



Complainant filed its Motion for Leave to Supplement the Prehearing Exchange on October 26, 2020. Respondents claim, without evidence, that Complainant is attempting to mislead or sway the Court. The Court has yet to rule on Complainant's Motion for Accelerated decision. In an attempt to ensure that *all* available evidence is before the Court for full and fair consideration, Complainant filed its Motion before a decision was made and in accordance with 40 C.F.R. §22.19(f) and the Court's Prehearing Order. The effort to supplement the record should not have come as a surprise. As detailed in Complainant's Prehearing Exchanges, there was always a placeholder exhibit reserved for the information request response of Tom Robinson. The Court now has the document and the opportunity to consider this additional evidence and its probative value.

## **II. Response to Respondents' Motion for Default and Attorneys' Fees**

Respondents incorrectly assert the Court should enter default judgment against Complainant for requesting to supplement the Prehearing Exchange. Both the Consolidated Rules of Practice and the Court's Prehearing Order specifically allow for either party to supplement the Prehearing Exchange. *See* 40 C.F.R. §22.19(f); Court's Prehearing Order, Oct. 18, 2019. As stated in Complainant's Motion to Supplement, Complainant supplemented the Prehearing Exchange as soon as Complainant knew the information was in its possession and in accordance with the Court's Prehearing Order. A date for the hearing has not yet been set. Therefore, Respondents, as they have done in their Response, have had the full opportunity to review and respond to the information presented as anticipated by the Court's prehearing order and Part 22.

In support of its Motion and to further show good cause to the Court, Complainant has attached an affidavit to provide additional information regarding why the document was not known to be in Complainant's possession until early October 2020.

Complainant is unaware of any caselaw that supports Respondents' position that default should be granted under these circumstances and Respondents failed to cite to any precedent in support thereof. To the contrary, default and exclusion are reserved for the most egregious circumstances and are rarely granted. *See, e.g. In the Matter of Scranton Products, Inc., et al.*, 2008 WL 2553236, Docket No. 3-2008-0004 (May 23, 2008); *In the Matter of VSS International, Inc.*, 2019 WL 2079328, Docket No. OPA-09-2018-002 (April 30, 2019); *In the Matter of Kent Hoggan, et al.*, 2018 WL 6136858, Docket No. CWA-08-2017-0026 (Nov. 14, 2018).<sup>1</sup> As stated above, Complainant has properly moved to supplement the Prehearing Exchange in accordance with 40 C.F.R. §22.19(f) and the Prehearing Order, well in advance of the hearing. This allows the Respondents the opportunity to respond to the additional evidence and more importantly, the Court can determine its probative value to the Parties' briefing related to Complainant's Motion for Accelerated Decision.

Finally, regarding Respondents' request for an award of attorneys' fees, Respondents failed to cite to any statutory or regulatory basis for their argument. The governing rules of practice do not allow for the award of attorneys' fees as a remedy in this matter. The Court's only authority to award attorneys' fees is governed by the Equal Access to Justice Act, 5 U.S.C. §504, which is inapplicable at this stage of the proceedings. *In the Matter of Camp Pubie Hunting Club Partnership*, 2007 WL 2192950, Docket No. CWA-05-2005-0011 (Feb. 27, 2007); *see also In the Matter of Alaska Pulp Corp. and Technic Services, Inc.*, 1998 WL 100027,

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<sup>1</sup> Complainant notes that Respondents have cited to no caselaw to support their claim.

Docket No. 10-97-0042-CAA (Jan. 26, 1998); *In the Matter of Richmond American Homes of Colorado, Inc.*, 2004 WL 407030, Docket No. CWA-08-2003-0080 (Feb. 9, 2004).

For these reasons, Complainant respectfully requests that the Court (1) grant Complainant's Motion for Leave to Supplement the Prehearing Exchange and (2) deny Respondents' Motion for Default and Attorneys' Fees.

RESPECTFULLY SUBMITTED this 10th day of November 2020.

/s Sara Hertz Wu  
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CERTIFICATE OF SERVICE

I certify that the foregoing Complainant's Reply to Respondents' Response to Motion for Leave to Supplement Complainant's Prehearing Exchange and Response to Respondents' Cross-Motion for Default and Attorneys' Fees, Docket No. CWA-07-2019-0262, has been submitted electronically using the OALJ E-Filing System.

A copy was sent by email to:

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Date: 11/10/2020

/s Sara Hertz Wu \_\_\_\_\_

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