

**UNITED STATES OF AMERICA  
ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE ADMINISTRATOR**

**IN THE MATTER OF:** )  
 )  
**STRONG STEEL PRODUCTS, LLC,** ) **Docket No. CAA-5-2003-0009**  
 )  
**Respondent.** )

**ORDER ON MOTIONS TO SUPPLEMENT PREHEARING EXCHANGE**

On January 27, 2005, both parties moved to supplement their Prehearing Exchanges. (Respondent's "Second Motion to Supplement Prehearing Exchange" and Complainant's "Motion to Amend Prehearing Exchange, Fifth Amendment"). Thereafter, on February 11, 2005, both parties each submitted another motion to supplement their Prehearing Exchange (Respondent's "Third Motion to Supplement Prehearing Exchange" and Complainant's Motion to Amend Prehearing Exchange, Sixth Amendment"). On February 7, 2005, Respondent submitted a Response to Complainant's Motion as to its Fifth Amendment, and on February 11, Complainant filed a Reply thereto, entitled "Complainant's Reply to Respondent's Motion in Limine." The hearing is scheduled to commence on March 1, 2005.

**I. Complainant's Motion to Amend, Fifth Amendment**

Complainant's Motion to Amend its Prehearing Exchange, Fifth Amendment (Motion) requests an order approving all of its previous amendments to its Prehearing Exchange, along with proposed Exhibits 83 through 158. In its Fifth Amendment, Complainant seeks to add to the scope of testimony of Ross Powers, Reginald Arkell, Jeffrey Gahrns, and Sue Rodenbeck Brauer. Complainant also seeks to add new witnesses, Dr. Bradley Venner, to testify as to statistics, and Mark D. Ewen, to testify as an expert as to financial benefits of Respondent's alleged delayed compliance. Complainant seeks to add as adverse witnesses Steven and Anthony Benacquisto, Michael Beaudoin, and Lisa Carroll. Complainant asserts that Respondent either generated the proposed Exhibits or had them in its possession.

In its Response to the Motion, Respondent states that it does not object to Complainant's First, Second and Third Prehearing Exchange Amendments.

Respondent states that it *does* object to Complainant's request to add Mark D. Ewen as a witness and to proposed Exhibits 109, 111, 112, 113, 114, 115, 118, 134, and 135. Respondent asserts that Complainant had these documents in its possession before the March 4, 2004 rebuttal prehearing exchange deadline. Respondent argues that Mr. Ewen's testimony is a surprise and that, as it addresses financial benefit from delayed compliance, contradicts Mr. Cardile's penalty

calculation which did not include in the proposed penalty an economic benefit component. Respondent asserts that it relied on Complainant's representations that there would be no economic benefit component, and Complainant should not inject this new issue into the case just three weeks before hearing, as it unfairly prejudices Respondent. Respondent would not be able to locate and prepare a rebuttal witness.

In its Reply, Complainant asserts that the Response is actually a motion in limine filed beyond the deadline for pre-trial motions, January 27, 2005. Complainant asserts that Mr. Ewen will be called to testify to offset any reductions in the penalty that Respondent requests, and that economic benefit must be considered by this Tribunal under the statute and CFC Penalty Policy. Complainant reiterates that it does not seek to increase the proposed penalty. Complainant argues that Mr. Ring is expected to testify as to Respondent's recent expenditures on a facility which processes whole cars and removes CFCs and fluids. Complainant suggests that the delayed construction of this facility may represent an economic benefit.

Provided Mr. Ewen's testimony is in rebuttal to Mr. Ring's testimony on Respondent's expenditures on the new facility, it is possible, although not at all clear at this point, that his testimony could be relevant to the penalty calculation. In any event, Complainant will be required to lay a foundation for his testimony at the hearing.

Complainant's Exhibits 109, 112 and 118 were held admissible, and Respondent's Motion in Limine was denied as to those Exhibits, by an Order issued earlier today.

As to the remaining seven Exhibits, Respondent asserts that they were in Complainant's possession since 2002 or 2003, that Respondent is entitled to notice of the documents Complainant intends to rely on, and that it should not be required to search its own files to guess what Complainant may present. In addition, C's Exh 111, portions of a report of Conestoga Rovers to Michigan Department of Environmental Quality (MDEQ), June 2001, addressing how Respondent remediated spill areas, has no relevance to the CAA. Respondent asserts that C's Exh 134 duplicates the first 54 pages of C's Exh 118. There is no showing that C's Exh 135, a report dated March 21, 2002 by Arthur D. Little, concerning, *inter alia*, technologies for refrigeration, is publicly available.

The fact that Complainant did not amend its Prehearing Exchange to include these documents until now is considered along with the fact that both parties had many of these documents in their possession, that they have recently litigated the RCRA case against Respondent which includes some of these documents as exhibits, and that they have been spending extraordinary amounts of time on the many motions filed in these proceedings, and the scope of this case has changed due to the additional motions. Furthermore, C's Exh 111 addresses Respondent's cleanup of the facility, and the conditions of the facility in 2001, and therefore may have some relevance to the issues in this case. It appears that C's Exh 134 duplicates C's Exh 118, but Complainant will be given an opportunity to show at the hearing whether or not its Exh 123 is duplicative. It is not necessary to exclude the Little report, C's Exh 134, based on the fact it is not publicly available.

