UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

ORDER ON RESPONDENT'S MOTION TO EXCLUDE SUPPLEMENTAL EXHIBITS AND WITNESSES AND COMPLAINANT'S CROSS-MOTION TO ADMIT CERTAIN EXHIBITS INTO EVIDENCE

This matter commenced on September 21, 2020, when the Director of the Enforcement and Compliance Assurance Division of the U.S. Environmental Protection Agency ("EPA"), Region 8 ("Complainant") filed a Complaint and Notice of Opportunity for a Hearing against New Prime, Inc. ("Respondent"), alleging in five counts violations of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.* After Respondent requested a hearing and I was designated as the Presiding Officer, the parties were ordered to engage in the prehearing exchange of information. *See* Prehearing Order (Nov. 2, 2020). Complainant submitted its Initial Prehearing Exchange on December 18, 2020; Respondent submitted its Prehearing Exchange on January 8, 2021; and Complainant submitted its Rebuttal Prehearing Exchange on January 22, 2021. Complainant then submitted two supplements to its prehearing exchange—the first on February 22, 2021, and the second on April 18, 2022. Complainant also moved for accelerated decision under 40 C.F.R. § 22.20. Accelerated decision as to liability for all five counts alleged in the Complaint was granted by Order on April 4, 2022 ("AD Order"); however, accelerated decision as to penalty was denied and the parties were instructed to prepare for hearing. Subsequently, on May 9, 2022, the parties were formally notified that the hearing was scheduled to begin on October 24, 2022. The Order that scheduled the hearing also set August 24, 2022, as the deadline for parties to supplement their prehearing exchanges without an accompanying motion; motions would be required after that date. *See* Notice of Hearing Order (May 9, 2022).

On August 22, 2022, Complainant filed its Third Supplement to its Prehearing Exchange, adding two witnesses and ten exhibits. On August 24, 2022, Respondent filed a Motion to Exclude Supplemental Exhibits and Witnesses ("Motion"). As ordered[1] by this Tribunal, Complainant filed its Response to Respondent's Motion to Exclude Supplemental Exhibits and Witnesses and Respondent's Motion in Limine and Cross-Motion to Admit Certain Exhibits into Evidence ("Response") on September 6, 2022. Respondent filed its Reply re Motion to Exclude and Response re Complainant's Motion to Admit ("Reply") on September 14, 2022.

[1] Besides setting briefing deadlines, the parties were ordered to address in their Response and Reply "the admissibility (relevance, materiality, probity, etc.) of this additional evidence" along with the arguments Respondent made in its Motion. *See* Order Setting Deadlines (Aug. 24, 2022).

Complainant filed its Reply to Respondent's Response to Cross-Motion to Admit Certain Exhibits into Evidence ("Surreply"[2]) on September 16, 2022.

The Third Supplement adds a new expert witness and a new EPA Criminal Investigation Division ("CID") witness as a substitute[3] for a CID witness who has retired. The Third Supplement also adds a series of exhibits concerning stormwater at Respondent's Utah Facility (CX68-73); a series of satellite photos of the Facility (CX74); an expert report from the new expert witness and that witness's curriculum vitae (CX75); and the resume of the new CID witness and his affidavit as to the authenticity of certain other exhibits (CX76-77). Complainant relates that it "is adding exhibits CX68-77 in response to certain assertions in Respondent's Prehearing Exchange and the Response to Motion for Accelerated Decision; and to address an issue raised sua sponte by the Court in the [AD Order]." 3d Suppl. at 3.

