



UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

In the Matter of: )  
 )  
Birds Eye Foods, Inc., ) Docket Nos. MM-05-2018-0002  
 ) CERCLA-05-2018-0005  
 ) EPCRA-05-2018-0009  
 )  
Respondent. )

**PREHEARING ORDER**

As you have been previously notified, I am designated to preside over this proceeding. 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 to 22.45 (“Rules of Practice” or “Rules”). The parties are advised to familiarize themselves with the applicable statute(s) and the Rules of Practice. An informal Practice Manual, Citizen’s Guide to proceedings before the Office of Administrative Law Judges (“OALJ”), and significant decisions issued by the Administrative Law Judges are accessible on the OALJ’s website at [www.epa.gov/alj](http://www.epa.gov/alj).

**Settlement.** U.S. Environmental Protection Agency (“Agency” or “EPA”) policy strongly supports settlement without the necessity of a formal proceeding, and the procedures regarding settlements are set forth in Section 22.18 of the Rules of Practice, 40 C.F.R. § 22.18. The benefits of a negotiated settlement may far outweigh the uncertainty, time, and expense associated with a litigated proceeding. With these considerations in mind, the parties are directed to engage in a settlement conference on or before **August 3, 2018**, and to attempt to reach an amicable resolution of this matter. Without mentioning any specific terms of settlement, Complainant shall file a Status Report regarding this conference and the status of settlement, on or before **August 10, 2018**. If the case is settled, a fully-executed Consent Agreement and Final Order shall be filed with the Regional Hearing Clerk no later than **August 31, 2018**, and a courtesy copy submitted to the undersigned.

Should a Consent Agreement not be finalized on or before August 31, 2018, the parties must prepare for hearing and shall strictly comply with the following prehearing requirements of this Order. *The pendency of settlement negotiations or the existence of a settlement in principle does not constitute a basis for failing to strictly comply with the following 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 undersigned, excuses noncompliance with filing deadlines.*

**Preliminary Statement.** No later than **August 10, 2018**, each party shall file a Preliminary Statement that (1) identifies the party's preference for the location of the hearing; (2) indicates the party's consent to service of orders and decisions issued by this Tribunal, and to service of documents filed by other parties, *by email only* during this proceeding;<sup>1</sup> and (3) provides a valid email address at which the party will accept such service.

**Prehearing Exchange.** This Order is issued pursuant to Section 22.19(a) of the Rules of Practice. *See* 40 C.F.R. § 22.19(a). Accordingly, the parties are hereby directed to engage in the following prehearing exchange of information:

1. Each party shall file with the Headquarters Hearing Clerk, serve on the opposing party, and serve on the undersigned:

(A) a list of names of the witnesses intended to be called at the hearing, identifying each as a fact witness or an expert witness, a brief narrative summary of their expected testimony, and a curriculum vitae or resume for each identified expert witness; or a statement that no witnesses will be called;

(B) a list of all exhibits, numbered in sequential order, that the party intends to produce at the hearing, along with a copy of each exhibit marked for identification as follows:

- i. Complainant's exhibits shall be identified as "CX."
- ii. Respondent's exhibits shall be identified as "RX."
- iii. Each exhibit shall be labeled numerically on each page of the exhibit. For example, the first exhibit provided by Complainant shall be labeled on each page of the exhibit as "CX 1," and the first exhibit provided by Respondent shall be labeled on each page of the exhibit as "RX 1."
- iv. Any exhibit consisting of more than one page shall be numbered consecutively at the bottom of each page as follows: "Page X of [total of] Y," with "Page X" representing the page number in sequence beginning from the number 1 and "[total of] Y" representing the total number of pages in the exhibit. For example, to identify the third page of Complainant's first exhibit, which has five pages total, the bottom of the page shall read "CX 1 Page 3 of 5."