There are some documents in the Complainant's Amendments to its Prehearing Exchange which are only relevant to the waiver determination under CAA § 113(d), including C's Exs 46 through 51, 55, 57 through 63, and 75 through 79. These documents are not relevant to any current issues in this case. As discussed in the Order on Motions to Subpoena, dated February 17, 2005, the issue of the waiver determination has been ruled on, and that ruling is the law of the case. The issue will not be revisited at the hearing.

Accordingly, the documents included in Complainant's First, Second, Third, Fourth and Fifth Motions to Amend are accepted into the Prehearing Exchange, except for C's Exs 46 through 51, 55, 57 through 63, and 75 through 79.

Complainant's Motion to Amend, Fifth Amendment, is **granted** as to the expansion of the scope of testimony of the existing witnesses, and as to testimony of Dr. Bradley Venner, Mark D. Ewen, Steven and Anthony Benacquisto, Michael Beaudoin, and Lisa Carroll.

### **Respondent's Second Motion to Supplement Prehearing Exchange**

In its Second Motion to Supplement (Motion), Respondent seeks to add:

- (1) proposed Exhibits 42 through 67;
- (2) proposed witnesses who are EPA employees, namely Cheryl Newton, George Czerniak, T. Leverett Nelson, and Linda Rosen;
- (3) proposed witnesses who were representatives of suppliers of items to Respondent's facility, namely Vincent Quinn, Charles Wilson, Mitch Binkowski, John Jepson, Edward Kurzawa, Dan Kurzawa;
- (4) proposed witnesses who are City of Detroit Department of Environmental Affairs employees Sara Lile or Bruce M. King; and
- (5) Proposed witness who is Respondent's employee, Larry Hunt.

Respondent proposes to have the EPA employees testify in regard to the waiver determination under Clean Air Act (CAA) § 113(d). The proposed Exhibits, with the exception of R's Exhs 44, 45, 66, and 67 appear to be only relevant to the CAA § 113(d) waiver determination. As noted above, the issue of the waiver determination has been ruled on, it is the law of the case, and will not be revisited at the hearing. Therefore Respondent's Second Motion to Supplement is **denied** with respect to proposed witnesses Cheryl Newton, George Czerniak, T. Leverett Nelson, and Linda Rosen, and with respect to Exhs 42, 43, and 47 through 65.

As to the other witnesses, Complainant has requested sanctions for Respondent's failure to identify these witnesses earlier. The summaries of testimony indicate relevance to the issues disputed in this case. There is no indication of delay tactics or bad faith as to these supplements to Respondent's Prehearing Exchange. Respondent referred to representatives of some of its suppliers in its original Prehearing Exchange; although the witnesses were not named, they were representatives of the eight suppliers named in the original complaint. The remaining proposed

witnesses are representatives of suppliers named in the Second Amended Complaint, which was filed January 3, 2005. Respondent only learned of Complainant's evidence from the City of Detroit in C's Exh 112 when it filed its Motion to Amend, Fifth Amendment.

The remaining documents are R's Exhs 44, 45, 66, and 67. Respondent's Exh 44 is Complainant's July 9, 2004 request for information, and a response to an request for information from Respondent, dated June 3, 2004. R's Exh 45 is Respondent's response to the Complainant's July 9, 2004 request. R's Exh 66 is a letter from Respondent to Complainant, dated December 28, 2004, requesting the latter to consider certain issues before amending the Complaint. R's Exh 67 is Respondent's response to Complainant's request for information, dated December 3, 2004, concerning Mr. Ring's report.

It cannot be concluded at this point in the proceeding that the testimony of the Respondent's proposed witnesses, and R's Exhs 44, 45, 66 and 67, would be "irrelevant, immaterial, unduly repetitious, unreliable or of little probative value." 40 C.F.R. § 22.22(a). The admissibility of their testimony and R's Exhs 44, 45, 66 and 67 will be determined at the hearing.

Accordingly, the Motion will be **granted** with respect to testimony of Vincent Quinn, Charles Wilson, Mitch Binkowski, John Jepson, Edward Kurzawa, Dan Kurzawa; City of Detroit Department of Environmental Affairs employees Sara Lile or Bruce M. King; and Respondent's employee, Larry Hunt. The Motion also will be **granted** with respect to R's Exhibits 44, 45, 66 and 67.

### **Complainant's Motion to Amend, Sixth Amendment**

Recognizing the deadline of January 27, 2005 set for any pre-trial motions, Complainant requests permission to amend its Prehearing Exchange after the deadline, arguing that the Consolidated Rules of Practice, 40 C.F.R. part 22 (Rules) allow prehearing exchanges to be supplemented at any time, without cause, if more than 15 days prior to hearing, citing 63 Fed. Reg. 9464, 9472 (February 25, 1998)("The Agency . . . proposes that all barriers to amending prehearing exchanges should be dropped in the interest of full and complete exchange of information between the parties (see section 22.19(f) . . . ). Complainant asserts that in the companion RCRA case against Respondent, the latter was permitted to update its Prehearing Exchange at the hearing. Complainant asserts further that the three documents in the Sixth Amendment either correct earlier documents that were submitted summarize potential witness testimony or corroborate it.

