UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
New Prime, Inc.,	)	**Docket No. RCRA-08-2020-0007**
	)	
Respondent.	)	

COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION TO EXCLUDE SUPPLEMENTAL EXHIBITS AND WITNESSES, AND RESPONDENT'S MOTION IN LIMINE AND COMPLAINANT'S CROSS-MOTION TO ADMIT CERTAIN EXHIBITS INTO EVIDENCE

Complainant hereby respectfully submits its response to Respondent's Motion to Exclude Supplemental Exhibits and Witnesses (Respondent's Motion), its response to Respondent's Motion in Limine (Respondent's Motion in Limine), and Complainant's Cross-Motion to Admit Certain Exhibits into Evidence.

I. Introduction

On April 4, 2022, the Tribunal in this matter issued its Order on Complainant's Motion for Accelerated Decision (April 4 Order) granting Complainant's motion as to liability on each of the counts in the Complaint and denying Complainant's motion as to penalty. On April 22, 2022, Complainant informed Respondent and this Tribunal that it was contemplating adding one or more witnesses and exhibits to its prehearing exchange specifically in response to the April 4 Order. On May 9, 2022, this Tribunal issued its Notice of Hearing Order (Hearing Order), which, among other things, set forth deadlines for prehearing activities. The Hearing Order authorizes each party to seek to supplement its prehearing exchange without motion through August 24, 2022. 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.[1] Upon receipt of Respondent's motion, this Tribunal immediately issued its Order on Deadlines dated August 24, 2022 (Order on Deadlines). The Order on Deadlines orders the parties to treat Respondent's Motion also as a Motion in Limine, and orders Complainant to file its response, if any, no later than September 6, 2022.

Complainant's response to Respondent's Motion is set forth in Section II. Complainant's response to Respondent's Motion in Limine is set forth in Section III. Complainant's support for its Cross-Motion to Admit Certain Exhibits into Evidence is set forth in Section IV.

II. Complainant's Response to Respondent's Motion

Standard of Review – Respondent's Motion

Respondent argues that the entirety of Complainant's Supplement has not been promptly made pursuant to 40 C.F.R. § 22.19(f)[2] and that Complainant's Supplement "is prejudicial and puts Respondent at a distinct and unfair disadvantage." Resp. Mot. at 7.[3] Respondent also asserts that Complainant must provide a "compelling explanation" for its Supplement. Respondent cites no legal or other support for this assertion. Further, no order of this Tribunal, or the Rules of Practice, require a compelling explanation from either party to this matter if and when supplementing its prehearing exchange before August 24, 2022. In fact, this Tribunal's express

[1] Respondent's counsel did not contact Complainant in advance of filing Respondent's Motion as required by the Prehearing Order (November 2, 2020). Prehearing Order at 4.

[2] 40 CFR § 22.19(f) states that a party "shall promptly supplement or correct the exchange when the party learns that the information exchanged or response provided is incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party pursuant to this section."

[3] Respondent does not cite to any decisions by the Environmental Appeals Board, EPA Presiding Officers, or any other tribunals in support of its argument regarding promptness. Complainant also has been unable to identify any decisions, adverse or not, where, as is the case here, the party proffering the evidence or witness does so within the time constraints set forth by the tribunal, or the applicable rules. Complainant, conversely, has identified EAB and Presiding Officer decisions which address production of prospective evidence outside the timing requirements of an order of the tribunal, or the relevant rules. *See, e.g., In Re Cdt Landfill Corp*., 11 E.A.D. 88 (EAB June 5, 2003) (inquiry for admitting late-arriving evidence under 40 C.F.R. § 22.19(a) should include "whether the **untimely** production would result in unfair surprise to the other party, thereby prejudicing its capacity to properly prepare its case" (emphasis added).)

direction consistently has been that no explanation is necessary when a party timely seeks to supplement its prehearing exchange.[4]

Complainant's Response

Complainant's Supplement is timely under this Tribunal's scheduling orders and was promptly made for purposes of 40 C.F.R. § 22.19(f) based on the specific recent history of this proceeding. Further, even though Respondent argues a standard of review that is not applicable under the procedural circumstances here, Complainant notes that Respondent has failed to show either unfair surprise or actual prejudice to its ability to prepare for hearing; or that Complainant's timely and prompt Supplement is otherwise materially prejudicial.

