



**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:)
)
 Summit, Inc.,)
) **Docket No. RCRA-05-2014-0006**
)
 Respondent) **Dated: February 29, 2016**

**ORDER ON COMPLAINANT’S MOTION TO SUPPLEMENT/AMEND THE
PREHEARING EXCHANGE**

Before me is the Complainant’s motion to supplement/amend the prehearing exchange (“Motion”). This proceeding was initiated on March 17, 2014, by the Director, Land and Chemicals Division, Region 5 (“Complainant”) of the United States Environmental Protection Agency (“EPA” or “Agency”), filing a Complaint against Summit, Inc. (“Respondent” or “Summit”), under Section 3008(a) of the Solid Waste Disposal Act, as amended, also known as the Resource Conservation and Recovery Act (“RCRA” or “the Act”), 42 U.S.C. § 6928(a). The seven-count Complaint charges Summit, an automobile scrap recycling business located in Gary, Indiana, with violating various provisions of Indiana’s federally authorized regulations governing hazardous waste, used oil, and universal waste. The Complainant seeks a civil penalty of \$263,375 and an order that Summit maintain and certify its compliance with the regulations cited in the Complaint.

On June 10, 2014, I issued a Prehearing Order that instructed the parties to file their prehearing exchange. The Complainant filed its prehearing exchange on July 18, 2014, and rebuttal prehearing exchange material on September 19, 2014. On October 21, 2014, the Complainant moved for accelerated decision.

On July 24, 2015, I issued an Order on the Complainant’s Motion for Accelerated Decision, granting accelerated decision as to Summit’s liability on all counts except for Count 2 and Count 3. A hearing in this matter is scheduled to commence March 8, 2016. In the Order Scheduling Hearing, issued September 9, 2015, I instructed the parties that if they wished “to add a proposed witness or exhibit to [their] prehearing exchange, [they] must file a timely motion to supplement the prehearing exchange no later than February 22, 2016, explaining why the witness or exhibit was not included in the initial prehearing exchange.” Order Scheduling Hearing at 2.

The Complainant timely filed its Motion on February 18, 2016. In the Motion, the Complainant asks to supplement or amend its prehearing exchange by adding or removing the following exhibits and witnesses:

1. CX 53: Decl. of Sue Brauer. This was previously submitted with the Complainant's Motion for Accelerated Decision.
2. CX 54: Complaint. This document is part of the record, but the Complainant states it may refer to it during hearing.
3. CX 55: Answer. This document is part of the record, but the Complainant states it contains documents that Summit incorporated into its prehearing exchange but did not physically include, and the Complainant may refer to it during hearing.
4. CX 56: Various exhibits related to environmental justice that will be used during testimony by Lara Lasky.
5. CX 57: A copy of CX 35, the Penalty Summary Chart, revised to correct typographical errors.
6. CX 58: A December 22, 2006 report by ATC Associates, Inc., that Summit submitted to the Complainant when responding to its September 18, 2008, request for information.
7. CX 59: A copy of CX 39, revised to correct labelling and reorder and renumber consistent with photos found at CX 26, 1053-57.
8. CX 60: Resume of Theresa Morris, a newly added witness.
9. CX 61: Chart related to benzene concentration in the accumulation tank.
10. CX 62: Maps related to the Complainant's March 18, 2009, inspection of Summit.
11. CX 63: Map and related information regarding other RCRA-regulated entities near Summit.
12. Remove witness Jamie Paulin.
13. Qualify witness Sue Brauer as an expert in geology/hydrogeology (in addition to her previously disclosed used oil expertise) and expand her testimony accordingly.
14. Add Theresa Morris, Chemist, National Enforcement Investigations Center (NEIC), U.S. EPA, as a witness testifying about her calculation of benzene concentration of the mixture of the four drums of characteristic hazardous waste with the 3,000 gallons of liquid waste sent to Beaver Oil.

Motion at 4-7.

