



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:)
)
Kilauea Crushers, Inc.) Docket No. CAA-09-2011-0004
)
Respondent) Dated: August 22, 2012

PREHEARING ORDER
AND ORDER GRANTING MOTION FOR LEAVE TO FILE
FIRST AMENDED COMPLAINT

As you were previously notified, I have been designated to preside in this proceeding, which is 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” or “Rules”). The Rules of Practice, and for further guidance, an informal Practice Manual, and significant orders and decisions issued by the EPA Office of Administrative Law Judges, may be found on the office’s website at <http://www.epa.gov/oalj>. The parties are advised to familiarize themselves with the applicable statute(s) and the Rules of Practice.

Agency policy strongly supports settlement of a proceeding without a formal hearing. Procedures and policies regarding settlement are set forth in the Rules of Practice at 40 C.F.R. §22.18. Although settlement discussions have not led to resolution of this matter, the parties are commended for taking the initiative to resolve this matter informally and expeditiously through Alternative Dispute Resolution. The parties are 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, and should consider that a settlement allows the parties to control the outcome of the case. The parties are encouraged to engage in further settlement negotiations during the course of this proceeding, to attempt to reach an amicable resolution of this matter.

I. Order Granting Motion for Leave to File First Amended Complaint

The Complaint initiating this matter, filed on September 27, 2011 pursuant to Section 113(d) of the Clean Air Act, as amended, alleges that Respondent violated certain provisions of Rule 316 of the Maricopa County Air Quality Department (“MCAQD”) as incorporated into the

State Implementation Plan for Arizona. After Respondent filed an Answer to the Complaint and the parties engaged in Alternative Dispute Resolution, Complainant submitted on August 1, 2012 a Motion for Leave to File First Amended Complaint (“Motion”) accompanied by a First Amended Complaint and Notice of Opportunity for Hearing (“Amended Complaint”). Complainant states in the Motion that upon review of Respondent’s Answer, Complainant seeks to delete Count II of the original Complaint and to amend Count III of the original Complaint to better conform to the regulatory language of the provision in MCAQD Rule 316 that Respondent allegedly violated.

To date, Respondent has not filed any response to the Motion. The Rules of Practice governing this proceeding, 40 C.F.R. Part 22, provide that a response to a motion “must be filed within 15 days of service of such motion” and that five days are added to this period where the motion was served mail. 40 C.F.R. §§ 22.7(c), 22.16(b). The Rules provide further that “[a]ny party who fails to respond within the designated period waives any objection to the granting of the motion.” 40 C.F.R. § 22.16(b). Respondent had until August 21, 2012 to file a response to the Motion, and, having failed to respond by that date, has waived any objection to the relief requested in the Motion.

The Rules provide that once an answer has been filed, “the complainant may amend the complaint only upon motion granted by the Presiding Officer.” 40 C.F.R. § 22.14(c). The Rules do not provide any standard for granting leave to amend a complaint, but the Federal Rules of Civil Procedure (“FRCP”) and federal court decisions interpreting the FRCP provide guidance. FRCP 15(a) provides that “[t]he court “should freely give leave” to amend a complaint “when justice so requires.” In *Foman v. Davis*, 371 U.S. 178, 182 (1962), the Supreme Court stated:

In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be "freely given."

The First Amended Complaint deletes Paragraphs 39, 40, 46, 47 and 48 and amends paragraph 51 of the original Complaint, and inserts a new Paragraph 37 in the First Amended Complaint. There is no undue delay, bad faith, dilatory motive, futility of amendment, or repeated failure to cure deficiencies apparent in this case. Further, Respondent would not suffer undue prejudice, where one count of the original Complaint is being withdrawn, there is no increase to a proposed penalty,¹ the parties have not yet filed prehearing information exchanges, and a hearing is not yet scheduled.

¹Neither the original Complaint nor the Amended Complaint specifies a proposed penalty, but instead recites the maximum penalty allowable under Section 113(d) of the Clean Air Act.

The Rules provide at 40 C.F.R. § 22.14(c) that “Respondent shall have 20 additional days from the date of service of the amended complaint to file its answer.” In the Motion, Complainant requests that the Amended Complaint be deemed filed and served pursuant to 40 C.F.R. § 22.14(c) as of the date of the order granting leave to file the Amended Complaint. It is appropriate to grant this request, as Complainant mailed Respondent’s counsel a copy of the Amended Complaint on August 1, 2012, and therefore Respondent has had ample time to review the Amended Complaint for preparing an answer thereto. Accordingly, Respondent will be provided 20 days from the date of this Order to file an answer to the Amended Complaint.

