



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

U.S. ENVIRONMENTAL PROTECTION AGENCY-REG. II 2009 NOV 17 P 1:49 REGIONAL HEARING CLERK

IN THE MATTER OF)
AGUAKEM CARIBE, INC.,) DOCKET NO. RCRA-02-2009-7110
RESPONDENT)

ORDER ON COMPLAINANT'S OBJECTION TO RESPONDENT'S ADDITIONAL SUPPLEMENTAL TO ITS INITIAL PREHEARING EXCHANGE

I. Introduction

The United States Environmental Protection Agency, Region 2, Caribbean Environmental Protection Division ("Complainant" or "EPA") initiated this proceeding on September 29, 2009, by filing a Complaint, Compliance Order, and Notice of Opportunity for Hearing ("Complaint") against Aguakem Caribe, Inc. ("Respondent"). The Complaint alleges that Respondent violated regulations governing the management of hazardous waste and used oil, set forth at 40 C.F.R. parts 260 through 279, as a result of its chemical manufacturing operations at a facility owned by the Port of Ponce Authority ("PPA") in Ponce, Puerto Rico. For the three violations alleged in the Complaint, Complainant proposes the imposition of a civil administrative penalty of \$332,963 against Respondent.

On October 26, 2009, Respondent filed an Answer to Complaint and Request for Hearing ("Answer"), in which Respondent denies the allegations and raises a number of affirmative defenses to liability. Specifically, Respondent contends that Complainant is barred from pursuing the present action against Respondent because of "the legal release granted to Aguakem by the EPA in [an Administrative Order on Consent entered into by Complainant, Respondent, and the PPA], mitigation, failure to join necessary parties, the defense of illegality (federal OSHA laws and Puerto Rico law precluded Aguakem to act in the ways desired by the EPA), the equitable defense of laches, and failure to state a claim." Answer at 6.

Thereafter, the parties filed their initial prehearing exchanges pursuant to the Prehearing Order issued by Judge Moran on November 25, 2009. The parties subsequently filed a number of motions, and after ruling on those motions by Orders dated May 14, 2010, and June 2, 2010, the undersigned issued an Order Scheduling Hearing on July 15, 2010. In the Order Scheduling Hearing, the undersigned directed the parties to file a joint set of stipulated facts, exhibits, and testimony by November 16, 2010, and scheduled the hearing to commence on December 6, 2010. In addition, the undersigned noted that, during a conference call held with the parties on July 14, 2010, counsel for Respondent had raised the possibility of claiming an ability to pay defense. The undersigned advised Respondent to raise this issue no later than September 1, 2010, and to submit documentation corroborating its claim no later than September 15, 2010.

On November 1, 2010, Respondent submitted an Additional Supplement to its Initial Prehearing Exchange ("Supplemental Prehearing Exchange"), in which Respondent identifies three additional witnesses whose testimony it intends to present at the hearing.^{1/} Respondent states that one of those proposed witnesses, Eduardo Guzman, will testify regarding audited financial statements he prepared on behalf of Respondent and Respondent's ability to pay the proposed penalty. Respondent also submitted an audited financial statement for 2010 as an additional exhibit it intends to introduce into evidence at the hearing.

On November 2, 2010, Complainant submitted an Objection to Respondent's Additional Supplemental to its Initial Prehearing Exchange ("Objection").^{2/} Complainant contends that the Order Scheduling Hearing "set strict deadlines that the attorneys for the parties had to comply with," including "those deadlines establish[ing] the dates by which Respondent had to raise the ability to pay defense...and had to submit documentation corroborating its claim..." Objection at 2. Complainant further contends that Respondent failed to comply with those deadlines and thus failed to timely raise the ability to pay defense and submit supporting documentation, despite having had "ample time and various opportunities" to do so. Objection at 3. Complainant

^{1/} In its initial prehearing exchange, Respondent had identified Jorge J. Unanue, the president of Respondent, as the only witness it intended to call to testify.