Respondent's arguments that Complainant's Supplement is not promptly made, and that Complainant must submit a compelling explanation, ignore the fact that after alerting the parties by its April 4 Order that a hearing must be held, this Tribunal set forth the schedule for finalizing prehearing exchanges without requiring a motion in it its Hearing Order issued on May 9, 2022. Further, Respondent makes these arguments while acknowledging that Complainant gave Respondent and this Tribunal clear notice on April 22, 2022, that Complainant was contemplating adding one or more witnesses and exhibits to its prehearing exchange, specifically in response to the April 4 Order. Resp. Mot. at 5

[4] Order on Motion to Amend Prehearing Exchange (May 4, 2022), at 4. ("This Tribunal has been clear that permission to supplement a party's prehearing exchange is unnecessary if the hearing is not imminent.") *See, also*, Notice of Hearing Order at 1 ("Similarly, a party seeking to supplement its prehearing exchange may do so only by motion after August 24, 2022. Belated supplements to a party's prehearing exchange may be excluded from evidence at the undersigned's discretion."); and, Prehearing Order at 4. ("Any addition of a proposed witness or exhibit to the prehearing exchange, submitted pursuant to Section 22.19(f) of the Rules of Practice, must be filed with an accompanying motion to supplement the prehearing exchange only when supplementation is sought within 60 days of the scheduled hearing.")

Respondent strenuously points to the wrong timeline for analysis of Complainant's Supplement in support of its Motion, arguing the timeline starts the day it submitted its prehearing exchange. The relevant timeline, however, starts with this Tribunal's April 4 Order establishing that a hearing on penalty would be held. The details of this relevant timeline subsequently were clarified in the Hearing Order issued on May 9, 2022.

As Complainant made abundantly clear in its Memorandum in Support of its Motion for Accelerated Decision on Liability and Penalty, and its reply to Respondent's response to that motion, Complainant was ready and willing to have this matter proceed to full resolution of both liability and penalty on the exhibits and arguments in front of this Tribunal at that time. This Tribunal, however, declined to issue a decision on penalty, among other things finding that "there are material facts in dispute concerning both the likelihood of exposure and the potential seriousness of contamination." April 4 Order at 26. Further, in connection with its finding of liability, and notwithstanding the fact that the matter was not disputed by the parties, this Tribunal determined that Complainant had only established that 8 drums contained hazardous waste, rather than at least 20 drums.

As more fully discussed below, upon receipt of the April 4 Order and through August 22, 2022, Complainant worked diligently to complete its Supplemental Exchange in order to meet this Tribunal's deadlines set in the Hearing Order, and thus its Supplement was promptly submitted under the circumstances. Also, while Complainant argues that the "standard" for reviewing not-prompt or untimely supplements to evidence does not apply here, Respondent has not described in any way how it has been unfairly surprised by any of Complainant's Supplement or meaningfully prejudiced in any way, let alone in its ability to prepare its case.

Finally, Respondent also argues that the additional witnesses and exhibits, will put the five-day hearing schedule at risk and leave less time for Respondent to put on its case. Resp. Mot. at 8. While this argument is highly speculative, as explained below, Dr. Miller's testimony is limited in scope, addressing a single issue raised by this Tribunal, and Mr. Callaghan will be a substitute witness for Mr. Mugleston due to unavailability. As a result, there should be no impact to the time allotted for Respondent to put on its defense.

