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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 REPLY RE MOTION TO EXCLUDE AND RESPONSE RE COMPLAINANT'S MOTION TO ADMIT**
	)	
Respondent.	)	
	)	
_____	)	

Pursuant to 40 C.F.R. § 22.16(b) and the Presiding Officer's Order dated August 24, 2022, Respondent submits the following reply to EPA's brief captioned: Response to Respondent's Motion to Exclude Supplemental Exhibits and Witnesses and Respondent's Motion in Limine and Complainant's Cross Motion to Admit Certain Exhibits Into Evidence.[1] For the reasons set out below, Respondent's Motion should be granted, and Complainant's Motion should be denied.

[1] Complainant correctly notes that the undersigned counsel for Prime did not notify it of Respondent's intent to the file the underlying Motion. The Motion to Exclude was filed within 48 hours of EPA's Third Supplement to avoid delay in the resolution of this important issue. Counsel for Respondent apologizes for the oversight.

ARGUMENT

I. COMPLAINANT HAS FAILED TO SHOW HOW IT COMPLIED WITH 40 C.F.R. § 22.19(f).

Respondent's underlying Motion is premised on Complainant's failure to comply with 40 C.F.R. § 22.19(f), which states in relevant part: 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the exchange when the party learns that the information exchanged or response provided is *incomplete*, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party pursuant to this section." 40 C.F.R. § 22.19(f) (emphasis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's Response Brief fails to show how it complied with those requirements. Regardless which starting point one picks to determine promptness, Complainant took months, waiting until the last possible moment to file its Third Supplement to its prehearing exchange. As such, EPA was not prompt and its Third Supplement should be excluded under 40 C.F.R. § 22.19(g)(2).

EPA argues that Respondent's Motion should fail because it met the deadline set by the Presiding Officer to amend its prehearing exchange. EPA Resp. Br. at 1-2. That argument misses the point. It avoids section 22.19(f)'s independent requirement that EPA promptly supplement when the conditions set out in section 22.19(f) are met. Coming months after EPA knew or should have known supplementation was necessary, Complainant's Third Supplement was not prompt for any of the information it now seeks to add to the record of this case.

More importantly, Complainant's argument, taken to its logical conclusion, would render 40 C.F.R. § 22.19(f)'s promptness requirement meaningless. If, as Complainant argues, a party is free to amend its prehearing exchange as it wishes any time prior to the deadline set by the Presiding Officer, that party could withhold important information it knew would correct the record and it could then make important shifts in the focus of its case at the last minute, throwing

off the other side with a volley of new arguments and evidence. Such a result would be manifestly unfair.

And that is exactly the scenario contemplated by 40 C.F.R. § 22.19(f). The rule is designed to foster early and complete disclosure in lieu of typical federal or state court discovery. Discovery is allowed under 40 C.F.R. § 22.19(e)(1) only upon leave of the Presiding Officer for very specific and limited reasons. The limitations of subsections (e)(1) and (f) are designed to encourage the parties to fully disclose the documents and witness testimony that will support their cases and to do so early enough to allow the other side to prepare.

Hence this Presiding Officer admonished the parties in her Prehearing Order, to "thoughtfully prepare" their prehearing exchanges from the outset. Putting in the effort up front to put forth the evidence one intends to rely on at hearing gives the opposing party the opportunity both to prepare for hearing and to understand its opponent's case well enough to make tactical, long-term decisions and to properly evaluate the possibility of seeking further discovery. Despite the Presiding Officer's early admonishment to the parties, and having had five years to develop this case, EPA has now supplemented its original prehearing exchange three times. It has corrected errors in its penalty policy analysis, added new documents and witnesses and substituted two of its most important witnesses using people (McNeill for penalty and Callaghan for facts) who have only second-hard knowledge of facts underlying their very significant proposed testimonies.

As noted above, section 22.19(f), requires a party that knows its prior prehearing exchange is incomplete to, "*promptly* supplement or correct the exchange." Complainant's Third Supplement was submitted on the eve of the deadline, more than four months from the date of the April 4 Order and more than 19 months since its first prehearing exchange. Neither amount

of time can be considered "prompt." As noted in more detail below, all the information EPA now seeks to add in its Third Supplement was either known or should have been known to Complainant from the outset had it properly prepared its case -- the case for which it bears the burden of persuasion at hearing.

