

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

Dave Erlanson, Sr., Individual,

Swan Valley, Idaho,

Respondent.

DOCKET NO. CWA-10-2016-0109

**COMPLAINANT’S MOTION FOR
LEAVE TO FILE SECOND
SUPPLEMENTAL PREHEARING
EXCHANGE**

Complainant Environmental Protection Agency, Region 10 (“Complainant” or “EPA”), respectfully requests leave to file its Second Supplemental Prehearing Exchange, attached hereto as Attachment A. This motion is submitted pursuant to 40 C.F.R. § 22.19(f) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders (“Part 22 Rules”). Specifically, EPA seeks the addition of one document, CX-43, which is a visual aid that will be used to assist the testimony of Mr. Dan Kenney, North Zone Fisheries Biologist, Nez-Perce Clearwater National Forests, and Mr. David Arthaud, Fisheries Biologist, National Marine Fisheries Service.

STANDARD

This action is governed by the Part 22 Rules, which provide that:

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

40 C.F.R. § 22.22(a)(1). Section 22.19 of the Rules require parties to submit prehearing exchanges, and require that a party who has submitted its prehearing exchange “shall promptly supplement ... the exchange when the party learns that the information exchanged ... is incomplete ..., and the additional ... information has not otherwise been disclosed to the other party pursuant to this section [22.19].” 40 C.F.R. § 22.19(f).

EPA is not required to meet the standard of 40 C.F.R. § 22.22(a)(1) and demonstrate good cause for failing to exchange the proposed exhibit, because this Motion is filed over one month before the date the hearing in this matter is scheduled to begin. In circumstances like these, this tribunal has instead required parties to submit a motion explaining the reasons for not submitting it sooner. *In re 99 Cents Only Stores*, Dkt. No. FIFRA-9-2008-0027, at *5, ALJ (June 19, 2009) (Biro, C.J). A supplement may be denied where it is “not prompt or where the existing information is not incomplete, inaccurate or outdated, and particularly where there is evidence of bad faith, delay tactics, or undue prejudice.” *Id.* at *4.

DISCUSSION

Proposed exhibit CX-43 is a document recently created by Dan Kenney, North Zone Fisheries Biologist, Nez-Perce Clearwater National Forests. It contains photographs of the site of Respondent’s dredge activity in 2015, 2016, and 2018. The photographs include indicators that will allow witnesses to direct the Presiding Officers to particular features of the river. Some of the photographs in CX-43 were previously exchanged as a part of CX-38 and CX-39, Mr. Kenney’s *Investigation of Stream Channel Modification at Unauthorized Suction Dredging Sites on the South Fork Clearwater River, October 7 and 8, 2015*, and its 2016 addendum (“2015 and

2016 Post-Dredge Reports”). Other photographs in CX-43 were taken by Mr. Kenney or his staff during the same investigations but were omitted from the 2015 and 2016 Post-Dredge Reports. Additionally, Table 1 of CX-43 uses data from the 2015 and 2016 Post-Dredge Reports to calculate the volume and area of the hole and pile that Respondent created while mining.

The addition of CX-43 is prompt and not the result of bad faith or undue delay. In preparing witnesses for their testimony, EPA discovered the utility of a single document containing photographs, so that witnesses and the Presiding Officer could compare visible impacts through successive years without turning back and forth among exhibits. Also, through discussions with Mr. Kenney, EPA learned that he and his staff captured additional photos that more clearly demonstrate the impacts caused by Respondent’s mining activity. Soon after Mr. Kenney created this document, EPA filed this Motion and provided it to Respondent.

The addition of CX-43 will not result in undue prejudice. As stated above, certain photographs in CX-43 were previously provided to Respondent in CX-37 and CX-38. The photographs that were not previously exchanged are very similar, in that they depict the same location from a different angle, such that the river’s substrate is visible. Only Figure 5, which depicts the same location in 2018, is completely new to Respondent. Similarly, the data in Table 1 was previously provided in CX-37 and CX-38, but now includes calculations of volume and area. These new photographs and data will not cause undue prejudice to Respondent, who, by his own admission, became “personally and intimately familiar with the location and geography of the area in question, having traveled there innumerable times to work [his] mining claim” Declaration of Dave Erlanson, Sr., Docket No. 34. Moreover, this Motion was filed over one month before hearing – sufficient time for Respondent to review only three additional pages of information.

CONCLUSION

For the foregoing reasons, Complainant respectfully requests that the Presiding Officer grant EPA's Motion for Leave to File Second Supplemental Prehearing Exchange.

Dated this 12th day of April, 2019.

Respectfully submitted,

/s/ J. Matthew Moore

J. Matthew Moore
Assistant Regional Counsel
U.S. EPA, Region 10

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **COMPLAINANT’S MOTION FOR LEAVE TO FILE SECOND SUPPLEMENTAL PREHEARING EXCHANGE**, dated April 12, 2019, was filed electronically with the Clerk of the Office of Administrative Law Judges using the ALJ e-filing system, which sends a Notice of Electronic Filing to Respondent.

The undersigned also certifies that on this date she served the foregoing **COMPLAINANT’S MOTION FOR LEAVE TO FILE SECOND SUPPLEMENTAL PREHEARING EXCHANGE**, via regular US Mail, postage prepaid, on Respondent Dave Erlanson, Sr., at P.O. Box 46, Swan Valley, Idaho 83449.

Dated this 12th day of April, 2019.

/s/ Teresa Young

Teresa Young
Administrative Assistant
U.S. EPA, Region 10
1200 Sixth Avenue, Suite 900, M/S ORC-113
Seattle, WA 98101
connery.shannon@epa.gov
(206) 553-1037