Dr. Bradley Miller and CX75

Dr. Miller's testimony and expert report are submitted solely in response to this Tribunal's ruling that only 8 of the 20 drums alleged to be hazardous waste are proven to be hazardous waste.[5]

Because the difference between a final determination that either 8 or 20 drums of hazardous waste were handled in violation of RCRA more likely than not will be of significance in this Tribunal's consideration of an appropriate penalty for one or more of the five violations, Complainant promptly initiated a search for an Agency expert who might provide an expert opinion on the analytical matters noted by this Tribunal.[6] Complainant was able to obtain the services of Dr. Miller, a principle analytical chemist and project manager at EPA's National Enforcement Investigations Center. Notwithstanding his extensive workload, Dr. Miller agreed

[5] In partial explanation of its ruling, this Tribunal noted Complainant did not "explain how the TCLP results for eight drums would allow this Tribunal to infer that the 12 untested drums also contained 'hazardous waste'" and that "Complainant's submissions are lacking a clarification of how the ignitability determination for eight of the drums applies to the remaining, untested 12." *Id*. at 11. This Tribunal also stated that "[a]dditional 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." *Id*. at 25.
Also, contrary to the implications in Respondent's Motion at 2, Dr. Miller will not be testifying to assertions in Respondent's Prehearing Exchange and his expert report is not submitted in response to any such assertions.
[6] While it is possible that one or more of the remaining 12 (of the 32) drums also contained hazardous waste, Respondent performed no additional testing on any of the drums, before deciding to dispose of all 32 drums as hazardous waste. Thus, the answer to this question will remain unknown.

to treat this work as a time-critical matter in order to meet this Tribunal's scheduling order. As reflected in his expert report, Dr. Miller conducted significant research and laboratory work. Nevertheless, he was able to finalize his report, including peer review, in time for Complainant to meet this Tribunal's Notice of Hearing Order deadline.

While Respondent asserts it is prejudiced by the addition of Dr. Miller and his expert report (CX75), Respondent provides no explanation of how it may be unfairly prejudiced by the addition of evidence regarding an allegation it has admitted and stated it will not contest. At least up to the time the April 4 Order was issued, Respondent's position on penalty in no way related to the number of drums of hazardous waste it generated. Further, it bears noting that without the addition of Dr. Miller and his expert report, Respondent simply could choose to add this Tribunal's determination that Complainant only has proven that 8 drums contained hazardous waste, and not 20, to support its position on penalty. Finally, it is hard to imagine how, after reading the April 4 Order, Respondent could have been unfairly surprised that Complainant would attempt to address this finding by the Tribunal and its related and explicit request for additional evidence, or prejudiced by Complainant attempting to respond. This is especially true where Complainant informed Respondent and this Tribunal that it was contemplating adding one or more witnesses and exhibits to its prehearing exchange on April 22 in response to the April 4 Order, and timely and promptly met this Tribunal's scheduling requirements set forth on May 9, 2022.

Mark Callaghan, CX76 and CX77

Complainant acknowledges that it could have been clearer about the addition of Mr. Callaghan as a likely substitute witness for Mr. Mugleston.

Upon learning in April that a hearing would be necessary, Complainant began contacting its listed witnesses. Mr. Mugleston, who retired from the Agency over two years ago, was out of the country or otherwise unavailable for a significant portion of this time. After contact was made in July 2022, it was determined that Mr. Mugleston may not be available to testify at hearing. Complainant promptly initiated a search for an alternative Agency witness to authenticate the EPA-CID documents and testify as to the EPA-CID investigation. Mr. Callaghan, who participated in the investigation and who continues to work for the Agency as a Special Agent in EPA-CID, therefore, is proposed as a substitute witness to authenticate the EPA-CID documents submitted as Complainant's exhibits listed in his affidavit (CX76) and is expected to testify about information gathered during EPA-CID's investigation. Complainant, therefore, submitted Mr. Callaghan as a potential witness as promptly as possible, and included an affidavit (CX 76) and his resume (CX77). CX76, of course, could be relied upon in lieu of testimony as sufficient foundation to support the admission of a number of Complainant's exhibits, specifically CX6-CX65.

Respondent argues that it will be prejudiced by the inclusion of Mr. Callaghan because Mr. Callaghan's testimony is repetitive, second-hand, and unnecessary. Resp. Mot. at 3.[7] Complainant, however, intends to call only Mr. Callaghan not Mr. Mugleston. As evidenced by Mr. Callaghan's affidavit, he assisted with the Prime investigation and became co-lead investigator on or about March 2016, giving him first-hand knowledge of the investigation. See CX76, p. 2. Further, neither Mr. Callaghan's affidavit, nor his resume require any significant effort by Respondent to address. Therefore, there is no unfair surprise, or prejudice to

[7] Also, contrary to the statements in Respondent's Motion at 7, Mr. Callaghan was not Mr. Mugleston's supervisor, and he is not testifying on his supervisory review of Mr. Mugleston's work.

