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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8

IN THE MATTER OF:)	Docket No. RCRA-08-2020-0007
)	
New Prime, Inc.)	RESPONDENT’S MOTION TO
)	EXCLUDE SUPPLEMENTAL
Respondent.)	EXHIBITS AND WITNESSES
)	
_____)	

Complainant commenced this administrative action in September 2020, and on January 8, 2021, Respondent timely filed its Prehearing Exchange listing its exhibits and witnesses including an expert environmental toxicologist, Elizabeth Walker, PhD. Respondent’s Prehearing Exchange stated Dr. Walker “will testify regarding the nature of the potential harm posed by a theoretical release of paint or paint fumes from the stored trailer in Salt Lake City” and included her CV and expert report as exhibits. *See* Respondent’s Prehearing Exchange at 4. On April 4, 2022, this Court issued its memorandum Order denying Complainant’s motion for accelerated decision.

Now over nineteen months after receiving Respondent’s Prehearing Exchange, over four months from the Court’s issuance of its memorandum Order and a mere two months from trial, Complainant seeks to significantly expand its case by supplementing its various prior exchanges and adding numerous exhibits to its already voluminous list of exhibits and two new witnesses including an expert witness offered to rebut the long-since disclosed testimony of Dr. Walker and the Memorandum Order issued by this Court. In doing so, Complainant has failed to act “promptly” as required by 40 C.F.R. § 22.19(f) when a party wishes to “supplement or correct the exchange when the party learns that the information exchanged or response provided is incomplete, inaccurate or outdated . . .”

Accordingly and pursuant to 40 C.F.R. § 22.16(a), Respondent (Prime) moves to exclude Complainant’s Third Supplemental Prehearing Exchange dated August 22, 2022.

PROCEDURAL HISTORY AND SUMMARY OF ARGUMENT

Complainant filed its Third Supplemental Prehearing Exchange just two days before the deadline for supplementing without prior ALJ approval. In its Third Supplement, EPA submits one new expert and one new fact witness along with numerous new documents (CX 68-77) adding to the already voluminous proposed record it submitted with its first and second supplements. Among Complainant’s new exhibits is a lengthy expert report from a newly disclosed expert. According to Complainant, it “is adding exhibits CX68-77 in response to certain assertions in Respondent’s Prehearing Exchange¹ and the Response to Motion for Accelerated Decision; and to address an issue raised sua sponte by the Court in the Order on the Motion for Accelerated Decision, dated April 4, 2022.” Third Supplement at 3.

Complainant filed its original Prehearing Exchange on December 18, 2020, naming five

¹ Respondent filed a single prehearing exchange over nineteen months ago on January 8, 2021.

witnesses and identifying 50 exhibits. On February 22, 2021, Complainant filed a motion to supplement its original Prehearing Exchange to correct errors it made in its penalty calculation.² Complainant filed a second motion to supplement its prehearing exchange on April 18, 2022, requesting permission to substitute its penalty witness in the case on the grounds that the original witness was busy on other matters.³

Now, a mere 60 days from trial, nearly two years after Respondent's disclosures and months after the Court's April 4, 2022 ruling on EPA's failed motion for accelerated decision on penalty, EPA is attempting to further fill holes in its case with yet another large and expansive supplement. This Third Supplement expands the scope of EPA's case by introducing new expert testimony intended to address expert testimony disclosed by Respondent over nineteen months ago⁴ and the Court decision issued over four months ago. EPA further wishes to expand its case by disclosing documents related to stormwater control at the site. EPA now proposes to introduce 77 exhibits totaling over 1,548 pages -- all in a case where liability is not at issue.

The Presiding Officer should exclude this latest supplement because the proposed testimony of EPA's new expert, Dr. Brad Miller, and the listed documents were in EPA's possession or were readily obtainable by EPA long ago. The proposed testimony of EPA agent Marc Callaghan is repetitive, second-hand and unnecessary. At bottom, EPA's Third Supplement does not meet the minimum requirements of 40 C.F.R. § 22.19(f) because the newly offered witnesses and documents come many months after EPA was on notice of the need for them and EPA did not "promptly" supplement as required by the rules when it realized its prior exchanges were incomplete.

² That motion was granted. *See* Order on Motion to Correct Prehearing Exchange (March 31, 2021).

³ That motion was also granted. *See* Order on Motion to Amend Prehearing Exchange (May 4, 2022).

