

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:) Docket No. RCRA-08-2015-0002
)
The U.S. Bureau of Reclamation, National)
Electric Coil, Environmental Contractors, LLC,)
and CTA Construction and Environmental, LLC,)
)
Respondents.)

COMPLAINANT’S REBUTTAL PREHEARING EXCHANGE

Complainant, the United States Environmental Protection Agency, Region 8 (EPA), submits COMPLAINANT’S REBUTTAL PREHEARING EXCHANGE pursuant to 40 C.F.R. § 22.19(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation/Termination or Suspension of Permits (Rules of Practice) and the Prehearing Order of Presiding Officer M. Lisa Buschmann, dated December 29, 2015, as modified by the Presiding Officer’s Erratum issued December 30, 2015, and Order on Unopposed Motion for Extension of Time to File Complainant’s Rebuttal Prehearing Exchange, dated March 26, 2016.

I. WITNESSES AND SUMMARY OF EXPECTED TESTIMONY

Complainant provided a complete list of its proposed fact witnesses in Complainant’s Initial Prehearing Exchange. Complainant does not wish to add to its list of proposed fact witnesses in its Rebuttal Prehearing Exchange, but reserves the right to have its previously-identified fact witnesses testify in rebuttal to any matter raised by Respondents that is not addressed in Respondents’ Prehearing Exchange. In addition, Complainant supplements its Initial Prehearing Exchange by identifying the fact and/or expert witness that may introduce into evidence through testimony Complainant’s exhibits. Further, Complainant is supplementing its proposed expert witness list by naming Ms. Linda TeKrony as a potential Complainant’s Expert Witness.

A. Fact Witness

1. Mr. Victor Zielinski – **Supplemental Testimony**
Air and Toxics Technical Enforcement Program
Office of Enforcement, Compliance and Environmental Justice
U.S. Environmental Protection Agency, Region 8
Denver, Colorado

In addition to the Complainant's exhibits listed in Complainant's Initial Prehearing Exchange that Mr. Zielinski may establish through testimony the basis for admitting into evidence, the following additional Complainant's exhibits may be introduced into evidence by Mr. Zielinski: Complainant's Exhibits 4, 5, 6, 7, 8, 12, 21, 38.

B. Expert Witnesses

1. Ms. Linda Jacobson – **Supplemental Testimony**
Resource Conservation and Recovery Act Technical Enforcement Program
Office of Enforcement, Compliance and Environmental Justice
U.S. Environmental Protection Agency, Region 8
Denver, Colorado

Ms. Jacobson may establish through testimony the basis for admitting into evidence Complainant's exhibits 1, 2, 6, 7, 11, 12, 14, 26, 32, 33, 35 – 40.

2. Ms. Linda TeKrony – **Supplemental Witness**
National Enforcement Investigations Center
U.S. Environmental Protection Agency
Denver, Colorado

Ms. TeKrony is currently employed as an Environmental Engineer at the U.S. EPA's National Enforcement Investigations Center. Ms. TeKrony's job responsibilities include, among other things, process-based single and multimedia compliance investigations in the context of existing regulations and the development of new regulatory requirements, evaluation of RCRA waste generation points and waste determinations, analysis of the underlying chemistry in process operations for the purpose of

determining regulated constituents in waste streams, interpretation of EPA guidance documents in the compliance context, and documentation of her findings and analysis in inspection reports and, when relevant, expert reports. Ms. TeKrony regularly presents on a wide variety of RCRA-related issues around the country and has served as a technical expert in a number of RCRA-related cases since 2001. Ms. TeKrony's Curriculum Vitae is included in Complainant's Rebuttal Prehearing Exchange as CX 41. Ms. TeKrony may testify about her education background and professional experience.

Ms. TeKrony is expected to testify as an expert witness in this case based on her national expertise and extensive regulatory experience with the federal RCRA C program and the application of its implementing regulations and policies. Ms. TeKrony's work directly relates to the federal RCRA C program, agency regulations, policies, and practices within that program, and their application to different entities and waste streams. Ms. TeKrony will explain the RCRA regulatory requirements and their application to the facts in this case from a national perspective. Ms. TeKrony will also discuss the sampling methodologies and hazardous waste determination practices used by Respondents as these methodologies and practices relate to the national regulatory scheme. Ms. TeKrony will offer her expert opinion based on the relevant regulatory requirements and policies, as well as her knowledge of the facts in this case, why the Respondents violated RCRA, as alleged in the Amended Order.

II. EXHIBITS

The only supplemental exhibit that Complainant wishes to add at this time is CX 41, the Curriculum Vitae of Linda TeKrony.