Respondent by the addition of Mr. Callaghan and CX76 and CX77. Finally, and most importantly for the standards by which the addition of Mr. Callaghan and these exhibits are to be judged, the additions were timely made under Hearing Order.

City of Salt Lake City Documents (CX68 - CX73)

> In its April 4 Order, this Tribunal states
>
> **[s]orting 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**. Since the hazard posed by a leak is unclear**,** the Tribunal would be assisted by hearing evidence addressing the threat of exposure to the drums' liquid contents based on the manner of storage as it contemplates the penalty calculation. … **The forthcoming development of evidence** and resultant resolution of these disputes will trickle down into the analysis of the potential for harm and the subsequent penalty calculation for Count 4.

April 4 Order, at 26 (emphasis added).

After April 4, 2022, Complainant spent a great deal of time considering what information beyond Dr. Keteles expert report Complainant might submit that would not be speculative, overly complex for purposes of this matter, or both, and which could materially aid the Tribunal in sorting out the aftereffects of a release. Complainant determined to submit only a modest amount of information[8] relating to stormwater management at the Facility for three reasons. First is this Tribunal's interest in evidence that would aid it in sorting out the aftereffects of a release. Second, Respondent has made it clear that its position is that no release could reach a receptor because, as this Tribunal has observed, "Respondent asserts that even if a leak did occur, the drums were on a concrete pad and any paint was not likely to travel 'beyond the immediate soil it

[8] Notwithstanding the total number of pages in CX71, which is Respondent's own Stormwater Pollution Prevention Plan.

seeped into' (RX20 at 5)" April 4 Order at 26 Third, it is an incontrovertible and simple fact that stormwater management equipment exists at the Facility.

After determining that this information could materially aid this Tribunal, Complainant contacted the City of Salt Lake City, Utah (City) and the City developed and/or shared exhibits CX68-73. CX68 is submitted to provide the foundation for the admissibility CX69-73. CX69-73 are submitted to show that stormwater falling on the Facility generally moves to the Facility's storm drains, then out to the City's stormwater management system, and, eventually, to the Great Salt Lake.

Complainant submits CX68-73 in an effort to aid this Tribunal, as this Tribunal specifically contemplated in its April 4 Order, and, potentially, to rebut testimony Respondent's witnessess may make at hearing regarding Respondent's view of the potential aftereffects of a release.

Complainant's submittal of CX68-73 is a prompt and timely response to this Tribunal's April 4 Order. Further, Respondent has not described how it has been (indeed, could be) unfairly surprised or prejudiced by the introduction of the fact that a stormwater system exists at its own Facility through records that were generated in whole or in part by Respondent, and the fact that stormwater at the Facility flows into and through the City's stormwater system.

CX74

Recently Complainant learned that Google Earth might contain images taken on various dates, rather than just containing the most recently taken image (which, of course, could include images of the Facility). In response to this Tribunal's request for evidence in its April 4 Order that might assist this Tribunal in assessing "the threat of exposure to the drums' liquid contents

based on the manner of storage" April 4 Order at 26 (emphasis added), Complainant searched for potentially relevant images and compiled CX74. CX74 is submitted primarily to rebut, if necessary, reasonably expected testimony from Respondent that the drums and trailer were covered by tarps at all times[9], and other testimony as appropriate. The fact that Complainant did not discover this information until recently should not preclude its use.

CX74, therefore, was timely submitted. Further, Respondent has not described how it is unable to prepare its case now that this evidence has come to light, how it has been unfairly surprised, or how it is in any way prejudiced by the potential use of these images by Complainant at hearing.

III. Response to Respondent's Motion in Limine

Standard of Review – Respondent's Motion in Limine

For the purposes of the instant Motion in Limine, this Tribunal has directed the parties to "focus on the admissibility (relevance, materiality, probity, etc.)" of Complainant's Supplement.[10] Order Setting Deadlines at 2

Complainant's Response

This Tribunal specifically requested additional information on a number of subjects in its April 4 Order.[11] As discussed in Section II above, Complainant has provided additional

[9] Complainant previously accepted Respondent's assertion at its word because it was not aware of evidence to the contrary.