⁴ To be sure, Complainant's new expert report is replete with references to toxicity and other characteristics intended to rebut the long-since disclosed testimony of Dr. Walker.

ARGUMENT

I. COMPLAINANT'S PROPOSED NEW WITNESSES AND DOCUMENTS SHOULD BE EXCLUDED.

Complainant proposes two new witnesses and ten new exhibits totaling 220 pages to add to the previous five witnesses and 67 exhibits it identified in its original, first and second supplemental prehearing exchanges. The two new proposed witnesses are Brad W. Miller, an expert, and Marc Callaghan, a fact witness. Complainant provides no compelling explanation why these two witnesses or the ten new proposed exhibits are being offered at this late stage in the proceeding and only asserts these witnesses and exhibits are “in response” to long-known disclosures by Respondent and the Court’s order.

A. EPA’s Late Addition of New Witnesses and Exhibits Should be Excluded Under 40 C.F.R. § 22.19(g)(2).

EPA asserts that Dr. Miller’s proposed testimony is to “provide testimony in support of EPA’s determination that at least 20 of the drums of waste at Respondent’s Salt Lake City Facility, at the time of the NEIC inspection, contained hazardous waste.” EPA Third Supplement at 2. This is an issue that the Presiding Officer highlighted in her April 4, 2022, Order on Complainant’s Motion for Accelerated Decision, *see id.* at 25, where she noted that EPA had not established how many drums contained toxic waste. That ruling was more than four months ago. EPA has been aware of this issue in its case since at least April 4, 2022, yet waited more than four months to attempt to address it. This proposed supplemental witness does not meet the standards set out in 40 C.F.R. § 22.19(f). It is untimely and should be excluded.

The parties may not wait until the last minute to breezily supplement their prehearing exchanges. Indeed, the Presiding Officer set out a precise timeline for exchanging information between the parties in her November 2, 2020, Prehearing Order, in which she admonished the

parties to “thoughtfully prepare” their exchange such that the other party can rely on that exchanged information and prepare for hearing. Prehearing Order at 4. Further, the Consolidated Rules of Practice (CROP) provide that the “party who has made an information exchange . . . shall *promptly* supplement or correct the exchange when the party learns that the information exchanged or response provided is *incomplete*, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party pursuant to this section.” 40 C.F.R. § 22.19(f) (emphasis added).

Complainant knew or should have known that its prior prehearing exchanges were incomplete after Respondent’s exchange in January 2021, and after the Presiding Officer’s April 4, 2022 ruling. *See* April 22, 2022, email from Laurianne Jackson to Alyssa Katzennelson (“Complainant is evaluating the Court’s latest Order to determine the impact on Complainant’s hearing preparation, *including the need for additional witnesses*. At this time, Complainant anticipates needing approximately four days to present its case in chief subject to stipulations prior to the hearing and the time used for cross-examination by counsel for Respondent.” (emphasis added)).

With the exception of the proposed Callaghan testimony, which as argued below is duplicative, second-hand and unnecessary, the new exhibits and witnesses in the Third Supplement all address the issue of environmental harm, which has been a prominent issue in this case from the beginning. EPA, with this new proposed information, is not rebutting anything new Respondent has brought into the case. Respondent raised lack of environmental harm in its Answer to the Complaint in 2020. *See id.* at ¶ 38. Respondent filed its Prehearing Exchange (which it has not supplemented) on January 22, 2021, more than nineteen months ago. In that Prehearing Exchange, Respondent clearly identified lack of environmental harm, among other

defenses. In its prehearing exchange, Respondent designated an expert toxicologist and submitted an expert report outlining the absence of environmental harm or significant threat to human health, *see id* at 4, and explained its lack-of-environmental-harm case at 6. Respondent also highlighted lack of environmental harm in its brief opposing Accelerated Decision. *See id.* at 8-10.

EPA's Third Supplemental Exchange is not timely. The proposed testimony by Dr. Miller appears to be to show the quantity of toxic material at the site in an effort to rebut Respondent's now longstanding argument that the level of exposure and potential environmental harm were low. Similarly, the 2018 stormwater documents in the Third Supplement appear to be targeted at showing potential environmental harm. Complainant has been aware of the Respondent's environmental harm arguments since the inception of this case and it has known of the lack of evidence supporting the number of drums containing toxic waste since at least April 4, 2022. The stormwater documents (Ex.'s CX 69-71) are now six years old and were readily available to EPA before it filed its three prior prehearing exchanges (original and two supplements). Yet EPA waited until two days before the deadline to supplement the new witnesses and documents.

