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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY BEFORE THE ADMINISTRATOR

In the Matter of)		
Ri dgewood Provi dence)	Docket Nos.	RCRA- I - 98-
1031			
Power Partners)		CWA-2-I-98
1030			
)		
Respondent)		

ORDER DENYING MOTION FOR SIMULTANEOUS PREHEARING EXCHANGE

The Region 1 Office of the United States Department of Environmental Protection (the "Region" or "Complainant") has filed a motion seeking an order requiring the parties to submit their prehearing exchanges of proposed evidence simultaneously, rather than consecutively. The Region has apparently observed that it has been the practice of the undersigned Administrative Law Judge ("ALJ"), as well as that of some other ALJ's, to require staggered prehearing exchanges, rather than simultaneous exchanges, pursuant to the EPA Rules of Practice, at 40 CFR §22.19(b).

I have generally required staggered prehearing exchanges in order to maintain consistency with the parties' respective burdens of proof and persuasion under the Administrative Procedure Act, 5 U.S.C. §556(d) and the EPA's Rules, 40 CFR

§22.24. (1) The latter rule imposes on the complainant "the burden of going forward with and of proving that the violation occurred a set forth in the complaint, and that the proposed civil penalty . . . is appropriate. Following the establishment of a prima facie case, respondent shall have the burden of presenting and of going forward with any defense to the allegations set forth in the complaint." (Italics added). The scheduling of consecutive prehearing exchanges follows the statutory burdens of going forward and order of presentation of evidence required at the hearing itself. This fosters a more efficient procedure as the respondent can limit its evidence to the issues raised by the complainant's evidence.

The scheduling of consecutive exchanges is not designed to allow the respondent more time to gather evidence or to complete its exchange, as surmised by the Region. The schedule as a whole is intended to provide more than adequate time for both parties to file their initial prehearing exchanges, and to supplement their exchanges. The purpose of staggering the initial exchange is to allow the respondent to respond to the complainant's evidence in an orderly fashion, as envisioned by the Administrative Procedure Act and the EPA's procedural rules.

In this case, the Region has pointed out that the parties have engaged in extensive settlement discussions and alternative dispute resolution. They are already fully familiar with each other's potential evidence and have had ample time to prepare their cases. While these circumstances might warrant accelerating the entire prehearing exchange process and scheduling an early hearing, they do not warrant varying from the practice of scheduling consecutive prehearing exchanges. Any evidence relating to settlement is inadmissible at hearing pursuant to the Federal Rules of Evidence, Rule 408, and 40 CFR §22.22(a). Moreover, whatever took place during settlement negotiations need not have any relation to the litigation strategies pursued by either party. The hearing process is just now beginning, and the Complainant is free to produce whatever evidence it deems appropriate, regardless of what took place during prior negotiations. Nothing that took place previously between the parties can alter the parties' respective burdens of going forward and burdens of proof at the hearing.

<u>Order</u>

The Complainant's motion for scheduling simultaneous prehearing exchanges is denied. A prehearing order requiring staggered prehearing exchanges will be issued separately, accompanying this order.

Andrew S. Pearlstein Administrative Law Judge

Dated: April 27, 1999 Washington, D.C.

1. I generally depart from this practice and require simultaneous exchanges only when the parties have reported that they have reached a settlement in principle. When the parties have thus shifted from primarily a litigation posture to a settlement posture, requiring simultaneous exchanges eliminates any disparate pressure on the parties to finalize the settlement.

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