[10] Under federal law generally, motions in limine "should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose." *Noble v. Sheahan*, 116 F.Supp.2d 966, 969 (N.D. Ill. 2000), see also, *Plair v. E.J. Brach & Sons, Inc*., 864 F. Supp. 67, 69 (N.D. Ill. 1994). Because the witnesses and exhibits proposed in Complainant's Supplement are not atypical for these types of proceedings and particularly without argument in support of the Motion in Limine, it is not clear how any could be "inadmissible for any purpose".

[11] *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." *Id*. at 25 "Sorting

information and potential testimony in direct response (and within the deadlines set by this Tribunal without requesting an extension). It is hard to imagine how testimony and exhibits could be more relevant, material, and probative to further proceedings in this matter in front of this Tribunal than being directly responsive to specific requests from the Tribunal.

Dr. Miller's expert report, including his CV (CX75), and his expected testimony, will address what became known as a potentially important issue in this matter on April 4, 2022.[12] Since Dr. Miller's expert report and testimony, are relevant, material, probative and reliable[13], and were timely and promptly submitted, Respondent's Motion in Limine should be denied as to them.

Mr. Archuleta's affidavit and the business records provided by Salt Lake City (CX68-CX73), are submitted in response to this Tribunal's request for additional evidence on specific questions. Since these exhibits are relevant, material, probative and reliable[14], and were timely and promptly submitted, Respondent's Motion in Limine should be denied as to them.

With regard to Mr. Callaghan and his affidavit and resume (CX76-77), as discussed in Section II above, upon receipt of the April 4 Order, Complainant began contacting its witnesses

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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.

[12] It bears noting that federal decisions on the **untimely** submittal of important expert testimony place the burden of showing prejudice on the party **opposing** admission. *See Brennan's Inc. v. Dickie Brennan & Co. Inc*., 376 F.3d 356, 375-76 (5th Cir. 2004), also published at 72 U.S.P.Q.2d 1926, 2004 WL 1637996 (5th Cir. 2004) (admission of supplemental expert report and related testimony was not an abuse of discretion where opposing party was not prejudiced by the tardy receipt of the documents); *Nalder v. West Park Hosp*., 254 F.3d 1168, 1178 (10th Cir. 2001) (not an abuse of discretion to admit expert testimony where opposing party failed to demonstrate significant surprise or prejudice); *Samos Imex Corp. v. Nextel Communications, Inc*., 194 F.3d 301, 305 (1st Cir. 1999) (district courts are free to allow evidence not properly disclosed when the failure to disclose occurs long before trial and is likely subject to correction without much harm to the opposing party).

[13] Dr. Miller's testimony and expert report are reliable enough on their face to defeat a motion to exclude them solely on the basis of unreliability. The same is true for the remaining witness and exhibits in Complainant's Supplement. Of course, the weight given to the anticipated testimony and exhibits in Complainant's Supplement, including the relative reliability of each, will be determined by this Tribunal at hearing.

[14] Mr. Archuleta's affidavit is notarized. His affidavit confirms that CX69-73 are business records.

to allow them to begin preparing in earnest for the hearing. Because Complainant subsequently learned that Mr. Mugleston may be unavailable, Complainant promptly worked to identify a current Agency employee who also has direct familiarity with the Prime EPA-CID investigation as a substitute witness for Mr. Mugleston. Mr. Mugleston also would have provided a foundation for the admission of certain exhibits already in Complainant's prehearing exchange. Mr. Callaghan is fully qualified to provide this testimony.

As discussed in Section II above, Complainant's identification of Mr. Callaghan was prompt and timely under the circumstances. Mr. Callaghan's potential testimony, including as expressed in his affidavit (CX76), would lay the foundation for the admission of a number of Complainant's exhibits. Since Mr. Callaghan's testimony, his resume and affidavit are relevant, material, probative and reliable (see, n.13), and were timely and promptly submitted, Respondent's Motion in Limine should be denied as to them.

