UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**	
	)	
USA REMEDIATION SERVICES, INC.,	**)**	**DOCKET No. CAA-03-2002-0159**
	)	
Respondent.	**)**	

ORDER ON MOTION IN LIMINE, MOTION TO STRIKE AND MOTION IN OPPOSITION TO SUPPLEMENTAL PREHEARING EXCHANGE

On January 24, 2003, Complainant filed a Motion in Limine to Exclude Documents and Testimony and Motion to Strike Affirmative Defenses. In that Motion, Complainant seeks to exclude the admission into evidence of Respondent's financial statements attached to its Prehearing Exchange and to strike certain allegations made by Respondent in its Answer in defense of the Complaint in this matter.

On January 29, 2003, Complainant filed a Supplemental Prehearing Exchange wherein it identified Ms. Joan K. Myers as its substitute expert witness for its previously identified financial expert witness (Ms. Chiara Trabucchi) whom it represented was expected to be out of the country and unavailable at the time of the hearing in this matter.[1]

On February 3, 2003, Respondent filed its Objection to Complainant's Supplemental Prehearing Exchange and Motion to Exclude. In its Objection, Respondent asserted that Complainant failed to contact Respondent to discuss the issue of the unavailability of its expert witness prior to filing the Supplemental Prehearing Exchange, that the cutoff date for prehearing motions was January 24, 2003, and that "[g]ranting a substitution this late in the proceeding constitutes a surprise and will prejudice USA's ability to present a reasonable defense." Respondent requested that either the substitute expert witness be excluded from testifying at the hearing or that the hearing be continued until a mutually convenient time when the originally identified expert can be present.

Later on February 3, 2003, Complainant filed a Response to Respondent's Objection. In its Response Complainant noted that the expert witness it identified is designated as a rebuttal witness, not a witness to be called in its case in chief, and that the testimony of the two expert witnesses is not anticipated to differ. Further, Complainant asserted that such expert witness will only be called if Respondent is successful in moving into evidence documents regarding its

[1] The hearing of this case is scheduled to begin on March 4, 2003.

financial status which Complainant has sought to exclude by its Motion in Limine. Additionally, Complainant represented that it notified the Respondent of the unavailability of its originally designated expert in a timely manner, within two days of being notified of the unavailability, attaching documents in support thereof.

A. Motion in Limine

In its Motion in Limine, Complainant seeks to exclude from admission into evidence at hearing the financial statements which were attached to Respondent's prehearing exchange and any other exhibits or witness testimony Respondent has not identified prior to the hearing as well as evidence in support of the "affirmative defenses" set forth in paragraphs 13 through 17 of the Answer.

"[A] motion in limine should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose." *Noble v. Sheahan*, 116 F. Supp. 2d 966, 969 (N.D. Ill. 2000). Motions in limine are generally disfavored. *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993). If evidence is not clearly inadmissible, evidentiary rulings must be deferred until trial so questions of foundation, relevancy, and prejudice may be resolved in context. *Id.* at 1401. Thus, denial of a motion in limine does not mean that all evidence contemplated by the motion will be admitted at trial. Rather, denial of the motion in limine means only that without the context of trial the court is unable to determine whether the evidence in question should be excluded. *United States v. Connelly,* 874 F.2d 412, 416 (7th Cir. 1989).

The issues for hearing in this case are whether Respondent violated Section 112 of the Clean Air Act and the asbestos NESHAP in regard to the removal of asbestos removal activities on the campus of West Virginia University. Specifically, Count I charges Respondent with failing to adequately wet asbestos containing material when stripping it, in violation of 40 C.F.R. § 61.145(c)(3), and Count II charges Respondent with failing to ensure all asbestos containing material removed remained wet until collected and contained or treated in preparation for disposal, in violation of 40 C.F.R. §61.145(c)(6)(i). The Complaint proposes a penalty of $35,000.

In response to the Complainant and Answer filed in this case, the Prehearing Order issued by this Tribunal on September 12, 2002, asked Respondent in its Prehearing Exchange to provide:

> (A) a detailed narrative statement, and a copy of any documents in support, explaining the factual and/or legal basis for the denials stated in Paragraphs 13, 14, 15 and 17 of the Answer;
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> (B) a detailed narrative statement, and a copy of any documents in support, explaining the factual and/or legal basis for

the assertion in Paragraph 16 of the Answer;

(C) if Respondent takes the position that Respondent is unable to pay the proposed penalty, a copy of any and all documents it intends to rely upon in support of such position; and

(D) if Respondent takes the position that the proposed penalty should be reduced or eliminated on any other grounds, a copy of any and all documents it intends to rely upon in support of such position.

The Prehearing Order further advised Respondent that:

> Section 22.19(a) of the Rules of Practice provides that, except in accordance with Section 22.22(a), any document not included in the prehearing exchange shall not be admitted into evidence, and any witness whose name and testimony summary are not included in the prehearing exchange shall not be allowed to testify. Therefore, each party should thoughtfully prepare its prehearing exchange. Any supplements to prehearing exchanges shall be filed with an accompanying motion to supplement the prehearing exchange.

