



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:)
)
Advanced Recovery, Inc.,) Docket No. RCRA-02-2013-7106
)
Respondent)

ORDER ON COMPLAINANT'S MOTION TO PRECLUDE

On September 9, 2014, Complainant filed a Memorandum in Support of Motion to Preclude Respondent from Qualifying Expert Witness and Producing Expert Report ("Motion" and "Mot."). Complainant seeks an order precluding Respondent from qualifying an expert witness at the hearing in this matter, and from introducing any expert report "pertaining to or otherwise related to 'the extent that [Respondent] deviated from the regulations, and the potential of harm arising out of any such deviation.'" Mot. 1, 14.

Complainant argues in the Motion that she "remains unaware and uninformed of many things about this purported expert," including her professional qualifications, her familiarity, knowledge and experience concerning RCRA requirements and Respondent's alleged deviation from those requirements and extent of resulting harm, and what her expert report would purport to show. *Id.* 7. Respondent has not moved for an extension of time to provide this information. *Id.* 8. Respondent's failure to exchange the information "works to the prejudice of EPA in its preparation for the hearing," is in violation of multiple orders issued in this matter, and warrants preclusion under the rules governing this proceeding, set forth at 40 C.F.R. Part 22 ("Rules"), and federal court rules of procedure. *Id.* 8-13.

There is no statement in the Motion as to whether Respondent objects to the relief sought by Complainant.¹ The Rules provide that a party may respond to a motion within 15 days after service of the motion. 40 C.F.R. § 22.16(b). However, the hearing is scheduled to commence 12 days from the date of this Order. The presiding judge is authorized to shorten response deadlines, "make other orders concerning the disposition of motions," and "take all measures necessary for the . . . efficient, fair and impartial adjudication" of issues arising in this matter.

¹ My staff attorney called Respondent's counsel on Tuesday, September 9, 2014, and left a message to have him call this Tribunal regarding filings in this matter, in particular, whether he had filed or intended to file the information that is the subject of this Motion. As of the issuance of this Order, he has not returned the call, through which he could have advised as to his position on this Motion.

Id.; 40 C.F.R. § 22.4(c)(10). Also, the presiding judge “shall . . . avoid delay.” 40 C.F.R. § 22.4(c). Pursuant to my authority under the Rules, I shall rule on this Motion without a response from Respondent.

As to the preclusion of evidence, the Rules state as follows:

If . . . a party fails to provide any document, exhibit, witness name or summary of expected testimony required to be exchanged under § 22.19(a), (e) or (f) to all parties at least 15 days before the hearing date, the Presiding Officer shall not admit the document, exhibit or testimony into evidence, unless the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information, or had good cause for not doing so.

40 C.F.R. § 22.22(a)(1).² It has already been set forth in prior orders that the Rules require the parties to file and exchange the names of their proposed witnesses, summaries of their anticipated testimony, and copies of all documents intended for evidence, and to supplement that exchange when necessary. 40 C.F.R. § 22.19(a); 40 C.F.R. § 22.19(f). “Where a party fails to provide information within its control as required pursuant to this section [outlining prehearing exchange requirements], the Presiding Officer may, in his discretion: . . . (2) Exclude the information from evidence.” 40 C.F.R. § 22.19(g). Similarly, the Prehearing Order (“PHO”) issued March 10, 2014, requires that a party file and serve a curriculum vitae or resume for any proposed expert witness, and warns, “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.” PHO 2-3.

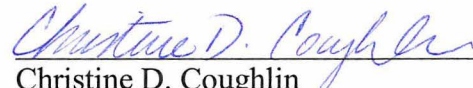
Because, in its prehearing exchange, Respondent stated that it would introduce the testimony of an expert witness, not yet retained, Complainant eventually moved to compel Respondent to identify that witness, provide her CV and describe her anticipated testimony, etc. Complainant’s motion was granted by Order dated August 19, 2014. The deadline by which Respondent was ordered to file and serve that information was extended by Order dated September 3, 2014, to September 5, 2014. As of the date of this order, Respondent has failed to comply, request more time, or explain the delay. As Complainant argues in its Motion, the exchange requirements set forth in the pre-trial Orders issued in this proceeding, and in the

² Complainant was permitted to supplement and amend her prehearing exchange 14 days before the hearing because Complainant filed a motion to do so showing good cause, and I found Respondent would not be unduly prejudiced in its hearing preparations by the limited new documentation submitted. *See* Order dated September 9, 2014.

Rules, help ensure an efficient and fair proceeding where no party is unfairly surprised by evidence at the hearing.

For good cause shown, and in accordance with the Rules and the Orders issued in this proceeding, Complainant's Motion is **GRANTED**.

SO ORDERED.



Christine D. Coughlin
Administrative Law Judge

Date: September 11, 2014
Washington, D.C.

In The Matter of Advanced Recovery, Inc., Respondent.
Docket No. RCRA-02-2013-7106

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order On Complainant's Motion To Preclude**, dated September 11, 2014, was sent this day in following manner to the addresses listed below:



Sybil Anderson
Office of Administrative Law Judges
U.S. Environmental Protection Agency
(202)564-6261

Dated: **September 11, 2014**

Copy By Regular Mail and E-Mail To:

Melva J. Hayden, Esq.
Assistant Regional Counsel
Lee A. Spielmann, Esq.
Assistant Regional Counsel
ORC, U.S. EPA, Region II
290 Broadway, 16th Floor
New York, NY 10007-1866
Email: hayden.melva@epa.gov
Email: spielmann.lee@epa.gov

Kirk O. Orseck, Esq.
Orseck Law Offices, PLLC
1924 State Route 52
P.O. Box 469
Liberty, NY 12754
Email: orsecklaw@yahoo.com