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8 UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
9 REGION IX

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11 In the Matter of:) Docket No. TSCA-09-2018-0007
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McNamara Realty,
Respondent.

MOTION FOR EXTENSION OF TIME
AND REVISION OF PREHEARING
EXCHANGE SCHEDULE

16 This civil administrative action was first commenced by the United States Environmental
17 Protection Agency, Region IX (“EPA” or “Complainant”) by filing a Complaint and Notice of
18 Opportunity of Hearing on September 24, 2018 (the “Complaint”). The Complaint cited 142
19 violations of Section 409 of TSCA by McNamara Realty (“Respondent”) for failing to comply
20 with Section 1018 and federal regulations promulgated to implement Section 1018 at 40 C.F.R.
21 Part 745, Subpart F. Respondent filed an Answer dated October 23, 2018. A Prehearing Order
22 in this matter was issued by Administrative Law Judge Christine Donelian Coughlin on
23 November 1, 2018. Complainant sought to amend its Complaint by submitting a Motion
24 Seeking Leave to File Amended Complaint and the First Amended Complaint on November 27,
25 2018. On November 28, 2018, Judge Coughlin issued an Order on Complainant’s Motion
26 Seeking Leave to File Amended Complaint in which she granted the Motion, and on November
27 30, 2018 Complainant filed the First Amended Complaint and served it upon Respondent. Judge
28

1 Coughlin's Order from November 28, 2018 also indicated that Respondent would have 20 days
2 to file an Amended Answer from the date of being served with the First Amended Complaint.

3 Pursuant to the Prehearing Exchange Schedule set forth in the Prehearing Order,
4 Complainant's Initial Prehearing Exchange is due December 14, 2018, Respondent's Prehearing
5 Exchange is due January 11, 2019, and Complainant's Rebuttal Prehearing Exchange is due
6 January 25, 2019. Complainant seeks to have this schedule amended to reflect the fact that the
7 initial Complaint has since been amended via the First Amended Complaint and that
8 Respondent's Amended Answer has not yet been submitted – indeed, it is not due until
9 December 19th, several days after the due date for Complainant's Initial Prehearing Exchange.
10 Complainant seeks to have the Prehearing Exchange Schedule set forth in the Prehearing Order
11 revised to take into account the resetting of the clock incurred by the filing of the First Amended
12 Complaint and the eventual filing of the Amended Answer, and to provide sufficient time to
13 Complainant to prepare Complainant's Initial Prehearing Exchange once it has received the
14 Amended Answer. Complainant believes an extension of time of at least 20 days to each of the
15 pleading due dates in the Prehearing Exchange Schedule would be appropriate given the
16 circumstances, though perhaps a slightly longer extension of time (30 days?) may be beneficial to
17 avoid issues raised by the seasonal holidays (*e.g.*, the limited availability of witnesses and
18 counsel during this traditionally busy time period).

19 The Presiding Officer may grant an extension of time to file an answer upon filing of a
20 timely motion, a showing of good cause, and after consideration of prejudice to other parties to
21 the action. 40 C.F.R. §§ 22.7(b) and 22.16. This motion satisfies these criteria.

22 This motion is timely, having been filed immediately after Judge Coughlin's issuance of
23 an Order granting Complainant's Motion Seeking Leave to File Amended Complaint and the
24 filing of the First Amended Complaint itself. This motion is also being made several weeks
25 before the due date for Complainant's Initial Prehearing Exchange.

26 This motion also complies with the "good cause" requirement of 40 C.F.R. § 22.7(b).
27 Respondent's Answer addresses the allegations in Complainant's initial Complaint by paragraph
28 numbers. Because the Complaint contained 142 identified violations at 25 properties, this

