

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)	Docket No. RCRA-08-2015-0002
)	
The U.S. Bureau of Reclamation, National)	
Electric Coil, Environmental Contractors, LLC,)	
and CTA Construction and Environmental, LLC,)	
)	
Respondents.)	

COMPLAINANT’S PREHEARING EXCHANGE

Complainant, the United States Environmental Protection Agency, Region 8 (EPA), submits COMPLAINANT’S INITIAL PREHEARING EXCHANGE pursuant to 40 C.F.R. § 22.19(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation/Termination or Suspension of Permits (Rules of Practice) and the Prehearing Order of Presiding Officer M. Lisa Buschmann, dated December 29, 2015, as modified by the Presiding Officer’s Erratum issued December 30, 2015, and the email titled “Response to Your Status Report filed 1/15/2016” authored by Michael B. Wright, Office of Administrative Law Judges Staff Attorney on February 4, 2016.

I. WITNESSES AND BRIEF NARRATIVE SUMMARY OF EXPECTED TESTIMONY

Complainant may call any and/or all of the following witnesses at a hearing of the above-captioned matter. In addition, should Respondents’ Initial Prehearing Exchange or other discovery reveal the need for further witnesses to rebut Respondents’ case, Complainant respectfully reserves the right to supplement this list of witnesses upon motion and adequate notice to the Presiding Officer and Respondents, and to call such witnesses at the hearing of this matter. Complainant reserves the right to cross-examine any witnesses offered by Respondents.

Complainant notes that some of the testimony described below may be rendered unnecessary by stipulations or by rulings on dispositive motions. It is Complainant's intent to promote judicial efficiency by resolving factual issues through stipulations or dispositive motions where possible.

A. Fact Witnesses

1. Mr. Victor Zielinski, Former Senior Environmental Engineer
Air and Toxics Technical Enforcement Program
Office of Enforcement, Compliance and Environmental Justice
U.S. Environmental Protection Agency, Region 8
Denver, Colorado

Mr. Zielinski was employed as a Senior Environmental Employee with the EPA Region 8 Air and Toxics Technical Enforcement Program, Office of Enforcement, Compliance and Environmental Justice, for over eleven years from October 18, 2004, to September 4, 2015. Mr. Zielinski's responsibilities included asbestos National Emission Standards for Hazardous Air Pollutants (NESHAPs) and Lead Program implementation and oversight. Beginning October 21, 2014, Mr. Zielinski served as the lead EPA Region 8 technical asbestos NESHAPs contact and was the custodian of the CAA enforcement case file in this matter until he retired.

Based on Mr. Zielinski's involvement in this case, he is expected to testify regarding the scope, nature and timing of the asbestos abatement project performed by the Respondents at the Yellowtail Dam Facility (Facility) that resulted in the generation of an estimated 5,165 gallons of mixed asbestos and hazardous wastewater. Relatedly, Mr. Zielinski may testify regarding the content and location of the contaminated wastewater stored at the Facility, and the threat of harm the wastewater posed to the environment and human health.

Additionally, Mr. Zielinski may testify regarding information he obtained from and communications he had with representatives of the State of Montana Department of Environmental

Quality (Montana DEQ) and the Respondents relating to the Facility's asbestos abatement project and the wastewater generated. Such testimony may include, but is not limited to, concerns expressed by both EPA and the State regarding the Respondents' handling and temporary storage of the wastewater and wastewater disposal recommendations provided to the Respondents by both state and federal authorities.

Mr. Zielinski may testify regarding the Agency's basis for issuing the First Amended Compliance Order (Amended Order) and the relief sought under the Resource Conservation and Recovery Act (RCRA). Because Mr. Zielinski was assigned to this case on behalf of the Air and Toxics Technical Enforcement Program, Mr. Zielinski's testimony in this proceeding will be limited to subject matter with Asbestos NESHAPs nexus or dual RCRA/Asbestos NESHAPs implications within Mr. Zielinski's purview. Mr. Zielinski may establish through testimony the basis for admitting into evidence Complainant's Exhibits 3, 10, 15, 16, 19, 20, 22-25, 27-30.