(C) a statement specifying the amount of time needed to present its direct case. *See* 40 C.F.R. §§ 22.21(d), 22.19(d). Also, state whether the services of an interpreter are necessary with 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:

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<sup>1</sup> The Rules of Practice allow for electronic service, and in the interest of judicial efficiency, it will be this Tribunal's practice to serve the parties by email only. *See* 40 C.F.R. §§ 22.5(b)(2), 22.6 (authorizing service of most documents by email). If a party is unable to receive service by email, the party shall affirmatively state that it is unable to accept service by email and provide a valid address at which it may be served by regular mail.

(A) documentation showing that service of the Complaint was completed in accordance with Section 22.5(b)(1) of the Rules of Practice, 40 C.F.R. § 22.5(b)(1);

(B) a brief narrative statement, and a copy of any documents in support, explaining in detail the factual and/or legal bases for the allegations denied or otherwise not admitted in Respondent's Answer;

(C) all factual information and supporting documentation relevant to the assessment of a penalty, and a copy, or a statement of the internet address (URL), of any policy or guidance intended to be relied on by Complainant in calculating a proposed penalty;

(D) a copy, or a statement of the internet address (URL), of any EPA guidance documents and/or policies, including any updates or revisions to such guidance and/or policies, and any preambles to regulations that Complainant has relied upon with regard to the allegations set forth in the Complaint; and

(E) a detailed explanation of the factors considered and methodology utilized in calculating the amount of the proposed penalty, in accordance with the penalty factors and policies referenced in the proposed civil penalty section of the Complaint.

3. In addition, Respondent shall submit the following as part of its Prehearing Exchange:

(A) a copy of any documents in support of the denials made in its Answer;

(B) a copy of any documents in support of any asserted affirmative defenses and an explanation of the arguments in support of any such affirmative defenses;

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

(D) if Respondent takes the position that the proposed penalty should be reduced or eliminated on any grounds, such as an inability to pay, then provide 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.

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 pursuant to the following schedule:

**August 31, 2018**

Complainant's Initial Prehearing Exchange

**September 21, 2018**

Respondent's Prehearing Exchange

**October 5, 2018**

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. 40 C.F.R. § 22.19(a). Therefore, each party is advised to thoughtfully prepare its prehearing exchange.

In general, hearings are scheduled following the submission of the prehearing exchanges. The parties will be provided with adequate notice of the scheduled hearing to enable them to meet the remaining deadlines contained in this Order.

**Supplement to Prehearing Exchange.** Any addition of a proposed witness or exhibit to the prehearing exchange, submitted pursuant to Section 22.19(f) of the Rules of Practice, must be filed with an accompanying *motion to supplement the prehearing exchange* only when supplementation is sought within 60 days of the scheduled hearing.

**Motions.** Prior to filing any motion, the moving party must contact all other parties to determine whether the other parties have any objection to the granting of the relief sought in the motion, and the motion shall state the position of the other parties. However, 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, a reply, and/or the issuance of a ruling on the motion before any relevant deadline set by this or any subsequent order. *See generally* 40 C.F.R. §§ 22.16(b), 22.7(c).

*Dispositive motions* regarding liability, such as a motion for accelerated decision or motion to dismiss under Section 22.20(a) of the Rules of Practice, must be filed within 30 days after the due date for Complainant's Rebuttal Prehearing Exchange. *Non-dispositive motions*, such as motions for additional discovery, motions for subpoenas, and motions in limine, must be filed no later than 60 days prior to the scheduled hearing. *Motions not filed in a timely manner may not be considered.*

Pursuant to Section 22.16(d) of the Rules of Practice, a party may submit a written request for oral argument upon filing a motion, a response to a motion, or a reply. 40 C.F.R. § 22.16(d). The requesting party shall propose an appropriate location for the argument. The OALJ has access to videoconferencing technology that may be utilized for oral arguments on motions, which may 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.

**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 ("APA"), 5 U.S.C. § 554. Respondent's Answer to the Complaint

contained 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. 5 U.S.C. § 554(c)(2). 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. 5 U.S.C. § 556(d). 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 witness(es). Respondent is entitled to elect any or all three means to pursue its defenses.