Complainant seeks to add proposed Exhibits (C's Exhs) 159, 160 and 161. C's Exh 159 is a letter dated February 4, 2005, from Ford Motor Company responding to a request from Complainant, including information as to air conditioning in certain vehicles identified by Complainant, and MVACs (motor vehicle air conditioning systems). Complainant asserts that it is an update and correction to C's Exh 151. C's Exh 160 is an undated Ward's 1981-2001 summary of percent of vehicles with air conditioning, with a facsimile cover sheet showing it

was sent from Chicago Public Library to EPA on January 28, 2005. C's Exh 161 is a report dated November 1991, entitled "Non-Inert Refrigerant Study for Automotive Applications" by Arthur Little for the U.S. Department of Energy, with a cover sheet stating that it is "available to the public through the National Technical Information Service . . . ." Complainant concedes that not all of the latter document will be relevant at hearing, but provided the entire document nevertheless, and asserts that portions of it may be the source of testimony of one or more of its witnesses. Complainant asserts that the information in these exhibits is necessary to prepare rebuttal to the testimony and study of Mr. Ring.

Complainant has submitted the documents more than 15 days prior to the hearing, and thus does not need to show good cause for failing to supply the documents sooner. However, filing supplements to prehearing exchanges more than 15 days prior to hearing does not guarantee that they will be accepted into the prehearing exchange. Such a guarantee may allow parties 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. Such a guarantee would in effect make the prehearing exchange deadlines meaningless. Indeed, 40 C.F.R. § 22.19(f) requires a party to supplement a prehearing exchange "*promptly . . . when the party learns that the information exchanged . . . is incomplete, inaccurate or outdated*" unless it has been otherwise disclosed (Emphasis added). Thus, where 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, supplements to prehearing exchanges may be denied. Consequently, the undersigned requires parties to file motions to supplement prehearing exchanges, in which they can provide reasons for filing the supplement and failing to supply the information sooner. A party failing to file such motion or provide such reasons, although not necessarily in violation of the Rules, simply runs the risk of being considered to be acting in bad faith or engaging in delay tactics.

No response was received from Respondent,<sup>1</sup> and there is no evidence that Complainant is acting in bad faith or engaging in delay tactics in filing its Sixth Amendment. It does not appear at this point that the documents therein are "irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value." 40 C.F.R. § 22.22(a).

Accordingly, Complainant's Motion to Amend, Sixth Amendment, will be **granted** and Complainant will be given the opportunity at hearing to lay a foundation for these documents.

### **Respondent's Third Motion to Supplement Prehearing Exchange**

In its Third Motion to Supplement, Respondent seeks to add proposed Exhibits 68, 69,

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<sup>1</sup> Given that the motions deadline has passed, no motion or responsive document was expected from Respondent.

and 70, which are a July 13, 2004 FOIA request by Respondent's counsel to Region 5, and two responses thereto, and proposed Exhibits 71 through 74, which are complaints and settlement orders relevant to Respondent's arguments as to the waiver determination under CAA § 113(d). As noted above, the waiver determination issue will not be revisited at the hearing. Accordingly, the Respondent's Third Motion to Supplement is **denied**.

### **ORDER**

1. Complainant's Motion to Amend, Fifth Amendment, is **granted in part and denied in part**, as follows. The Motion is **granted** as to documents included in Complainant's First, Second, Third, Fourth and Fifth Motions to Amend, but **denied** as to C's Exs 46 through 51, 55, 57 through 63, and 75 through 79. Complainant's Motion to Amend, Fifth Amendment, is **granted** as to the expansion of the scope of testimony of the existing witnesses, and as to testimony of Dr. Bradley Venner, Mark D. Ewen, Steven and Anthony Benacquisto, Michael Beaudoin, and Lisa Carroll.
2. Complainant's Motion to Amend, Sixth Amendment is **granted**.
3. Respondent's Second Motion to Supplement is **granted in part and denied in part**, as follows. The Motion is **denied** with respect to proposed witnesses Cheryl Newton, George Czerniak, T. Leverett Nelson, and Linda Rosen, and with respect to Exhs 42, 43, and 47 through 65. The Motion is **granted** with respect to testimony of Vincent Quinn, Charles Wilson, Mitch Binkowski, John Jepsen, Edward Kurzawa, Dan Kurzawa; City of Detroit Department of Environmental Affairs employees Sara Lile or Bruce M. King; and Respondent's employee, Larry Hunt. The Motion is **granted** with respect to R's Exhibits 44, 45, 66 and 67.
4. Respondent's Third Motion to Supplement is **denied**.

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Susan L. Biro  
Chief Administrative Law Judge

Dated: February 18, 2005  
Washington, D.C.