1 inherently triggered a certain level of complexity in Respondent’s responses. For example, in
2 Paragraph 13 of Respondent’s Answer, Respondent states that it “denies the allegations
3 contained [sic] 50 through 52, 54 through 56, 58 through 60, 62 through 64, 66 through 68, 70
4 through 72, and 74 through 76....” Because the allegations and paragraph numbers have changed
5 significantly in Complainant’s First Amended Complainant, the paragraph references to be made
6 in Respondent’s Amended Answer will also need to be revised dramatically. Among other
7 items, the Prehearing Order requires Complainant’s Initial Prehearing Exchange to address “in
8 detail the factual and/or legal bases for the allegations denied or otherwise not admitted in
9 Respondent’s Answer.” Doing so could be immensely challenging and potentially confusing to
10 all involved given that Respondent’s responses were made in relation to a Complaint that has
11 subsequently been replaced, and Respondent’s Amended Answer would have paragraph
12 references that would match either the Complaint or Amended Complaint but not both. And then
13 Respondent’s Prehearing Exchange would either sync with Respondent’s Initial Prehearing
14 Exchange or its own Amended Answer but not both. Complainant’s filing of the First Amended
15 Complaint was done in part to streamline the matter and reduce some of the complexity inherent
16 in this case, but choosing not to revise the Prehearing Exchange Schedule would defeat this
17 purpose and have the opposite effect. Moreover, it is entirely possible that Respondent will seize
18 the opportunity provided by the Amended Answer to submit new or different responses and
19 arguments that would be missed by Complainant’s Initial Prehearing Exchange. (Such
20 differences might theoretically be able to be captured in Complainant’s Rebuttal Prehearing
21 Exchange, but the Prehearing Order specifically indicates that the scope of this Exchange is
22 meant to address the facts and legal issues raised by Respondent’s Prehearing Exchange and
23 nothing more.) The avoidance of unnecessary complexity and obfuscation provides ample “good
24 cause” to simply revise the Prehearing Exchange Schedule. No other extensions are expected at
25 this time.

26 Finally, granting of this motion will not prejudice or present an undue hardship to
27 Respondent. This motion does not propose to increase the number of alleged violations or
28 otherwise increase the penalty amount. If the Prehearing Exchange Schedule were to be

1 amended evenly, then Respondent would be no worse off than under the prior schedule. If
2 anything, Respondent would be in a better situation by not being subject to two overlapping
3 deadlines for the filing of its Amended Answer (due December 19, 2018 under the prior
4 schedule) and the filing of Respondent's Prehearing Exchange (due January 11, 2019 under the
5 prior schedule, but having the clock start on its time with the filing of Complainant's Initial
6 Prehearing Exchange on December 14, 2018). In addition, this requested revision of the
7 Prehearing Exchange Schedule would have the ancillary benefit of allowing the parties to
8 continue actively engaging in productive settlement discussions in parallel with their prehearing
9 preparations. (This opportunity is particularly relevant in atypical situations such as this one
10 where the traditional option of alternative dispute resolution prior to the prehearing exchange
11 stage is no longer available, given that historically many cases would be resolved precisely
12 during or as a result of this option.) It is Complainant's policy to encourage settlement and avoid
13 litigation when consistent with the provisions and objectives of the law at issue, and a revision of
14 the Prehearing Exchange Schedule would facilitate the process by which the settlement
15 discussions could progress to a sought-after resolution.

16 For the reasons set forth herein, the Complaint moves the Administrative Law Judge to
17 grant Complainant's Motion for Extension of Time and Revision to Prehearing Exchange
18 Schedule and to revise the Prehearing Order's Prehearing Exchange Schedule by pushing back all
19 the due dates therein at least 20 days.

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23 11/30/18
24 Date

Respectfully submitted,



Edgar P. Coral
Assistant Regional Counsel
U.S. EPA, Region IX

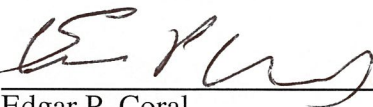
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CERTIFICATE OF SERVICE

I hereby certify that the original and a copy of the foregoing Motion for Extension of Time and Revision to Prehearing Exchange Schedule was filed with the Headquarters Hearing Clerk and Judge Coughlin via the Office of Administrative Law Judge's E-filing system and by email and First Class Mail to Respondent's counsel at:

Jeffry Radding, Esq.
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1035 Walnut Street
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11/30/18
Date


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Office of Regional Counsel
U.S. EPA, Region IX