

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

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MAR 18 2009

In the Matter of: )  
)  
Wisconsin Plating Works of Racine, Inc. )  
Racine, Wisconsin )  
)  
Respondent. )  
\_\_\_\_\_ )

Docket No. CAA-05-2008-0037  
REGIONAL HEARING CLERK  
U.S. ENVIRONMENTAL  
PROTECTION AGENCY  
Honorable Judge Susan Biro  
Presiding Administrative Law Judge

**COMPLAINANT'S MOTION TO SUPPLEMENT PREHEARING EXCHANGE**

Complainant files this Motion to Supplement Prehearing Exchange pursuant to Judge Biro's December 4, 2008 Prehearing Order and 40 C.F.R. §§ 22.16(a) and 22.19(f) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, and the Revocation/Termination or Suspension of Permits, codified at 40 C.F.R. Part 22, §§ 22.16(a) and 22.19(f). Complainant moves this Honorable Court to allow Complainant to supplement its Prehearing Exchange to include the additional exhibits identified below. Complainant's counsel has contacted Respondent's counsel concerning this motion and Respondent's counsel has no objection to the Court granting this motion.

**I. SUPPLEMENTAL LIST OF DOCUMENTS AND EXHIBITS**

In addition to the 14 documents identified in Complainant's initial prehearing exchange, the 11 documents identified in Respondent's initial prehearing exchange, and the 2 documents identified in Complainant's rebuttal prehearing exchange, Complainant expects to offer the following documents into evidence:

- 17. COMPLAINANT'S EXHIBIT 17 Permit No. 252016270-F10 for Wisconsin Plating Works of Racine, Inc. (Title V Permit)

## II. GOVERNING LEGAL STANDARD

The Consolidated Rules' provision governing supplementation of prehearing exchanges is found at 40 C.F.R. § 22.19(f), and provides as follows:

*(f) Supplementing prior exchanges.* A party who has made an information exchange under paragraph (a) of [Section 22.19], ... shall promptly supplement or correct the exchange when the party learns that the information exchanged ... is incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party pursuant to this section.

The Environmental Appeals Board has expressed a preference for admitting evidence into the record of an administrative hearing. As the Board explained in *In re: CDT Landfill Corporation*, 11 E.A.D. 88 (EAB 2003), in upholding an ALJ's decision to admit into evidence a document that was provided only eight days before the hearing date:

Administrative hearings are such that rules allowing evidence into the record tend to be more liberal than in proceedings in other courts, and normally err towards over-inclusion rather than under-inclusion. *See, e.g., In re Green Thumb Nursery*, 6 E.A.D. 782, 795 n.26 (EAB 1997) (noting that "that the Federal Rules of Evidence are more restrictive than our own administrative rules"); *In re Great Lakes Div. of Nat'l Steel Corp.*, 5 E.A.D. 355, 369 (EAB 1994) (holding that hearsay evidence is admissible in administrative proceedings even if it would not be admissible under the Federal Rules of Evidence); *see also Calhoun v. Bailar*, 626 F.2d 145, 148 (9th Cir. 1980), cert. denied, 452 U.S. 906 (1981) (recognizing that "strict rules of evidence do not apply in the administrative context"). In light of the more relaxed rules in administrative hearings, together with the liberal standard of review for an ALJ's evidentiary determination, as discussed above, we are particularly wary of overruling an ALJ's decision when the issue raised concerns the ALJ's *admission* of evidence, as opposed to its *exclusion*. *Cf. Atlas Copco, Inc. v. EPA*, 642 F.2d at 467 (D.C. Cir. 1979) (stating that the discretion reposed in agencies to decide whether to admit particular evidence at a hearing is not unbridled and should not "exclude from consideration facts and circumstances relevant to its inquiry" which "may be persuasive weight in the exercise of its discretion").

*In re: CDT Landfill Corporation*, 11 E.A.D. 109-110.

Both of the documents included with this motion are publicly available documents. Complainant's Exhibit 16 is Respondent's permit under Title V of the Clean Air Act which provides additional information about Respondent's operations and methods of compliance with the NESHAP for Halogenated Solvents. Complainant's Exhibit 17 is information available from the Agency for Toxic Substances and Disease Registry's website concerning the harmful effects of trichloroethylene, the halogenated solvent at issue in this matter. Complainant believes that it should be allowed to supplement its Prehearing Exchange with the additional evidence identified above.

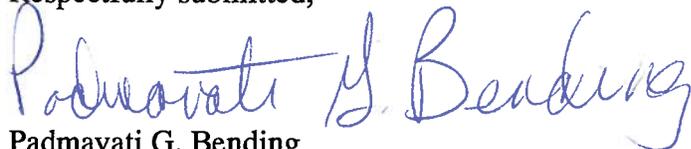
### **III. TIMELINESS OF COMPLAINANT'S MOTION AND ABSENCE OF PREJUDICE TO RESPONDENT**

Respondent will suffer no prejudice from the inclusion of these exhibits in the Prehearing Exchange. Complainant's motion to include the additional documentary evidence has been filed in a timely manner in this case.

Complainant has served the additional exhibits on Respondent's legal counsel concurrently with this motion. For the reasons set forth above, Respondent will clearly not be prejudiced by this additional evidence. The hearing in this matter is not scheduled to commence until June 2009, more than 30 days from the service of this motion. Respondent will have more than enough time to review these materials and prepare any clarification or rebuttal.

For all of the above reasons, Complainant respectfully requests that this Motion to Supplement Prehearing Exchange be granted.

Respectfully submitted,



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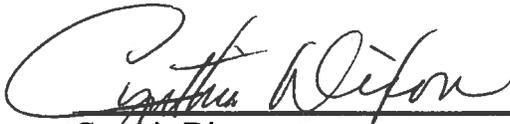
CERTIFICATE OF SERVICE

REGIONAL HEARING CLERK  
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PROTECTION AGENCY

I hereby certify that today I filed personally with the Regional Hearing Clerk, Region 5, United States Environmental Protection Agency, 77 West Jackson Boulevard (E-19J), Chicago, Illinois, 60604-3590, the original document and a copy entitled Complainant's Reply to Respondent's Response to Complainant's Motion to Reschedule Hearing for this civil administrative action, and that I issued to the Court (via pouch mail) and Respondent's Counsel (via first class mail) a copy of the original document:

The Honorable Susan L. Biro  
Chief Administrative Law Judge  
U.S. Environmental Protection Agency  
Mail Code 1900L  
1200 Pennsylvania Ave., N.W.  
Washington, D.C. 20460

Christopher T. Nowotarski  
Stuart M. Sheldon  
Stone, Pogrund and Korey, LLC  
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Cynthia Dixon  
Administrative Program Assistant

March 18, 2009  
Date