*Respondent is hereby notified that its failure to comply with the prehearing exchange requirements set forth herein may result in the entry of a default judgment against it. Complainant is hereby notified that its failure to file its prehearing exchange in a timely manner can result in a dismissal of the case with prejudice.*

**Filing and Service.** Consistent with Section 22.5 of the Rules of Practice, the original and one copy of all documents intended to be part of the record in this proceeding (excluding a fully-executed Consent Agreement and Final Order, which must be filed with the Regional Hearing Clerk), shall be filed with the Headquarters Hearing Clerk.<sup>2</sup> Electronic filing is strongly encouraged.<sup>3</sup> To file a document electronically, a party shall use a web-based tool known as the OALJ E-Filing System by visiting the website for the OALJ at [www.epa.gov/alj](http://www.epa.gov/alj). Documents filed electronically are deemed to constitute both the original and one copy of the document.

Any party choosing to file electronically must first register with the OALJ E-Filing System at [https://yosemite.epa.gov/OA/EAB/EAB-ALJ\\_Upload.nsf](https://yosemite.epa.gov/OA/EAB/EAB-ALJ_Upload.nsf). There may be a delay of one to two business days between the time a party applies for registration and the time at which the party is able to upload documents into the system.

A document submitted to the OALJ E-Filing System is considered "filed" at the time and date of electronic reception, as recorded by the OALJ E-Filing System immediately upon reception. To be considered timely, documents submitted through the OALJ E-Filing System must be received by 11:59 p.m. Eastern Time on the date the document is due, unless another time is specified by the Judge. Within an hour of a document being electronically filed, the OALJ E-Filing System will generate an electronic receipt of the submission that will be sent by email to both the party submitting the document and the Headquarters Hearing Clerk.

The OALJ E-Filing System will accept any type of digital file, but the file size is limited to 70 megabytes.<sup>4</sup> Electronically filed textual documents must be in Portable Document Format

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<sup>2</sup> Pursuant to the Headquarters Hearing Clerk Pilot Project, the OALJ and Headquarters Hearing Clerk shall keep the official record and be the proper filing location for all contested cases in which an answer was filed after May 1, 2012. For more information, see the OALJ's website at [www.epa.gov/alj](http://www.epa.gov/alj).

<sup>3</sup> More information about electronic filing may be found in the Standing Order Authorizing Electronic Filing in Proceedings Before the Office of Administrative Law Judges, available on the OALJ website at [www.epa.gov/alj](http://www.epa.gov/alj).

<sup>4</sup> If your multimedia file exceeds 70 megabytes, you may submit the file on a compact disc or USB flash drive and mail it to one of the addresses listed herein or contact the main number for the Office of Administrative

("PDF"). A motion and any associated brief may be filed together through the OALJ E-Filing System. However, any documents filed in support of a brief, motion, or other filing, such as copies of proposed exhibits submitted as part of party's prehearing exchange, should be filed separately as an attachment. Where a party wishes to file multiple documents in support of a brief, motion, or other filing, rather than filing a separate attachment for each such document, the documents should be compiled into a single electronic file and filed as a single attachment, to the extent technically practicable. Attached to this Order is further guidance on the use of the OALJ E-Filing System for purposes of electronic filing.

Alternatively, documents may be filed by U.S. mail, personal delivery, courier, or commercial delivery service. To file a document using the U.S. Postal Service, address the document to:

Headquarters Hearing Clerk  
Office of Administrative Law Judges  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., NW  
Mail Code 1900R  
Washington, DC 20460

To file a document using UPS, FedEx, DHL, other courier or commercial delivery service, or personal delivery, address the document to:

Headquarters Hearing Clerk  
Office of Administrative Law Judges  
U.S. Environmental Protection Agency  
Ronald Reagan Building, Room M1200  
1300 Pennsylvania Ave., NW  
Washington, DC 20004

A document submitted by U.S. mail, personal delivery, courier, or commercial delivery service is considered "filed" when the Headquarters Hearing Clerk physically receives it, as reflected by the inked date stamp physically applied by the Headquarters Hearing Clerk to the paper copy of the document. The OALJ is open to receive such paper filings between 8:30 a.m. and 4:30 p.m. Eastern Time, Monday through Friday.

