complainant shall file a status report regarding settlement on or before **October 30, 2008**. If the case is settled, the Consent Agreement and Final Order signed by the parties should be filed no later than **November 28, 2008**, 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.

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 either 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 "Respondents'" 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 of the time needed to present its direct case. See Sections 22.21(d) and 22.19(d) of the Rules. Also, state if 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 34-36 of the Complaint;

(B) a copy of any reports and supporting documents relating to the inspections referenced in Paragraph 37 of the Complaint;

(C) a copy of the Notice of Noncompliance and Information Request Letter referenced in Paragraph 38 of the Complaint, as well as any response thereto;

(D) a copy of the subpoena referenced in Paragraph 40 of the Complaint as well as any response thereto;

(E) a copy of any documents in support of the allegations that Respondents failed to provide a Lead Hazard Information Pamphlet to each of the lessees as alleged in Count I of the Complaint;

(F) a copy of any documents in support of the allegations that Respondents failed to disclose known lead-based paint/hazards and provide records to each of the lessees as alleged in Count II of the Complaint;

(G) a copy of any documents in support of the allegations that Respondents failed

to include Lead Warning Statements in or as an attachment to each of the leases as alleged in Count III of the Complaint;

(H) a copy of any documents in support of the allegations that Respondents failed to include a disclosure statement regarding Lead-Based Paint/Hazards in or as an attachment to each of the leases as alleged in Count IV of the Complaint;

(I) a detailed narrative statement of the penalty Complainant proposes to assess against each Respondent on each Count, addressing each of the relevant penalty determination factor listed in Section 16 of FSCA, 15 U.S.C. § 2615;

(J) a copy of any and all policies or guidelines relied upon by Complainant in calculating the proposed penalty; and

(K) 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 Respondents, jointly or severally, shall submit the following as part of their Prehearing Exchange(s):

(A) Copies of any and all documents evidencing their provision of an EPA-approved lead hazard information pamphlet to each of the lessees identified in Count 1 of the Complaint and the date each such pamphlet was provided;

(B) Copies of any and all documents evidencing their disclosure of the presence of known lead-based paint and/or lead-based paint hazards and/or the provision of records pertaining thereto to each of the lessees identified in Count 2 of the Complaint and the date such disclosure was made;

(C) Copies of any and all documents evidencing their inclusion within the lease or as an attachment thereto of a Lead Warning Statement as to each and every lease identified in Count 3 of the Complaint;

(D) Copies of any and all documents evidencing their inclusion within the lease or as an attachment thereto of a statement disclosing their knowledge of lead-based paint or lead-based paint hazards as to each and every lease identified in Count 4 of the Complaint;

(E) Copies of any and all documents evidencing their compliance in whole or in part with the notice and/or disclosure requirements of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. §§ 4851 *et seq.* or the regulations promulgated in regard

thereto, 40 C.F.R. Part 745, Subpart F.

(F) In regard to Respondents' general denial of the truth of the allegations made in the Complaint (¶¶ 34-35) as to their ownership of the various properties identified therein, indicate what relationship, if any, each of the Respondents, individually or jointly, held in relation to each such property during the period beginning January 1, 2003 to the present, and provide any and all documentation in support thereof;

(G) In regard to Respondents' general denial of the truth of the allegations made in the Complaint (¶ 36) as to the properties identified in the Complaint (¶ 35) being at the time of the alleged violations "target housing," as defined by 40 C.F.R. § 745.103, provide a detailed narrative explanation for the denial, citing all facts and legal arguments Respondents are relying upon in support thereof, and provide a copy of any and all documents Respondents intend to rely upon in support of such position at hearing;

(H) Provide a complete copy of the information and records Respondents submitted to EPA as indicated in the Complaint (¶¶ 39 and 41);

(I) As to each of the five Affirmative Defenses raised by Respondents in the Answer, provide an individualized detailed narrative explanation, citing all facts and legal support therefor, and provide a copy of any and all documents Respondents intend to rely upon in support of such defense at hearing;

(J) As to each of the mitigation issues raised by Respondents in their Answer, provide a detailed narrative explanation, citing all facts and legal support therefor, and provide a copy of any and all documents Respondents intend to rely upon in support of its mitigation claims at hearing; and

(K) For each and every Respondent taking the position in this litigation that it is unable to pay the proposed penalty, provide an individualized detailed narrative statement in support thereof and a copy of any and all documents it intends to rely upon in support of such position, including tax returns, profit and loss statements and other financial records for the past 3-5 years. Include therein a detailed narrative statement as to any and all relationships which have existed between and among the Respondent entities since January 1, 2003.

4. Complainant shall submit as part of its Rebuttal Prehearing Exchange a statement and/or any documents in response to Respondents' Prehearing Exchange submittals as to provisions 3(A) and 3(K) above.

NOTE: To the extent that a response to any sub-paragraph of this Prehearing Order is fully addressed by material submitted with the Prehearing Exchange in response to another subparagraph, the party may simply reference that material rather than duplicating material already provided.

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

- November 28, 2008** - Complainant's Initial Prehearing Exchange
- December 26, 2008** - Respondents' Prehearing Exchange, including any direct and/or rebuttal evidence
- January 16, 2009** - 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 Respondents 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 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 themselves against the Complainant's charges by way of direct evidence, rebuttal evidence or through cross-examination of the Complainant's witnesses. Respondents are entitled to elect any or all three means to pursue their 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 their failure to either comply with the prehearing exchange requirements set forth herein or to state that they are 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.**

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.

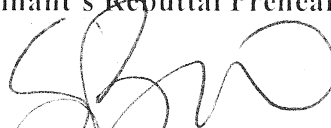
Telephone contact may be made with my legal assistant, Maria Whiting-Beale at (202) 564-6259 or my staff attorney, Lisa Knight, Esquire at (202) 564-6291. The facsimile number is (202) 565-0044.

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 not filed in a timely manner will not be considered.

The Office of Administrative Law Judges now has access to videoconferencing facilities, which facilitate oral arguments on motions. Upon the filing of a motion, a response to a motion, or a reply to a motion, any party may submit a written request for an oral argument on the motion, pursuant to 40 C.F.R. § 22.16(d). Such request shall state whether videoconferencing is desired and whether the opposing party or parties object(s) to such oral argument. Such request 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.**



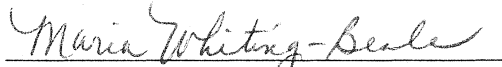
Susan L. Biro
Chief Administrative Law Judge

Dated: September 18, 2008
Washington, D.C.

In the Matter of The Community Builders, Inc, et al., Respondents
Docket No.TSCA-01-2008-0079

CERTIFICATE OF SERVICE

I certify that the foregoing **Prehearing Order**, dated September 18, 2008, was sent this day in the following manner to the addressees listed below.



Maria Whiting-Beale
Staff Assistant

Dated: September 18, 2008

Original And One Copy By Pouch Mail To:

Wanda I. Santiago
Regional Hearing Clerk
U.S. EPA
One Congress Street, Suite 1100
Boston, MA 02114-2023

Copy By Pouch Mail To:

Hugh W. Martinez, Esquire
Enforcement Counsel (SEL)
U.S. EPA
One Congress Street, Suite 1100
Boston, MA 02114-2023

Copy By Regular Mail To:

Jamie C. Beard, Esquire
Wilmer Cutler Pickering
Hale & Dorr LLP
60 State Street
Boston, MA 02109