UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**	
	)	
Alan Richey, Inc.,	**)**	**Docket No. CWA-06-2004-1903**
	)	
Respondent	**)**	

ORDER ON RESPONDENT'S COMBINED MOTION TO STRIKE COMPLAINANT'S PREHEARING EXCHANGE AND MOTION TO DEFAULT COMPLAINANT AND MOTION FOR SUSPENSION OF PREHEARING EXCHANGE

I. Background

A Prehearing Order issued in this matter required the parties to file prehearing exchanges, and upon a motion for a one month extension of time, Complainant was granted a two week extension of time to file its prehearing exchange. Complainant's prehearing exchange deadline was thus extended to July 22, 2005, the due date for Respondent's prehearing exchange was extended to August 12, and the Complainant's rebuttal prehearing exchange deadline was extended to August 24, 2005. Complainant timely filed its prehearing exchange.

On August 8, 2005, Respondent filed a "Combined Motion to Strike Complainant's Prehearing Exchange and Motion to Default Complainant" (Motion to Strike) asserting that Complainant's Prehearing Exchange is facially incomplete and inadequate. Along with the Motion to Strike, Respondent filed a Motion for Suspension of Initial Prehearing Exchange Deadline" (Motion for Suspension), requesting that the deadline for Respondent's prehearing exchange be suspended pending resolution of its Motion to Strike.

On August 10, Complainant filed a Motion to Oppose Respondent's Motion for Suspension and a Motion to Oppose Respondent's Motion to Strike (Opposition), explaining that its Prehearing Exchange was complete and adequate.

On August 12, Respondent filed its Prehearing Exchange. The Motion for Suspension is therefore denied as moot.

II. Discussion

Pursuant to 40 C.F.R. § 22.16(d) and the Prehearing Order, Respondent requests oral argument on its Motion to Strike. There is, however, no complexity to the arguments presented which suggest that oral argument is necessary to fully understand the parties' positions, assertions and reasoning. The parties' respective Motions and Prehearing Exchanges provide sufficient information upon which to issue a ruling on the Motions. Therefore the request for oral argument is denied.

Respondent's position is that the Complainant's Prehearing Exchange is "so vacuous and facially deficient" that it has not been given adequate notice or information to enable it to prepare its defense. Respondent urges that due to such inadequacies, Complainant has failed to file the prehearing exchange in a timely manner which, according to the Prehearing Order (at 4) can result in dismissal of the case with prejudice. Respondent also urges that Complainant should not be given leave to amend, supplement or make any prehearing disclosure to comply with the Rules and Prehearing Order.

For the reasons which follow,[1] Respondent requests the following relief: (1) strike Complainant's Prehearing Exchange, (2) find Complainant in default under 40 C.F.R. § 22.17(a), (3) dismiss this matter with prejudice, and (4) award Respondent attorney's fees, costs and expenses.

A. Standards for motions to strike prehearing exchange and to default a party

The procedural rules that govern this proceeding, 40 C.F.R. Part 22 (Rules) do not refer to motions to strike. Where the Rules do not address a particular procedure, the Federal Rules of Civil Procedure (FRCP) and federal case law thereunder may provide guidance. *Lazarus, Inc.*, 7 E.A.D. 318, 330 n. 25, 1997 EPA ALJ LEXIS 27 (EAB 1997). Analogous to the Part 22 Rules regarding prehearing exchange are the "disclosure" procedures set forth in FRCP 26(a), which require parties to provide, *inter alia*, the identity of individuals likely to have discoverable information and witnesses, written reports of expert witnesses, copies or descriptions of documents and tangible things that may be used to support the party's case, identification of exhibits, and computation of damages.

---

[1]Respondent asserts in its Motion to Strike that it received part of Complainant's prehearing exchange on July 26, and the remaining part on July 28, during a meeting with Complainant's counsel at EPA Region 6. The case file shows that Complainant filed its Prehearing Exchange timely on July 22, but two boxed copies of the same exhibits were mistakenly sent to the undersigned's office and the other set of the same two copies were sent to Respondent's counsel, rather than one box of each set being sent to the undersigned and to Respondent's counsel. The case file shows that Complainant immediately took action to ensure that the undersigned and Respondent received the correct boxes. Respondent does not appear to rely on these facts to move to strike these documents from the prehearing exchange or to hold Complainant in default.