2. Ms. Judy Watkins, Environmental Science Specialist
Waste and Underground Tank Management Bureau
Permitting and Compliance Division
Montana Department of Environmental Quality
Helena, Montana

Ms. Watkins is employed as an Environmental Science Specialist with the Montana Department of Environmental Quality, Waste and Underground Tank Management Bureau. Ms. Watkins' employment responsibilities include permitting and compliance oversight relating to the State of Montana's RCRA C program authorized by the EPA. Ms. Watkins has experience overseeing all phases of the RCRA C program including the generation, storage, transportation and disposal of hazardous waste.

Based on Ms. Watkins employment duties and expertise, as well as her involvement in this case, she is expected to testify regarding the nature of the wastewater the Respondents generated and its proper treatment, storage and disposal. Relatedly, Ms. Watkins is expected to testify regarding her communications with Respondents' representatives and the EPA relating to the wastewater's designation as a hazardous waste and the Facility's status as a hazardous waste generator. Ms. Watkins may testify regarding the RCRA C Compliance Evaluation Inspection she performed at the Facility on March 23, 2015, her findings, conclusions and communications with Respondents' representatives. Relatedly, Ms. Watkins will testify regarding the draft report she prepared following the inspection and the noncompliance identified.

Ms. Watkins may testify regarding her communications, both oral and written, with the Respondents, her counterparts in the Montana DEQ Asbestos Control Program, Waste and Tank Management Bureau colleagues and the EPA relating to the Respondents' generation and storage of hazardous wastewater at the Facility, and the information she provided to the Respondents regarding the wastewater they generated. Ms. Watkins may establish through testimony the basis for admitting into evidence Complainant's Exhibit 9, 13, 17, 18, 31 and 34.

B. Expert Witnesses

1. Ms. Linda Jacobson
Resource Conservation and Recovery Act Technical Enforcement Program
Office of Enforcement, Compliance and Environmental Justice
U.S. Environmental Protection Agency, Region 8
Denver, Colorado
Ms. Jacobson currently is employed as an Inspector with the U.S. EPA Region 8 Office of Enforcement, Compliance and Environmental Justice RCRA/CERCLA Technical Enforcement Program. Ms. Jacobson's job responsibilities include inspections, case

development, enforcement and state oversight of the federal RCRA C program. Ms. Jacobson regularly is tasked with interpreting RCRA's implementing regulations and applying them to factual scenarios for the purpose of maintaining RCRA C compliance amongst the regulated community. Ms. Jacobson participates in regular RCRA C technical workgroups and is considered an expert on RCRA C technical matters. Ms. Jacobson is the custodian of the RCRA C enforcement case file in this matter. Ms. Jacobson's Curriculum Vitae is included in Complainant's Prehearing Exchange as CX 39. Ms. Jacobson may testify about her education background and professional experience.

Ms. Jacobson is expected to testify as an expert witness in this case based on her extensive experience with the federal RCRA C program and knowledge of the implementing regulations. Since October 1995, Ms. Jacobson has worked as a RCRA inspector. In addition, Ms. Jacobson's RCRA work includes direct implementation of the RCRA C program in Wyoming (consisting of drafting and overseeing permits and initiating enforcement actions) and oversight of field characterization work. From May 2005 to April 2010, Ms. Jacobson served as the RCRA project manager for a complex RCRA corrective action order.

Ms. Jacobson will explain the RCRA regulatory requirements and their application to the facts in this case. Ms. Jacobson will also discuss the sampling events and methodologies employed by the Respondents to characterize the wastewater. Ms. Jacobson will offer her expert opinion based on the applicable regulatory requirements and facts why the Respondents violated the RCRA requirements alleged in the Amended Order and, further, why the Amended Order was reasonable and appropriate based on the circumstances. Ms. Jacobson also will testify regarding the threat of harm the wastewater posed to the environment and public health.

II. EXHIBITS COMPLAINANT INTENDS TO INTRODUCE INTO EVIDENCE AT HEARING

Complainant intends to introduce into evidence at hearing the following exhibits:

Complainant's Exhibit No.	Document
1.	EPA Delegation No. 8-9-A
2.	Montana: Final Authorization of State Hazardous Waste Management Program Revision, 74 Fed. Reg. 18997, dated April 27, 2009
3.	Map of Yellowtail Dam facility and Crow Reservation and emails regarding questions of Montana DEQ or EPA jurisdiction for addressing issues at Yellowtail Dam, dated March 12 to 17, 2015
4.	NEC Generator Services Requisition Order no. 63-08757
5.	Yellowtail Dam background information, dated September 20, 2015
6.	National Electric Coil, Inc. background information, dated September 21 to 22, 2015
7.	CTA Construction & Environmental LLC background information, dated September 21, 2015
8.	BOR Press Release "Reclamation Awards Yellowtail Power Plant Contract to National Electric Coil, Inc." dated September 21, 2015
9.	Environmental Contractors, LLC Daily Activity Log Sheets, Project No. 2014-23, dated July 15, 2014 through January 14, 2015
10.	Letter from CTA to NEC regarding "Report of Timeline of Pertinent Events - Generator #3," dated May 27, 2015
11.	Email from Keith Cron, CTA, with NEC's "Weekly Waste Water Tank Inspection Report Yellowtail Power Plant" (Report No. 1), dated May 27, 2015
12.	NEC Field Photo Report for Yellowtail Waste Water Report #1, Yellowtail Power Plant, dated May 27, 2015
13.	Draft Montana DEQ Compliance Evaluation Inspection at USBR-Yellowtail Dam, Montana and Field Investigation Report, dated March 23, 2015
14.	Email from BOR to EPA regarding levels of wastewater in the large tank, dated May 18 and 22, 2015
15.	Letter from CTA to NEC regarding "Cleaning and Waste Management," dated September 29, 2014
16.	Letter from CTA to NEC regarding "Pre/Post Abatement Test Results - Gen #3", dated April 10, 2015
17.	Emails between NEC, CTA, EPA and Montana DEQ, dated May 7 to May 21, 2015
18.	Montana DEQ Memo, Yellowtail Dam MTP14-0119 Unit 3, detailing timeline of events, dated May 3, 2014 to May 5, 2015
19.	Letter from CTA to NEC regarding "Cleaning and Waste Management," dated January 13, 2015

Complainant's Exhibit No.	Document
20.	EPA emails regarding Yellowtail Dam asbestos project and EPA's instruction to BOR to notify EPA if the project is regulated, dated October 21, 2014 and June 3, 2015
21.	Regulatory Asbestos Levels
22.	Emails between EPA and CTA, dated April 16 to May 21, 2015
23.	Email from BOR to EPA regarding EPA approval for change in asbestos removal at Yellowtail Dam asbestos removal project, dated March 6, 2015
24.	Emails between CTA and EPA including results of tests for Metals/PCBs in wastewater tanks for Yellowtail Dam Gen #3, dated March 23 and March 24, 2015
25.	Emails between EPA, CTA and BOR regarding options for wastewater disposal, dated March 16 and March 20, 2015
26.	EPA Detailed Facility Report, USBR Yellowtail Dam, dated March 12, 2015
27.	EPA emails regarding options for wastewater disposal, particularly filtering, dated March 11, 2015
28.	EPA email regarding status of Yellowtail Dam project, dated May 15, 2015
29.	Emails from EPA, CTA and Montana DEQ regarding status of Yellowtail Dam project, dated April 16, April 20 and April 22, 2015
30.	Emails between EPA and CTA regarding wastewater characterization reports, dated March 9, 2015
31.	Emails between Montana DEQ and CTA regarding Yellowtail Dam project, dated February 4 and February 13, 2015
32.	EPA RCRA View a Site Identification Form, for Yellowtail Dam; Handler Details; Evaluation List; Violation List; Enforcement List; RCRA Site Detail Report, dated March 12 and March 21, 2015
33.	EPA RCRA Subtitle C Site Identification Form, ID# MT0142390046, dated June 26, 2015
34.	Letter from Montana DEQ to BOR regarding "Subsequent Notification of Regulated Waste Activity" for Yellowtail Dam, dated July 7, 2015
35.	EPA emails regarding items to address in the Order regarding the leaking frack tank, dated June 16, 2015
36.	EPA email and Energy Lab's Analytical Report for Project Yellowtail Dam-Gen 3, dated March 20 and March 31, 2015
37.	EPA emails regarding RCRA violations for the Order, dated June 3, 2015
38.	Postal service Form 3811 Receipts
39.	Curriculum Vitae of Linda S.M. Jacobson
40.	60 Fed. Reg. 49239, dated September 22, 1995

III. OFFICIAL NOTICE

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Complainant's Initial Prehearing Exchange – Page 7

Complainant respectfully requests that the Presiding Officer take official notice pursuant to 40 C.F.R. § 22.22(f) of the following documents within the specialized knowledge and experience of the EPA:

- 40 C.F.R. Part 22 (July 23, 1999)
- Solid Waste Disposal Act, as Amended, 42 U.S.C. § 6901 to 6992k
- 40 C.F.R. Parts 260, 262, 265, 268

IV. PLACE FOR HEARING AND ESTIMATED TIME FOR DIRECT CASE

Complainant's preferred place of hearing is Billings, Montana. Complainant estimates that presenting its direct case will take one (1) day. Complainant is not requesting translation services for the testimony of any anticipated witnesses.