Accordingly, **IT IS ORDERED THAT:**

1. Complainant’s Motion for Leave to File First Amended Complaint is hereby **GRANTED.**
2. The First Amended Complaint and Notice of Opportunity for Hearing is deemed to be filed and served on the date of this Order.
3. Respondent shall file an Answer to the First Amended Complaint **on or before September 11, 2012.**

II. Prehearing Order

The parties are directed to engage in a settlement conference, and Complainant shall file a **status report** as to the progress of settlement (without describing any specific terms) on or before **September 7, 2012**. If the case is settled, the Consent Agreement and Final Order (CAFO) signed by the parties should be filed no later than **September 21, 2012**, with a copy sent to the undersigned.

If a CAFO is not 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, the parties are directed to engage in the following prehearing exchange:

- A. Each party shall file with the Hearing Clerk an original and two copies, and shall serve on the opposing party the following Prehearing Exchange:
 1. The names of any witnesses the party intends to call at the hearing, identifying each as a fact witness or an expert witness, and a brief narrative summary of the expected testimony of each witness, or a statement that no witnesses will be called.
 2. Copies of all documents and exhibits intended to be introduced into evidence at the

hearing. 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). The copies may be printed double-sided.

3. A statement of the city or county in which the party prefers the hearing to be held, and an estimate of the time needed to present its direct case. See 40 C.F.R. §§ 22.19(d), 22.21(d). Also, a statement of whether translation services are necessary for the testimony of any anticipated witness(es), and if so, the language to be translated.

B. Complainant also shall submit the following as part of its Initial Prehearing Exchange:

1. A copy of any documents in support of the factual allegations in the Complaint which were not admitted by Respondent.

2. A narrative statement explaining in detail how the proposed penalty was calculated, addressing each penalty factor set forth in the applicable statute, and describing how the specific provisions of any penalty policies and/or guidelines were applied in calculating the penalty. A penalty worksheet with supporting narrative statement may be submitted.

3. A copy, or a statement of the internet address (URL), of any penalty policies and/or guidelines, and any amendment, appendix or clarification thereto, considered by Complainant in calculating the proposed penalty. Complainant need not submit a hard copy of any penalty policy that was enclosed with the Complaint, or of the Amendments to EPA's Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule.

4. A statement as to 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.

C. Respondent shall also submit the following as part of its Prehearing Exchange:

1. If Respondent has stated any affirmative defense(s) in the Answer, Respondent shall submit with respect to each such affirmative defense

(a) a narrative statement explaining in detail the legal and/or factual bases for such affirmative defense, and a copy of any documents in support; or

(b) a statement that Respondent intends that the affirmative defense be considered only in mitigation of a penalty; or

(c) a statement that Respondent is withdrawing the affirmative defense.

2. A narrative statement explaining in detail the legal and/or factual bases for any other assertions in the Answer defending against factual allegation(s) in the Complaint, and/or a copy of any documents in support of such assertion(s).

3. A narrative statement explaining why the proposed penalty should be reduced or eliminated, and a copy of any documents in support.

4. If Respondent believes that it is unable to pay the proposed penalty or that payment would have an adverse effect on its ability to continue to do business, a brief statement to that effect, and a copy of documents in support, such as tax returns and/or certified copies of financial statements.

D. Complainant shall submit as part of its Rebuttal Prehearing Exchange a statement and/or any documents in response to Respondent's Prehearing Exchange submittals.

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

September 21, 2012	-	Complainant's Initial Prehearing Exchange
October 19, 2012	-	Respondent's Prehearing Exchange, including any direct and/or rebuttal evidence
November 2, 2012	-	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 carefully and thoughtfully prepare its prehearing exchange.

Supplement to Prehearing Exchange. If a party wishes to present at the hearing any additional exhibit(s) or proposed witness(es), the party shall file a supplement to the prehearing exchange. Such supplement shall include a copy of the exhibit(s) and/or witness name and summary of testimony, as appropriate, and an accompanying motion to supplement the prehearing exchange explaining why the exhibit(s) or witness(es) were not provided in the prehearing exchange. Such supplements should be filed as soon as possible, and at least 15 days before the hearing. *See*, 40 C.F.R. § 22.22(a)(1).

Default and Opportunity for Hearing. The Complaint 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 the Answer to the Complaint, the Respondent exercised its right to request 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 against the Complainant's charges by way of direct evidence, rebuttal evidence or through cross-examination of Complainant's witness. Respondent is entitled to elect any or all three means to pursue its defenses. If the Respondent intends only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, the Respondent shall file a statement to that effect on or before the date for filing its prehearing exchange.

