

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

IN THE MATTER OF:

BASF Corporation,

Respondent.

Docket No. CWA-05-2018-0008

**RESPONDENT BASF CORPORATION'S REPLY IN FURTHER SUPPORT OF
MOTION FOR EXTENSION OF TIME TO FILE THE PREHEARING EXCHANGE**

Respondent BASF Corporation (“BASF”), through its undersigned attorneys Bressler, Amery & Ross, P.C., respectfully submits this reply to its Motion requesting an extension of time for BASF to file its Prehearing Exchange.

Complainant, the United States Environmental Protection Agency (“EPA” or “Complainant”), is now opposing Respondent’s motion despite previously advising the undersigned that it would not object to such a request, as admitted to in paragraph 8 of Complainant’s opposition. In fact, despite Complainant’s current position that three (3) weeks is reasonable for Respondent to be able to prepare and submit its response to Complainant’s Prehearing Exchange, Complainant acknowledged during a previous discussion that three (3) weeks was a relatively tight deadline for Respondent and that Respondent should file a motion for an extension two (2) weeks before the deadline, which EPA would not object to.

The Complainant also incorrectly alleges that Respondent did not contact Complainant before filing the Motion. To the contrary, Respondent sent Complainant an e-mail dated November 14, 2018 at 10:17 a.m. seeking Complainant’s formal consent to a 60-day extension. Not receiving a response, Respondent filed its motion twenty-four (24) hours later on November 15, 2018 at 12:24:49 PM (two weeks before the November 30, 2018 deadline), and truthfully

characterized its communications with Complainant therein. Complainant did not respond to the November 14 e-mail until the morning of November 16, 2018, at which time he indicated that Complainant would oppose the motion, despite his previous communication to the contrary. Complainant's e-mail response did not indicate or provide a basis for Complainant's newly formed objection.

Following receipt of Complainant's objection, the undersigned immediately attempted to contact Complainant via both telephone and e-mail in an effort to discuss and hopefully resolve the issue without having to resort to unnecessary motion practice. Complainant did not respond to the undersigned's requests, except to send an e-mail asking whether BASF would submit a revised motion recognizing Complainant's objection or prefer that Complainant submit an opposition. Respondent responded that Complainant should submit an opposition.

Respondent is also confused by the pronouncements made in Complainant's opposition that Respondent "failed to state to the Court why it could not continue settlement discussions and simultaneously comply with the Prehearing Order of the Court," "failed to state to the Court why it did not already further explore settlement discussions given its recently received information on damages," and "failed to state to the Court it had not schedule[d] further settlement discussions."

Since the filing of the Complaint on July 24, 2018, Respondent has repeatedly requested Complainant's methodology used in calculating the proposed penalty (i.e. "penalty calculation"), and advised Complainant that settlement discussions were dependent upon its receipt and review of said information. Complainant responded on multiple occasions that he would endeavor to provide Respondent with this information as soon as possible and before the November 9, 2018 deadline for Complainant's Prehearing Exchange. However, by e-mail dated October 23, 2018,

Complainant advised that he was unable to provide the penalty information before the formal submission of Complainant's Prehearing Exchange on November 9, 2018.

What Complainant fails to advise the Court is that, despite the above conversations and in addition to the discussions noted in Complainant's Status Report and Preliminary Statement, Respondent requested a conference call with Complainant to discuss settlement and that said call was scheduled for November 2, 2018. However, shortly after the November 2, 2018 call was confirmed, Complainant notified the undersigned by e-mail dated October 31, 2018 that Complainant did not want to have a call until Respondent submitted a "good faith written proposal." Complainant took this position despite knowing full well that Respondent's receipt of the penalty calculation was necessary for Respondent to make any meaningful settlement offer, and that Complainant had not yet provided said penalty calculation to Respondent.

