

11/13/95

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)	
)	Docket Nos:
CITY OF INDEPENDENCE, MISSOURI)	RCRA VII-93-H-0001
)	and
Respondent)	CWA VII-93-W-0001

ORDER GRANTING COMPLAINANT'S MOTION TO FILE A
SUPPLEMENTAL PREHEARING EXCHANGE
and
DENYING RESPONDENT'S MOTION FOR ACCELERATED DECISION

Procedural Background

This proceeding commenced with the filing of a Complaint by Region 7 of the United States Environmental Protection Agency (the "Complainant" or the "Region") on the City of Independence, Missouri (the "Respondent" or the "City") on August 16, 1993. The Complaint charges the Respondent with a series of violations of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §6901 et seq, and the Clean Water Act ("CWA"), 33 U.S.C. §1251 et seq, with respect to its management of hazardous wastes and discharge of pollutants at Respondent's Rock Creek Waste Treatment Facilities, a publicly treatment works ("POTW"). The Complaint seeks imposition of a Compliance Order and assessment of a total civil penalty of \$423,683 against Respondent.

The Respondent served its Answer on September 16, 1993. Respondent denied the material allegations of the Complaint and raised nineteen defenses to the charges. Respondent thus denied liability for the violations and requested a hearing.

Administrative Law Judge Jon G. Lotis was designated Presiding Officer, and issued an Order Setting Prehearing Procedures on September 28, 1993. After several extensions duly granted, the parties filed extensive Prehearing Exchanges pursuant to the prehearing order and the EPA Rules of Practice, 40 C.F.R. §22.19, on or about September 19, 1994. The parties filed replies to the Prehearing Exchanges were filed on or about October 11, 1994.

The undersigned was redesignated as the Administrative Law Judge to preside in this proceeding on September 18, 1995. On September 19, 1995 I issued an order scheduling the hearing in this proceeding to be held on December 5-8, 1995 in Independence or Kansas City, Missouri.

Complainant's Motion to File a Supplemental Prehearing Exchange

On October 18, 1995, Complainant filed a Motion for Leave to File a Supplemental Prehearing Exchange. Complainant seeks leave to add up to three additional witnesses, and to expand the area of the intended testimony of another witness previously identified in its Prehearing Exchange.

On November 1, 1995, Respondent filed an Opposition to Complainant's motion. Respondent contends that Complainant provided no reason why it waited over a year since the filing of the Prehearing Exchanges to propose additional witnesses and testimony.

Although Respondent protests Complainant's delay in naming these additional witnesses, it makes absolutely no showing of any prejudice. It is not at all inappropriate for a party to make modifications or additions to its witness list and Prehearing Exchange as the hearing date draws near, provided the opposing party has adequate notice and is not prejudiced. That is the case here. The additional witnesses and testimony are all within the issues raised in the prior pleadings and Prehearing Exchanges. There is no prejudice to Respondent in being presented with the supplemental material over a month and a half before the hearing.

Accordingly, Respondent's Motion for Leave to File a Supplemental Prehearing Exchange is granted, and the Supplement to the Prehearing Exchange is received as such.

Respondent's Motion for Accelerated Decision

Respondent filed a Motion for an Accelerated Decision on Liability on November 3, 1995, received in the Office of Administrative Law Judges on the afternoon of November 6, 1995. The motion cites several grounds and is accompanied by a 40-page memorandum in support, exhibits, and affidavits. Complainant has not yet responded to Respondent's motion.

Respondent's Motion for an Accelerated Decision is untimely and is therefore denied at this time. It is inappropriate for a party to wait over a year before filing a motion for accelerated decision less than a month before the scheduled start of the hearing. There simply is not sufficient time for the Complainant to respond and for the presiding officer to rule on Respondent's motion before the hearing.

There is no conceivable excuse for waiting until shortly before the hearing to file a motion such as this for accelerated decision. The motion raises potential legal issues that have not changed, and that could and should have been addressed earlier, when there was adequate time to respond and consider them. This is unlike Complainant's motion to supplement its Prehearing Exchange,

in which it is alleged that it has discovered additional witnesses since the earlier filing. Discovery is a continuing process, and it could well be expected that parties will make changes in their proposed evidence during the passage of time between the original exchange and the hearing. But this consideration does not apply to a motion for accelerated decision that comes long after the parties have submitted extensive Prehearing Exchanges indicative of preparation for the hearing, and on the eve of the hearing.

Therefore, Complainant need not respond to Respondent's Motion for Accelerated Decision on Liability, and I will not address its merits at this time. By this order, it is denied as untimely.

As in any other hearing, the parties are encouraged to discuss possible resolution or narrowing of the issues, as well as distinguishing legal from factual issues, that may result in at least shortening the hearing. The issues raised in Respondent's Motion for Accelerated Decision will be resolved by means of the evidentiary hearing process.

Barring any agreement by both parties, the hearing will begin as scheduled on December 5, 1995 in Independence or Kansas City, Missouri, and continue on the ensuing days until completed. The parties will be notified shortly of the exact time and location of the hearing.



Andrew S. Pearlstein
Administrative Law Judge

Dated: November 13, 1995
Washington, D.C.

IN THE MATTER OF CITY OF INDEPENENCE, MO, Respondent.
Docket Nos. RCRA VII-93-H-0001 and CWA VII-93-W-0001

CERTIFICATE OF SERVICE

I certify that the foregoing Order Granting Complainant's Motion for Leave to File a Supplemental Prehearing Exchange and Denying Respondent's Motion for Accelerated Decision, dated November 13, 1995, was sent in the following manner to the addressees listed below:

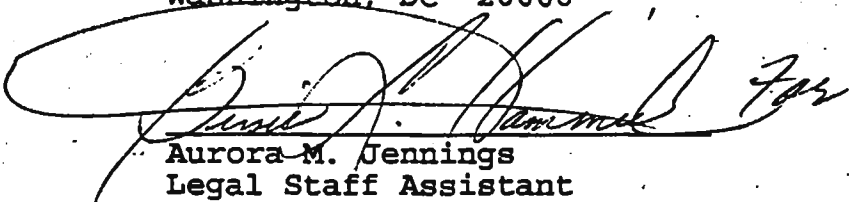
Fax and Original by Pouch Mail to: Venessa R. Cobbs
Regional Hearing Clerk
U.S. EPA, Region 7
726 Minn. Ave.
Kansas City, MO 66101

Fax and Copy by Certified Mail,
Return Receipt Requested to:

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Dated: November 13, 1995
Washington, DC