In its Motion, Respondent asserts that "a mere two months from trial, Complainant seeks to significantly expand its case by supplementing its various prior exchanges and adding numerous exhibits to its already voluminous list of exhibits and two new witnesses including an expert witness offered to rebut the long-since disclosed testimony of" Respondent's expert witness as well as the AD Order. Mot. at 2. Respondent argues that:

> The Presiding Officer should exclude this latest supplement because the proposed testimony of EPA's new expert . . . and the listed documents were in EPA's possession or were readily obtainable by EPA long ago. The proposed testimony of [the new CID witness] is repetitive, second-hand and unnecessary. At bottom, EPA's Third Supplement does not meet the minimum requirements of 40 C.F.R. § 22.19(f)[4] because the newly offered witnesses and documents come many months after EPA was on notice of the need for them and EPA did not "promptly" supplement as required by the rules when it realized its prior exchanges were incomplete.

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[2] For ease, the second Reply will be referred to as the Surreply, whether it fits the technical definition of that type of document or not.

[3] As noted later, Complainant did not clearly state in the Third Supplement that it no longer intends to call the original CID witness listed in its Initial Prehearing Exchange and that the new CID witness was intended as a substitution.

[4] According to 40 C.F.R. § 22.19(f):

> A party who has made an information exchange under paragraph (a) of this section, or who has exchanged information in response to a request for information or a discovery order pursuant to paragraph (e) of this section, 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.

And according to 40 C.F.R. § 22.19(g), "Where a party fails to provide information within its control as required pursuant to this section, the Presiding Officer may, in his discretion: . . . (2) Exclude the information from evidence[.]"

Mot. at 3. Respondent claims that "[t]he parties may not wait until the last minute to breezily supplement their prehearing exchanges." Mot. at 4. Specifically, Respondent objects to the new expert witness and many of the exhibits because they are, as Respondent interprets them, aimed at the issue of environmental harm, an issue that Respondent argues "has been a prominent issue in this case since the beginning." Mot. at 5. To buttress its argument that the supplementation is untimely, Respondent maintains that:

> Complainant has been aware of the Respondent's environmental harm arguments since the inception of this case and it has known of the lack of evidence supporting the number of drums containing toxic waste since at least April 4, 2022 [the date of the AD Order]. . . . Yet EPA waited until two days before the deadline to supplement the new witnesses and documents.

Mot. at 6. Respondent reiterates that the testimony of the new CID witness is "duplicative" of the other CID witness's testimony, "superfluous," "secondary," and "of little probative value." Mot. at 6-7.

Respondent further contends that it is prejudiced by the supplementation: "Nowhere in the Complaint or in any of the previous filings in this case has EPA raised stormwater as an issue. To introduce stormwater as an issue on the eve of trial . . . is prejudicial and puts Respondent at a distinct and unfair disadvantage." Mot. at 7. Respondent also suggests that the hearing may run more than five days due to the addition of the new witnesses. Mot. at 8.

In its Response, Complainant argues that its "[Third] 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." Resp. at 3. Complainant points to this Tribunal's Hearing Order and the deadlines set therein as the definitive standard for determining whether the Third Supplement is timely. Resp. at 3-4. Complainant argues that the new expert witness is necessary to resolve the number of drums alleged to contain hazardous waste, a factor which weighs on the penalty calculation, and that "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." Resp. at 5-6. Complainant declares that the new CID witness is in place of the original CID witness and admits "it could have been clearer" about the substitution. Resp. at 6-8. Complainant insists that the stormwater exhibits will expound on an issue raised in the AD Order about the "aftereffects" of a release and show that stormwater at the Facility moves to its storm drains. Resp. at 8-9. Complainant also proffers that the satellite images are "submitted primarily to rebut, if necessary, reasonably expected testimony from Respondent that the drums and trailer were covered by tarps at all times, and other testimony as appropriate." Resp. at 9-10 (footnote omitted).

As to the admissibility of these exhibits and testimony, Complainant asserts that:

> This Tribunal specifically requested additional information on a number of subjects in its [AD Order]. . . . Complainant has provided additional 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.