As discussed in Section II above, CX74 (aerial images of the Facility over time from Google Earth) is submitted for use, if necessary, to assist this Tribunal in understanding the threat of exposure based on the manner of storage of the drums, and to rebut potential testimony from Respondent that the drums and trailer were covered by tarps at all times. Because it is not possible to know the scope of testimony from Respondent's witnesses until hearing, Complainant reserves the right to use the exhibit to rebut other of Respondent's testimony regarding Respondent's storage of the drums at the Facility as appropriate. CX74, therefore, is relevant, material, and probative. Since CX74 is relevant, material, probative and reliable,[15] and

[15] The reliability of CX74 is discussed in Section IV below, at 16.

were timely and promptly submitted, Respondent's Motion in Limine should be denied as to them.

IV. Complainant's Cross-Motion to Admit

Introduction

Pursuant to 40 C.F.R. § 22.16(a) and § 22.22(a)(1), Complainant, through its undersigned attorney, files Complainant's Cross-Motion to Admit Certain Exhibits into Evidence, specifically CX68-CX74 and CX76-77.[16] Granting this motion and admitting these exhibits into evidence in advance of the hearing will conserve resources by reducing the time necessary to conduct the hearing. Specifically, the parties will be able to eliminate most purely foundational testimony, which will allow more trial time to be spent on substantive issues. Complainant has consulted with counsel for Respondent regarding its Cross-Motion. Respondent will object.

Timing

Although this Tribunal's Hearing Order required parties to make their non-dispositive motions by August 19, 2022, this deadline came and went before the Hearing Order's deadline for supplements to prehearing exchanges without motion, and well before the deadline for stipulations, including stipulations as to the admission of exhibits. Respondent's Motion, and Motion in Limine (together, Motions), however, have compelled this Tribunal to conduct a thorough analysis of each of the exhibits in Complainant's Supplement. Because this thorough analysis will be complete at the close of consideration of Respondent's Motions, and because the

[16] Complainant will establish Dr. Miller as an expert and the authenticity and relevance of Dr. Miller's expert report (CX75) through his testimony at hearing.

standard of review for admissibility is the same as the review already under way,[17] this Tribunal can enter CX68-CX74 and CX76-77 into evidence and conserve time at the hearing. This motion, therefore, is not untimely because the precise review requested hereunder already is being conducted pursuant to Respondent's Motions and this Tribunal can rule on this motion concurrently with its ruling on Respondent's Motions.

Standard of Review – Complainant's Cross-Motion to Admit

The legal standard governing the admissibility of evidence in administrative hearings held under the Rules of Practice is codified at 40 C.F.R. § 22.22(a), which provides that "[t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value." While not binding on this Tribunal, it is also appropriate to consult the Federal Rules of Civil Procedure and Federal Rules of Evidence for guidance on admission of evidence. *In Re Euclid of Virginia, Inc*., 13 E.A.D. 616, 657-58 (citing *In Re Wego Chem. & Mineral Corp*., 4 E.A.D. 513, 524 n. 10 (EAB 1993)).

Analysis of Exhibits in Complainant's Supplement

In Section II above, Complainant has shown that each exhibit submitted in Complainant's Supplement is timely submitted, otherwise prompt, and not unduly repetitious. Further, although Respondent adds a standard that is not applicable under the timing requirements of this matter, to the extent this Tribunal arguably may consider it, Complainant also has shown that that submittal of each exhibit was not an unfair surprise and did not cause any meaningful prejudice to Respondent, including Respondent's ability to prepare for hearing. In Section III above, as

[17] For purposes of Respondent's Motion in Limine, this Tribunal ordered Complainant to show that each exhibit is relevant, material, and of probative value (etc.). As discussed immediately below, the standard for admissibility under Complainant's Motion, and in general is that the exhibit is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value.

ordered by this Tribunal, Complainant has shown how each such exhibit is relevant, material, probative and reliable. Because each of Complainant's exhibits CX68-CX74 and CX76-77 is relevant, material, not unduly repetitious, or unreliable, and is of significant probative value, each exhibit can and should be admitted prior to hearing.