Notwithstanding the plain language of the regulation, EPA argues that Respondent's motion is not persuasive because it cites no case law to support its section 22.19(f) argument. EPA Resp. Br. at n. 3. Respondent cited no supporting or contrary case law because the argument Respondent makes in this Motion appears to be an issue of first impression and the undersigned found no relevant caselaw when researching the basis for the motion. The case EPA cites, *In Re CDT Landfill Corp*., 11 E.A.D. 88 (EAB June 5, 2003), is inapposite. Filing a supplement out of time in that case involved solely an analysis of prejudice to the other side. The argument here is one of compliance with section 22.19(f)'s requirement for prompt supplementation. As noted above, EPA failed to meet that requirement. Exclusion occurs under section 22.19(g)(2) for a failure to comply with the promptness requirement of subsection (f), and neither subsection requires a showing of prejudice by the party moving to exclude.

Despite the lack of a prejudice showing in the rules, EPA argues that because it gave the Presiding Officer and Respondent notice by email on April 22, 2022, Respondent can show no prejudice. EPA Resp. Br. at 3. EPA asserts in its Response Brief that its notice showed that, "Complainant was contemplating adding one or more witnesses and exhibits to its prehearing exchange . . ." *Id.* That is incorrect. The referenced April 22 notice stated, "Complainant is evaluating the Court's latest Order to determine the impact on Complainant's hearing preparation, *including the need for additional witnesses*." April 22, 2022, email from Laurianne Jackson to Alyssa Katzennelson (emphasis added). That email does not state how many

witnesses might be added. Nor does it identify who the witnesses are or what they might say and, contrary to EPA's Response Brief, it makes no mention of adding exhibits, let alone the 220 pages of new exhibits that comprised EPA's Third Supplement. By EPA's reasoning, if a party discloses that at some undetermined point it might disclose unnamed witnesses to discuss unidentified topics and add unknown documents, it has done what it needs. Surely it has not.

The CROP rule states that "[w]here a party fails to provide information *within its control* as required pursuant to this section, the Presiding Officer may, in his discretion . . . (2) exclude the information from evidence." 40 C.F.R. § 22.19(g) (emphasis added). As set out in more details below, all the information EPA now proffers with its Third Supplement was either within its direct control or could have easily been obtained in the five years EPA had to develop this case and EPA delayed far too long in providing that information to Respondent.

A. The Stormwater Information and Aerial Photos Should be Excluded.

EPA argues that the relevant timeline starts not with the first prehearing exchange, but with the April 4, 2022, Order on Accelerated Decision. EPA Resp. Br. at 5. That argument fails for two reasons. First, even if true, EPA took over four months from the date of the Order on Accelerated Decision to provide the supplemental information. That delay violates the promptness requirement of 22.19(f). Second, EPA's argument presumes that most of the newly-proffered information is in response to the April 4 Order. It is not.

Despite EPA's attempt to prove the contrary, the stormwater permit and related documents (CX68-73) are unrelated to the April 4 Order. As we argued in our underlying Motion, the stormwater documents attempt to introduce a new element to the case at a very late date after the deadline has passed for Prime to identify new witnesses and exhibits of its own.

Complainant argues that the new stormwater information is now being introduced in

response to the Presiding Officer's April Order. EPA Resp. Br. at 8-9. But the stormwater information is presumably intended to rebut the lack-of-environmental-harm argument Respondent has asserted from the outset of these proceedings and as set out in more detail in the underlying Motion to Exclude at pages 5 to 6.

If the addition of the stormwater documents was meant to counter information provided in Dr. Walker's report 19 months prior, it was not prompt. Complainant argues that it is only responding to the Presiding Officer's request for more information than was provided in the Motion for Accelerated Decision. *See* April 4, 2022 Order at 6 and EPA's Resp. Br. at 8. But even if the Presiding Officer's Order can be construed as a call for EPA to adduce additional evidence not already in the prior prehearing exchanges, it does not imply that EPA can wait months in violation of section 22.19(f) to proffer the evidence.

Like the stormwater documents, the aerial photos (CX 74) are proposed to show that Respondent did not cover the trailer during the entire period of storage. Coverage of the load has been known since the time of EPA's inspection years ago, and the Google Earth photos EPA now seeks to put into the record have also been available for years. Nothing new has happened in the interim other than EPA's apparent realization two years after filing its complthat it had a hole in its evidence it wanted to fill at the last minute.

EPA's Third Supplement is not introducing these new documents in order to comply with the April 4 Order. Rather, it is EPA's eleventh-hour effort to try and address a deficiency in its case without giving Respondent an opportunity to respond. The stormwater documents and aerial photographs were well within EPA's control and the arguments it now attempts to counter with those documents were reasonably discernable to EPA long ago.

B. The Callaghan Testimony and Related Documents (CX76-77) Should Be Excluded.

The proposed addition of Callaghan as a witness is also unrelated to the April 4 Order. Complainant now acknowledges it was less than forthcoming in describing its reason for adding Callaghan as a witness. Absent Respondent's Motion to Exclude compelling EPA to disclose that it no longer intended to call Darin Muggleston, Respondent would have been compelled to expend significant resources preparing for his testimony.