Additionally, the Prehearing Order advised Respondent that:

> The Complaint herein gave the Respondent notice and opportunity for a hearing, in accordance with Section 554 of the Administrative Procedure Act (APA), 5 U.S.C. § 554. In its Answer to the Complaint, the Respondent requested such a hearing. In this regard, Section 554(c)(2) of the APA sets out that a hearing be conducted under Section 556 of the APA. Section 556(d) provides that a party is entitled to present its case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. Thus, the Respondent has the right to defend itself against the Complainant's charges by way of direct evidence, rebuttal evidence or through cross-examination of the Complainant's witnesses. Respondent is entitled to elect any or all three means to pursue its defenses. If the Respondent intends to elect only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, the Respondent shall serve a statement to that effect on

> or before the date for filing its prehearing exchange. . . . .

Respondent failed to file its Prehearing Exchange by the deadline established in the Prehearing Order, and as a result a Show Cause Order was issued. In Response to that Order, on or about November 11, 2002, Respondent filed its Prehearing Exchange. In that Exchange Respondent indicated that:

> 1. With respect to the factual allegations as set forth in the Complaint . . . Respondent shall solely rely upon the cross-examination of Complainant's witnesses, procedural and evidentiary objections, and argument on controlling and applicable law at Hearing. Respondent shall not put on any direct evidence.
>
> 2. USA does explicitly reserve the right to submit any and all proper evidence regarding its ability to pay the proposed penalty and mitigating factors supporting a reduction in the proposed penalty, should this matter progress to a penalty phase at Hearing. As such a copy of USA's most recent Financial Statement is attached hereto and incorporated herein by reference.

Attached to the Prehearing Exchange were documents titled "Financial Statements USA Remediation Services, Inc., January 31, 2002 and 2001. Included in the document was a letter to Respondents' Board of Director and Shareholder, dated June 28, 2002, indicating that the Statements had been audited by a Certified Public Accountant according to generally accepted accounting standards and the accountants opined that the Statements presented fairly in all material respects the financial position of the company.

Complainant seeks to exclude the Financial Statements from being introduced and/or admitted at hearing on the ground that they neither contain any statements, opinions or explanations as to Respondent's ability or lack thereof to pay the proposed penalty. Further, Complainant asserts that Respondent has identified no fact or expect witness upon whom it intends to rely to establish the necessary foundation for authenticating the documents so that they can be admitted into evidence.

Authentication is the act of proving that something, such as a document, is true or genuine so that it may be admitted into evidence in a contested proceeding. Black's Law Dictionary, 127 (7th Ed. 1999); *United States v. Mulnelli-Navas*, 111 F.3d 983 (1st Cir. 1997) (authenticity of exhibit is established if enough evidence is introduced to show that the exhibit is what the proponent says it is). The rules of evidence governing proceedings in Federal Court have a specific rule requiring the authentication of exhibits prior to their admission into

evidence. *See*, F.R.E. 901. However, there is no set of codified rules of evidence which apply to this administrative proceeding. There is only Rule 22.22(a) of the Consolidated Rules of Practice (40 C.F.R. § 22.22(a)), which provides in pertinent part that:

> The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value . . ..

While it has been said that a standard such as this used in administrative proceedings for admissibility of evidence is "somewhat lower" than that required for authentication of documents under F.R.E. 901, it nevertheless "does not completely obviate the necessity of proving by competent evidence that real evidence is what it purports to be.... absent any such proof, the evidence to be admitted would be irrelevant or immaterial and hence should be excluded from the proceeding." *Woolsey v. NTSB*, 993 F.2d 516 (5th Cir. 1993)(documents requested by FAA investigations showed no signs of forgery and were admitted) (quoting *Gallagher v. National Transportation Safety Board*, 953 F.2d 1214, 1218 (10th Cir.1992).

In this case, Respondent identified as intended exhibits to be introduced at hearing its Financial Statements but failed to identify in its prehearing exchange any witness who could authenticate the documents, *i.e.,* testify that they are true and accurate copies of Respondent's Financial Statements. Rule 22.19(g) clearly provides that witnesses whose name and testimony summary have not been included in the prehearing exchange shall not be allowed to testify. Thus, Respondent cannot through its own witnesses authenticate the documents and thereby offer them for receipt into evidence.

However, that being said, it is also true that a party need not use its own witnesses to authenticate documents. Respondent could request and perhaps it could obtain from Complainant a stipulation as to admissibility of the documents prior to or during the hearing. Another alternative open to Respondent would be to obtain sufficient testimony from one of Complainant's witnesses during cross-examination so as to authenticate the documents. *See, Woolsey, infra*. Therefore, at this point in the proceedings, it cannot be determined with certainty that Respondent's Financial Statements cannot be authenticated and so are "irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value." Thus, the Complainant's motion in limine as to the Financial Statements is **DENIED.**

