



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

In the Matter of:)
)
McCook Cold Storage Corporation,) **Docket No. EPCRA-05-2012-0005**
)
Respondent.)

PREHEARING ORDER

As you have been previously notified, I am designated to preside over the above-captioned matter. This proceeding will be 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 through 22.45 (“Rules of Practice”). The parties are advised to familiarize themselves with the applicable statute(s) and regulations cited in the Complaint, and the Rules of Practice. An informal Practice Manual, a Citizens’ Guide to proceedings before the EPA Office of Administrative Law Judges, and significant decisions issued by the Office are accessible on the internet at: <http://www.epa.gov/oalj>.

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. If the parties are currently pursuing settlement negotiations, they 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. Each party should also realistically consider the risk of not prevailing in the proceeding despite such expenditures. While a negotiated settlement allows the parties to control the outcome of the proceeding, a judicial decision eliminates that control. Complainant shall file Status Reports regarding the status of settlement, without mentioning any specific terms, on or before **April 27, 2012, May 18, 2012, and June 8, 2012**. If the case is settled, a fully-executed Consent Agreement and Final Order shall be filed no later than **June 22, 2012**, and a copy shall be submitted to the office of the undersigned.

Should a Consent Agreement and Final Order not be finalized on or before the deadline set forth above, the parties shall prepare for hearing and strictly comply with the prehearing requirements of this Order, as set forth below.

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

1. Each party shall file with the Regional Hearing Clerk, serve on the opposing party, and serve on the Presiding Judge:
 - (A) a list of the names of all witnesses it intends to call at the hearing, identifying each as a fact witness or an expert witness, a brief narrative summary of each witness's expected testimony, and a curriculum vitae or resume for each expert witness; or a statement that no witnesses will be called;
 - (B) a copy of each document and exhibit it intends to introduce into evidence, 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 including an estimate of the time needed to present its direct case, and an explanation as to which location is the most appropriate place to hold the hearing. See Sections 22.21(d) and 22.19(d) of the Rules of Practice. Also, state whether interpretation or translation services are necessary in regard to the testimony of any witness(es), and, if so, state the language to be translated.
2. In addition, Complainant shall submit the following as part of its Initial Prehearing Exchange:
 - (A) a brief narrative statement, and a copy of any supporting documents, explaining in detail the factual bases for the allegations in Paragraphs 10, 12, 40, 43, 46, 49, 52, 55, 58, 61, and 64 of the Complaint, to the extent the allegations therein are denied in Respondent's Answer;
 - (B) a narrative statement explaining in detail how the proposed penalty was calculated, including a discussion of each factor referred to in Paragraph 104 of the Complaint; and
 - (C) a copy or URL of any EPA policy or guidance document upon which Complainant has relied, or intends to rely, in determining the proposed penalty.
3. In addition, Respondent shall submit the following as part of its Prehearing Exchange, *except for the motion referenced in (E) below, which, if made, shall be separately filed and served as a motion in accordance with 40 C.F.R. §§ 22.5 and 22.16:*
 - (A) a copy of any documents in support of the denials and factual assertions made in Paragraphs 30-31, 40, 43, 46, 49, 52, 55, 58, 61, and 64 of the Answer;

(B) a detailed explanation and a copy of any documents in support of any affirmative defenses in the Answer;

(C) all factual information and supporting documentation Respondent considers relevant to the assessment and calculation of a penalty;

(D) if Respondent takes the position that the proposed penalty should be mitigated or eliminated because of any consideration, such as an inability to pay, a detailed narrative statement explaining the precise factual and legal bases for its position and a copy of any and all documents upon which it intends to rely in support of such position;

(E) if Respondent intends to move for judgment as a matter of law, as it suggests in Paragraph 104 of the Answer, it shall file a motion for accelerated decision, including detailed legal arguments and a copy of any supporting documents.

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

(A) a statement and/or any documents in response to Respondent's Prehearing Exchange 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 22, 2012	Complainant's Initial Prehearing Exchange
July 13, 2012	Respondent's Prehearing Exchange
July 27, 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 should thoughtfully prepare its prehearing exchange.

Supplement to Prehearing Exchange. Any addition of a proposed witness or exhibit to the prehearing exchange shall be filed with an accompanying motion to supplement the prehearing exchange.