Resp. at 10-11. Complainant reiterates that each exhibit and each witness's testimony is relevant, material, probative, reliable, and timely and promptly submitted. Resp. at 11-13. Complainant then argues that because this Tribunal's "thorough analysis" of the exhibits in the Third Supplement "will be complete at the close of consideration of Respondent's Motions, and because the standard of review for admissibility is the same as the review already under way, this Tribunal can enter CX68-CX74 and CX76-77 into evidence and conserve time at the hearing." Resp. at 13-14 (footnote omitted). Complainant also explains that:

> Granting this [Cross-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 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.

Resp. at 16-17.

Respondent, in its Reply, reiterates that Complainant failed to comply with 40 C.F.R. § 22.19(f) because "Complainant took months, waiting until the last possible moment to file its Third Supplement[.]" Reply at 2. Respondent declares that, notwithstanding the deadlines set in the Hearing Order, Complainant failed to satisfy "section 22.19(f)'s independent requirement that EPA promptly supplement when the conditions set out in section 22.19(f) are met." Reply at 2. Respondent predicts that if the promptness requirement were meaningless, a "party could withhold important information it knew would correct the record and it could then make important shifts in the focus of its case at the last minute, throwing off the other side with a volley of new arguments and evidence. Such a result would be manifestly unfair." Reply at 2-3. Respondent also argues that "all the information EPA now seeks to add in its Third Supplement was either known or should have been known to Complainant from the outset had it properly prepared its case—the case for which it bears the burden of persuasion at hearing." Reply at 4.

In discussing the exhibits, Respondent characterizes the satellite images and the stormwater documents as an "eleventh-hour effort to try and address a deficiency in [Complainant's] case without giving Respondent an opportunity to respond." Reply at 6. Respondent also avows that the stormwater exhibits are unrelated to the AD Order and instead are "intended to rebut the lack-of-environmental-harm argument Respondent has asserted from the outset of these proceedings[.]" Reply at 5-6. Respondent further states that the issue of whether the drums were covered by a tarp "has been known since the time of EPA's inspection years ago . . . . Nothing new has happened in the interim other than EPA's apparent realization . . . that it had a hole in its evidence it wanted to fill at the last minute." Reply at 6. Moreover, as to the new CID witness, Respondent stresses that EPA did not promptly disclose him as a witness and that "Respondent is entitled to cross examine him on how much, if any, he participated in the interviews before allowing those documents to come into evidence." Reply at 7-8. Concerning the new expert witness, Respondent asserts that taking four months to disclose the witness was not prompt and that the "proposed testimony should have been disclosed months

ago, and it therefore should be excluded." Reply at 8. Finally, Respondent proffers that it would be unfair to Respondent to admit the new exhibits: "Respondent should be allowed to preserve its objections to the documents at issue in [the Motion] and in EPA's cross-motion, and [the Presiding Officer should] allow Respondent to require EPA to lay a proper foundation for the admission of those documents and proposed witness testimony at hearing." Reply at 9.

In the Surreply, Complainant argues that "[o]ther than a brief reference to its argument that Complainant's Supplement was late and unfair, Respondent does not provide any support" that the Cross-Motion is premature. Surreply at 2. Complainant notes that "Respondent does not argue that any of Complainant's exhibits proposed for admission are irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value." Surreply at 2. Complainant declares that it provided some of the new exhibits "solely and specifically in direct response to this Tribunal's specific requests for additional information made in its" AD Order. Surreply at 3. Complainant concludes that "Complainant's Cross-Motion is a logical next step from this Tribunal's Order to both parties to address the admissibility of all of Complainant's Supplement . . . and this Tribunal's regularly stated admonitions to both parties to make every effort to conserve time at hearing." Surreply at 4.