EPA's Third Supplemental Exchange neither states expressly nor implies that the information did not previously exist or was outside of EPA's reasonable ability to obtain it. In fact, EPA's Third Supplement makes scant mention of why these witnesses and exhibits are being designated at this late stage. Under 40 C.F.R. § 22.19(g)(2), the Presiding Officer may, when a party fails to timely turn over information that is "within its control," 40 C.F.R. § 22.19(g), exclude the information from evidence, and that should be done in this case.

Mr. Callaghan's proposed testimony appears duplicative of EPA's previously-designated witness Darin Mugleston and is therefore unnecessary. The CROP rules provide for the

admission of evidence unless it is “unduly repetitive . . . or of little probative value.” 40 C.F.R. § 22.22(a)(1). Mr. Callaghan was apparently Mr. Mugleston’s supervisor, and while he claims in his declaration to have reviewed Mr. Mugleston’s work, *see* Ex. CX 76, his name does not appear on the Investigation Activity Reports (IARs) EPA has already put into evidence. *See e.g.*, Ex. CX22 and CX 23. In an already tight hearing schedule, there is no room for superfluous witnesses. Mr. Callaghan’s testimony is secondary, based at best on a review of another witness’s reports, and will likely add nothing to the proposed testimony of Mr. Mugleston. It is repetitive of Mr. Mugleston’s proposed testimony and is therefore of little probative value. As such, it should be excluded under both 40 C.F.R. § 22.19(g)(2) and 40 C.F.R. § 22.22(a)(1).

B. Prime Is Prejudiced by the Late Addition of a New Expert Witness and Report.

The additional witnesses, arguments and documents set out in Complainant’s Third Supplemental Prehearing Exchange are unfair to Respondent at this late stage. Complainant appears to be attempting to fill what it perceives are deficiencies in its case -- where it has the burden of proof -- through proposed testimony and documents related to issues that have been known to the parties since the case inception.

EPA now seeks to add additional information and witness testimony regarding stormwater compliance at the facility. Nowhere in the Complaint or in any of the previous filings in this case has EPA raised stormwater as an issue. To introduce stormwater as an issue on the eve of trial after the deadlines for dispositive motions and prehearing exchange supplements have passed, is prejudicial and puts Respondent at a distinct and unfair disadvantage.

II. THE ALLOTTED FIVE DAYS FOR HEARING MAY NOT SUFFICE IF THESE NEW WITNESSES AND EXHIBITS ARE ALLOWED.

The witnesses and documents in EPA’s Third Supplement put the five-day hearing schedule at risk. Complainant originally requested eight hours for its case in chief. *See*

Complainant's Prehearing Exchange at 5-6. It later revised that time to four days *before* the addition of these two additional witnesses and ten new exhibits which introduce new arguments into the case. *See* April 22, 2022, email from Laurianne Jackson to Alyssa Katzennelson.

Because only five days have been allotted for hearing and because Respondent has estimated that it will need at least 1.5 days to put on its defense, the attempted addition by EPA of new witnesses, documents and arguments will leave even less time for Respondent to put on its case – an untenable and unfair consequence of Complainant's late disclosure.

CONCLUSION

The accident that led to the complaint in the present matter occurred in September 2015. Complainant waited a full five years before filing its complaint in this matter in September 2020, prior to the running of the statute of limitations. The Presiding Officer clearly warned in her November 2, 2020 Prehearing Order that “each party is advised to thoughtfully prepare its prehearing exchange,” *id.* at 4. Now, almost two years later, EPA seeks through its third supplemental prehearing exchange, to add new arguments, witnesses and documents to the case. Respondent has relied on the allegations in the Complaint and information contained in the previous three prehearing exchanges to prepare its case for hearing and is now prejudiced by the addition of new witnesses, documents and arguments so close to hearing. For these and other good reasons set forth above, the additional witnesses and documents proposed in Complainant's Third Supplemental Prehearing Exchange should be excluded under 40 C.F.R. §§ 22.22(a)(1) and 22.19(g)(2).

RESPECTFULLY SUBMITTED this 24th day of August 2022.

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_____/s/ Mark A. Ryan

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