

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029**

**Via electronic filing**

December 21, 2015

Sybil Anderson, Headquarters Hearing Clerk  
Office of Administrative Law Judges  
U.S. Environmental Protection Agency  
Mail Code 1900R  
William Jefferson Clinton Building  
1200 Pennsylvania Ave. NW  
Washington, DC 20460

Re: In the Matter of: Aylin, Inc., et al (Docket No. RCRA-03-2013-0039)

Dear Ms. Anderson:

Please find enclosed Complainant's Reply to Respondents' Partial Opposition to Complainant's Motion for Leave to File Supplemental Prehearing Exchange, filed electronically today. Please advise if there are problems with the transmission. Thank you.

Sincerely,



Janet E. Sharke  
Senior Assistant Regional Counsel (3RC50)  
sharke.janet@epa.gov  
215-814-2689

cc: Jeffrey Leiter, Esq., Counsel for Respondents



RCRA-02-2009-7110, 2010 ALJ LEXIS 9, at \*6 (ALJ, Order on Complainant's Motion in Limine and Motion to Strike and Respondent's Request for Discovery, June 2, 2010) (citations omitted). Because Respondents seek to exclude two of Complainant's exhibits, CX 149 and CX 150, as being irrelevant, immaterial, and of no probative value (Respondents' Opp. at 3, 7), Complainant is construing Respondents' opposition as a motion *in limine*. As the Rules of Practice are silent as to the standard for such motions, EPA's administrative law judges have looked to the Federal Rules of Civil Procedure and the Federal Rules of Evidence for guidance. *Id.* at 3. Motions *in limine* are "generally disfavored and should be granted only if the proposed testimony or exhibit sought to be excluded is clearly inadmissible for any purpose." *Id.* at \*7 (citing to *Zaclon, Inc.*, EPA Docket No. RCRA-05-2004-0119, 2006 EPA ALJ LEXIS 21, at \*11 (ALJ, Order on Respondents' Motion in Limine, Apr. 24, 2006)); *accord, In Re Carbon Injection Sys.*, EPA Docket No. RCRA-05-2011-0009, 2012 ALJ LEXIS 23, at \*9-10 (ALJ, Order on Complainant's Motion *In Limine* to Preclude Certain Testimony Evidence, and Documents, and Respondents['] Motion *In Limine* to Bar Evidence of the Financial Worth or Assets of Scott Forester and Eric Lofquist, May 31, 2012). If this high standard is not met, evidentiary rulings are deferred until the evidentiary hearing, at which time the presiding officer may render her determination. *Id.* at \*8.

## **II. Argument**

### **A. CX 149 and CX 150 Contain Information that is Relevant, Material and of Probative Value**

Respondents seek to exclude two documents included in Complainant's most recent prehearing exchange submittal, exhibits denoted as CX 149 and CX 150, each of which was cited in Complainant's Motion for Partial Accelerated Decision on Liability and Memorandum

of Law in Support (“A.D. Motion”). CX 149 is a record of lien/judgement filed against Respondents Holland Food Mart and Adnan Kiriscioglu referenced at page 27 of the A.D. Motion. CX 150 is EPA’s notice of the promulgation of its final lender liability rule under Subtitle I of RCRA published in the Federal Register on September 7, 1995, referenced at page 20, footnote 8, of the A.D. Motion.

Each of these documents contains information that is relevant, material and of probative value as to whether Respondent Kiriscioglu is or could be considered an “operator” of under-ground storage tanks (“USTs”) within the meaning of 9 VAC § 25-580-10. Complainant addressed this issue at length in its A.D. Motion and cited to each of these documents and others therein in support. A.D. Motion at 19-27. Because neither document had been included in Complainant’s prior prehearing submittals, Complainant sought to supplement its prehearing exchange pursuant to Rule 22.19(f) of the Rules of Practice. A party must “promptly supplement or correct the exchange when the party learns that the information changed is incomplete, inaccurate or outdated, and the additional information has not otherwise been disclosed to the other party.” 40 C.F.R. § 22.19(f). Failure to timely supplement a prehearing exchange (at least 15 days prior to the hearing) may result in the information not being admitted into evidence at hearing. 40 C.F.R. § 22.22(a)(1). Accordingly, Complainant has erred on the side of inclusion in its prehearing exchange submittals and included publicly available documents such as CX 150. *See, e.g.,* CX 48, CX 144.

