

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:

C.P. BURDICK & SONS, INC.,

Respondent.

)
)
)
)
)

Docket Nos. CWA-01-2007-0124
EPCRA-01-2007-0125

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 parties are commended for taking the initiative to settle this matter informally and expeditiously through Alternative Dispute Resolution. Although these efforts did not result in a settlement, the parties are encouraged to continue efforts to settle this matter. 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 **May 23, 2008**, and attempt to reach an amicable resolution of this matter. The Complainant shall file a status report regarding settlement on or before **May 30, 2008**. If the case is settled, the Consent Agreement and Final Order signed by the parties should be filed no later than **June 20, 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 a fact witness or an 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 an appropriate city or county in which to conduct the 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. 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 report(s) of the inspection on December 1, 2006, referenced in Paragraphs 15 and 16 of the Complaint, along with any documents, photographs, field notes, site maps, illustrations and/or videos taken or created during the inspection, as relevant to allegations in the Complaint;

(B) a copy of any documents, photographs, and/or maps in support of the allegations in Paragraphs 15, 16, and 19 through 24 of the Complaint;

(C) a copy of the January 23, 2007 Information Request Letter that was sent to Respondent, referenced in Paragraph 25 of the Complaint;

(D) a copy of the letters dated June 1 and June 13, 2007 that were sent to Respondent, and proof that they were received, as referenced in Paragraphs 27 and 29 of the Complaint;

(E) a copy of any documents in support of the allegations in Paragraph 30 of the Complaint, and a detailed narrative response to Respondent's assertion in its Answer that it "responded verbally to all EPA requests for information";

(F) a copy of any documents in support of the allegations in Paragraphs 43 of the Complaint;

(G) a statement of the number of violations and number of days of violation alleged in Count 1 of the Complaint, and a detailed narrative statement discussing all penalty assessment factors set forth in Section 311(b)(8) of the CWA and all factual information that

Complainant considers relevant to those factors in assessing a penalty against Respondent for Count 1, with a copy of any documents in support;

(H) a statement of the number of days of violation alleged in Count 2 of the Complaint, and a detailed narrative statement discussing all penalty assessment factors set forth in Section 309(g) of the CWA, and all factual information that Complainant considers relevant to those factors in assessing a penalty against Respondent for Count 2, with a copy of any documents in support;

(I) a statement of the number of violations and number of days of violation alleged in Count 3 of the Complaint, and a detailed narrative statement discussing all applicable penalty assessment factors, and all factual information that Complainant considers relevant to those factors, in assessing a penalty against Respondent for Count 3, with a copy of any documents in support;

(J) a copy of any and all penalty policies and/or guidance documents that Complainant intends to consider in calculating the proposed penalties in this case; and

(K) a statement regarding whether the Paper Work Reduction 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:

(A) a detailed narrative statement explaining the factual and/or legal bases for Respondent's assertion that "The criteria for implementing SPCC plans were not met at either property," and a copy of any documents in support;

(B) a copy of any and all EPCRA Tier II inventory forms which Respondent filed to date, and a statement and/or documents showing each person or entity to which each form was addressed and the date and method (first class mail, FedEx, etc.) that each form was submitted;

(C) if Respondent takes the position that Respondent is unable to pay the proposed penalty, a copy of any and all documents to rely upon in support of such position; and

(D) if Respondent takes the position that the proposed 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.

4. Complainant shall submit as part of its Rebuttal Prehearing Exchange:

(A) a statement of the penalties Complainant proposes to assess for Counts 1, 2, and 3, and a detailed narrative statement explaining how each penalty was calculated in accordance with relevant penalty assessment criteria; and

(B) a statement and/or any documents in response to Respondent's Prehearing Exchange submittals as to provisions 3(A) through 3(D) above.

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

- | | | |
|----------------------|---|---|
| June 20, 2008 | - | Complainant's Initial Prehearing Exchange |
| July 11, 2008 | - | Respondent's Prehearing Exchange, including any direct and/or rebuttal evidence |
| July 25, 2008 | - | 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.**

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.

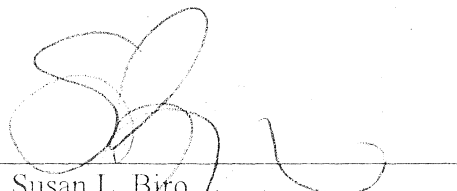
If any party wishes to receive, by e-mail or by facsimile, an expedited courtesy copy of decisions and substantive orders issued in this proceeding, the party shall submit a request for expedited courtesy copies by letter addressed to Maria Whiting-Beale, Legal Staff Assistant, Office of Administrative 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 will 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.**



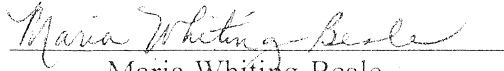
Susan L. Biro
Chief Administrative Law Judge

Dated: May 13, 2008
Washington, D.C.

In the Matter of C.P. Burdick & Son, Inc., Respondent
Docket Nos. CWA-01-2007-0124 & EPCRA-01-2007-0125

CERTIFICATE OF SERVICE

I certify that the foregoing **Prehearing Order**, dated May 13, 2008, was sent this day in the following manner to the addressees listed below.



Maria Whiting-Beale
Staff Assistant

Dated: May 13, 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:

Tonia Bandrowicz, Esquire
Enforcement Counsel (SES)
U.S. EPA
One Congress Steet, Suite 1100
Boston, MA 02114-2023

Copy By Regular Mail To:

Charles P. Burdick, President
C.P. Burdick & Son, Inc.
108 Main Street
P.O. Box 667
Ivoryton, CT 06442