Complainant's penalty calculation and factual basis for same, including voluminous exhibits totaling over 1,200 pages, were not provided until November 9, 2018. In its opposition, Complainant questions why Respondent has not scheduled any further settlement discussions now that it has received the information. However, Respondent's Motion was filed within seven (7) days of receiving Complainant's penalty calculation. *Despite Complainant's "questions" as to why Respondent has not discussed settlement within these seven (7) days, it is worth noting that it took Complainant more than three (3) months from filing its Complaint in July 2018 and one-and-a-half years after serving Respondent with the Notice of Intent to provide Respondent with the basis and reasoning for the penalties being sought in the Complaint.* It is more than reasonable that Respondent needs more than one (1) week to review, digest and evaluate this information before being in a position to make a meaningful settlement offer or schedule discussions. Moreover, at no point did Respondent state that it could not "continue settlement discussions and simultaneously comply with the Prehearing Order of the Court," rather,

Respondent provided this Court with “good cause” why it needed more than three (3) weeks to accomplish both given Complainant’s production and the pending holiday.

Complainant also questions why Respondent cannot submit its Prehearing Exchange within three (3) weeks of receiving Complainant’s voluminous Prehearing Exchange, and why Respondent did not plan on working around the holiday. First, this position is questionable, to say the least, given the previous discussion with Complainant regarding an extension as discussed above. Moreover, it is worth noting again that Complainant had over three (3) months since filing the Complaint to submit its Prehearing Exchange (which is less than the extension requested by Respondent), although it is reasonable to assume that this information was prepared and/or available to Complainant at the time it filed the Complaint against Respondent. Respondent’s need of additional time beyond three (3) weeks to review and prepare a *responsive* Prehearing Exchange is more than reasonable, especially if one of those weeks is the week of Thanksgiving. Respondent has more than provided good cause in support of its request for additional time.

Significantly, Complainant has *not* stated or even alleged that it would be prejudiced by an extension of time for Respondent’s Prehearing Exchange. While Complainant’s absence of prejudice is notable, there is no dispute that Respondent would be prejudiced in its ability to fully prepare and defend against Complainant’s allegations without an extension of time.

Pursuant to 40 C.F.R. §22.7(b), upon good cause shown, the Court may grant Respondent an extension of time for filing its Prehearing Exchange. For the above reasons, BASF states that sufficient good cause exists to grant an extension of time to file the prehearing exchange, and there is no prejudice to Complainant in doing so. However, given Complainant’s newfound objection to BASF’s request, “particularly due to the length of time requested,” and BASF’s continued efforts to resolve this issue amiably, if the Court is not amenable to grant the

requested 60 day extension, BASF respectfully requests that it be given an extension in the amount of time that the Court finds is just and reasonable to allow BASF to (i) continue settlement discussions, and (ii) to review, evaluate, and respond to Complainant's recently received Prehearing Exchange.

DATED: November 19, 2018

Respectfully submitted,

/s/ Yelena S. Ferreira
Yelena S. Ferreira, Esq.
Donald J. Camerson, II, Esq.
BRESSLER, AMERY & ROSS, P.C.
301 Columbia Turnpike, Suite 301
Florham Park, NJ 07932
Phone: (973) 514-1200
Email: yferreira@bressler.com
DJCamerson@bressler.com

Counsel for BASF Corporation

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

IN THE MATTER OF:

BASF Corporation,

Respondent.

Docket No. CWA-05-2018-0008

CERTIFICATE OF SERVICE

I hereby certify that today I filed with the Office of Administrative Law Judge E-Filing System at www.epa.gov/alj, and thus also provided the Presiding Officer Administrative Law Judge Christine Donelian Coughlin a copy of **RESPONDENT BASF CORPORATION'S REPLY IN FURTHER SUPPORT OF MOTION FOR EXTENSION OF TIME TO FILE PREHEARING EXCHANGE.**

I hereby certify that today I also issued to Jeffery M. Trevino, Counsel to Complainant, via e-mail at trevino.jeffery@epa.gov a copy of this **RESPONDENT BASF CORPORATION'S REPLY IN FURTHER SUPPORT OF MOTION FOR EXTENSION OF TIME TO FILE PREHEARING EXCHANGE.**

Dated: November 19, 2018

/s/ Yelena S. Ferreira
Yelena S. Ferreira, Esq.
Donald J. Camerson, II, Esq.
BRESSLER, AMERY & ROSS, P.C.
301 Columbia Turnpike, Suite 301
Florham Park, NJ 07932
Phone: (973) 514-1200
Email: yferreira@bressler.com
DJCamerson@bressler.com

Counsel for BASF Corporation