CX 149, the lien/judgement, is one piece of evidence that supports Complainant’s contention that Respondent Kiriscioglu controlled the day-to-day operations of the USTs at the facilities, including payment to fuel suppliers, such as Crossroads Fuel. A.D. Motion at 27.

CX 150 comprises EPA’s publication in the Federal Register of its lender liability rule

which amended 40 C.F.R. Parts 280 and 281, wherein EPA explains, *inter alia*, that there may be more than one “operator” of a tank at a given time. 60 *Fed. Reg.* 46,692, 46,693 (1995). This supports Complainant’s contention that Respondent Kiriscioglu was, at the time of the alleged violations, an “operator” of the tanks at the facilities. A.D. Motion at 20, n.8. In addition, because CX 150 is a public document, this Court may take judicial notice of this document even if Complainant had not submitted it prior to hearing. *See, In Re Howmet Corp.*, 13 E.A.D. 272, 288 n.32 (EAB 2007) (taking notice of a public document cited by neither party) (citing *In re Cutler*, 11 E.A.D. 622, 650-51 (EAB 2004), 40 C.F.R. § 22.22(f)).

Accordingly, each of these documents bears directly on the issue of Respondent Kiriscioglu’s liability as set forth in Complainant’s A.D. Motion, and is relevant, material and of probative value, therefore neither CX 149 nor CX 150 should be excluded from Complainant’s list of proposed exhibits.

### **III. Conclusion**

For the foregoing reasons, Respondents have not satisfied the standard for granting a motion *in limine*, accordingly, this Court should deny Respondents’ Partial Opposition to Complainant’s Motion for Leave to Supplement its Prehearing Exchange.

WHEREFORE, Complainant requests this Court issue an Order Denying Respondents Partial Opposition to Complainant’s Motion for Leave to Supplement its Prehearing Exchange.

Respectfully Submitted,



---

Janet E. Sharke/Louis F. Ramalho  
Senior Assistant Regional Counsel  
U.S. EPA, Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029  
ATTORNEYS FOR COMPLAINANT

12/21/2015  
Date

**CERTIFICATE OF SERVICE**

I hereby certify that on the date set forth below, in accordance with the procedures set forth in the Standing Order Authorizing Electronic Filing in Proceedings before the Office of Administrative Law Judges, dated August 11, 2014, I filed Complainant's Reply to Respondents' Partial Opposition to Complainant's Motion for Leave to Supplement its Prehearing Exchange, Docket No. RCRA-03-2013-0039, for service to:

Sybil Anderson, Headquarters Hearing Clerk  
Office of Administrative Law Judges  
U.S. EPA, Mail Code 1900R  
William Jefferson Clinton Building  
1200 Pennsylvania Ave., NW  
Washington, DC 20460

The Hon. Christine D. Coughlin  
Administrative Law Judge  
U.S. EPA Mail Code 1900R  
William Jefferson Clinton Building  
1200 Pennsylvania Ave., NW  
Washington, DC 20460

I further certify that on the date set forth below, I served via e-mail and first class mail a true and correct copy of the foregoing to:

Jeffrey Leiter, Esq.  
Counsel for Respondents  
Leiter & Cramer, PLLC  
1707 L Street, NW, Ste. 560  
Washington, DC 20036  
Email: [jll@leitercramer.com](mailto:jll@leitercramer.com)

12/21/2015  
Date



Janet E. Sharke  
Counsel for Complainant  
U.S. EPA, Region III  
1650 Arch Street (3RC50)  
Philadelphia, PA 19103-2029  
[sharke.janet@epa.gov](mailto:sharke.janet@epa.gov)  
(215) 814-2689 (tel.)  
(215) 814-2601 (fax)