For failure of a party to comply with these disclosures, FRCP 37 governs sanctions, providing in part that "If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions" and that for purposes of that subdivision, an "evasive or incomplete disclosure, answer or response is to be treated as a failure to disclose, answer or respond." FRCP 37(a)(2)(A), 37(a)(3). The court may require the party who did not disclose information to pay expenses incurred in making the motion in certain circumstances. FRCP 37(a)(4). If a party fails to obey a discovery order, the court may, *inter alia*, prohibit the party from introducing designated matters in evidence, dismiss a proceeding or part thereof, or render a default judgment. FRCP 37(b)(2). A party that fails to disclose information required by FRCP 26(a) is not permitted to use as evidence any witness or information not so disclosed, unless such failure is harmless. FRCP 37(c).

A trial court has broad and considerable discretion in striking (or excluding) discovery material, particularly where compliance is a matter of degree. *Sierra Club v. Cedar Point Oil Co., Inc.*, 73 F.3d 546, 569-70 and n. 46 (5th Cir. 1996)(discovery order and FRCP 26(a)(2) required parties to include a complete and detailed expert report for each expert witness; where party provided only incomplete and insubstantial statement for each expert, and later supplemented with reports, court upheld order excluding experts from testifying). Referring to the Advisory Committee Notes to the 1993 amendments to FRCP 37(a), the Fifth Circuit noted that under FRCP 37 it is not necessary for a party to file a motion to compel discovery before the court strikes discovery information that was not adequately disclosed. *Id*. at 572. The court listed four factors to consider in determining whether exclusion of testimony is appropriate: (1) the importance of the testimony, (2) prejudice to the opposing party in allowing the witness to testify, (3) the possibility of curing the prejudice by a continuance of the hearing, and (4) the party's explanation of its failure to comply with the discovery order. *Id*. at 572. As to the second factor, the court considered that there was some prejudice where the information was supplemented two months before trial but should have been produced a month earlier. As to the third factor, the court noted that a continuance would not have an effect of punishing the party for its noncompliance or deterring it from future noncompliance. As to the fourth factor, the court found the party's reasons for noncompliance to be unpersuasive, considering it had nine months since the complaint was filed to prepare the expert reports. *Id.* at 573. The court distinguished this situation where the requirement was clear from the situation where there is not a clear obligation to produce information, in which it may be unfair to sanction the party. *Id.*

In the Part 22 Rules, there are three sanctions authorized for failure to provide prehearing information: the presiding judge may, in his or her discretion: infer that the information would be adverse to the party, exclude it from evidence, or issue a default order. 40 C.F.R. § 22.19(g); 40 C.F.R. § 22.17(a)("A party may be found in default: after motion, . . . upon failure to comply with the prehearing exchange requirements of § 22.19(a) . . . ."). There is no authority in the Part 22 Rules for ordering a party to pay an opposing party's expenses for failure to comply with discovery. Rule 22.19(g) does not define "Where a *party fails to provide* information within its control as required under this section," but appears to address an *absence* of information, rather than *insufficient* information. The Rule does not include a provision like FRCP 37(a)(3), defining a failure to disclose as including incomplete disclosure. Moreover, the

preferred remedy for an insufficient prehearing exchange is compelling the party to produce the information rather than exclusion of information or default. *Roadway Surfacing, Inc.*, EPA Docket No. CWA-05-2002-0004, 2002 EPA ALJ LEXIS 61 (Order on Motion to Strike Respondent's Prehearing Exchange, Sept 18, 2002)(where prehearing exchange contained insufficient narrative summaries of testimony, motion to strike prehearing exchange denied and respondent directed to file supplement); *Universal Equipment Co.*, EPA Docket No. TSCA (PCB)-VIII-91-17, 1994 EPA ALJ LEXIS 14 (Order Resetting Hearing and Ruling on Outstanding Motions, Nov. 23, 1994)("If there is a procedural defect in the exchange [in that case, failure to provide the proposed exhibits listed in the prehearing exchange], generally the more reasonable remedy is to correct the defect prior to trial, as opposed to the more drastic approach of excluding the evidence at hearing."). This approach is consistent with 40 C.F.R. § 22.22(a), which provides for exclusion of testimony or exhibit where a party fails to provide to all parties at least 15 days before the hearing date a document, exhibit, witness name or summary of expected testimony as required in the prehearing exchange, other discovery or required supplement.

