

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
  
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Misch Excavating, LLC	)	Docket No. CWA-05-2011-0003
d/b/a Rooterman,	)	
	)	
Respondent.	)	

**PREHEARING ORDER**

As you were previously notified, I am designated to preside over the above-captioned matter. This proceeding will be 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 *et seq.* (“Rules of Practice”). The parties are advised to familiarize themselves with the applicable statute(s) and the Rules of Practice. An informal Practice Manual and significant decisions issued by the office of the undersigned are accessible on the world wide web at <http://www.epa.gov/oalj>.

U.S. Environmental Protection Agency (“EPA” or “Agency”) policy strongly supports settlement, and the procedures governing the documentation of settlement agreements are set forth in Section 22.18 of the Rules of Practice, 40 C.F.R. § 22.18. If settlement discussions have already been undertaken, the parties are commended for taking the initiative to resolve this matter informally and expeditiously. If settlement discussions have not yet commenced or have stalled, each party is reminded that pursuing this matter through a hearing and possible appeals will require the expenditure of significant amounts of time and financial resources. Each party should also realistically consider the risk of not prevailing in the proceeding despite such expenditures. While a negotiated settlement allows the parties to control the outcome of the proceeding, a judicial decision eliminates that control. With these considerations in mind, the parties are directed to engage in a settlement conference on or before **April 1, 2011**, and attempt to reach an amicable resolution of this matter. Complainant shall file a Status Report regarding this conference and the status of settlement on or before **April 8, 2011**. If the case is settled, a fully-executed Consent Agreement and Final Order shall be filed no later than **May 6, 2011**, with a copy sent to the undersigned.

Should a Consent Agreement and Final Order not be finalized on or before the deadline set forth above, the parties shall prepare for hearing and strictly comply with the prehearing requirements of this Order, as set forth below.

**PREHEARING EXCHANGE.** Pursuant to Section 22.19(a) of the Rules of Practice, 40 C.F.R. § 22.19(a), the parties are directed to engage in the following prehearing exchange:

1. Each party shall file with the Regional Hearing Clerk, serve on the opposing party, and serve on the undersigned as part of its Initial Prehearing Exchange:
  - (A) a list of names of the expert and other witnesses intended to be called at hearing, identifying each as a fact witness or an expert witness, a brief narrative summary of each

witness's expected testimony, and a curriculum vitae or resume for each identified expert witness, or a statement that no witnesses will be called;

(B) copies of all documents and other exhibits intended to be introduced into evidence, identified as Complainant's or Respondent's exhibits, as appropriate, and numbered with Arabic numerals (e.g., "CX 1" or "RX 1"); and

(C) a statement explaining its views as to the appropriate place for the hearing and the estimated amount of time needed to present its direct case. See Sections 22.21(d) and 22.19(d) of the Rules of Practice, 40 C.F.R. §§ 22.21(d) and 22.19(d). Also, state whether translation services are necessary in regard to the testimony of any witness(es), and, if so, state the language to be translated.

2. In addition, Complainant shall file the following as part of its Initial Prehearing Exchange:

(A) a narrative statement, and a copy of any documents in support, explaining in detail the factual and/or legal bases for the allegations in Paragraphs 22, 23, 25, 26, 37, and 40 of the Complaint;

(B) a copy of all documents referenced in Paragraphs 28, 34-36, and 39 of the Complaint;

(C) a copy of any EPA policy or guidance document upon which Complainant has relied, or intends to rely, in calculating the proposed penalty;

(D) a narrative statement, and a copy of any documents in support, explaining in detail how the proposed penalty was calculated, including a discussion of each penalty assessment factor set forth in Section 309(g)(3) of the Clean Water Act, 33 U.S.C. § 1319(g)(3); and

(E) a statement regarding whether the Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3501 et seq. ("PRA"), applies to this proceeding; whether there is a current Office of Management and Budget control number involved herein; and whether the provisions of Section 3512 of the PRA are applicable in this case.

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

(A) a narrative statement, and a copy of any documents in support, explaining in detail the factual and/or legal bases for Respondent's assertions in response to Paragraphs 28, 32-34, 37-40, and 43-46.

(B) if Respondent intends to take the position that it is unable to pay the proposed penalty or that payment will have an adverse effect on its ability to continue to do business, a copy of any and all documents it intends to rely upon in support of such position; and

(C) if Respondent intends to take the position that the proposed penalty should be reduced or eliminated on any other grounds, a copy of any and all documents it intends to rely upon in support of such position.