Additionally, Complainant requests that Respondent be prohibited at the hearing from introducing any testimony or evidence not properly submitted in advance. Complainant makes this request in response to the statement in Respondent's Prehearing Exchange that "USA does explicitly reserve the right to submit any and all proper evidence regarding its ability to pay the proposed penalty and mitigating factors supporting a reduction in the proposed penalty, should this matter progress to a penalty phase at Hearing." The statement by Respondent, who is *pro se*, suggests that at least at that point, Respondent was unclear about how the proceedings in this case operate. In administrative proceedings such as this, there is only a single hearing in which the issues of liability and penalty will be tried together. There will be no separate "penalty phrase" after a determination of liability. Complainant is entitled to prepare for hearing and not

be the subject of surprise. Therefore, if Respondent is currently aware of any additional evidence it anticipates offering into evidence at the hearing, it must file a supplemental prehearing exchange along with a motion to supplement its Prehearing Exchange, demonstrating good cause for failing to include the evidence with the original Prehearing Exchange. **Except as in compliance with 40 C.F.R. §§ 22.19 or 22.22(a)(1),[2] evidence or testimony proffered by either party at hearing will NOT be admitted into evidence**.

B. Motion to Strike Affirmative Defenses

Complainant has also moved to strike the "affirmative defenses" set forth in paragraphs 13 through 17 of Respondent's Answer. In those paragraphs Respondent asserts as follows:

> 13. USA specifically denies that any "dry removal" of asbestos took place on the project.
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> 14. USA specifically denies that any removal of RACM was performed without the material being adequately wet.
>
> 15. USA specifically denies that any stored RACM was not maintained adequately wet.
>
> 16. USA specifically states that it is not responsible for the unforseen criminal acts of third parties.
>
> 17. USA denies that the Complainant has stated a cause of action for which relief can be granted.

As indicated above, although it was specifically requested in the Prehearing Order to do so, Respondent failed to provide "a detailed narrative statement, and a copy of any documents in support, explaining the factual and/or legal basis for [these assertions]."

In its Answer, Respondent does not identify any of these assertions as "affirmative defenses," and clearly the assertions contained in paragraphs 13-15 are not. An affirmative defense is an assertion by a respondent raising new facts and arguments that, if true, will defeat

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[2] Rule 22.22(a)(1) provides, in part, "If . . . a party fails to provide any document, exhibit, witness name or summary of expected testimony required to be exchanged under § 22.19(a), (e) or (f) to all parties at least 15 days before the hearing date, the Presiding Officer shall not admit the document, exhibit or testimony into evidence, unless the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information, or had good cause for not doing so."

the Complainant's claim, even if all allegations in the complaint are true. Black's Law Dictionary 430 (7th ed. 1999). The assertions in paragraphs 13-15 are mere denials of factual allegations made in the Complaint. The assertions made in paragraphs 16 and 17 are affirmative defenses, and the burden therefore falls on Respondent to prove them. The information in support of these claims is within the control of Respondent who made them. To date, despite being so requested in the Prehearing Exchange and prompted by the Complainant's Motion to strike these defenses, Respondent has not proffered any evidence in support thereof.

Therefore, pursuant to Rule 22.19(g) Respondent will not be allowed to proffer evidence in support of these defenses at hearing. Accordingly, Complainant's Motion to Strike is granted in part, with respect to Paragraphs 16 and 17 of the Answer, and denied in part as moot, with respect to Paragraphs 13 through 15 of the Answer.

C. Opposition to Supplemental Prehearing Exchange

Respondent has filed an opposition to Complainant's Supplemental Prehearing Exchange arguing for the exclusion of Complainant's substitute expert witness or a postponement until the originally identified witness would be available to testify. Respondent asserts that the late substitution prejudices its ability to prepare for hearing. Specifically, Respondent asserts that it is *pro se* with limited resources and is prejudiced by the fact that it will not have ample time to familiarize itself with the publications and credentials of the proposed substitute witness prior to the hearing date.

Rule 22.19(f) provides that:

> A party who has made an information exchange under paragraph (a) of this section . . . shall promptly supplement or correct the exchange when the party learns that the information exchanged or the response provided is incomplete, inaccurate or outdated . . .

In this case, within two days of learning of the unavailability of the expert witness it had timely identified in its initial prehearing exchange, Complainant notified Respondent and amended its exchange. Respondent received notice of the substitution over a month before the hearing was scheduled to begin.[3] Such time gives Respondent an adequate period to investigate and prepare to cross examine the new expert witness, particularly since Complainant has indicated that the testimony of the two witnesses are the same and the testimony is solely to be introduced if at all on rebuttal.

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[3] On January 29, 2003, Complainant served a copy of its Supplemental Prehearing Exchange on the Respondent by Federal Express, Standard Overnight Delivery. Respondent indicates in its Opposition that it received it the next day on January 30, 2003.

Therefore, Complainant's Supplemental Prehearing Exchange is hereby accepted, and Respondent's Objection to Complainant's Supplemental Prehearing Exchange and Motion to Exclude are DENIED.[4]

Susan L. Biro
Chief Administrative Law Judge

Dated: February 10, 2003
Washington, D.C.

[4] In accordance with the Prehearing Order, Complainant should have filed a motion to supplement, although such motions, due to the exigent circumstances would not be barred by the motions deadline. I do not deem Complainant's failure to file a motion with the Supplemental Exchange fatal however.