B. Summaries of expected testimony

Respondent asserts that Complainant's Prehearing Exchange is inadequate in several respects. First, Respondent asserts, it does not comply with 40 C.F.R. § 22.19(a), because it does not include a "brief narrative summary" of expected testimony of Complainant's proposed witnesses as required by Rule 22.19(a)(2). Respondent takes issue with Complainant's use of the word "may" in stating that the witness "may testify as to . . . ," and suggests that Complainant does not know what its witnesses will testify about. Respondent argues that the summaries of Complainant's proposed witness' testimony are each contained in one overly-broad unhelpful sentence, and Respondent cannot reasonably anticipate what they will testify about or the subject of the two expert witnesses' testimony, and Respondent cannot adequately prepare its disclosures, defense and rebuttal evidence and exhibits, or determine what fact or expert witnesses it needs. Respondent argues that fundamental fairness and due process require much more than what Complainant has provided. Respondent argues further that the fact that each of the five related cases (the present case and EPA Docket Nos. CWA-06-2004-1904, -1935, -1949, and -2166), Complainant lists the same witnesses with virtually the same one sentence summary of testimony, rather than a narrative of testimony relevant to the particular case.

In response, Complainant asserts that it provided a "brief narrative summary" of testimony for each witness with sufficient detail regarding the alleged violations. Complainant's summaries of testimony for its proposed experts, Carl Wills and Abu Senkayi, PhD., are as follows:

> Mr. Wills is a[n] Environmental Geologist for the Water Enforcement Branch of the Compliance Assurance and Enforcement Division . . . . Mr. Wills conducts field inspections and has years of experience with the geographic information

> systenm mapping techniques, rock and mineral formation and hydrology. He may testify as to how Respondent violated the Clean Water Act (CWA) and his communication with Respondent regarding the alleged violations.
>
> Dr. Senkayi is an Environmental Scientist and is the EPA Region 6 Concentrated Animal Feeding Operation Coordinator. He investigates and enforces violations of the CWA's Concentrated Animal Feeding Operation (CAFO) requirements. Dr. Senkayi works in the Water Enforcement Branch . . . . He may testify as to CWA requirements, the penalty assessed, and his communications with Respondent.

Complainant's Prehearing Exchange at 2. For five of the fact witnesses, Complainant describes their employment, states as to some that they conduct field inspections generally and as to others that they conducted field inspections of Respondent's facility, and states "He may testify as to how Respondent violated the CWA and his communication with Respondent regarding the alleged violations." *Id.* As to four other fact witnesses, Complainant states that they are members of the Yuba Citizen Group and "may testify as to what he [or she] has seen at Respondent's facility." *Id.*

The Rules do not define a "brief narrative summary of [witnesses'] expected testimony." As my esteemed colleagues have stated, the purpose of the requirement for a narrative summary of testimony is to prevent surprises to the parties and the resulting inefficiencies at the hearing, and to permit adequate preparation for hearing. *Pekin Energy Co.* EPA Docket No. 5-EPCRA-95-045, 1997 EPA ALJ LEXIS 89 (Order Requiring Supplemental Prehearing Exchange, March 25, 1997)(one sentence of chief witness that he will testify regarding respondent's cyclohexane operations and the timeliness and reasonableness of their response to the hazardous substance releases subject to the Comprehensive Environmental Response, Compensation and Liability Act, held insufficient; summary should have addressed reasons the notices were untimely and unreasonable); *Cello-Foil Products*, EPA Docket No. 5-RCRA-97-0005, 1998 EPA ALJ LEXIS 24 (Order Granting Complainant's Motion to Compel Supplemental Prehearing Exchange, Feb. 18, 1998)(interchangeable phrases applying to various witnesses, consisting of sentence fragments and symbol codes, held insufficient as narrative summary of testimony). The summaries of testimony must convey sufficient information concerning the witnesses' connection to the case at hand, to notify the opposing party of the general substance and context of the testimony of each witness. *Henry Velleman*, EPA Docket No. 5-CAA-97-008, 1998 EPA ALJ LEXIS 27 (Order Compelling Compliance with Prehearing Order and Denying Motion to Strike Proposed Witnesses, March 18, 1998).

Complainant's use of the words "may testify as to" does not render the summaries of testimony insufficient, but properly indicates that the testimony is merely *proposed*, not a certainty, and may not be presented if, for example, the parties stipulate to certain facts. Complainant's summaries of testimony include the witnesses' titles and general job duties and some refer to their inspections of Respondent's facility, giving some context of their testimony, but the summaries do not include the particular allegations or other facts to which they will

testify. The vague statements of what the witness will testify to are the same for several witnesses, which suggests that there could be duplicative testimony. However, under the first of four factors set out in *Cedar Point Oil Co., supra,* for determining whether to exclude testimony, it is obvious that for at least some of the witnesses, their testimony is critical to Complainant's case. Under the second and third factors, the fact that the hearing has not yet been scheduled minimizes any prejudice to Respondent in allowing the witnesses to testify.