III. STATEMENT IN RESPONSE TO RESPONDENTS' PREHEARING EXCHANGE

Complainant submits the following statement in response to Respondents' Prehearing Exchange as directed by the Presiding Officer's Prehearing Order. Specifically, Complainant seeks to clarify its

evidentiary burden at hearing under the Rules of Practice in response to Respondents' statement at p. 2 of their Prehearing Exchange that "[n]one of the alleged violations, for which EPA bears the burden of proof, is supported by a preponderance of the evidence, or for that matter, by substantial evidence." Secondly, Complainant responds to Respondents' interpretation of the hazardous waste characterizations underlying the basis for the RCRA violations alleged by the EPA.

First, with regard to the burden of proof, Complainant seeks to clarify that pursuant to 40 C.F.R. § 22.24(a) of the Rules of Practice, "the complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate." In addition to having the burden of presenting any defense to the allegation in the complaint and any response or evidence regarding the appropriate relief after complainant's establishment of a prima facie case, Respondents bear similar burdens of presentation and persuasion for any affirmative defenses.¹ 40 C.F.R. § 22.24(a). 40 C.F.R. § 22.15(b) specifies that the Answer shall state the circumstances or arguments which are alleged to constitute the grounds of any defense. It is worth noting, however, that neither Respondent NEC nor Respondent CTA specifically claimed any affirmative defenses in their respective Answers to the First Amended Order.

Complainant further clarifies that the preponderance of the evidence standard, meaning that degree of proof which is more probable than not, is decided by the Presiding Officer. "Each matter of controversy shall be decided by the Presiding Officer upon a preponderance of the evidence." 40 C.F.R. § 22.24(b). Contrary to Respondents' statement, there is no substantial evidence burden imposed by the Rules of Practice.

¹ For purposes of the Part 22 Rules of Practice, a compliance order issued under section 3008(a)(3) of RCRA is considered a complaint. 40 C.F.R. § 22.1(a).

Second, Complainant wishes to respond to Respondents' assertion that the evidence does not support the determination that the wastewater contained hazardous waste. Respondents' claims that EPA relied on test results that did not utilize the appropriate test method for a TCLP analysis and non representative samples are irrelevant. EPA did not perform the testing and analyses at issue, nor was it required to do so; Respondent CTA did. EPA, in addition to Respondent NEC and the Montana Department of Environmental Quality (MDEQ), relied upon Respondent CTA's multiple conclusions and representations that the wastewater was hazardous. In July 2015, Respondent Bureau of Reclamation changed the Yellowtail Dam facility's generator status from a conditionally exempt small quantity generator to a large quantity generator based on Respondent CTA's representation that the wastewater was above the RCRA limit of hazardous waste for both lead and cadmium. At no time prior to EPA's issuance of the First Amended Order did Respondent CTA represent to EPA, MDEQ, or its fellow Respondents to the best of EPA's knowledge, that the wastewater sampled in August and September 2014 was anything other than hazardous. Respondents' late-forming argument that EPA's finding of hazardous waste is invalid because the Respondents did not perform the proper test offers nothing but a red-herring. Further, if the Respondents believed they had made an improper hazardous waste determination, the onus was solely on them in accordance with 40 C.F.R. § 262.11 to perform an additional and proper hazardous waste determination. At this point, the Respondents cannot disprove that the wastewater was hazardous as Respondent CTA originally determined and repeatedly communicated to EPA and MDEQ.

Despite the Respondents' attempt post-issuance of the First Amended Order to improperly shift the burden for making a hazardous waste determination to the EPA, the regulations clearly impose such

requirement on the generators. 40 C.F.R. § 262.11 allows generators to make hazardous waste determinations based either on generator knowledge or testing in accordance with subpart C of 40 C.F.R. part 261. In this particular instance, Respondent CTA tested the wastewater in August and September 2014, concluded that it was hazardous based on the test results and informed the EPA and others of its determination. This determination supports the RCRA violations alleged by EPA.

Lastly, contrary to Respondents' depiction, the conversations between EPA and MDEQ in the spring of 2015 to address the Respondents' co-mingled asbestos and hazardous wastewater generated between July and December 2014 in no way restricted, much less prohibited, Respondents from disposing of their wastewater before the 90-day storage period expired or from obtaining a permit.

Respectfully submitted,

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

Date: 4/8/2016

By: 
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CERTIFICATE OF SERVICE

The undersigned certifies that on April 8, 2016, the foregoing COMPLAINANT'S REBUTTAL PREHEARING EXCHANGE and the supplemental document intended to be part of the record (Complainant's Exhibit 41) were filed with the Office of Administrative Law Judges and served on each party as follows in accordance with 40 C.F.R. §§ 22.5 and 22.7(b):

By the OALJ E-Filing System:

Ms. Sybil Anderson, Headquarters Hearing Clerk
U.S. Environmental Protection Agency
Office of Administrative Law Judges
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The Honorable M. Lisa Buschmann, Administrative Law Judge
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4/8/2016

By:

