UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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

ORDER ON COMPLAINANT'S REPLY TO RESPONDENT'S PREHEARING EXCHANGE

I. Introduction

This proceeding arises under the authority of Section 3008 of the Solid Waste Disposal Act, as amended, commonly referred to as the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (collectively referred to as "RCRA"), 42 U.S.C. § 6928. The United States Environmental Protection Agency, Region 2, Caribbean Environmental Protection Division ("Complainant" or "EPA") initiated the proceeding on September 29, 2009, by filing a Complaint, Compliance Order, and Notice of Opportunity for Hearing ("Complaint") against Aguakem Caribe, Inc. ("Respondent" or "Aguakem").

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.

By Order dated November 16, 2009, the Honorable William B. Moran, an administrative law judge ("ALJ") in EPA's Office of Administrative Law Judges, was designated as the Presiding Officer for the case. Judge Moran issued a Prehearing Order on November

25, 2009, directing the parties to make their initial prehearing exchanges by January 25, 2010. Specifically, Judge Moran directed each party to submit, among other things, "a list of all expert and other witnesses it intends to call with a brief narrative summary of their expected testimony; and copies of all documents and exhibits it intends to introduce into evidence." Judge Moran also advised that the parties "may file supplements to their prehearing exchanges (including any reply or rebuttal material), without motion, until 30 days before the date scheduled for the hearing."

The parties timely filed their initial prehearing exchanges. However, Respondent states in its initial prehearing exchange ("Initial Prehearing Exchange") that it "is making a partial submission of the documents it intends to present at the hearing" and that it will make "[a] supplememental submission, in compliance with the...Prehearing Order," within ten days. Initial Prehearing Exchange at 2 n.1. Complainant subsequently submitted a Reply to Respondent's Prehearing Exchange ("Reply"), in which Complainant objects to "wait[ing] ten additional days in order to review the rest of the documents and determine if [it] needs to file supplements to its initial prehearing exchange." Reply at 2 (emphasis in original).

Complainant contends that, by providing in a piecemeal fashion the documents it had always intended to introduce at the hearing, Respondent failed to comply with the Prehearing Order and the regulations governing this proceeding.[1/] Reply at 1. Complainant further argues that "Respondent's action constitutes evidence of bad faith" and cites an order issued by my esteemed colleague, Chief Judge Susan L. Biro, in *99 Cents Only Stores*, EPA Docket No. FIFRA-9-2008-0027, 2009 EPA ALJ LEXIS 9 (ALJ, Order on Motions to Supplement Prehearing Exchanges, June 18, 2009), for the proposition that evidence of bad faith is grounds for denying supplements to initial prehearing exchanges. Reply at 2. Respondent subsequently submitted one document as a supplement to

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[1/] These regulations, entitled the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the "Rules of Practice"), are set forth at 40 C.F.R. §§ 22.1-22.32. Complainant specifically alleges that Respondent failed to comply with Section 22.20 of the Rules of Practice, 40 C.F.R. § 22.20. That provision is not applicable here, however, as it provides the authority for ALJs to render accelerated decisions and to dismiss proceedings. The proper citation is Section 22.19 of the Rules of Practice, 40 C.F.R. § 22.19, which governs prehearing exchanges.

its initial prehearing exchange but did not respond to Complainant's contentions.[2/]

On February 17, 2010, Judge Moran issued a Notice of Hearing notifying the parties that a hearing in this case would commence on May 4, 2010. However, pursuant to a Notice of Hearing Postponement issued on March 29, 2010, Judge Moran postponed the hearing until rulings had been issued on the matter at hand and on other motions filed by the parties in this case.[3/]

On April 22, 2010, this case was reassigned to the undersigned Judge Barbara A. Gunning because of Judge Moran's departure from EPA's Office of Administrative Law Judges.

II. Discussion

As noted above, Section 22.19 of the Rules of Practice, 40 C.F.R. § 22.19, sets forth the requirement that parties file prehearing exchanges of information. Pursuant to this provision, each party is obligated to submit, in accordance with a prehearing order issued by the presiding ALJ, "[t]he names of...any witnesses it intends to call at the hearing, together with a brief narrative summary of their expected testimony," and "[c]opies of all documents and exhibits which it intends to introduce into evidence at the hearing." 40 C.F.R. § 22.19(a). Section 22.19 also requires a party to promptly supplement its prehearing exchange when the party learns that the information therein is incomplete, inaccurate, or outdated. 40 C.F.R. § 22.19(f). The Rules of Practice further provide at Section 22.22 that:

[2/] Respondent submitted its initial prehearing exchange on January 25, 2010. Although Respondent claimed that it would submit a supplement to its initial prehearing exchange within ten days of that date, Respondent did not submit the supplement until February 11, 2010.

[3/] On February 10, 2010, Complainant submitted Complainant's Motion in Limine and Motion to Strike. On February 25, 2010, Respondent submitted Respondent's Opposition to EPA's Motion in Limine and Motion to Strike, and Request for Discovery and Rescheduling of Hearing. On March 11, 2010, Complainant submitted a Response to Respondent's Opposition to EPA's Motion in Limine and Motion to Strike, and Motion to Deny Respondent's Request for Discovery and Rescheduling of Hearing. Disposition of these motions is forthcoming.

> 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).

In the present proceeding, Respondent submitted the supplement to its initial prehearing exchange prior to Judge Moran setting a hearing date and more than two months before the scheduled hearing date. Respondent, therefore, is not required under Section 22.22(a)(1) to show good cause for failing to supply the document contained in the supplement sooner. Nevertheless, the 15-day requirement imposed by Section 22.22(a)(1) "does not exempt a party from complying with a prehearing order deadline in the first instance." *In re JHNY, Inc.*, 12 E.A.D. 372, 387 (EAB 2005) ("*JHNY*").[4/] If a party fails to supply information within its control in accordance with the Rules of Practice and the prehearing order, Section 22.19(g), 40 C.F.R. § 22.19(g), provides that the presiding ALJ may, in his or her discretion, infer that the information would be adverse to the party failing to provide it, issue a default order, or exclude the information from evidence.

[4/] In *JHNY*, the Environmental Appeals Board ("EAB") described the "pivotal function" of prehearing exchanges, stating that, "by compelling the parties to provide [all evidence to be used at hearing and other related information] in one central submission, the prehearing exchange clarifies the issues to be addressed at hearing and allows the parties and the court an opportunity for informed preparation for hearing." *Id.* at 382. Accordingly, the EAB found that the 15-day requirement set forth in Section 22.22(a)(1) does not mean that a party may submit information in accordance with a prehearing order at any point fifteen days prior to the hearing, as argued by the respondent in that case. *Id.* at 387. Rather, it relates to "a party's continuing obligation under the [Rules of Practice] to promptly supplement [an information] exchange" as required by Section 22.19(f), 40 C.F.R. § 22.19(f). *Id.* (citing *JHNY, Inc.*, EPA Docket No. CAA-03-2003-0298, 2004 EPA ALJ LEXIS 143, at *15 (ALJ, Order Denying Motion for Reconsideration, Nov. 17, 2004) (internal quotations omitted)).

As the EAB has consistently recognized, 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). Complainant correctly states in its Reply that Chief Judge Biro, in her discretion, has advised that a party's supplement to its initial prehearing exchange may be denied "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." *99 Cents Only Stores*, 2009 EPA ALJ LEXIS 9, at *10. In drawing this conclusion, Chief Judge Biro sought to give meaning to the deadlines set by prehearing orders and 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." *Id.* at *11 n.2.

