

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR**

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| <b>In the Matter of:</b> | ) |                                     |
|                          | ) |                                     |
| <b>New Prime, Inc.,</b>  | ) | <b>Docket No. RCRA-08-2020-0007</b> |
|                          | ) |                                     |
| <b>Respondent.</b>       | ) |                                     |

**COMPLAINANT’S REPLY TO RESPONDENT’S RESPONSE  
TO  
COMPLAINANT’S CROSS-MOTION  
TO ADMIT CERTAIN EXHIBITS INTO EVIDENCE**

**Introduction**

On August 22, 2022, Complainant filed its third supplement to its prehearing exchange (Complainant’s Supplement). On August 24, 2022, Respondent filed its Motion to Exclude Supplemental Exhibits and Witnesses (Motion to Exclude). Also on August 24, 2022, this Tribunal issued its Order Setting Deadlines (Order Setting Deadlines) directing the parties to treat Respondent’s Motion to Exclude also as a Motion in Limine (Motion in Limine). On September 6, 2022, Complainant filed its response to Respondent’s Motion to Exclude, and Motion in Limine (together Response to Respondent’s Motions), and its Cross-Motion to Admit Certain Exhibits into Evidence (Cross-Motion)<sup>1</sup>. On September 14, 2022, Respondent filed its Reply Re Motion to Exclude and Response Re Complainant’s Motion to Admit (Respondent’s Response and Reply). Pursuant to 40 C.F.R. § 22.16(b), Complainant hereby respectfully submits its reply to Respondent’s Response and Reply.

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<sup>1</sup> Complainant’s Response to Respondent’s Motions and Cross Motion were filed as a single document. Citations to Complainant’s Cross-Motion therefore are referenced as Resp. and Cross-Mot.

## Argument

Respondent quickly notes three issues in support of its position that Complainant's Cross-Motion is premature. Other than a brief reference to its argument that Complainant's Supplement was late and unfair, Respondent does not provide any support.

Notably, Respondent does not argue that any of Complainant's exhibits proposed for admission are irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value. *See*, Order Setting Deadlines at 3 ("Arguments in the forthcoming Response [from Complainant] and Reply [from Respondent] should therefore also focus on the admissibility (relevance, materiality, probity, etc.) of this additional evidence (see 40 C.F.R. § 22.22(a)) and not merely on the narrow issues raised in the Motion").<sup>2</sup> In its Reply, however, Respondent requests that "[i]f the Presiding Officer denies Respondent's Motion to Exclude, Respondent should be allowed to preserve its objections to the documents at issue ... and allow Respondent to require EPA to lay a proper foundation for the admission of those documents and proposed witness testimony at hearing." Resp. and Repl. at 9.

Notwithstanding this Tribunal's order to address admissibility and this Tribunal's repeated admonitions that "the time allotted for the hearing is limited" (*see*, Order Setting Deadlines at 2), Respondent pointedly chooses (1) to ignore this Tribunal's order, (2) to not address Complainant's showing of the admissibility of exhibits CX68-74 and CX76-77, and (3)

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<sup>2</sup> Although this Complainant's Reply is made only to Respondent's Response to Complainant's Cross-Motion, Complainant notes that in Respondent's Response and Reply, Respondent briefly notes the potential unreliability of Mr. Callaghan's potential testimony about exhibits that are not the subject of Complainant's Cross-Motion (CX6-65) (Resp. and Repl. at 7, n.2). Mr. Callaghan's affidavit (CX77), however, is a subject of Complainant's Cross-Motion and is submitted as foundation to establish that certain of Complainant's exhibits (again, that are not the subject of the Cross-Motion) are business records. To the extent that Respondent is arguing that CX77 is unreliable as foundation for the admissibility of business records in response to the Cross-Motion, Complainant replies that Respondent has pointed to no potential error or unreliability in CX77 that makes it inadmissible, and that the admission of CX6-65 will be addressed either in stipulations, or at hearing.

asks the Tribunal to reserve limited hearing time at hearing to address foundational issues that could be resolved prior to hearing under Complainant's Cross-Motion.

Respondent's first assertion is that "the deadline for non-dispositive motions has passed and Complainant did not seek leave to file the cross-motion." *Id.* Respondent simply ignores the Timing section at the beginning of Complainant's Cross-Motion where Complainant explains in detail why its Cross-Motion can and should be considered, even though it was not filed by the August 19, 2022 deadline set by this Tribunal. *Resp. and Cross-Mot.* at 13-14.

