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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)
)
 MARK FASTOW AND) Docket No. EPCRA-09-97-
 0013)
 FIBERGLASS SPECIALTIES, INC.,)
)
 Respondents)

ORDER GRANTING MOTION TO AMEND PREHEARING EXCHANGE

By Motion dated March 30, 1998, Respondents requested leave to amend their prehearing exchange by submitting additional documents and adding a proposed witness to testify at the hearing.⁽¹⁾ In the Motion, Respondents indicated that upon being contacted, Complainant's counsel stated something to the effect that he did not object but would not agree with the Motion until he reviews the documents.

Respondents propose to add as a witness Kathy Keener, identified as an "office assistant," presumably an assistant in the Respondent Fiberglass Specialties, Inc.'s corporate office. The documents Respondents propose to add were attached to the Motion. They include an invoice, a letter, and computer printouts from the company's vendors referencing balances owed by Respondents. The Respondents' ability to pay a penalty, a factor to be considered in assessing penalties under the EPA's Enforcement Response Policy for Section 313 of EPCRA, has been raised as an issue in this proceeding, and the documents Respondent proposes to add to the prehearing exchange may have some relevance to that issue.

The time for responding to the Motion has expired. Ten days is provided by the Rules of Practice to respond to motions, and an additional five days is provided where the motion is served by mail. 40 C.F.R. §§ 22.07(c), 22.16(b). To date, Complainant has not filed any response to the Motion. Under the Rules of Practice, if a party fails to respond to a motion within the designated time period, the party may be deemed to have waived any objection to the granting of the motion. 40 C.F.R. §22.16(b). The fact that this proceeding is currently before a neutral in an Alternative Dispute Resolution (ADR) proceeding does not preclude the granting of the Motion, where the litigation has not been stayed by the Presiding Judge, and where there appears to be no conflict with the ADR proceeding.

Accordingly, **IT IS ORDERED THAT:**

1. Respondents' Motion to Amend the Prehearing Exchange is **GRANTED**.
2. **Within ten (10) days from the date of this Order** Respondents shall serve a copy of their Motion to Amend the Prehearing Exchange, with copies of the attachments thereto, on the Regional Hearing Clerk at the following address:

Danielle E. Carr
Regional Hearing Clerk
U.S. EPA Region 9
75 Hawthorne Street
San Francisco, CA 94105

Susan L. Biro
Chief Administrative Law Judge

Dated: May 8, 1998
Washington D.C.

1. It is noted that Respondents sent the Motion, with attachments, only to the Presiding Judge and Complainant's counsel. Under the Rules of Practice, 40 C.F.R. § 22.05(a), the original of all documents served in the proceeding must be filed with the Regional Hearing Clerk, with copies served on the Presiding Judge and other parties. Considering the *pro se* status of Respondents, the Motion will be ruled upon nevertheless, although Respondents will be directed to properly serve the Motion, with the attachments, on the Regional Hearing Clerk.

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