The Respondent is hereby notified that if it fails to timely submit either a prehearing exchange as set forth herein, or a statement that it has chosen only to conduct cross-examination of the Complainant's witnesses, a default judgment may be issued against it. The Complainant is notified that if it fails to file its prehearing exchange in a timely manner, this case can be dismissed with prejudice. **Active settlement negotiations or even a settlement in principle is NOT an excuse for failing to submit a timely prehearing exchange. Each party MUST comply with the filing deadlines UNLESS a fully executed CAFO is filed with the Hearing Clerk OR the Administrative Law Judge has granted that party an extension of time to file.**

Filing and Service. Each original document that is "filed" must be sent along with two copies to the Hearing Clerk and a copy shall also be "served" on the opposing party. A certificate of service must be attached to all filed documents. 40 C.F.R. § 22.5(a)(3). According to the Rules, 40 C.F.R. § 22.5(a), a document is "filed" on the date the Hearing Clerk receives it. Therefore, the parties should send a document in enough time before it is due so that the Hearing Clerk will receive it by the due date. To ensure that the undersigned receives a document on time, a courtesy copy may be sent to the Office of Administrative Law Judges by email, at oaljfiling@epa.gov, or by facsimile, at (202) 565-0044. The original and two hard copies of all filings also must be sent by mail to the Hearing Clerk.

The parties are advised NOT to include, attach or refer to any terms of settlement offers or agreements in any document filed with the Hearing Clerk, and no copies of Consent Agreements and Final Orders (CAFOs) shall be submitted or attached to any filed document, except those CAFOs that are fully executed by the parties.

Contact Information. Telephone contact may be made with my legal assistant, Knolyn Jones, at (202) 564-6262 to ask whether a document has been received or issued. For procedural questions, email or telephone contact may be made with staff attorney Michael Wright, Esq., at wright.michaelB@epa.gov or (202) 564-3247, or Ed Kulschinsky, Esq., at

kulschinsky.edward@epa.gov or (202) 564-4133. 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, the party shall submit a request for expedited courtesy copies by letter addressed to Knolyn Jones, 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 or sent to her by email at oaljfilng@epa.gov. 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.

Procedures for Motions and Extensions of Time. A party intending to file a motion is directed to contact the other party or parties to inquire whether it has any objection to the relief sought in the motion. The motion shall then state whether or not the other party objects to the relief sought. A party must not assume that an unopposed motion will be granted.

All motions must be submitted in sufficient time to allow the other party or parties to file a response and/or to allow time for a ruling on the motion before the hearing or any relevant deadline set by this or any subsequent order. The Rules of Practice, 40 C.F.R. §§ 22.16(b) and 22.7(c), allow a 15-day response period for motions with an additional five days if the pleading is served by mail. Any party requesting an extension of time to file a document must file a written motion in accordance with 40 C.F.R. §§ 22.5, 22.7(b) and 22.16, which should be received by the undersigned at least one day prior to the due date if unopposed, and at least a week prior to the due date if opposed. Motions not filed in a timely manner may not be considered.

Dispositive Motions. If Respondent in its Answer has requested dismissal of the Complaint, Respondent is advised that such request does not constitute a motion under 40 C.F.R. § 22.16(a) as it does not state the grounds for a motion with particularity. If the Respondent seeks dismissal of the Complaint, or any portion thereof, it may file a motion for dismissal in accordance with 40 C.F.R. §§ 22.5, 22.16 and 22.20.

If a 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.**

SO ORDERED.



M. Lisa Buschmann
Administrative Law Judge

**In the ADR Matter of Kilauea Crushers, Inc. Respondent.
Docket No. CAA-09-2011-0004**

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Prehearing Order and Order Granting Motion for Leave to File First Amended Complaint**, dated August 22, 2012, was sent this day in the following manner to the addressees listed below.



Knolyn R. Jones
Legal Staff Assistant

Original and One Copy by Hand Delivery to:

Sybil Anderson
Headquarters Hearing Clerk
U.S. EPA / Office of Administrative Law Judges
Mail Code 1900L
1200 Pennsylvania Ave., NW
Washington, DC 20460

One Copy by Regular Mail to:

David Kim, Esq.
Assistant Regional Counsel
ORC / U.S. EPA, Region IX
75 Hawthorne Street
San Francisco, CA 94105

One Copy by Regular Mail to:

Patrick J. Paul, Esq.
Christopher P. Colyer, Esq.
One Arizona Center
400 East Van Buren Street, Suite 1900
Phoenix, AZ 85004-2202

**Dated: August 22, 2012
Washington, D.C.**