**UNITED STATES**
**ENVIRONMENTAL PROTECTION AGENCY**
**BEFORE THE ADMINISTRATOR**

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| **IN THE MATTER OF** | ) | |
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| **Chippewa Hazardous Waste Remediation & Energy Inc., d/b/a Chippewa Hazardous Waste Inc.** | ) | **Docket No. CAA-03-2002-0144** |
| | ) | |
| **and** | ) | |
| | ) | |
| **Trustees of the Ohio Valley[1] Christian Center of the Assemblies of God** | ) | |
| | ) | |
| **Respondents** | ) | |

## ORDER ON MOTION TO FURTHER AMEND PREHEARING SUBMITTALS

On May 19, 2003, the United States Environmental Protection Agency ("Complainant"or "EPA") filed a motion to further amend its January 7, 2003 First Prehearing Exchange. Nearly two months earlier, on March 21, 2003, EPA filed its first Motion to Amend its prehearing submittals. On April 28, 2003, the Court granted EPA's Motion, allowing the *exchange* of the material. The present motion, representing EPA's third amendment to the exchange, comes 23 days before the trial's commencement and seeks that it be allowed to amend again its prehearing exchange.

EPA's current motion to amend its prehearing submittals seeks to name an *alternative* fact witness. EPA relates that it *may* call its newly listed witness, Mr. Forostiak, in lieu of two witnesses, Mr. Sieracki and Mr. Weltz, who were listed in its First Prehearing Exchange. According to EPA, Mr. Sieracki was listed because he would be able to testify "as to Criterion Laboratories, Inc.'s receipt, care and handling of [asbestos-containing] samples and as to the

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[1]The Trustees of the Ohio Valley Christian Center of the Assemblies of God and the EPA entered into a consent agreement on October 20, 2002. Chippewa Hazardous Waste Remediation and Energy, Inc., therefore, is the only remaining Respondent.

analytical results of the Polarized Light Microscopy (PLM) Analysis performed by Criterion Laboratories, Inc." EPA Motion to Further Amend at 2. Weltz, Criterion's lab director, was listed because he was "Criterion Laboratories, Inc. laboratory director at the time that the instant sample analyses were performed and because his signature appears on the actual Certificates of Analyses ... as the individual who certified the laboratory analytical test results." *Id*. In contrast, Forostiak, who is now an EPA employee, was the "laboratory technician who performed the analyses of each of the referenced samples collected by EPA Inspector Douglas E. Foster ...[as attested by] his initials on each of the respective Bulk Analysis Data Sheets ... that he prepared subsequent to the analysis of these samples ..." *Id*. EPA states that it first received these data sheets from Criterion on May 16, 2003. EPA states that Forostiak's testimony "is not expected to differ in any relevant or material respect from ... Sieracki or Weltz ... [but that Forostiak's testimony will be based on] direct, first-hand knowledge ..."[2]

EPA also seeks to add potential hearing exhibits with this motion to further amend by adding Criterion's Bulk Analysis Sheets. According to EPA, these analysis sheets, consisting of five pages, contain the PLM laboratory test results derived from inspector Foster's samples and they contain information supporting the results which appear in Criterion Lab's Reports of Asbestos Analysis. Those Lab Reports were disclosed in EPA's First Prehearing Exchange, provided on January 7, 2003.

In support of its current motion, EPA states that, on or about the week of May 12, 2003, it initiated arrangements to retrieve the actual samples,[3] which were taken by Foster, from Criterion for introduction at the hearing. These samples were identified in EPA's original prehearing exchange as Exhibit 17. In gathering these samples, EPA states that, on May 16, 2003, Criterion sent along to Forostiak, via facsimile, the Data Sheets, which had not been provided to EPA earlier, when Criterion delivered the Certificate of Analysis Reports. According to the motion, it was not until then that Forostiak advised EPA counsel that he was the lab technician who performed the PLM analyses. *Id*. at 5. EPA contends that Forostiak is the most appropriate witness to testify as the sample results, especially because Respondent intends to challenge EPA's contention that the samples contained more than 1% asbestos.[4]

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[2] EPA also seeks to add Forostiaks's resume as an exhibit.

[3]The samples EPA sought are OVCC 1 through 10 and 201 through 203.