Therefore, under the Rules, and even under the standards in the FRCP and Federal case law, the insufficiency in Complainant's prehearing exchange does not warrant striking or excluding testimony, much less dismissal or a default order. Nevertheless, the insufficiency does warrant an order to compel Complainant to provide more substantive information as to each witness' testimony consistent with the purposes and standards for summaries of testimony discussed herein.

C. Detailed narrative statement describing water bodies

Second, Respondent asserts that Complainant did not provide a "detailed narrative statement,"or any information, identifying and describing creeks and tributaries referenced in the Complaint. Therefore, Respondent argues, it cannot prepare a defense or have reasonable and adequate opportunity to investigate, make disclosures and generate evidence and information regarding such creeks and tributaries.

The Prehearing Order (at 2) required Complainant to provide a detailed narrative statement . . . identifying and describing the "nearby creeks," "large creek channels" and "tributaries of the Old Indian Boundary Island Bayou" and explaining the factual and/or legal bases for the allegations in Paragraph 8 that the Bayou "is a tributary of the Red River, which is a water of the U.S." As maintained by Complainant, the narrative statement in the Prehearing Exchange (at 7) provided legal and factual bases for the claim that the channels, Bayou and Red River are "waters of the United States," along with distances from the "point source" of Respondent's facility to "the large creek channel" and from that channel to Old Indian Boundary Island Bayou, and from the Bayou to the Red River.

There is, however, a discrepancy. The Complaint alleges and the Prehearing Exchange narrative statement refer to plural "large creek channels" which are tributaries of the Bayou, but the narrative statement refers to a singular "large creek channel" in the next sentence. Complainant will be ordered to explain the discrepancy and provide more information as to each such water body, specifically, to describe each channel and tributary relevant to the allegations in the Complaint with reference to any map, diagram, photo and/or particular witness' testimony.

D. Information as to the penalty calculation

Third, Respondent asserts that the Complainant's Prehearing Exchange does not comply

with 40 C.F.R. § 22.19(a)(3), requiring Complainant to explain how the proposed penalty was calculated in accordance with criteria in the applicable statute. Respondent argues that Complainant stated in conclusory fashion without detail, backdrop or explanation, the amount allotted to certain statutory factors in its calculations, and provided either hypothetical statements or no statements as to factual underpinnings of the proposed penalty. Respondent points out that Complainant valued the seriousness of the violation with a penalty of $40,000 to represent a high risk to the environment, because contamination is "possible" and "can" cause certain issues. Respondent argues that "nothing factual and specific actually relating to the above-captioned matter was provided." Motion to Strike at 6.

As to the factor of economic benefit of noncompliance, Complainant presented what appears to be a "BEN" computer model printout showing an arithmetic equation (Motion to Strike, Exhibit I), but, Respondent asserts, did not provide documentation or explanations of the costs and other inputs to the BEN model. Respondent points out that it requested through the Freedom of Information Act (FOIA) the information regarding Complainant's penalty calculations, but the Assistant Regional Administrator for Management of EPA Region 6 stated that EPA will not release under FOIA the draft economic benefit calculations, draft gravity penalty calculations and attorney notes generated during ADR, as they are exempt from mandatory disclosure under FOIA.

In addition, Respondent points out that Complainant did not submit in its Prehearing Exchange "a copy of any penalty policies or guidelines relied upon . . . to calculate the proposed penalty," as required by the Prehearing Order.

Complainant correctly explains in its Opposition that the Clean Water Act (CWA) has no penalty policy, other than a settlement policy, and that the economic benefit calculation was computed through a computer program, for which Complainant supplied the worksheet, which includes the key components. These key components will be discussed at the hearing, Complainant states. Complainant asserts that it has provided evidence in the Prehearing Exchange as to the potential contamination and harm to humans and the environment, which indicate the seriousness of the violation. Complainant argues that penalty calculations, such as gravity calculations and draft economic benefit calculations, are deliberative and privileged and therefore exempt from disclosure under Exemption 5 of FOIA. Finally, Complainant asserts that Respondent should have followed the process of appealing the denial of the release to the FOIA Officer in Washington D.C.