Default and Opportunity for a Hearing. The Complaint in this matter gave Respondent notice and opportunity for a hearing, in accordance with Section 554 of the Administrative Procedure Act, 5 U.S.C. § 554 ("APA"). Respondent's Answer to the Complaint contains a request for 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, Respondent has the right to defend against Complainant's charges by way of direct evidence, rebuttal evidence or through cross-examination of Complainant's witnesses. Respondent is entitled to elect any or all three means to pursue its defenses. If Respondent intends to elect only to conduct cross-examination of Complainant's witnesses and to forego the presentation of direct and/or rebuttal evidence, Respondent shall serve a statement to that effect on or before the date for filing its prehearing exchange.

Respondent is hereby notified that a 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 Complainant's witnesses can result in the entry of a default judgment against it. 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 Regional Hearing Clerk of a fully-executed Consent Agreement and Final Order, or an order of the judge, excuses noncompliance with filing deadlines.

Filing and Service. A document is "filed" when the Regional Hearing Clerk receives it. A document is "served" upon mailing or when placed in the custody of a reliable commercial delivery service. The parties are encouraged to send a courtesy copy to the Office of Administrative Law Judges by facsimile or email, in addition to the mailed hard copy, as physical mail delivery is often subject to significant delay. The facsimile number for the Office of Administrative Law Judges is (202) 565-0044, and the email address is oaljfilng@epa.gov. A signed certificate of service must be attached to all filed documents.

Any document sent to the undersigned in this proceeding shall be addressed as follows:

If sent by the U.S. Postal Service (USPS):

The Honorable Susan L. Biro, Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W., Mail Code 1900L
Washington, DC 20460

If hand-delivered or sent by a non-USPS delivery service, such as Federal Express or UPS, that x-rays their packages as part of its routine security procedures:

The Honorable Susan L. Biro, Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1099 14th Street, N.W., Suite 350
Washington, DC 20005

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

Contact Information. Telephone contact may be made with my legal assistant, Maria Whiting-Beale, at (202) 564-6259 to ask whether a document has been received or issued. Email or telephone contact may be made with my staff attorney, Adrienne Fortin, at (202) 564-7862 or fortin.adrienne@epa.gov, for procedural questions.

Courtesy Copies. If any party wishes to receive, by e-mail or facsimile, an expedited courtesy copy of decisions and substantive orders issued in this proceeding, the party shall submit a request for such copies by letter addressed to Maria Whiting-Beale at one of the addresses above. The letter shall include the case docket number, the party's e-mail address or facsimile number, and a statement as to whether the party requests expedited courtesy copies of (a) the initial decision and/or any orders on motion for accelerated decision or dismissal, or (b) 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.

Motions. Prior to filing any motion, the moving party must contact the non-moving party to determine whether the non-moving party has any objection to the granting of the relief sought in the motion, and the motion shall state the position of the non-moving party. The mere consent of the non-moving party to the relief sought does not assure that the motion will be granted. All motions must be submitted in sufficient time to permit the filing of a response by the non-moving party and/or 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 allow a 15-day response period for motions, with an additional 5 days added thereto if the motion is served by mail. Motions not filed in a timely manner may not be considered. **If any 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 30 days after the due date for Complainant's Rebuttal Prehearing Exchange.**

Oral Argument. Pursuant to 40 C.F.R. § 22.16(d), a party may submit a written request for oral argument upon filing a motion, a response to a motion, or a reply. The requesting party shall propose an appropriate location for the argument. The Office of Administrative Law Judges has access to videoconferencing technology, 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.

SO ORDERED.



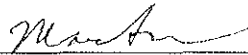
Susan L. Biro
Chief Administrative Law Judge

Dated: April 9, 2012
Washington, D.C.

**In the Matter of *McCook Cold Storage Corporation*, Respondent.
Docket No. EPCRA-05-2012-0005**

CERTIFICATE OF SERVICE

I hereby certify that true copies of this **Prehearing Order**, issued by Susan Biro, Chief Administrative Law Judge, in Docket No. EPCRA-05-2012-0005, were sent to the following parties on this 9th day of April 2012, in the manner indicated:



Mary Angeles
Legal Staff Assistant

Original and One Copy by Regular Mail to:

LaDawn Whitehead
Regional Hearing Clerk
U.S. EPA, Region V, MC-E-19J
77 West Jackson Blvd.,
Chicago, IL 60604-3590

Copy by Regular Mail to:

Cathleen R. Martwick, Esq.
Associate Regional Counsel
U.S. EPA, Region V, C-14J
77 W. Jackson Blvd.
Chicago, IL 60622

Copy by Regular Mail to:

Lloyd M. Sonenthal, LTD
Attorneys at Law
Three First National Plaza
70 West Madison Street, Suite 400
Chicago, IL 60602

**Dated: April 9, 2012
Washington, DC**