The notarized affidavit of Mr. Archuleta (CX68) meets the requirements for establishing the admissibility each of Complainant's exhibits CX69-CX73. In CX68, Mr. Archuleta attests that these are City of Salt Lake City business records and were received by the EPA from the City, the permitting authority, and therefore can be admitted into evidence.

Pursuant to Federal Rule of Evidence 902(11), a written sworn declaration may be utilized in lieu of live testimony at trial to authenticate documents that a party seeks to introduce into evidence. To meet the requirements of Rule 803(6)(A)-(C), the sworn written declaration must certify that the documents: (a) were made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; (b) were kept in the course of the regularly conducted activity; and (c) were made by the regularly conducted activity as a regular practice." FED. R. EVID. 803(6).

Rules 902(11) and 803(6) are "designed to work in tandem… to allow proponents of business records to qualify [the records] for admittance with an affidavit or similar written statement rather than the live testimony of a qualified witness." *DirecTV, Inc. v. Murray*, 307 F. Supp. 2d 764, 772 n3 (D.S.C. 2004).[18] Mr. Archuleta's notarized affidavit authenticates and

[18] S*ee also United States v. Lezcano*, 296 F. App'x 800, 807, 808 (11th Cir. 2008) (holding that court properly admitted records into evidence without live testimony pursuant to FED. R. EVID. 803(6) and 902(11)); *United States v. Klinzing*, 315 F.3d 803, 809 (7th Cir. 2003) ("Rule 803(6) was amended to avoid the expense and inconvenience of producing time-consuming foundation witness testimony in situations where the authenticity of the business records could be confirmed by written declaration pursuant to Rules 902(11)-(12)."); *United States v. Kahre*, 610 F. Supp. 2d 1261, 1263 (D. Nev. 2009) (discussing at length the admissibility of business records under Rule 803(6)

otherwise lays a complete foundation for the admission of the City's business records submitted as CX69-73. CX68 and CX69-73, therefore, can be admitted into evidence prior to the hearing.

CX77 is a true and accurate copy of Mr. Callaghan's resume and speaks for itself.

Mr. Callaghan's affidavit (CX76) was submitted, among other things, to save time at hearing by properly laying the foundation for admission of a number of Complainant's exhibits (CX6-CX65), all of which are EPA business records, into evidence. Mr. Callaghan's notarized affidavit meets the admissibility requirements because it authenticates and otherwise fully lays the foundation for other of Complainants exhibits. Mr. Callaghan's affidavit, therefore, can be admitted into evidence prior to the hearing.

CX74 is a compilation of publicly available aerial photographs of Respondent's Facility, made by Ms. McNeill, with detailed imprinted information from Google Earth, and minimal clarifying marginalia added by Ms. McNeill. The appearance, contents, and substance of the aerial photographs are sufficient to establish authenticity. Because the images are readily reproduceable from Google Earth using the imprinted imagery information, the authenticity and reliability of these photographs is clear. CX74, therefore, can be admitted into evidence prior to the hearing.

Granting this motion and admitting these exhibits into evidence in advance of the hearing will conserve judicial resources by reducing the time necessary to conduct the hearing. Specifically, the Parties will be able to eliminate most purely foundational testimony, such as

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and 902(11)); FED. R. EVID. 902 advisory committee's note to 2000 amendment (explaining that Rule 902(11) "sets forth a procedure by which parties can authenticate certain records of regularly conducted activity, other than through the testimony of a foundation witness."); and, FED. R. EVID. 803 advisory committee's note to 2000 amendment (explaining that Rule 902(11) "provides that the foundation requirements of Rule 803(6) can be satisfied under certain circumstances without the expense and inconvenience of producing time-consuming foundation witnesses.")

witness statements that identify each exhibit, explain how and when the exhibit was procured, and confirming that the copy produced in court is a true, accurate and complete copy of the original document originally procured by the witness.

IV. Conclusion

Based on the foregoing, Respondent's Motion should be denied, Respondent's Motion in Limine should be denied, and Complainant's Cross-Motion to Admit Certain Exhibits into Evidence (CX68-74 and CX76-77) should be granted.

Dated: September 6, 2022

Respectfully Submitted,

LAURIANNE JACKSON
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Laurianne Jackson
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