Regardless of the method of filing, all filed documents must be signed and must contain the contact name, telephone number, mailing address, and email address of the filing party or its authorized representative.

A copy of each document filed in this proceeding shall also be served on the undersigned and on each party. 40 C.F.R. § 22.5(b). Documents may be served by U.S. mail, personal delivery, reliable commercial delivery service, or email if the party being served has consented in writing to service by email and provided a valid email address. 40 C.F.R. § 22.5(b)(2).

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Law Judges at (202) 564-6255 for instructions on alternative electronic filing methods.

Documents filed through the OALJ E-Filing System are deemed to have been served on the undersigned. A document is considered served upon mailing, when placed in the custody of a reliable commercial delivery service, or upon electronic transmission. 40 C.F.R. § 22.7(c).

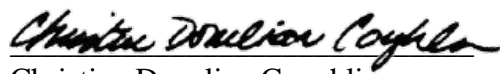
*The parties are advised NOT to include, attach, or refer to any terms of settlement offers or agreements in any document submitted to the undersigned, and no copies of Consent Agreements and Final Orders shall be submitted, or attached to any document submitted, to the undersigned except those that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

**Privacy Act Statement; Notice of Disclosure of Confidential and Personal Information; Waiver of Confidentiality and Consent to Public Disclosure.** The parties are cautioned that, unless redacted, all information filed with the OALJ will be made publicly available. Thus, the parties are hereby advised not to file any Confidential Business Information (“CBI”) or Personally Identifiable Information (“PII”) pertaining to any person. Where filing of such information is necessary, the parties are hereby advised to redact (i.e., remove or obscure) the CBI or PII present in the materials filed. This may include information that, if disclosed to the public, would constitute an unwarranted invasion of personal privacy, such as Social Security numbers, medical records, and personal financial information.

*To the extent that any person files or submits any unredacted CBI or PII pertaining to themselves or their client, that person thereby waives any claims to confidentiality and thereby consents to public disclosure by EPA, including posting on the Internet, of all such information they submit. Submission of such information through the OALJ E-Filing System will also be considered a waiver of confidentiality. To protect such information against public disclosure, parties must follow the procedures specified on the OALJ website at [www.epa.gov/alj](http://www.epa.gov/alj).*

**Contact Information.** For any questions about this Order, the Rules, or any other procedural, scheduling, or logistical issues, you may contact Jennifer Almase, Attorney-Advisor, at (202) 564-1170 or [almase.jennifer@epa.gov](mailto:almase.jennifer@epa.gov).

**SO ORDERED.**

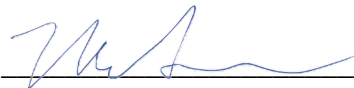
  
Christine Donelian Coughlin  
Administrative Law Judge

Dated: July 20, 2018  
Washington, D.C.

In the Matter of *Birds Eye Foods, LLC*, Respondent.  
Docket Nos. MM-05-2018-0002, CERCLA-05-2018-0005, EPCRA-05-2018-0009

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **Prehearing Order**, dated July 20, 2018, and issued by Administrative Law Judge Christine Donelian Coughlin, was sent this day to the following parties in the manner indicated below.