EPA's Response Brief is the first notice it has given Prime's counsel that its lead fact witness, Muggleston, will not be attending the hearing. Muggleston is the author of witness interviews that comprise a large part of EPA's voluminous prehearing exchange documentation. Those interviews contain multiple layers of hearsay from other witnesses who will not be attending the hearing.[2] We now learn on the eve of the hearing that Mr. Muggleston will not be attending. EPA claims it learned in "July 2022" that Muggleston would not be attending, omitting the exact date it learned he would not testify. *See* EPA Resp. Br. at 7. Complainant gives "foreign travel" as an excuse for not contacting Mr. Muggleston sooner to ascertain this vital witness's availability for hearing, offering no reason why he wasn't available by cell phone while abroad. The Presiding Officer set the hearing date on May 9, 2022. Notice of Hearing Order at 2. One assumes that Complainant alerted its witnesses immediately after the issuance of the Hearing Order in May of the need to appear at the hearing in October. But EPA waited until August to disclose in a response brief that its principal fact witnesses would not be appearing at hearing. EPA should have promptly alerted Respondent of its intent to substitute out this

[2] While 40 C.F.R. § 22.22(a)(1) does not forbid hearsay evidence, it does prohibit the introduction into the record evidence which is considered unreliable. A witness testifying about another absent witness's interviews of people not in the courtroom (who, at times, relay statements from yet other witnesses who will not be called to testify) creates genuine problems of both the credibility of the testimony and the inability of Respondent to cross examine multiple witnesses who will not be at the hearing.

important witness. It did not.

As argued in our opening brief, the newly-proposed witness Callaghan does not appear to have authored any of the multiple IAR's (*see e.g.*, CX52-62), nor does his name appear in any, although numerous agents' names are blacked out in the documents provided to Respondent. If Callaghan is allowed to testify, Respondent is entitled to cross examine him on how much, if any, he participated in the interviews before allowing those documents to come into evidence. If Mr. Callaghan was not present during the interviews, he should not be allowed to testify regarding them, and those interviews should be excluded. In any case, the issue of Callaghan's competence to testify about IARs he did not author or participate in should be resolved at hearing, not in EPA's untimely prehearing cross-motion. What can be decided here, however, is whether EPA promptly disclosed Callaghan as a witness. It did not.

C. The Miller Report and Exhibits Should be Excluded.

If the April 4 Order was the impetus for the addition of Dr. Miller, an EPA employee that Complainant has had access to throughout this proceeding, four months was not prompt. Complainant asks this Tribunal to countenance a practice in which the parties ambush each other with new information and proposed expert witness testimony at the eleventh-hour with the effect of surprising and prejudicing the opposing side. As noted above, given that discovery is discouraged under Part 22, the parties are encouraged to disclose the elements of their case early to allow the other side to prepare. *See* 40 C.F.R. § 22.19(e)(1) (". . . the Presiding Officer may order discovery only if [specific criteria are met]"). Dr. Miller's proposed testimony should have been disclosed months ago, and it therefore should be excluded.

II. COMPLAINANT'S MOTION TO ADMIT IS PREMATURE.

In its cross-motion filed after the non-dispositive motion deadline in this case, EPA seeks a ruling in limine holding that certain newly-disclosed exhibits in its Third Supplement should be admitted now. First, the deadline for non-dispositive motions has passed and Complainant did not seek leave to file the cross-motion. Respondent's Motion to Exclude was in response to a late filing of prehearing materials under 40 C.F.R. § 22.19(f). It is improper for EPA to now seek an advance ruling, by a motion filed after the deadline, on the admissibility of the late-disclosed exhibits in EPA's Third Supplement.

It is manifestly unfair to Respondent for EPA to dump 220 pages of new documents on Respondent on the eve of the amendment deadline, just 60 days before hearing, and then ask that it all be presumptively admitted. If the Presiding Officer denies Respondent's Motion to Exclude, Respondent should be allowed to preserve its objections to the documents at issue in that motion and in EPA's cross-motion, and allow Respondent to require EPA to lay a proper foundation for the admission of those documents and proposed witness testimony at hearing.

CONCLUSION

For these and other good reasons set forth above, the additional witnesses and documents proposed in Complainant's Third Supplemental Prehearing Exchange were not promptly supplied to Respondent and should be excluded under 40 C.F.R. § 22.19(g)(2) and Complainant's Motion to Admit should be denied.

RESPECTFULLY SUBMITTED this 14th day of September 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of September 2022, I filed Respondent's Reply to EPA's Response re Motion to Exclude Supplemental Exhibits and Witnesses and Respondent's Motion in Limine and Complainant's Cross Motion to Admit Certain Exhibits Into Evidence via the OALJ E-filing system and via email to:

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