4. Finally, Complainant shall submit as part of its Rebuttal Prehearing Exchange a statement and/or any documents in response to Respondent's Initial Prehearing Exchange as to

provisions 3(A) through 3(C) above.

The prehearing exchanges called for above shall be filed in seriatim fashion, pursuant to the following schedule:

<b>May 6, 2011</b>	Complainant's Initial Prehearing Exchange
<b>May 27, 2011</b>	Respondent's Prehearing Exchange
<b>June 10, 2011</b>	Complainant's Rebuttal Prehearing Exchange

Section 22.19(a) of the Rules of Practice, 40 C.F.R. § 22.19(a), 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 summary of expected testimony are not included in the prehearing exchange shall not be allowed to testify.** Therefore, each party is advised to very carefully and thoughtfully prepare its prehearing exchange.

**MOTION TO SUPPLEMENT 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 HEARING.** The Complaint notified Respondent of the opportunity to request a hearing, in accordance with Section 554 of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 554 et seq. In its Answer to the Complaint, Respondent requests a hearing. Pursuant to Section 554(c)(2) of the APA, 5 U.S.C. § 554(c)(2), a hearing will be conducted in accordance with Section 556 of the APA, 5 U.S.C. § 556. Section 556(d) of the APA, 5 U.S.C. § 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 its defense. If Respondent intends to elect only to conduct cross-examination of 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 its Initial Prehearing Exchange.

**Respondent is hereby notified that the failure either to comply with the prehearing exchange requirements set forth herein or to state that it is electing only to conduct cross-examination of Complainant's witnesses can result in the entry of a default judgment against it. Complainant is notified that its 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 Regional Hearing Clerk of a fully-executed Consent Agreement and Final Order, or an order issued by the judge, excuses noncompliance with filing deadlines.**

**FILING AND SERVICE.** A document is "filed" on the date the Regional Hearing Clerk receives it. 40 C.F.R. § 22.5(a). Therefore, in order for a document to be timely filed, the parties

are required to send a document far enough in advance of the filing deadline to be received by the Regional Hearing Clerk on or before that deadline. The parties shall serve the undersigned such that she also receives the document on or before the filing deadline. To ensure that the undersigned receives a document in a timely manner, a courtesy copy may be sent by facsimile or email to the Office of Administrative Law Judges, but a hard copy also must be mailed. The facsimile number for the Office of Administrative Law Judges is (202) 565-0044 and the email address is oaljfilng@epa.gov. A certificate of service must be attached to all filed documents. 40 C.F.R. § 22.5(a)(3).

Prehearing exchange information, as well as any motions or other papers required or allowed to be filed in this proceeding, shall be addressed to the undersigned 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 their 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 inquire as to whether a document has been received or issued. Telephone or e-mail contact may be made with my staff attorney, Lisa Knight, Esq., at (202) 564-6291 or knight.lisa@epa.gov for procedural questions.

**COURTESY COPIES.** If any party wishes to receive, by e-mail or facsimile, an expedited courtesy copy of substantive orders and decisions 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 motions 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 is required to contact the non-moving party to determine whether the non-moving party has any objection to the granting of the relief

sought in the motion. The motion shall state the position of the non-moving party. The mere consent of the non-moving party 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 non-moving 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, 40 C.F.R. §§ 22.16(b) and 22.7(c), allow a 15-day response period for motions, with an additional five 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 Section 22.20(a) of the Rules of Practice, 40 C.F.R. § 22.20(a), it shall be filed within thirty days after the due date for Complainant's Rebuttal Prehearing Exchange.**

Pursuant to Section 22.16(d) of the Rules of Practice, 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 financial 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.**



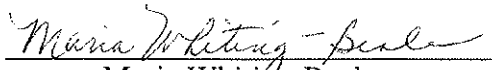
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Susan L. Biro  
Chief Administrative Law Judge

Dated: March 16, 2011  
Washington, D.C.

In the Matter of MISCH Excavating, LLC d/b/a Rooterman, Respondent  
Docket No. CWA-05-2011-0003

CERTIFICATE OF SERVICE

I certify that the foregoing **Prehearing Order**, dated March 16, 2011, was sent this day in the following manner to the addressees listed below:

  
\_\_\_\_\_  
Maria Whiting-Beale  
Staff Assistant

Dated: March 16, 2011

Original And One Copy By Pouch Mail To:

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

Copy By Pouch Mail To:

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

Copy By Regular Mail To:

Thomas W. Daggett, Esquire  
Daggett Law Firm  
161 North Clark Street, Suite 4950  
Chicago, IL 60601