

Mark Ryan
RYAN & KUEHLER PLLC
P.O. Box 3059
Winthrop, WA 98862
Telephone (509) 996-2617
mr@ryankuehler.com

Scott McKay
NEVIN, BENJAMIN & McKAY LLP
P.O. Box 2772
Boise, ID 83701
Telephone: (208) 343-1000
Facsimile: (208) 345-8274
smckay@nbmlaw.com

Attorneys for Respondent New Prime, Inc.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8

IN THE MATTER OF:)	
)	Docket No. RCRA-08-2020-0007
New Prime, Inc.)	
)	RESPONDENT'S RESPONSE
Respondent.)	TO MOTION TO AMEND
)	COMPLAINANT'S PREHEARING
_____)	EXCHANGE

Pursuant to 40 C.F.R. §§ 22.16(b) and 22.19(f), Respondent New Prime, Inc. submits this Response to Complainant's Motion to Amend its Prehearing Exchange. Complaint requests with this motion to correct several mathematical and typographical mistakes in its Exhibit CX04, which is the penalty policy analysis at the center of the penalty dispute in this case. Complainant also seeks to "correct" Exhibit CX64, to enhance the credentials of John J. Reschl. Respondent will address each exhibit in turn.

Exhibit 04: The Penalty Policy Analysis

Complainant explains in its Motion to Correct that it made several mistakes in the preparation of its Exhibit CX04. This exhibit is EPA's RCRA penalty policy analysis for this case and is the basis for Complainant's proposed \$631,402 penalty. Because Respondent has admitted liability in this matter, but disputes the size of the proposed penalty, Exhibit CX04 is a key exhibit in the case. And it contains several significant mistakes. *See* EPA's Motion to Correct at 1-2 and the attached amended CX04 and the Declaration of Linda Jacobson at ¶¶ 10-19. 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.

Respondent does, however, request that the original CX04 that was part of the prehearing exchange remain in Complainant's prehearing exchange as originally submitted, and the corrected version that Complainant now seeks to amend be labeled with the unique "CX04Cor" as Complainant suggests. Respondent is entitled to cross examine EPA's penalty witness on the mistakes in her penalty policy analysis, and Respondent may therefore seek to enter both versions of the exhibit into the record at hearing.

Exhibit CX64: Reschl Resume

Complainant seeks to "correct" the resume of its proposed expert witness John Reschl to add information regarding "Mr. Reschl's knowledge and experience regarding Toxicity Characteristic Leaching Procedure and flashpoint analysis." Motion to Amend at 2-3. Mr. Reschl was identified in Complainant's Prehearing Exchange as a fact witness. Respondent's Prehearing Exchange at 3. In Complainant's Rebuttal Prehearing Exchange, Mr. Reschl was promoted to an expert witness. Respondent's Rebuttal Prehearing Exchange at 2.

At no point does Complainant assert that the additions it seeks to add to Mr. Reschl'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 Mr. Reschl's CV meets this test.

Complainant has twice now identified Mr. Reschl in its prehearing exchange and rebuttal prehearing exchange, and therefore has had two opportunities to get Mr. Reschl's CV to say what it wants. Complainant now seeks to amend Mr. Reschl's CV to bolster its case without identifying any inaccuracies in that CV. The CROP rules do not provide authority for such an amendment. And for good reason. If the rules allowed a party to amend its prehearing exchange exhibits each time the party discovered a weakness in its case, the process would never end.

Complainant had two tries for Mr. Reschl. It should be denied a third. Because Complainant has not complied with the requirements of section 22.19(f), the motion should be denied.

CONCLUSION

For the foregoing reasons, Respondent does not oppose the motion to correct the mistakes in Exhibit CX04, but requests that the original CX04 be preserved as a unique exhibit. Respondent opposes Complainant's motion to "correct" Exhibit CX64 because no correction is proposed.

RESPECTFULLY SUBMITTED this 9th day of March 2021.

RYAN & KUEHLER PLLC



Mark A. Ryan
WSBA No. 18279

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of March 2021, I filed Respondent's Response to Complainant's Motion to Amend its Prehearing Exchange via the OALJ E-filing system and via email to:

Laurianne M. Jackson
Senior Assistant Regional Counsel
Regulatory Enforcement Section
U.S. Environmental Protection Agency, Region 8
1595 Wynkoop Street
Denver, CO 80202-1129
Jackson.laurianne@epa.gov

Charles Figur
Senior Assistant Regional Counsel
Regulatory Enforcement Section
U.S. Environmental Protection Agency, Region 8
1595 Wynkoop Street
Denver, CO 80202-1129
Figur.charles@epa.gov



Mark Ryan