In the Matter of:

DANIEL MCDOWELL,                   ARB CASE NO. 97-053

COMPLAINANT,

v.                                           ALJ CASE NO. 96-TSC-0008

DOYON DRILLING SERVICES, LTD,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

DECISION AND ORDER OF REMAND

This case arises under the Clean Air Act (CAA), 42 U.S.C. § 7622, Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971, Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622, and Water Pollution Control Act (WPCA), 33 U.S.C. § 1367. The parties have submitted a Memorandum of Settlement seeking approval of the settlement and dismissal of the complaint. No copy of the settlement agreement was submitted to the Administrative Law Judge (ALJ) and therefore, it was not reviewed prior to the issuance of his January 13, 1997 Recommended Order. We issued an Order on March 7, 1997 instructing the parties to submit their settlement to the Board for review.

The parties responded to our Order, claiming that submission of the settlement agreement would constitute a de facto waiver of the confidentiality provision of the agreement. This claim is without merit. The request for approval is based on an agreement entered into by the parties, therefore, we must review it to determine whether the terms are a fair, adequate and reasonable settlement of the complaint. 29 C.F.R. § 24.6. Macktal v. Secretary of Labor, 923 F.2d 1150, 1153-54 (5th Cir. 1991); Thompson v. U.S. Dep’t of Labor, 885 F.2d 551, 556 (9th Cir. 1989); Fuchko and Yunker v. Georgia Power Co., Case Nos. 89-ERA-9, 89-ERA-10, Sec. Order, Mar. 23, 1989, slip op. at 1-2.
The TSCA provides in pertinent part:

(A) Upon receipt of a complaint filed under paragraph (1), the Secretary shall conduct an investigation of the violation alleged in the complaint. Within 30 days of the receipt of such complaint, the Secretary shall complete such investigation and shall notify in writing the complainant (and any person acting on behalf of the complainant) and the person alleged to have committed such violation of the results of the investigation conducted pursuant to this paragraph. Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint. An order of the Secretary shall be made on the record after notice and opportunity for agency hearing. The Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant.

15 U.S.C. § 2622(b)(2)(A). The CAA contains a similar provision:

(A) Upon receipt of a complaint filed under paragraph (1), the Secretary shall conduct an investigation of the violation alleged in the complaint. Within thirty days of the receipt of such complaint, the Secretary shall complete such investigation and shall notify in writing the complainant (and any person acting in his behalf) and the person alleged to have committed such violation of the results of the investigation conducted pursuant to this subparagraph. Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint. An order of the Secretary shall be made on the record after notice and opportunity for public hearing. The Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant.

42 U.S.C. § 7622(b)(2)(A). Approval by the Secretary, or her designee, the Board, is a necessary component of an enforceable settlement. We simply cannot approve a settlement that we have never seen. Since the parties have not complied with our March 7, 1997 Order, we cannot affirm the ALJ’s Recommended Order.

With respect to the parties' request that the March 7, 1997 Order be amended to direct submittal of the settlement agreement “under seal,” we note that the parties' submissions in whistleblower cases under 29 C.F.R. Part 24 (1996) become part of the record in the case and the Freedom of Information Act, 5 U.S.C. § 552 (1988), requires federal agencies to disclose requested records unless they are exempt from disclosure under that Act. Coffman v. Alyeska
Pursuant to 29 C.F.R. § 70.26(b), submitters may designate specific information as confidential commercial information to be handled as provided in the regulations. When FOIA requests are received for such information, the Department of Labor shall notify the submitter promptly, 29 C.F.R. § 70.26(e); and the submitter will be given a reasonable period of time to state its objections to disclosure, 29 C.F.R. § 70.26(e); and the submitter will be notified if a decision is made to disclose the information, 29 C.F.R. § 70.26(f). If the information is withheld and suit is filed by the requester to compel disclosure, the submitter will be notified, 29 C.F.R. § 70.26(h).

CONCLUSION

Accordingly, this case is REMANDED to the ALJ in order to give the parties opportunity to submit their settlement documentation consistent with the instructions in this order.

SO ORDERED.

DAVID A. O’BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member