Second, Respondent asserts that "[i]t is improper for EPA to now seek an advance ruling, by a motion filed after the deadline, on the admissibility of the late-disclosed exhibits in EPA's Third Supplement." *Id.* Because CX68-74 and CX76-77 were submitted prior to this Tribunal's deadline of August 24, 2022, and well before the deadline set in 40 C.F.R. § 22.22(a), Complainant infers that Respondent is continuing its argument that these exhibits were not promptly submitted under 40 C.F.R. § 22.19(f). As Complainant made clear in its Response to Respondent's Motions, Complainant has provided CX68-74 solely and specifically in direct response to this Tribunal's specific requests for additional information made in its Order on Complainant's Motion for Accelerated Decision dated April 4, 2022 (April 4 Order).<sup>3</sup> Complainant also listed Mr. Callaghan as a substitute for Mr. Muggleston in Complainant's Supplement, and provided CX76-77<sup>4</sup>, having learned from Mr. Muggleston for the first time on July 7, 2022, that he was unlikely to willingly appear at hearing. Prior to listing Mr. Callaghan as a substitute witness, between April 2022 and July 2022, Complainant made numerous

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<sup>3</sup> See, e.g., "Additional testimony concerning the true amount of hazardous waste in the 32 drums will again aid the Tribunal in determining the potential seriousness of contamination and calculating the penalty." April 4 Order at 25. "Sorting out the aftereffects of a release of paint from the drums would aid the Tribunal in its assessment of the risk of exposure to receptor populations." *Id.* at 26.

<sup>4</sup> Complainant notes that if counsel for Respondent had contacted counsel for Complainant prior to filing its Motion to Exclude, counsel for Complainant could have explained the status of the potential substitution at that time, potentially avoiding argument over Mr. Callaghan's substitution, and, perhaps, CX76-77 before this Tribunal.

attempts at contact Mr. Muggleston to engage in substantive discussions about the impending hearing.

Finally, Respondent asserts that “[i]t is manifestly unfair to Respondent for EPA to dump 220 pages of new documents on Respondent on the eve of the amendment deadline, just 60 days before hearing, and then ask that it all be presumptively admitted.”<sup>5</sup>Resp. and Repl. at 9.

Complainant’s Cross-Motion is not presumptive because both parties were ordered to address admissibility, and Complainant has done so.

### **Conclusion**

Complainant’s Cross-Motion is a logical next step from this Tribunal’s Order to both parties to address the admissibility of all of Complainant’s Supplement (Order Setting Deadlines, at 1-2) and this Tribunal’s regularly stated admonitions to both parties to make every effort to conserve time at hearing.

In its Response and Reply, Respondent simply has ignored (1) the timeframe set by this Tribunal in its Notice of Hearing (May 9 – August 24) to, among other things, respond to this Tribunal’s requests for additional information made in the April 4 Order; (2) this Tribunal’s order to both parties to address in detail the admissibility of all of Complainant’s Supplement; and (3) this Tribunal’s regularly stated admonitions to both parties to make every effort to conserve time at hearing.

Complainant’s analysis of the admissibility of CX68-74 and CX76-77 in its Cross-Motion is well founded and shows that these exhibits likely will be helpful to this Tribunal at

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<sup>5</sup> Respondent’s relentless references to the number of pages in Complainant’s Supplement is not meaningful, especially because Complainant is not moving to introduce Dr. Miller’s expert report (CX75) at this time, which reduces the count by 38, and because a single document, Respondent’s own Stormwater Pollution Prevention Plan (CX71), is 118 pages.

hearing. Admission of these exhibits now will save already-limited time at hearing. Therefore, Complainant's Cross-Motion to Admit Certain Exhibits into Evidence (CX68-74 and CX76-77) should be granted.

Dated: September 16, 2022

Respectfully Submitted,

Laurianne Jackson  
Senior Assistant Regional Counsel  
U.S. Environmental Protection Agency,  
Region 8

**CERTIFICATE OF SERVICE**

The undersigned certifies that on September 16, 2022, I filed electronically the foregoing the **COMPLAINANT’S REPLY TO RESPONDENT’S RESPONSE TO COMPLAINANT’S CROSS-MOTION TO ADMIT CERTAIN EXHIBITS INTO EVIDENCE** with the Clerk of the Office of Administrative Law Judges using the OALJ E-Filing System and sent by electronic mail to Mark Ryan, attorney for Respondent, at [mr@ryankuehler.com](mailto:mr@ryankuehler.com) and Scott McKay, attorney for Respondent, at [smckay@nbmlaw.com](mailto:smckay@nbmlaw.com).

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By: \_\_\_\_\_

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U.S. EPA, Region 8