



UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of: )  
 ) Docket No. CAA-03-2014-0092  
Whitehall Township, )  
 )  
Respondent. ) Dated: March 10, 2015

**ORDER GRANTING COMPLAINANT'S MOTION  
TO COMPEL COMPLIANCE WITH PREHEARING ORDER**

**I. Procedural Background**

This proceeding was initiated on March 31, 2014, with the filing of a Complaint by the Director of the Land and Chemicals Division, United States Environmental Protection Agency, Region III ("Complainant" or "EPA"), under Section 112 of the Clean Air Act ("CAA" or "Act"), as amended, 42 U.S.C. § 7412. The Complaint contains four counts alleging violations of the National Emission Standard for Hazardous Air Pollutant ("NESHAP") for asbestos, briefly characterized as follows: Count 1 charges Respondents with failure to provide EPA with written notice of intent to demolish a facility having regulated asbestos-containing material ("RACM"), in violation of 40 C.F.R. § 61.145(b). Count 2 alleges failure to remove the RACM from the facility before demolition, in violation of 40 C.F.R. § 61.145(c)(1). Count 3 alleges failure to adequately wet the RACM until it is collected and contained or treated for disposal, in violation of 40 C.F.R. § 61.145(c)(6)(i). Count 4 charges Respondents with failure to have a trained representative present at the site where RACM was handled or disturbed, in violation of 40 C.F.R. § 61.145(c)(8).

After an Answer was filed by both Respondents, the parties agreed to participate in an Alternative Dispute Resolution ("ADR") process, which resulted in a settlement agreement between Complainant and Respondent Madonna Enterprises, Inc. A fully-executed Consent Agreement and Final Order as to Respondent Madonna Enterprises, Inc. was filed on September 25, 2014 and Complainant filed a Notification of Partial Settlement with this Tribunal on October 30, 2014. Therefore, this case has been re-captioned to remove Madonna Enterprises, Inc. as a Respondent. Hereinafter, references to "Respondent" are to Whitehall Township only.

The ADR process having terminated without any settlement with Respondent Whitehall Township, the undersigned was designated to preside in this matter and on October 23, 2014

issued a Prehearing Order directing the parties to file and serve their prehearing exchange materials and information by certain deadlines. The parties timely filed their respective prehearing exchanges.

On January 15, 2015, Complainant filed a Motion to Compel Compliance with Prehearing Order (“Motion”). Complainant asserts that Respondent’s prehearing exchange identified Mr. David I. Shields as both a fact and expert witness, but failed to include a summary of his expected testimony and also failed to provide a copy of his curriculum vita or resume, as required by the Prehearing Order. No response to the Motion has been received, and Complainant represents that Respondent was contacted and does not object to the granting of the Motion.

## **II. Applicable Legal Standards**

The procedural rules governing this proceeding are the Rules of Practice at 40 C.F.R. Part 22 (“Rules”). Regarding the required contents of a prehearing exchange, the Rules provide as follows, in pertinent part:

Each party’s prehearing exchange shall contain: (i) The names of any expert or other witness it intends to call at the hearing, together with a brief narrative summary of their expected testimony . . . .

40 C.F.R. § 22.19(a)(2). Furthermore, the Prehearing Order issued in this proceeding required the parties to include “a curriculum vita or resume for each identified expert witness.” Prehearing Order ¶ I.A.2.

With regard to failure to exchange information, the Rules provide, “Except as provided in § 22.22(a), a document or exhibit that has not been included in prehearing information exchange shall not be admitted into evidence, and any witness whose name and testimony summary has not been included in prehearing information exchange shall not be allowed to testify.” 40 C.F.R. § 22.19(a). Section § 22.22(a) in turn provides that a document, exhibit, witness name or summary of testimony must be filed at least 15 days prior to the hearing date or it will not be admitted into evidence, unless the party offering it “had good cause for failing to exchange the required information” and provided it to the 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).

The Rules provide further:

Where a party fails to provide information within its control as required . . . , the presiding officer may, in [her] discretion: (1) Infer that the information would be adverse to the party failing to provide it; (2) Exclude the information from evidence; or (3) Issue a default order under § 22.17(c).