While I am not bound by other ALJs' rulings on other motions as precedent, I may turn to such rulings as persuasive authority. With respect to supplements to initial prehearing exchanges, I agree with the reasoning set forth by Chief Judge Biro in *99 Cents Only Stores*, and I hereby adopt the relevant language that she expressed in the order cited by Complainant. However, I do not find that denial of the supplement to Respondent's initial prehearing exchange is warranted in this case.

Although Respondent does not offer any reason for its failure to file all of the documents it intends to present at the hearing in one submission, the delay between the filing of its initial prehearing exchange and the supplement thereto was brief[5/] and does not appear to be an attempt by Respondent to unfairly disadvantage Complainant. Respondent did not withhold significant information until shortly before the hearing. To the contrary, Respondent submitted the supplement nearly a week prior to the issuance of the Notice of Hearing and more than two months prior to the date on which Judge Moran originally scheduled the hearing. Furthermore, Judge Moran subsequently postponed the hearing pursuant to the Notice of Hearing Postponement, and I have yet to reschedule it. Thus, Complainant has not been denied a meaningful opportunity to review and respond to the contents of the supplement. Accordingly, I find that Respondent committed a minor procedural infraction by

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[5/] Respondent filed the supplement approximately two weeks after filing its initial prehearing exchange.

failing to file all of the documents it intends to present at the hearing in its initial prehearing exchange and that acceptance of the supplement is the appropriate remedy.[6/] I advise the parties, however, that good faith compliance with all of the orders issued in the course of this proceeding is required.

III. Order

In accordance with the foregoing discussion, the supplement to Respondent's initial prehearing exchange is accepted.

Barbara A. Gunning
Administrative Law Judge

Dated: May 14, 2010
Washington, DC

[6/] This conclusion is further supported by the fact that Complainant did not move to exclude the information contained in the supplement but merely implied that exclusion was appropriate. Moreover, I note that the "preferred remedy for an insufficient [or incomplete] prehearing exchange is compelling the party to produce the information rather than exclusion of information...." *Alan Richey, Inc.*, EPA Docket No. CWA-06-2004-1903, 2005 EPA ALJ LEXIS 46, at *8 (ALJ, Order on Respondent's Combined Motion, Aug. 18, 2005) (citing *Roadway Surfacing, Inc.*, EPA Docket No. CWA-05-2002-0004, 2002 EPA ALJ LEXIS 61 (ALJ, Order on Motion to Strike Respondent's Prehearing Exchange, Sept. 18, 2002) (denying motion to strike prehearing exchange and directing the respondent to file a supplement thereto after the respondent provided insufficient narrative summaries of testimony); *Universal Equip. Co.*, EPA Docket No. TSCA (PCB)-VIII-91-17, 1994 EPA ALJ LEXIS 14 (ALJ, Order Resetting Hearing and Ruling on Outstanding Motions, Nov. 23, 1994) (holding that, "[i]f there is a procedural defect in the exchange [in that case, the failure to provide the proposed exhibits listed in the prehearing exchange], generally the more reasonable remedy is to correct the defect prior to trial, as opposed to the more drastic approach of excluding the evidence at hearing.")).

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 Reply to Respondent's Prehearing Exchange**, dated May 14, 2010, was sent this day in the following manner to the addressees listed below.

Mary Angeles
Legal Staff Assistant

Original and One Copy by Pouch Mail to:

Karen Maples
Regional Hearing Clerk
US EPA, Region II
290 Broadway, 16th Floor
New York, NY 10007-1866

Copy by Pouch Mail to:

Lourdes del Carmen Rodriguez, Esq.
Assistant Regional Counsel
ORC, U.S. EPA, Region II, Caribbean Field Div.
Centro Europa Building
1492 Ponce de Leon Ave., Ste. 417
San Juan, PR 00907-1417

Copy by Regular Mail to:

Armando Llorens, Esq.
Furgang & Adwar
1325 Avenue of the Americas, 28th Floor
New York, NY 10019

Dated: May 14, 2010
Washington, D.C.