V. DOCUMENTS IN SUPPORT OF THE ALLEGATIONS IN PARAGRAPHS 4, 7 AND 13 OF THE FIRST AMENDED ORDER

The following documents are submitted in support of the factual allegations set forth in the Amended Order not admitted by the Respondents:

Paragraph 5: Respondents NEC and CTA deny the allegations due to lack of knowledge as to EPA's authority in Indian country, including the Crow Reservation in Montana. In support of the allegations, Complainant cites to CX 2 and 3.

Paragraph 6: Not applicable to the RCRA proceeding.

Paragraph 7: Respondents NEC and CTA deny the allegations due to lack of knowledge as to whether EPA "typically excludes Indian country as defined by federal statute at 18 U.S.C. § 1151 from program delegation and authorizations to states in the absence of an express grant of authority to a state from Congress." In support of the allegations, Complainant cites to CX 2 and 40, in

addition to case law which Complainant respectfully requests the presiding officer take official notice of pursuant to 40 C.F.R. § 22.22(f).

Paragraph 12: Respondents NEC and CTA deny the allegation that the Amended Order jointly and severally binds the Respondents. In support of the allegation, Complainant cites to the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq., and case law which Complainant respectfully requests the presiding officer take official notice of pursuant to 40 C.F.R. § 22.22(f).

Paragraph 19: Respondents NEC and CTA deny the allegations due to lack of knowledge or information sufficient to respond to the findings. In support of the allegations, Complainant cites to CX 5, 8, 12, 13.

Paragraph 20: Respondents NEC and CTA deny the allegations due to lack of knowledge or information sufficient to respond to the findings. In support of the allegations, Complainant cites to CX 32.

Paragraph 21: Respondents NEC and CTA deny the allegations due to lack of knowledge or information sufficient to respond to the findings. In support of the allegations, Complainant cites to CX 31, 32.

Paragraph 23: Respondents NEC and CTA admit the allegations in the first two and fourth sentences, but deny due to lack of knowledge the findings in the third sentence that approximately 852 square feet of brake dust was removed from Generator 3. This finding is not applicable to the RCRA proceeding.

Paragraph 24: Respondents NEC and CTA deny the allegations. In support of the allegations, Complainant cites to CX 4, 8, 9, 10.

Paragraph 25: Respondents NEC and CTA admit the allegations in the second sentence, but deny due to lack of knowledge the first and third sentences. These findings are not applicable to the RCRA proceeding.

Paragraph 26: Respondents NEC and CTA admit all of the findings except for the allegations in the third sentence. In support of the allegations, Complainant cites to CX 9, 10.

Paragraph 27: Respondents NEC and CTA deny the allegations due to lack of knowledge or information sufficient to respond to the findings. These findings are not applicable to the RCRA proceeding.

Paragraph 28: Respondents NEC and CTA deny the allegations due to lack of knowledge or information sufficient to respond to the findings. This findings is not applicable to the RCRA proceeding.

Paragraph 30: Respondents NEC and CTA deny the allegations. These findings are not applicable to the RCRA proceeding.

Paragraph 32: Respondent CTA admits the findings, but takes issue with EPA's reference to the holding tank as a "frac tank." In support of this allegation, Complainant cites to CX 9, 10, 17, 18.

Paragraph 33: Respondents NEC and CTA deny the allegations. In support of the allegations, Complainant cites to CX 9, 10, 18.

Paragraph 34: Respondents NEC and CTA admit the allegation that water samples of the wastewater in the holding tank were collected on August 18, 2014, but deny that the sample results exceeded the RCRA toxicity characteristic leaching procedure levels and/or that the wastewater carries the hazardous waste code of D008 for cadmium. The Respondents further deny that the samples for the poly container indicated that this water was a characteristically hazardous waste and that the wastewater

carries the hazardous waste codes of D006 for lead and D008 for cadmium. In support of the allegations, Complainant cites to CX 9, 10, 13, 15.