[4]For good measure, EPA adds that, as an EPA employee, Forostiak is available without the need for a subpoena and, as it would no longer need Sieracki or Weltz, it would not have to burden Criterion, a small company, with the expense and loss of its employees for several days by necessitating their appearance at the hearing. EPA had not previously expressed concern over Criterion's deprivation of these employees. EPA also includes an irrelevant reason for adding Forostiak, by adding that it amended its prehearing exchange in another case, changing Forostiak's listed employment status from a Criterion employee to an EPA employee. It then announces that Forostiak went on to testify about sample analyses in that other case. But surely

EPA also asserts that, as it has made this exchange at least 15 days before the hearing, and "immediately after it came into possession and control" of it, the exchange comports with the procedural rule set forth at 40 C.F.R. § 22.22(a).[5] Last, EPA maintains that, as its new witness will be offering the same testimony as those named earlier, Respondent suffers no prejudice or harm with the substitution. Similarly, it contends that the Data Sheets are "relevant and appropriate" and "further corroborate" Criterion's Certificate of Analysis Resports [sic] ." *Id*. at 7.

On May 22, 2003 Respondent submitted its Opposition to EPA's Motion. Respondent asserts that EPA's latest amended submittal is an attempt to insert a critical witness under the guise that the witness is merely an alternative witness. In this regard Respondent notes that neither Sieracki nor Weltz were identified as fact witnesses who performed the sample analyses. Respondent relates that this is significant because it has claimed that the "shingles did not contain sufficient asbestos fibers to warrant the extreme penalty ... [EPA seeks]. Respondent relates that EPA Counsel contacted Respondent's Counsel on May 19th to discuss stipulations. During this call, according to Respondent's Counsel, it would not agree with EPA's proposed stipulations because "they assumed that the shingles contained asbestos fibers." Respondent's Opposition at 2. This alerted EPA counsel that there was a problem with its case, because it lacked a witness with firsthand knowledge of the laboratory analyses. As EPA should always have known that it needed to have a witness with firsthand knowledge of the analyses, it should have identified such witness four months ago, on January 7, 2003, when the first prehearing exchange was due. Thus, Respondent maintains that EPA is disingenuously attempting to present its new witness as an "alternative" witness when, in fact, Forostiak is a key witness. Respondent asserts that this late addition creates severe prejudice to it.

Similarly, Respondent asserts that the last minute attempt to add the Data Sheets are of the same order as the last minute witness. Both are late-realized deficiencies in EPA's case. With regard to the documents, Respondent asserts that, by presenting the documents only 21 days before the hearing, it has been denied an opportunity to challenge their authenticity and credibility. As the Data Sheets were prepared in May 2001, Respondent maintains that EPA would have had them long ago and consequently they should have been part of the First Prehearing Exchange in January 2003. Respondent also asserts that if the Data Sheets were prepared more recently, it will have no basis to determine that and it maintains that it cannot

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EPA can distinguish a situation where, having listed Forostiak as a witness, it then amends Forostiak's current employer from the situation in this case, where Forostiak had not been listed at all. This specious analogy is properly rejected.

[5]Despite the Court's last Order in this case explaining the difference between prehearing exchanges and admissibility at hearing, EPA adds that the information is admissible pursuant to 40 C.F.R. § 22.22(a). Absent a motion in limine or a stipulation, admissibility is addressed at the hearing.

obtain the records from Criterion before the June 11th hearing. Thus, Respondent claims that EPA has engaged in unsavory litigation tactics by withholding the information it now seeks to introduce at a time less than 30 days before the hearing. Given that EPA has not offered any reasonable explanation for its failure to prepare its case, Respondent asserts that such dilatory tactics should not be rewarded and it would give EPA an unfair advantage. Opposition at 4.

As permitted under the procedural rules, EPA filed a Reply to Respondent's Opposition. It asserts that both Sieracki and Weltz have training and credentials as laboratory analysts and are familiar with Criterion's procedures and that it noted this in its original prehearing exchange of January 7th. It reiterates that, until May 16, 2003, it did not know that Forostiak actually performed the analyses of the samples. Reply at 2. As stated in its Motion, EPA reiterates that it was not until after arranging for the samples to be sent to it that it learned, after Forostiak reviewed the Bulk Analysis Sample Sheets, that Forostiak realized he had done the analyses. EPA relates that it did not know this because typically it only receives a Certificate of Analysis, not the sample sheets themselves. It also notes that these sample sheets contain the same information, including the same results, which it previously provided in the Certificate of Analysis. The difference is that the sample sheets represent the raw underlying data.