The Rules require Complainant to "explain . . . how the proposed penalty was calculated in accordance with any criteria set forth in the Act ," or if the complainant has not yet specified a penalty, each party must include "all factual information it considers relevant to assessment of a penalty" and then within 15 days after respondent files such information, the complainant must file a document specifying a proposed penalty and explaining how it was calculated. 40 C.F.R. § 22.19(a)(3) and (a)(4). Because Complainant had not yet specified a proposed penalty in the Complaint, the Prehearing Order required Complainant to provide "a detailed narrative statement of all factual information Complainant considers relevant to the assessment of a penalty, *or a*

statement of the penalty Complainant proposes to assess against Respondent, addressing each penalty determination factor listed in Section 309(g) of the CWA, and a copy of any documents in support." Prehearing Order at 2 (emphasis added).

Complainant elected to submit a statement of the proposed penalty and explain how it was calculated in its Prehearing Exchange, rather than submit it after Respondent's prehearing exchange. Complainant's Prehearing Exchange discussed each penalty determination factor in Section 309(g) of the CWA. Complainant valued the seriousness of the violation with a penalty of $40,000. Although there is no penalty policy under the CWA to assign particular dollar values, Complainant specified facts as to the storm water runoff and its potential harm in support of that dollar value. This is appropriate, as the CWA does not prescribe a precise formula to compute a penalty nor provide any relative weight of the factors. *Phoenix Construction Services,* CWA App. No. 02-07, 2004 EPA App. LEXIS 9 * 40 (EAB, April 15, 2004). As stated by the Supreme Court, "highly discretionary calculations . . . are necessary in order to set civil penalties" under the CWA. *Tull v. United States,* 481 U.S. 412, 427 (1987). The phrasing of the harm as "*possible* surface water contamination" which "*can* cause high biological oxygen demand" and the statements that "pathogens from the carcasses *can* be carried in water which *can* be a threat to humans and animals" and that "scavenging animals *may* spread disease" (emphasis added) from the carcasses do not suggest any insufficiency in compliance with either the Prehearing Order or the Rules. Penalties for seriousness of a violation are frequently based on the *potential* for harm rather than evidence of *actual* harm. *See, e.g., Carroll Oil Co.*, RCRA (9006) Appeal No. 01-02, 2002 EPA App. LEXIS 14 * 6 (EAB, July 31, 2002).

As to the economic benefit penalty calculation, Complainant briefly described in its Prehearing Exchange the two components of economic benefit and that the BEN computer model is the standard method to compute it. There is no standard in the Rules or in the Prehearing Order as to the extent of detail required in discussing each penalty factor; the complainant is merely required to address each factor and explain the calculation of the proposed penalty. Complainant has complied with these requirements.

E. Collection of documents

Fourth, Respondent asserts that Complainant's Exhibit 13, identified as Respondent's Section 308 Response, located in Appendix Z of the Master Binders in the Complainant's Prehearing Exchange, contains documents 1 ½ inches thick "which appear to be a hodgepodge collection of miscellaneous documents," some of which are "simply unidentifiable" and that Complainant "makes no attempt to explain their inclusion in Appendix Z." Motion to Strike at 7.

Complainant responds that Respondent's 308 Response consist of documents which Respondent itself provided. There is no requirement in either the Rules or the Prehearing Order for a party to explain the significance of each exhibit or part thereof. The Rules merely require each party to provide copies of each document and exhibit it intends to introduce at the hearing,

and mark them for identification. 40 C.F.R. §§ 22.19(a)(1) and (a)(2)(ii). Complainant has complied with this requirement.

ORDER

1. Respondent's Motion for Suspension of Prehearing Exchange is **DENIED as moot.**

2. Respondent's request for oral argument on the Combined Motion to Strike Prehearing Exchange and Motion to Default Complainant is **DENIED.**

3. Respondent's Motion to Strike Complainant's Prehearing Exchange is **DENIED.**

4. Respondent's Motion to Default Complainant and dismiss this matter is **DENIED.**

5. Complainant is hereby ORDERED to submit the following in its Rebuttal Prehearing Exchange:

> (A) substantive information as to each proposed witness' testimony, including a statement of particular allegations or other facts to which they will testify, consistent with the purposes and standards for summaries of testimony discussed herein above; and
>
> (B) an explanation of the references in the Complaint and the Prehearing Exchange to the plural "large creek channels" which are tributaries of the Bayou, and the narrative statement's reference to a singular "large creek channel," describing each channel and tributary relevant to the allegations in the Complaint with reference to any map, diagram, photo and/or particular witness' testimony.

_____

Susan L. Biro
Chief Administrative Law Judge

Date: August 18, 2005
Washington, D.C.