Discussion

First things first. No part of the AD Order was intended to elicit novel evidence or witness testimony from the parties or to suggest to the parties that they supplement their prehearing exchanges. When the AD Order mentions "[a]dditional testimony concerning the true amount of hazardous waste" or "[s]orting out the aftereffects of a release of paint from the drums" (*see* Resp. at 8, 10 n.11; Surreply at 3 n.3), it was alluding to anticipated testimony from witnesses already designated in the prehearing exchange process, not to new evidence. Particularly, the "further development of issues" and "testimony concerning the wanting and disputed facts" I foresaw (*see* AD Order at 27, 28) was robust direct and cross-examination of the listed witnesses—examinations that could delve beyond what was stated on the pages of the conflicting penalty exhibit and expert report to explore justifications, explanations, and assumptions (as effective witness examinations tend to do). These allusions were not prompts to Complainant meant to solicit more evidence.[5]

[5] *See, e.g.*, Resp. at 5-6, 5 n.5 ("Finally, it is hard to imagine how, after reading the [AD 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." (citing sections of the AD Order discussing the number of drums containing hazardous waste)), 8-9 ("First is this Tribunal's interest in evidence that would aid it in sorting out the aftereffects of a release. . . . Complainant submits CX68-73 in an effort to aid this Tribunal, as this Tribunal specifically contemplated in its [AD Order] . . . ." (citing AD Order section discussing the effects of a release of paint and hazards from leaks)), 9-10 ("In response to this Tribunal's request for evidence in its [AD Order] that might assist this Tribunal in assessing 'the threat of exposure to the drums' liquid contents based on the manner of storage' . . . , Complainant searched for potentially relevant images and compiled CX74." (emphasis and citation omitted)), 10 & n.11 ("This Tribunal specifically requested additional information on a number of subjects in its [AD Order]." (including footnote citing references in AD Order to "the true amount of hazardous waste" and "the aftereffects of a release")), 11 ("[The stormwater exhibits] are submitted in response to this Tribunal's request for

As described in the AD Order, in evaluating a motion for accelerated decision, I was required to abide by the following: "'the party moving for summary judgment has the burden of showing the absence of a genuine issue as to any material fact' but 'the evidentiary material proffered by the moving party in support of its motion must be viewed in the light most favorable to the opposing party.'" AD Order at 3 (quoting *Lay Brothers, Inc.*, EPA Docket No. EPCRA-IV-97-067, 1999 WL 362891, at *4 (ALJ, Mar. 12, 1999) (Order Granting Complainant's Motion for Accelerated Decision as to Liability/Order Denying Complainant's Motion for Accelerated Decision as to Penalty)). In layman's terms, the movant's case must be air-tight for accelerated decision to be warranted. Hence, if there was any way to construe the evidence in a manner that was favorable to Respondent, I had to. Perhaps doing so revealed "holes" or "deficiencies" in Complainant's case, as Respondent alleges. *See* Mot. at 3, 4, 5, 7; Reply at 4, 6. But, again, any exposure of these purported holes was not an instruction to Complainant to supplement its prehearing exchange.

Even though the AD Order in no way was meant to solicit additional evidence from Complainant, the fact is that Complainant submitted a Third Supplement. I cannot strike the Third Supplement merely because Complainant misinterpreted the AD Order. So irrespective of this miscue, I will now address the other arguments put forth by the parties in their briefing documents.

I will start with the Motion to Exclude Supplemental Exhibits and Witnesses. Respondent's arguments for excluding the exhibits and witnesses are that the supplementation was not timely and would be unfair. But as any litigation moves along, the parties are allowed to refine their positions and strategies. The deadline for freely supplementing the prehearing exchanges set by the Hearing Order—60 days before the hearing—is meant to prevent parties from truly ambushing each other on the immediate eve of hearing. Sixty days out from hearing is not the eleventh-hour Respondent claims it to be: Two months should provide the opposing party sufficient time to evaluate the new evidence and craft arguments undermining its admissibility, relevance, weight, etc., that it may air at the hearing.

Moreover, in the time between when the AD Order was issued and the supplementation deadline, Respondent was free to supplement its own prehearing exchange to make the most of what it describes as "holes" and "deficiencies" in Complainant's case supposedly unveiled by the AD Order. That it did not do so was its own decision.