40 C.F.R. § 22.19(g).

Generally, the preferred initial remedy for a prehearing exchange that is insufficient on its face is to compel the party to produce the information rather than to exclude it or find the party in default. See, *Alan Richey, Inc.*, EPA Docket No. CWA-06-2004-1903, 2005 EPA LEXIS 46, \*8 (ALJ, August 18, 2005)(Order on Respondent's Combined Motion to Strike Complainant's Prehearing Exchange and Motion to Default Complainant and Motion for Suspension of Prehearing Exchange). As my esteemed colleagues have stated, the purpose of the narrative summary of testimony "is to prevent surprises to the parties and the resulting inefficiencies at the hearing, and to permit adequate preparation for hearing." *Id.* \*11-12; *Pekin Energy Co.*, EPA Docket No. 5- EPCRA-95-045, 1997 EPA ALJ LEXIS 89 (ALJ, March 25, 1997)(Order Requiring Supplemental Prehearing Exchange); *Cello-Foil Products*, EPA Docket No. 5- RCRA-97-005, 1998 EPA ALJ LEXIS 24 (ALJ, February 18, 1998)(Order Granting Complainant's Motions to Compel Supplemental Prehearing Exchange and to Strike Attachments.). Summaries of testimony "must convey sufficient information concerning the witnesses' connection to the case at hand, to notify the opposing party of the general substance and context of the testimony of each witness." *Alan Richey* at \*11-12 (citing *Henry Velleman*, EPA Docket No. 5-CAA-97-008, 1998 EPA ALJ LEXIS 27 (ALJ, March 18, 1998)(Order Compelling Compliance with Prehearing Order and Denying Motion to Strike Proposed Witnesses)).

### **III. Discussion and Conclusion**

Respondent's Prehearing Exchange identifies Mr. David I. Shields as a "Fact/Expert witness on permitting for the demolition," without providing his curriculum vita or resume. R PHE at 2. It identifies Mr. Shields as president of Keystone Code Consulting and Enforcement and states that "his entity was responsible for review and approval of permits." *Id.* Complainant asserts this is not a sufficient summary of Mr. Shields' expected testimony, and thus prejudices Complainant's ability to secure witnesses or documents necessary to rebut his proposed testimony and his qualifications as an expert witness.

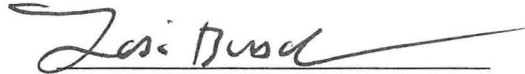
It is clear that the mere identification of Mr. Shields and the few words describing his business as stated in Respondent's prehearing exchange does not convey information on his connection to this case, and does not indicate the general substance of his testimony. It does not achieve the purpose of providing the summary of testimony. While Respondent could easily have remedied the situation by simply filing the missing materials, it has not done so within a reasonable period of time, thereby necessitating this Order.

Accordingly, **IT IS ORDERED THAT:**

Complaint's Motion to Compel Compliance with Prehearing Order is hereby **GRANTED**. Respondent shall file on or before **March 20, 2015**, a supplement to its Prehearing Exchange with a curriculum vita or resume for Mr. Shields and a narrative summary of the substance of his expected testimony and his connection to this case.

Complainant may supplement its Rebuttal Prehearing Exchange within 20 days from the date of service of Respondent's supplement to its Prehearing Exchange described above.

With respect to these items, it shall not be necessary for the parties to file motions to supplement the prehearing exchange.

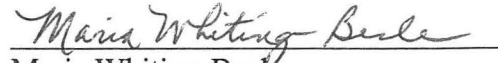
A handwritten signature in black ink, appearing to read "Lisa Buschmann", with a long horizontal flourish extending to the right.

M. Lisa Buschmann  
Administrative Law Judge

In the Matter of Whitehall Township, Respondent  
Docket No. CAA-03-2014-0092

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Granting Complainant's Motion To Compel Compliance With Prehearing Order**, dated March 10, 2015, was sent this day in the following manner to the addressees listed below.

  
\_\_\_\_\_  
Maria Whiting-Beale  
Staff Assistant

Dated: March 10, 2015

Original and One Copy To:

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Copy By Electronic and Regular Mail To:

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