Paragraph 35: Respondents NEC and CTA admit the allegation that water samples were collected from two positions in the tank on September 2, 2014, but deny the findings that "...the cadmium concentration in the wastewater in the tank was 4.4 mg/L, exceeding the TCLP value of 1.0 mg/L and that the "...sample for the poly container had metal results of 1.83 mg/L and 1.1.6 mg/L, making this a characteristically hazardous waste." The Respondents further deny that the wastewater carries the hazardous waste codes of D006 for lead and D008 for cadmium. In support of the allegations, Complainant cites to CX 9, 10, 13, 15, 31.

Paragraph 36: Respondents NEC and CTA deny the allegations. In support of the allegations, Complainant cites to CX 9, 11, 14, 18.

Paragraph 37: Respondents NEC and CTA deny the allegations. In support of the allegations, Complainant cites to CX 10, 13, 15, 18, 21, 31, 32, 33.

Paragraph 41: Respondents NEC and CTA admit the finding that, after initial sampling of wastewater on or about August 18, 2014, additional wastewater was added to the tank, but otherwise deny the allegations. In support of the allegations, Complainant cites to CX 9, 10, 13, 24.

Paragraph 42: Respondents NEC and CTA admit the first two sentences, but deny due to lack of knowledge the parenthetical sentence at the end. In support of the allegations, Complainant cites to CX 24.

Paragraph 45: Respondents NEC and CTA deny the allegations due to lack of knowledge or information sufficient to respond to the findings. In support of the allegations, Complainant cites to CX 13.

Paragraph 46: Respondents NEC and CTA deny the allegations due to lack of knowledge or information sufficient to respond to the findings. In support of the allegations, Complainant cites to CX 13.

Paragraph 48: Respondents NEC and CTA deny the allegations due to lack of knowledge or information sufficient to respond to the findings. In support of the allegations, Complainant cites to CX 11, 12.

Paragraph 49: Respondents NEC and CTA admit the findings in the first sentence, but deny the remaining allegations. In support of the allegations, Complainant cites to CX 10.

VI. EPA GUIDANCE DOCUMENTS, POLICIES AND/OR PREAMBLES TO REGULATIONS WHICH SUPPORT COMPLAINANT'S APPLICATION OF REGULATIONS TO PARTICULAR ALLEGED FACTS AND FINDINGS OF VIOLATION

The following source supports the application of regulations to particular alleged facts and findings of violation stated in the Amended Order. Complainant reserves the right to identify additional sources as the court deems appropriate.

Preamble to Parts 260, 261, 262, et al., Hazardous Waste Generator Improvements Proposed Rule, 80 FR page 57916, September 25, 2015:

<http://www.heinonline.org/HOL/Page?public=false&handle=hein.fedreg/080186&page=57918&collection=fedreg>.

VII. STATEMENT OF PROPOSED PENALTY AND POLICIES IN SUPPORT THEREOF

The Amended Order is for compliance only and does not propose a penalty, specific or otherwise. Prehearing Order sections B.3 and B.4 are not applicable at this time. However, Complainant reserves its right to propose a penalty.


VIII. RESERVATIONS

Complainant reserves the right to move for additional discovery pursuant to 40 C.F.R. § 22.19(e) and supplement its Prehearing Exchange thereafter if warranted to include evidence deemed relevant and probative by the presiding officer. Complainant also reserves the right to add witnesses to rebut Respondent's case, to call as a hostile witness any witness endorsed or noticed by Respondent, to subpoena any witnesses who is an employee, agent or contractor of the Respondent or who is endorsed or noticed by Respondent and to cross-examine any witnesses examined by Respondent at any time.

Respectfully submitted,

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

Date: 2/19/2016

By: 
Amy Swanson, Senior Enforcement Attorney
Legal Enforcement Program
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CERTIFICATE OF SERVICE

The undersigned certifies that on February 19, 2016, the foregoing COMPLAINANT'S INITIAL PREHEARING EXCHANGE and the documents intended to be part of the record in this proceeding were filed with the Office of Administrative Law Judges and served on each party as follows in accordance with 40 C.F.R. 22.5(a)(3), (b):

By the OALJ E-Filing System (with exhibits) on behalf of:

Ms. Sybil Anderson, Headquarters Hearing Clerk
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Ronald Regan Building, Room M1200
1300 Pennsylvania Avenue, NW
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The Honorable M. Lisa Buschmann, Administrative Law Judge
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By:

