



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY BEFORE THE ADMINISTRATOR

In the Matter of:)
New Prime, Inc.,) Docket No. RCRA-08-2020-0007
Respondent.)

ORDER ON MOTION TO CORRECT PREHEARING EXCHANGE

By Order, the parties to this matter were directed to engage in the prehearing exchange of information pursuant to 40 C.F.R. § 22.19(a). See Prehearing Order (Nov. 2, 2020). That process concluded when the U.S. Environmental Protection Agency, Region 8 (“Complainant”) filed with the Tribunal and served on New Prime, Inc. (“Respondent”) its Rebuttal Prehearing Exchange on January 22, 2021.

On February 22, 2021, Complainant filed a Motion to Correct its Prehearing Exchange (“Motion”).¹ With its Motion, Complainant seeks to correct two exhibits, CX04 and CX64. The former exhibit is Complainant’s Explanation of the Proposed Penalty Assessment. Mot. at 1. Complainant declares that it “incorrectly explained the two applicable sets of penalty matrices” in the exhibit. Mot. at 2. Complainant asserts that the allegations in Count 3 occurred after the effective date of a rule that adjusted penalty amounts upward, and, correspondingly, that it used the incorrect Daily Statutory Maximum in its calculations for Count 3. Mot. at 2. Complainant states that “[t]he attached corrected version of the exhibit has been updated to reflect the correct penalty amounts in the penalty charts and applicable penalty matrices for Count 3[.]” Mot. at 1. Complainant also notes that the amount of \$8,273 was erroneously subtracted from its penalty calculation. Mot. at 1-2.

The latter exhibit is the curriculum vitae (“CV”) of a witness. Mot. at 2. Complainant declares that “[t]his exhibit has been corrected to reflect [the witness’s] knowledge and experience regarding Toxicity Characteristic Leaching Procedure and flashpoint analysis.” Mot. at 2-3.

On March 9, 2021, Respondent submitted its Response to Motion to Amend Complainant’s Prehearing Exchange (“Response”). Respondent explains that “[b]ecause Respondent has admitted liability in this matter, but disputes the size of the proposed penalty, Exhibit CX04 is a key exhibit in the case.” Resp. at 2. Respondent avers that “Rule 22.19(f) allows for a party to correct mistakes in its exhibits, and for that reason Respondent does not oppose the instant motion to correct Exhibit CX04.” Resp. at 2. Respondent goes on to “request that the original CX04 . . . remain in Complainant’s prehearing exchange as originally submitted” because “Respondent is entitled to cross examine [Complainant’s] penalty witness on

¹ The Motion was re-filed on February 24, 2021, to correct the Certificate of Service and include additional attachments.

the mistakes in her penalty policy analysis, and Respondent may therefore seek to enter both versions of the exhibit into the record at hearing.” Resp. at 2.

Respondent then requests that the Motion be denied with respect to CX64. Resp. at 3. Respondent argues that:

At no point does Complainant assert that the additions it seeks to add to [the witness’s] CV are the result of any mistake in Exhibit CX64. Consolidated Rule of Practice 22.19(f) allows for amendment of a party’s prehearing exchange when it learns that the information provided in its prior prehearing exchange “is incomplete, inaccurate or outdated.” 40 C.F.R. § 22.19(f). Nothing in the proposed changes to [the witness’s] CV meets this test.

Resp. at 2-3. Respondent claims that “Complainant now seeks to amend [the witness’s] CV to bolster its case without identifying any inaccuracies in that CV. The [Consolidated Rules of Practice] do not provide authority for such an amendment.” Resp. at 3.

Complainant filed its Reply to Response to Motion to Correct Complainant’s Prehearing Exchange (“Reply”) on March 18, 2021. In its Reply, “Complainant agrees to include both CX04 and [its corrected version] CX04Cor in Complainant’s Prehearing Exchange[.]” Reply at 2.

As to CX64, Complainant reports that the witness did not have the opportunity to review his stock CV after Respondent submitted its Prehearing Exchange and before Complainant submitted its Rebuttal Prehearing Exchange. Reply at 2-3. Complainant states that, when the witness finally did review his CV, Complainant “realized [the witness’s] CV did not fully address his relevant experience” and anticipated testimony at hearing. Reply at 3. Complainant declares that it “is not seeking to change or expand the scope of [the witness’s] testimony as described in Complainant’s Rebuttal Prehearing Exchange, but is instead seeking to update [his] CV as expected by 40 C.F.R. [§ 22.]19(f).” Reply at 3. Complainant closes by noting that “Respondent will have the opportunity to cross-examine [the witness] during any hearing” and that “the hearing has not been scheduled; and there is no evidence of bad faith, delay tactics or undue prejudice.” Reply at 3.

Under the Consolidated Rules of Practice, 40 C.F.R. Part 22 (“Rules”):

A party who has made an information exchange under [40 C.F.R. § 22.19(a)] . . . 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.

40 C.F.R. § 22.19(f). As laid out in the Prehearing Order, “[a]ny addition of a proposed witness or exhibit to the prehearing exchange, submitted pursuant to Section 22.19(f) of the [Rules], must be filed with an accompanying motion to supplement the prehearing exchange only when supplementation is sought within 60 days of the scheduled hearing.” Prehearing Order at 4 (emphasis omitted). There is thus no regulation or order establishing that supplementation of a party’s prehearing exchange at this point in the proceeding requires leave of the Tribunal. Even

so, I will address each exhibit at issue in the Motion.

CX04Cor corrects errors Complainant inadvertently committed in the penalty calculations outlined in CX04. The Rules anticipate supplementing a prehearing exchange in circumstances such as these—upon the discovery of mistakes in exhibits. The parties are in agreement that Complainant’s Prehearing Exchange should include both CX04 and CX04Cor. CX04 and CX04Cor are therefore allowed as part of Complainant’s Prehearing Exchange.

The amendment to CX64 also seems to be within the scope anticipated by the Rules. The witness’s CV is incomplete, as his work with certain techniques has become relevant in light of the information provided by Respondent in its Prehearing Exchange. Complainant has provided a plausible explanation for why it failed to update CX64 before submitting it as part of its Rebuttal Prehearing Exchange. If Respondent would like to challenge the credentials, experience, or credibility of this witness, then it may do so through cross-examination or voir dire (if this witness acts as an expert witness) at the hearing. The corrected version of CX64, CX64Cor, may be included as part of Complainant’s Prehearing Exchange.

The Motion is **GRANTED**. Exhibits CX04 and CX64 may be updated, as described above. The Corrected Table of Complainant’s Exhibits, filed as an attachment to Complainant’s Reply, shall be received as part of its Prehearing Exchange. Further supplementation of either party’s prehearing exchange may be done without a motion until 60 days before the scheduled starting date of the hearing.

SO ORDERED.


Christine Donelian Coughlin
Administrative Law Judge

Dated: March 31, 2021
Washington, D.C.

In the Matter of *New Prime, Inc.*, Respondent.
Docket No. RCRA-08-2020-0007

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order on Motion to Correct Prehearing Exchange**, dated March 31, 2021, and issued by Administrative Law Judge Christine Donelian Coughlin, was sent this day to the following parties in the manner indicated below.


Alyssa Katzenelson
Attorney-Advisor

Copy by OALJ E-Filing System to:
Mary Angeles, Headquarters Hearing Clerk
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Ronald Reagan Building, Room M1200
1300 Pennsylvania Ave. NW
Washington, DC 20004

Copy by Electronic Mail to:
Laurianne M. Jackson, Senior Assistant Regional Counsel
Regulatory Enforcement Section
U.S. Environmental Protection Agency, Region 8
1595 Wynkoop St. (R8-ORC-R)
Denver, CO 80202-1129
Email: jackson.laurianne@epa.gov
For Complainant

Mark Ryan
RYAN & KUEHLER PLLC
P.O. Box 3059
Winthrop, WA 98862
Email: mr@ryankuehler.com
For Respondent

Scott McKay
NEVIN, BENJAMIN, MCKAY & BARTLETT LLP
P.O. Box 2772
Boise, ID 83701
Email: smckay@nbmlaw.com
For Respondent

Dated: March 31, 2021
Washington, D.C.