Addressing Respondent's arguments, EPA states at the time of its first prehearing exchange it was unaware who actually performed the sample analyses but that, in any event, it is not necessary to produce that person to prove the asbestos content. Rather, EPA would satisfy its evidentiary burden by producing Criterion's Certificates of Analyses along with the testimony of Sieracki and Weltz authenticating those Analyses and their knowledge of Criterion's testing and chain of custody procedures. EPA reiterates that it first learned of Forostiak's role in this matter on May 16, 2003 and it suggests that the Respondent benefits by this inclusion as it can now cross-examine the person who performed the analyses.[6] Regarding Respondent's claim of severe prejudice from this latest amendment, EPA asserts that it is in complete compliance with 40 C.F.R. §§ 22.20(f)[sic][7] and 22.22(a) in that the information was provided as soon as EPA had "control thereof, and [it was provided] more than fifteen (15) days in advance of the scheduled hearing in this matter." Reply at 5. EPA also contends that the Respondent has not identified the harm or prejudice it claims to have suffered and it notes that Forostiak will be subject to cross-examination regarding issues such as when the Data Sheets were actually

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[6]In a war of words, EPA denies that Respondent ever indicated during the May 19th telephone conversation that EPA lacked a critical witness and it denies that EPA called Respondent to discuss stipulations. Rather, EPA states the May 19th call was to advise Respondent that it intended to file the instant motion and the circumstances which prompted it. However, EPA admits that it did inquire of Respondent regarding EPA's proposed stipulations and sought to learn whether Respondent intended to challenge the asbestos content of the materials in issue. Obviously, the Court cannot sort out what was actually said. However it is not necessary to do this, as the merits of the motion can be decided without resolving that.

[7]There is no Section 22.20(f). *See infra* page 5.

prepared. *Id*.

**The Court's Ruling**

First, while it is true that the Court's Notice of Hearing established a cutoff date of March 31, 2003 for Motions and that EPA filed this motion some six weeks after that deadline, the late-filed motion is not dispositive in this instance. EPA has cited to 40 C.F.R. § 22.20(f) in its motion. As there is no such section, the Court assumes that EPA counsel must have been referring to Section 22.19(f).[8] That section requires, in relevant part, supplementing or correcting an exchange when it is learned that earlier information is incomplete, inaccurate or outdated. None of those reasons are present here. In particular, EPA has not claimed that its earlier exchanges were inaccurate or that they became outdated. Nor can they contend that its earlier submissions were incomplete. In fact, it contends that its earlier submissions are sufficient to establish its prima facie case. Thus, the Court concludes that, even the correctly cited section, does not apply here.

However, another section, 22.22(a) when read in conjunction with 22.19(a) does bear upon this matter. The latter section (i.e. 22.19) provides that each party is to file prehearing exchange information which is to include the names of witnesses and the documents and exhibits it intends to call, or introduce, into evidence. Section 22.19 which references Section 22.22(a), also provides that where a party fails to make such a exchange in a timely manner, the documents and witnesses may not be used at the hearing absent good cause for the failure coupled with delivery of the information as soon as it obtained control of it. Thus, by the plain language of these two sections, witnesses or documents exchanged at least 15 days before the hearing are not barred from introduction, at least from the standpoint of the prehearing exchange requirements.[9]

The upshot of this discussion is that the Court concludes that EPA, having made this prehearing exchange at least 15 days prior to the hearing is not precluded, at least from a timeliness standpoint, from making its latest exchange. No motion was required for EPA to have done this.[10] Where the rules implicitly permit an exchange made at least 15 days prior to the

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[8]As this Court has noted on many other occasions, EPA should endeavor to know its own procedural rules. This includes being able to cite the correct rule and proofreading its submissions.

[9]Of course, as distinguished from the prehearing exchange, a party still may assert numerous other bases for challenging proffered evidence at the hearing.

[10]A primary purpose behind the Court's imposing a cutoff date for motions is to ensure that there is adequate time for a response and for the Court to fully consider a matter in advance of the hearing. Here, as indicated, because of the procedural rules, no *motion* to amend the prehearing submittal was required.

hearing, the Court cannot employ a more rigorous standard.[11] Thus, because the exchange was timely under the procedural rules, EPA's exchange is permitted. It is also noted that the Respondent has not asserted any particular harm by the relative lateness of the exchange. Rather Respondent has only asserted "sever prejudice" but without any substantiation to the claim. As EPA acknowledges, Respondent will have the opportunity to cross-examine the new witness regarding this matter. That EPA may have been roused from its slumber at the last minute regarding an awareness of the evidence it needs for trial is not a reason to preclude an exchange which is submitted at least 15 days before the hearing.

**So Ordered.**

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William B. Moran
United States Administrative Law Judge

Dated: June 2, 2003
Washington, D.C.

[11]This does not mean that other options are unavailable. For example, in the proper case where evidence is exchanged at or just before the 15 day deadline, a Court may have to postpone a hearing in order to allow a respondent additional time to prepare. Respondent has not asserted such a need here.

In the Matter of *Chippewa Hazardous Waste, Remediation & Energy, Inc., d/b/a Chippewa Hazardous, Waste, Inc., and Trustees of the Ohio Valley, Christian Center of the Assemblies of God*, Respondents
Docket No. CAA-03-2002-0144

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order on Motion to Amend Prehearing Submittals**, dated April 28, 2003, was sent in the following manner to the addressees listed below.

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