As to Respondent's arguments concerning the promptness purportedly required by the Consolidated Rules, I do not agree with Respondent's position. Had Complainant *concealed* any information between the filing of its Rebuttal Prehearing Exchange and its Third Supplement, then that would be an egregious action for which exclusion under 40 C.F.R. § 22.19(g) would be warranted. But, as stated above, the slight refinement of strategy and position during a proceeding is a natural part of litigation. Because Complainant seems to have acquired new evidence reflecting an evolution in how it thinks it can best prove its case on penalty in the interim between the AD Order and the deadline for free supplementation—and has not actively

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additional evidence on specific questions."); Surreply at 3 & n.3 ("As Complainant made clear in its Response to Respondent's Motions, Complainant has provided CX68-74 solely and specifically in direct response to this Tribunal's specific requests for additional information made in its [AD Order]." (including footnote citing references in AD Order to "the true amount of hazardous waste" and "the aftereffects of a release")).

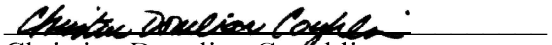
concealed anything that it should have turned over a long time ago—the Motion to Exclude is **DENIED**. The Third Supplement is allowed.

As part of the Order Scheduling Deadlines (August 24, 2022), I asked the parties to discuss the admissibility of the additional evidence because I stated I would construe the Motion to Exclude as a Motion in Limine as well. Then Complainant filed a Cross-Motion to Admit Certain Exhibits into Evidence. At this point, I am **DENYING** the Motion in Limine (to exclude) and **DENYING** the Cross-Motion (to admit). Respondent has not convinced me that the witness testimony and exhibits of the Third Supplement are not admissible, and Complainant has not convinced me that the select exhibits are admissible. I am not going to deliberate on the specific arguments for each exhibit and witness here; the admissibility of the witness testimony and exhibits will be worked out at the hearing.

I appreciate Complainant's efforts to avoid dedicating time at the hearing to foundational testimony. But those issues should be worked out between the parties as they prepare their Joint Stipulations. I will remind the parties that I expect them to work together to eliminate as much foundation testimony as possible by agreeing to the authenticity and admissibility of exhibits when those facets *cannot reasonably be contested*. Even though the Joint Stipulations are due September 30, 2022, I will continue to accept stipulations from the parties until the commencement of the hearing.

Finally, the hearing in this matter will focus on penalty *only*. In general, penalty hearings are not as extensive in breadth of testimony or time required as hearings to determine liability. I do expect that the five days currently scheduled for this hearing will be more than enough time to complete all the anticipated testimony, and I expect the parties to assist in this effort by being efficient during the hearing. The parties should proceed accordingly.

SO ORDERED.



Christine Donelian Coughlin
Administrative Law Judge

Dated: September 28, 2022
Washington, D.C.

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order on Respondent's Motion to Exclude Supplemental Exhibits and Witnesses and Complainant's Cross-Motion to Admit Certain Exhibits Into Evidence**, dated September 28, 2022, and issued by Administrative Law Judge Christine Donelian Coughlin, was sent this day to the following parties in the manner indicated below.

Alyssa Katzenelson
Attorney-Advisor

Copy by OALJ E-Filing System to:
Mary Angeles, Headquarters Hearing Clerk
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Ronald Reagan Building, Room M1200
1300 Pennsylvania Ave. NW
Washington, DC 20004

Copy by Electronic Mail to:
Laurianne Jackson
Charles Figur
U.S. Environmental Protection Agency, Region 8
1595 Wynkoop St. (R8-ORC-R)
Denver, CO 80202-1129
Email: Jackson.Laurianne@epa.gov
Email: Figur.Charles@epa.gov
For Complainant

Mark Ryan
MARK RYAN LAW PLLC
P.O. Box 306
Winthrop, WA 98862
Email: mryanboise@msn.com
For Respondent

Scott McKay
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
P.O. Box 2772
Boise, ID 83701
Email: smckay@nbmlaw.com
For Respondent

Dated: September 28, 2022
Washington, D.C.