Mary Angeles  
Paralegal Specialist

Original and One Copy by Personal Delivery to:

Mary Angeles, Headquarters Hearing Clerk  
U.S. Environmental Protection Agency  
Office of Administrative Law Judges  
Ronald Reagan Building, Room M1200  
1300 Pennsylvania Ave., NW  
Washington, DC 20004

Copy by Electronic and Regular Mail to:

Jeffery M. Trevino  
Associate Regional Counsel  
Office of Regional Counsel  
U.S. Environmental Protection Agency, Region 5  
Mail Code C-14J  
77 West Jackson Boulevard  
Chicago, IL 60604-3507  
Email: [trevino.jeffery@epa.gov](mailto:trevino.jeffery@epa.gov)  
*For Complainant*

Jodi Arndt Labs  
Conway, Olejniczak & Jerry, S.C.  
P.O. Box 23200  
Green Bay, WI 54305-3200  
Email: [jodi@lcojlaw.com](mailto:jodi@lcojlaw.com)  
*For Respondent*

Dated: July 20, 2018  
Washington, D.C.



**OFFICE OF ADMINISTRATIVE LAW JUDGES  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

**WASHINGTON, D.C.**

**GUIDANCE ON USE OF OALJ E-FILING SYSTEM**

The Office of Administrative Law Judges (“OALJ”) utilizes a web-based tool known as the OALJ E-Filing System to allow registered users to file documents electronically. Sending a document to oaljfilng@epa.gov or an email address of a staff member within the OALJ is not a valid method of electronic filing, unless otherwise specified in writing by the presiding Administrative Law Judge. The OALJ E-Filing System is accessible at [www.epa.gov/alj](http://www.epa.gov/alj). Documents filed electronically are deemed to constitute both the original and one copy of the document, and are deemed to have been both filed with the Headquarters Hearing Clerk and served electronically on the presiding Administrative Law Judge.

Any party choosing to file electronically must first register with the OALJ E-Filing System at [https://yosemite.epa.gov/OA/EAB/EAB-ALJ\\_Upload.nsf](https://yosemite.epa.gov/OA/EAB/EAB-ALJ_Upload.nsf). Registration is not automated. There may be a delay of one to two business days between the time a party applies for registration and the time at which the party is able to upload documents into the system. Parties are advised to plan accordingly.

To be considered timely, documents submitted through the OALJ E-Filing System must be received by 11:59 p.m. Eastern Time on the day the document is required to be filed, unless another time is specified by the presiding Administrative Law Judge. Immediately upon reception by the OALJ E-Filing System, the document will be marked with the official filing date and time. The OALJ E-Filing system will then generate an electronic receipt of the submission that will be sent by email to both the party submitting the document and the Headquarters Hearing Clerk. There may be a delay of approximately one hour between submission of the document and transmission of the electronic receipt.

The OALJ E-Filing System will accept any type of digital file, but the file size is limited to 70 megabytes. Electronically filed textual documents must be in Portable Document Format (“PDF”).

A motion and any associated brief may be filed together through the OALJ E-Filing System. However, any documents filed in support of a brief, motion, or other filing, such as copies of proposed exhibits submitted as part of a party’s prehearing exchange of information, should be submitted separately as an attachment. Where a party wishes to file multiple documents in support of a brief, motion, or other filing, rather than filing a separate attachment for each such document, the documents should be compiled into a single electronic file and filed as a single attachment, to the extent technically practicable. For example, where a party is filing copies of 12 proposed exhibits as part of its prehearing exchange, those 12 proposed exhibits should be submitted together as one attachment consisting of a single electronic file, to the extent technically practicable.

The OALJ E-Filing System is not equipped either to accommodate or to protect the privacy of confidential business information (“CBI”) or sensitive personally identifiable information (“PII”) that could be used to identify or trace an individual, such as Social Security numbers, medical records, or personal financial information. If a party wishes to electronically file a document containing such information, the party shall redact (i.e., remove or obscure) that information from the document before filing the redacted version of the document through the OALJ E-Filing System. If the party wishes for the presiding Administrative Law Judge to consider the CBI or PII contained in the document, the party shall also file a paper copy of the unredacted version of the document by means other than the OALJ E-Filing System, in accordance with the procedures specified on the OALJ’s website at [www.epa.gov/alj](http://www.epa.gov/alj). To the extent that any person files any un-redacted CBI or PII through the OALJ E-Filing System, that person thereby waives any claims to confidentiality and consents to public disclosure of all such information.