^{2/} Complainant simultaneously submitted its own Supplemental Prehearing Exchange.

notes that, when a party fails to provide information within in its control as required by Section 22.19(g) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), 40 C.F.R. § 22.19(g), the presiding Administrative Law Judge is authorized to infer that the information is adverse to the party, exclude the information, or issue a default order. Objection at 3. Accordingly, Complainant requests that the undersigned preclude Respondent from presenting the ability to pay defense, the testimony of Mr. Guzman, and the 2010 audited financial statement at the hearing. Objection at 3.

To date, Respondent has not filed a response to Complainant's Objection.

II. Discussion

As Complainant correctly observes in its Objection, the Order Scheduling Hearing directs the parties to "strictly comply with the requirements of [the] Order." The dates by which Respondent was advised to raise an ability to pay defense and submit supporting documentation did not constitute such "requirements," however. The record reflects that those dates were not mandatory filing deadlines but only guidelines recommended to Respondent by the undersigned. Respondent is not precluded from presenting the ability to pay defense, Mr. Guzman's testimony, or the proposed exhibit on the basis that it chose not to follow the undersigned's recommendations.

Exclusion of the foregoing is also not mandated by the Prehearing Order or the Rules of Practice. Pursuant to the Prehearing Order issued by Judge Moran, the parties were permitted to file supplements to their initial prehearing exchanges, without motion, until 30 days before the date scheduled for the hearing. In turn, the Rules of Practice provide at Section 22.22 that:

The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value....If, however, 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). Respondent submitted its Supplemental Prehearing Exchange well in advance of those deadlines established by the Prehearing Order and Rules of Practice.

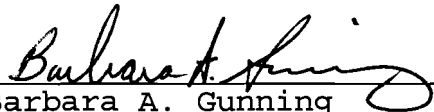
The undersigned notes that Section 22.19(f) of the Rules of Practice, 40 C.F.R. § 22.19(f), requires parties to promptly supplement their initial prehearing exchanges when they learn that the information therein is incomplete, inaccurate, or outdated, and the additional information has not otherwise been disclosed to the opposing party. Furthermore, Respondent was advised in the Order dated May 14, 2010, that the undersigned, in her discretion,^{3/} may deny a supplement to a party's prehearing exchange when the supplement is not prompt or where the existing information is not incomplete, inaccurate or outdated, and particularly where there is evidence of bad faith, delay tactics, or undue prejudice.

However, the undersigned finds no evidence of undue prejudice in this case. Respondent submitted its Supplemental Prehearing Exchange five weeks prior to the scheduled hearing date, and the submission consisted of only 16 pages. The objective of Section 22.19(f) of the Rules of Practice is to prevent parties from "attempt[ing] to unfairly disadvantage their opponent by holding back significant information until a couple of weeks prior to the hearing, when opposing counsel may not have sufficient opportunity to review it, respond, and prepare rebuttal testimony and exhibits." *99 Cents Only Stores*, 2009 EPA ALJ LEXIS 9, at *11 n.2. Here, five weeks provides Complainant with an adequate opportunity to evaluate and respond to the brief document submitted by Respondent. Accordingly, Respondent is not precluded from presenting the ability to pay defense, the testimony of Mr. Guzman, and the 2010 audited financial statement at the hearing.

^{3/} The Rules of Practice relating to prehearing exchanges "grant significant discretion to the presiding officer to conduct administrative proceedings and to make determinations regarding the admissibility of evidence during such proceedings." *In re CDT Landfill Corp.*, 11 E.A.D. 88, 107 (EAB 2003).

III. Order

In accordance with the foregoing discussion, Complainant's request to exclude the ability to pay defense, the testimony of Mr. Guzman, and the 2010 audited financial statement is denied.


Barbara A. Gunning
Administrative Law Judge

Dated: November 15, 2010
Washington, D.C.

**In the Matter of *Aguakem Caribe, Inc.*, Respondent.
Docket No. RCRA-02-2009-7110**

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order on Complainant's Objection to Respondent's Additional Supplemental to Its Initial Prehearing Exchange**, dated November 15, 2010, was sent this day in the following manner to the addressees listed below.



Mary Angeles
Legal Staff Assistant

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Dated: November 16, 2010
Washington, D.C.