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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
 CELLO- FOIL PRODUCTS) Docket No. 5- RCRA- 97- 0005
)
 Respondent.)

ORDER GRANTING COMPLAINANT'S MOTIONS TO COMPEL SUPPLEMENTAL

PREHEARING EXCHANGE AND TO STRIKE ATTACHMENTS

Motion to Compel Supplemental Prehearing Exchange

On January 22, 1998, Complainant EPA filed a motion to compel Respondent to file a supplemental prehearing exchange and a motion to strike attachments. For the reasons which follow, the motions are granted. Respondent is directed to immediately comply with this order.

The Complainant's motion⁽¹⁾ to compel Respondent to file a supplemental prehearing exchange seeks compliance with 40 C.F.R. 22.19(b) and the Prehearing Order dated October 10, 1997. In its response, Respondent maintains that its prehearing exchange does include narrative summaries.

At issue is the failure of the Respondent to provide a meaningful brief narrative summary of the expected testimony of its witnesses. In its prehearing exchange Respondent lists twenty-nine potential witnesses but provides only sentence fragments with symbol codes for the expected testimony.

The purpose of the requirement for a narrative summary is to prevent surprises to the parties, to permit adequate preparation for the hearing and to reduce inefficiencies during the hearing. The truth is better served if both sides understand their opponent's evidence and theories. Here, the Respondent's submission of interchangeable phrases applying to various witnesses is patently insufficient. See: In the Matter of Indoor Air Quality, Inc. And Soloman Scheter Day School of Philadelphia, Inc., Docket No. CAA-III-074 (September 18, 1997) at 1., and In the Matter of Indspec Chemical Corporation and Associated Thermal

Services, Inc., Docket No. CAA-III-086 (January 5, 1998). By providing such a submission Respondent also runs the risk that if the same description of testimony applies to several witnesses there may be an implication of redundancy and duplication, resulting in the risk of a preclusion of some testimony.

Ironically, Respondent proceeds in its response to EPA's Motion to partially comply with the original prehearing order and by doing so demonstrates an understanding of compliance with the Prehearing Order. For example, Respondent relates "[w]ith respect to the individuals . . . employed by . . . EPA and MDEQ, Cello-Foil may call them to testify regarding the inspections they conducted, the findings they allegedly reached and the applicability of the alleged findings to the issue in question. Response at 2, 3. Cello-Foil goes on to add more detail about the subject of the testimony about which they intend to question their potential witnesses. For potential witness Lyman Fielder, Cello-Foil identifies that she participated in the process of Cello-Foil's permit application. Respondent can be more specific about the subject of Ms. Fielder's testimony. Further, it is inappropriate to merely tell EPA to interview the witness if it has any questions. *Id* at 4.

As to Respondent's financial health, Respondent must provide more detail as to the nature of the testimony expected from "individuals with knowledge of Cello-Foil's financial status" and provide the documents upon which those individuals will be relying in support of their testimony

While a company's financial status is dynamic, it is disingenuous to suggest that Cello-Foil "does not know what its financial situation will be at the time of the hearing." Cello-Foil can submit its present financial status information and update any changes at the commencement of the hearing, which is scarcely more than two weeks away. Again, it is contrary to the request of the prehearing order and to the principle of modern discovery to merely shift the burden to EPA to submit "specific requests." Cello-Foil has a duty to be more forthcoming. The Prehearing Order directed that if Respondent took the position that it is unable to pay the proposed penalty or that penalty will adversely impact its ability to continue in business, "Respondent shall furnish supporting documentation such as financial statements or tax returns."

Similarly, Respondent's reference to testimony from a newspaper reporter is woefully inadequate. Discovery responsibilities are not satisfied by merely telling one's opponent to contact the Respondent's witness(es).

Motion to Strike Attachments

In the Complainant's Motion to Strike Respondent's Attachments as inappropriate and irrelevant, EPA objects to Respondent's inclusion of the following: a letter from a U.S. Representative to U.S. EPA; a letter from Michigan Jobs Commission to a Michigan State Senator; and a letter from a Michigan State Senator to the Chairman of Cello-Foil.

The Complainant also asks that, unless Respondent presents legitimate financial information, the Respondent be barred from claiming an inability to pay the proposed penalty. In the attachment described by Cello-Foil as relating to its ability to pay the letter, dated August 12, 1997, from U.S. Representative Fred Upton, the letter seems to concede violations: " Cello-Foil unknowingly failed to comply with required federal certifications. . . and Cello-Foil realize(s) [it does] not have the appropriate permit from EPA" but adds nothing regarding the ability to pay issue beyond an assertion that the penalty "would have a costly impact . . . perhaps even putting its future in question." The letter also asserts Respondent has an "outstanding environmental record and that this situation has not resulted in any pollution or damage to the environment."

Obviously, this is inadmissible on the issue of Respondent's ability to pay or its financial health. While the letter also implies that Cello-Foil has conceded violations, at least to the Congressman, it is similarly inadmissible to establish the violations. .

The second attachment is a letter dated June 20, 1997, from Douglas E. Stites,

Chief Operating Officer for the Michigan Jobs Commission. This says nothing regarding Respondent's financial condition. It asserts Respondent did not violate air emission standards but concedes it did not have the correct permit. Clearly, for the same reasons, this document is also of no relevance to this proceeding.

Last, there is a letter from Michigan State Senator John J. P. Schwarz, M.D. As with the others, it offers no evidentiary value to any issue in this proceeding.

Accordingly, EPA's motion to strike Respondent's attachments as irrelevant to this proceeding is also GRANTED. Complainant's motion is also GRANTED to allow the filing of a motion to preclude other evidence if, as the result of this Order concerning the Prehearing Exchange, Complainant believes that the information is irrelevant, immaterial, unduly repetitious or otherwise unreliable or of little probable value.

So Ordered.

William B. Moran
Administrative Law Judge

Dated: February 18, 1998
Washington, D.C.

1. The Complainant waited over forty days before filing this motion. Where, as here, the matter about which relief is sought is apparent on its face, parties should file motions without delay.

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