



**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

In the Matter of:

Cindy Draher,

Respondent.

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Docket No. TSCA-05-2012-0001

PREHEARING ORDER

This proceeding 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 through 22.45 (“Rules of Practice” or “Rules”). The Rules of Practice, an informal Practice Manual, and significant decisions issued by the EPA Office of Administrative Law Judges may be found on the Office’s Website at <http://www.epa.gov/oalj>. There you can also find a Citizen’s Guide that serves as an informal overview and guide to proceedings before the Office. The parties are strongly advised to familiarize themselves with these materials.

This action arises from Section 16(a) of the Toxic Substances Control Act (“TSCA”), 15 U.S.C. § 2615(a). The Director of the Land and Chemicals Division of United States Environmental Protection Agency Region 5 (“EPA” or “Complainant”) initiated this proceeding on October 28, 2011, by filing a Complaint against Ms. Cindy Draher (“Ms. Draher” or “Respondent”). Complainant alleges that Respondent is liable for thirty violations of the lead-based paint disclosure rules codified at 40 C.F.R. § 745.113(b).

EPA policy strongly supports settlement. In a previous order, the undersigned directed the parties to hold a settlement conference on or before **January 20, 2012**. The parties are reminded that pursuing this matter through a hearing will require a significant amount of time and money. Each party should realistically consider the risk of not prevailing in the proceeding, despite such expenditures. With these considerations in mind, the parties are directed to hold a settlement conference as previously ordered, to attempt to reach an amicable resolution of this matter. Complainant shall file a status report regarding the conference and the status of settlement on or before **January 27, 2012**. If the case is settled, Complainant shall file a fully-executed Consent Agreement and Final Order no later than **February 17, 2012**.

If a Consent Agreement and Final Order is not finalized on or before the deadline set forth above, the parties shall prepare for the hearing and strictly comply with the instructions in

this Order.

Prehearing Exchange. This Order is issued pursuant to Rule 22.19(a). Each party must prepare and submit a “Prehearing Exchange” of information. The Prehearing Exchange must contain the information listed below. The purpose of the Prehearing Exchange is to ensure that the parties know what issues are being contested, and can prepare to address those issues at the hearing. At the hearing, a party may not present any information that it did not include in its Prehearing Exchange.

1. Each party’s Prehearing Exchange must include the following:

(A) a list of the names of any witnesses the party intends to call at the hearing, or a statement that no witnesses will be called. The list of witnesses must identify each witness as a fact witness or an expert witness, include a brief narrative summary of their expected testimony, and be accompanied by a curriculum vitae or resume for each expert witness.

(B) copies of all documents, records, and other exhibits the party intends to introduce into evidence. Each document, record, or other exhibit must be identified as “Complainant’s,” or “Respondent’s” exhibit, as appropriate, and be numbered with Arabic numerals (e.g., CX 1 or RX 1).

(C) a statement indicating where the party wants the hearing to be held, and how long the party will need to present its case. See Rules 22.21(d), 22.19(d). The statement should also indicate whether translation services will be necessary in regard to the testimony of any witness(es), and, if so, state the language to be translated.

2. In addition, Complainant must 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 and/or legal bases for the allegations in Paragraphs 29, 32–36, 39, 42, 45–48, 51–53, 56, 59, 62, 65–67, 70–72, 75, 78, and 81–84 of the Complaint;

(B) a copy of the documents referred to in Paragraphs 19, 22, and 23 of the Complaint;

(C) a copy of the leases referred to in Paragraph 24 of the Complaint;

(D) a copy of any reports, notes, or other pertinent documentation produced as a result of the inspection referred to in Paragraph 21 of the Complaint; and

(E) all factual information and supporting documentation relevant to the assessment of the penalty, a detailed narrative explanation of the proposed penalty addressing relevant

penalty factors, and a copy, or a statement of the internet address (URL), of any policy or guidance relied on by Complainant in calculating the proposed penalty, or intended to be relied on if that penalty is adjusted.

3. In addition, Respondent must include the following as part of her Prehearing Exchange:

(A) a narrative statement describing any defenses against the allegations;

(B) any documents or other evidence available to support those defenses; and

(C) if Respondent intends to argue that the proposed penalty should be reduced or eliminated for any reason, such as an inability to pay the penalty, she should include a statement explaining why the penalty should be reduced or eliminated. The statement should be accompanied by a copy of any and all documents supporting Respondent's argument.

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) and 3(C) above.

The parties must file their Prehearing Exchanges with the Regional Hearing Clerk by the following dates:

Complainant's Initial Prehearing Exchange: **February 17, 2012**

Respondent's Prehearing Exchange: **March 9, 2012**

Complainant's Rebuttal Prehearing Exchange: **March 23, 2012**

Each party must also serve a copy of its Prehearing Exchange on the opposing party, and on the undersigned Administrative Law Judge. The hearing will be scheduled after all of the Prehearing Exchanges have been filed.

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 et seq (“APA”). Respondent has 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, 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 her defenses. If Respondent intends to only cross-examine Complainant’s witnesses and to forgo the presentation of direct and/or rebuttal evidence, Respondent shall serve a statement to that effect on or before the date for filing her Prehearing Exchange.

Respondent is hereby notified that if she does not comply with the prehearing exchange instructions set forth in this Order, a default judgment may be entered against her. Complainant is notified that 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.

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 of each document 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 oaljfiling@epa.gov. A signed certificate of service must be attached to all filed documents.

Prehearing Exchanges and other documents must be filed with the Regional Hearing Clerk by mailing them to:

Regional Hearing Clerk (E-19J)
U.S. EPA, Region 5
77 W. Jackson Boulevard
Chicago, IL 60604-3590

In addition, a copy shall be sent to the undersigned Administrative Law Judge, 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 its 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, Ed Kulschinsky, Esq., at (202) 564-4133 (kulschinsky.edward@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 other party or parties to determine whether the other party has any objection to the granting of the relief sought in the

motion, and the motion shall 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.

Furthermore, all motions must be submitted in sufficient time to permit the filing of a response by the other 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.**

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



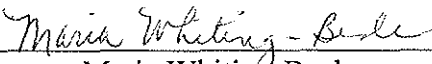
Susan L. Biro
Chief Administrative Law Judge

Dated: January 11, 2012
Washington, D.C.

In the Matter of Cindy Draher, Respondent
Docket No.TSCA-05-2012-0001

CERTIFICATE OF SERVICE

I certify that the foregoing **Prehearing Order**, dated January 11, 2012, was sent this day in the following manner to the addressees listed below.



Maria Whiting-Beale
Staff Assistant

Dated: January 11, 2012

Original And One Copy By Regular Mail To:

La Dawn Whitehead
Regional Hearing Clerk
U.S. EPA
77 West Jackson Boulevard, E-19J
Chicago, IL 60604-3590

Copy By Regular Mail To:

Jeffrey Trevino, Esquire
Associate Regional Counsel
U.S. EPA
77 West Jackson Boulevard, C-14J
Chicago, IL 60604-3590

Archie W. Skidmore, Esquire
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