As grounds for supplementing its prehearing exchange, the Complainant states its motion is timely and unlikely to prejudice Summit. Mot. at 7-8. Summit already possesses several of

the documents or they are publicly available, the Complainant argues, and any new documents “may either assist in the explanation of witness testimony or may be used as demonstrative exhibits” and “provide the Respondent with knowledge of potential testimony prior to it being presented at hearing.” Mot. at 8. As to the addition of a new witness, Theresa Morris, the Complainant contends she “is relevant to establishing the Respondent’s liability under RCRA as to Counts 2 and 3 and portions of Count 4 for the mixture contained in the 3,000-gallon accumulation tank.” Mot. at 8. Summit is not prejudiced by this, the Complainant adds, because “Ms. Morris’s testimony is consistent with the allegation in the Complaint that the mixture in the accumulation tank is a RCRA hazardous waste” and data underlying her testimony was previously exchanged. Mot. at 8. Also, according to the Complainant, she is providing testimony that is more limited in scope than would be provided by Jamie Paulin. Mot. at 8. Finally, the expansion of Sue Brauer’s testimony to include expert opinion on geology and hydrogeology remains within the scope of testimony initially identified, the Complainant states.

The Rules of Practice governing this proceeding, 40 C.F.R. Part 22 (“Rules”), provide that parties are required to “promptly supplement or correct” their prehearing information exchanges whenever they learn “that the information exchanged or response provided is incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party” through other discovery. 40 C.F.R. § 22.19(f). The Rules additionally state that a party has “at least 15 days before the hearing date” to provide documents, exhibits, witness names, or summary of expected testimony before the evidence must be precluded from admission absent good cause for not exchanging it sooner. 40 C.F.R. § 22.22(a).

Here, the exhibits and witnesses with which the Complainant proposes to supplement or amend its prehearing exchange will in various ways supplement or correct previously exchanged information that is “incomplete, inaccurate, or outdated” and add information that has not otherwise been disclosed. The proposed additions are also responsive to my prior rulings made after the parties initially submitted prehearing exchange material. In particular, the addition of Ms. Morris as a witness appears to be made in response to my ruling that the Complainant had not met its burden to show that a mixture of hazardous waste and solid waste at issue in this case exhibited a hazardous waste characteristic under RCRA. *See* Order on Complainant’s Motion for Accelerated Decision (July 24, 2015). Similarly, proposed exhibits CX 60 and 61 are evidence in support of her testimony on this matter. As for expanding the testimony of Ms. Brauer to include expertise on geology and hydrogeology, this is sufficiently related to her anticipated testimony as a used oil expert to supplement the prehearing exchange without unfairly surprising Summit. However, allowing this supplementation does not mean Ms. Morris or Ms. Brauer will ultimately be allowed or qualified to testify at hearing as a geology and hydrogeology expert.

Other supplementary material has been previously introduced into the record or was otherwise available to Summit even though it was not formally part of prior prehearing exchanges, including proposed exhibits CX 53-55 and CX 58. Proposed exhibit CX 56 incorporates environmental justice demonstratives of information that is either publicly available or that corrects or fits within the scope of exhibits previously disclosed. *See* Mot. at 5 n.2. Proposed exhibits CX 57 and CX 59 are revised to correct typographical errors of versions of

exhibits previously exchanged and contain little new information. Lastly, proposed exhibits CX 62 and CX 63 are maps of the Summit site and surrounding area that demonstrate publicly available information. For these reasons, I see no undue prejudice to Summit in allowing the Complainant to supplement its prehearing exchange at this stage of the proceeding.

Although the time for responding to the Complainant's Motion does not expire until March 4, 2016, and Summit has not yet filed a response, no response is necessary. Additionally, Summit was made aware of the Complainant's plan to add Ms. Morris and other documents during a prehearing conference call with this office on February 4, 2016.

Consequently, the Complainant's Motion is **GRANTED**. The Complainant may amend its prehearing exchange as requested. Notably, this does not mean these exhibits or witness will be automatically admitted into evidence as requested, and Summit may at hearing object to the extent it believes any of these exhibits or witnesses are inadmissible under the Rules.

SO ORDERED.

M. Lisa Buschmann
Administrative Law Judge

*In the Matter of **Summit Inc.***, Respondent.
Docket No. RCRA-05-2014-0006

CERTIFICATE OF SERVICE

I hereby certify that the foregoing ORDER ON COMPLAINANT'S MOTION TO SUPPLEMENT/AMEND THE PREHEARING EXCHANGE, dated February 29, 2016, and was sent this day in the following manner to the addressees listed below.

Chronnia L. Warren
Paralegal

Dated: February 29, 2016
Washington, DC

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