

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

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In the Matter of: ) Docket No. CAA-05-2008-0037  
)  
Wisconsin Plating Works of Racine, Inc. )  
Racine, Wisconsin ) Honorable Judge Susan Biro  
) Chief Administrative Law Judge  
Respondent. )  
\_\_\_\_\_)

**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 exhibit identified below. Complainant's counsel contacted Respondent's counsel by e-mail on June 29, 2009 concerning this motion and has not received a response from Respondent's counsel as to whether it has an 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, the 2 documents identified in Complainant's rebuttal prehearing exchange, the 2 documents identified in Complainant's March 18, 2009 Motion to Supplement Prehearing Exchange, and the 18 documents identified in Respondent's June 16, 2009 Motion to Supplement Prehearing Exchange, Complainant expects to offer the following document into evidence:

19. COMPLAINANT'S EXHIBIT 19

Gail B. Coad Wisconsin Plating Hearing Exhibits (consisting of spreadsheets based on Respondent's Income Statement, Respondent's Balance Sheet, Respondent's Statement of Cash Flows, RMA Comparison, Financial Ratio Analysis and Impact of Proposed Penalty).

Since this document contains information that is claimed Confidential Business Information by Respondent, Complainant is filing this exhibit in accordance with 40 C.F.R. § 22.5(d).

**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 (emphasis in original).

The document included with this motion is based upon documents provided by Respondent to Complainant and this Court. 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**

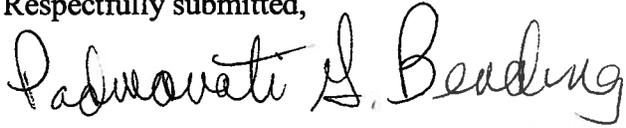
Respondent will suffer no prejudice from the inclusion of this exhibit in the Prehearing Exchange. In fact, this information is based upon the documents provided in Respondent's June 16, 2009, Motion to Supplement Its Prehearing Exchange. Complainant's motion to include the additional documentary evidence has been filed in a timely manner in this case.

Complainant has served the additional exhibit 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 July 21, 2009, more than 15 days from the service of this motion. Respondent will have more than enough time to review these materials and prepare any clarification or rebuttal.

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

Respectfully submitted,



Padmavati G. Bending  
Associate Regional Counsel  
Office of Regional Counsel  
U.S. Environmental Protection Agency,  
Region 5  
77 West Jackson Boulevard (C-14J)  
Chicago, Illinois 60604  
Tel. No. (312) 353-8917  
Fax No. (312) 582-5154

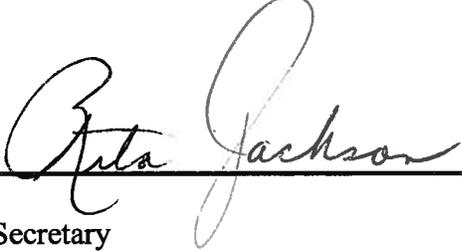
Robert H. Smith  
Associate Regional Counsel  
Office of Regional Counsel  
U.S. Environmental Protection Agency,  
Region 5  
77 West Jackson Boulevard (C-14J)  
Chicago, Illinois 60604  
Tel. No. (312) 886-0765  
Fax No. (312) 692-2011

CERTIFICATE OF SERVICE

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 Motion to Supplement Prehearing Exchange 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  
1 East Wacker Drive, Suite 2610  
Chicago, IL 60601

  
\_\_\_\_\_  
Secretary

  
\_\_\_\_\_  
Date

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