

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:)	Docket No.
)	
Summit, Inc.)	Proceeding to Assess a Civil Penalty
6901 West Chicago Avenue)	Under Section 3008(a) of the Resource
Gary, Indiana)	Conservation and Recovery Act,
)	42 U.S.C. § 6928(a)
U.S. EPA ID #: INX 000 028 902)	
)	RCRA-05-2014-0006
Respondent.)	
_____)	

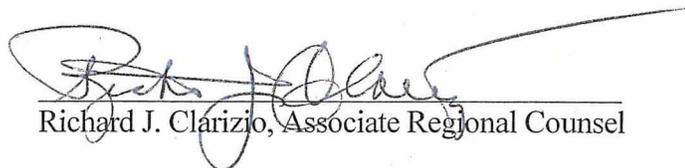
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MOTION TO SUPPLEMENT
COMPLAINANT'S PREHEARING EXCHANGE

The Complainant hereby moves the Presiding Officer to allow it to supplement its prehearing exchange pursuant to the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits*, 40 C.F.R. §§ 22.19(f) and 22.22(a). The Complainant submits the attached Memorandum of Law and Complainant's Exhibits 53 to 63.

RESPECTFULLY SUBMITTED,

2/18/16
Date


Richard J. Clarizio, Associate Regional Counsel

2/18/16
Date


Mark J. Koller, Associate Regional Counsel

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MEMORANDUM OF LAW

I. RELIEF REQUESTED – SUPPLEMENT PREHEARING EXCHANGE

The Complainant submits this request to supplement its prehearing exchange pursuant to the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits*, (Consolidated Rules or CROP), 40 C.F.R. §§ 22.19(f) and 22.22(a) and the Presiding Officer's September 9, 2015, *Order Scheduling Hearing*.

II. PROCEDURAL BACKGROUND

On March 17, 2014, the Complainant filed the Complaint in this matter. The Complaint contains seven counts alleging violations of the hazardous waste, used oil management and universal waste regulations promulgated under the Solid Waste Disposal Act, as amended, also known as the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901, *et seq.*

On June 10, 2014, the Presiding Officer issued a *Prehearing Order*, which required the Parties to respond to specific questions and submit specific information. On July 17, 2014, the Complainant filed its prehearing exchange. The Respondent filed its prehearing exchange on or

about September 8, 2014, pursuant to the Presiding Officer's August 14, 2014, Order granting the Respondent an extension of time. The Complainant filed its rebuttal prehearing exchange on September 22, 2014.

On October 21, 2014, the Complainant filed a Motion and Memorandum of Law for Accelerated Decision. The Complainant requested a liability determination on all seven counts. The Respondent did not file a response. On July 24, 2015, the Presiding Officer issued an *Order on Complainant's Motion for Accelerated Decision*. The Presiding Officer granted accelerated decision as to Counts 1, 4, 5, 6 and 7. She denied accelerated decision as to Counts 2 and 3, and part of Count 4, in part, because the Complainant had not met its burden to show that 35 drums and an accumulation tank exhibited a hazardous waste characteristic as defined under the RCRA regulations. Further, the Presiding Officer rejected the Complainant's argument that the burden of proof had shifted so that the Respondent was required to demonstrate that mixing characteristic hazardous waste with a solid waste resulted in a non-hazardous waste. The Presiding Officer directed the Parties to make good faith efforts to settle the case and to file a status report before September 4, 2015. The Parties filed a status report on August 27, 2015, stating that they were engaged in settlement discussions.

On September 9, 2015, the Presiding Officer issued an *Order Scheduling Hearing* which required status reports on October 20, 2015, December 16, 2015, and February 22, 2016. The Presiding Officer also stated that the Parties must submit any supplements to the prehearing exchanges, accompanied with a motion, no later than February 22, 2016.

The Parties filed Joint Status Reports on or about October 20, 2015 and December 16, 2015.¹ The Parties reported that they were still engaged in settlement discussions when they filed their October 20, 2015, Status Report. However, in the December 16, 2015, Status Report the Parties stated that no progress had been made toward settlement.

III. STANDARD FOR SUPPLEMENTING A PREHEARING EXCHANGE

Parties may supplement a prehearing exchange before hearing for good cause, and so long as the supplement is timely and provided to the opposing party. 40 C.F.R. § 22.22(a). Parties are *required* to supplement the prehearing exchange if it is incomplete, inaccurate or out of date. 40 C.F.R. § 22.19(f).

The Environmental Appeals Board has interpreted the CROP as liberally allowing the introduction of evidence into the administrative record. *CDT Landfill Corp.*, 11 E.A.D. 88, 109-110 (EAB 2003) (“Administrative hearings are such that rules allowing evidence into the record tend to be more liberal than in proceedings in other courts, and normally err towards over-inclusion rather than under-inclusion.”). A party does not have to demonstrate the relevancy of the document at the time it moves to supplement its prehearing exchange. *In re Zaclon Inc.*, 2005 EPA ALJ LEXIS 74, at *6. Adding documents to the prehearing exchange is permissible, even when the opposing party represents that the addition of the documents may cause it to expend considerable resources and time. *Id.* at *3.

The cases support that a prehearing exchange may be supplemented fairly late in a proceeding. In one case, the Presiding Officer allowed a Respondent to supplement

¹ The December 16, 2015, Joint Status Report repeated the same information included in the Status Report signed and submitted by the Complainant on December 16, 2015.

its prehearing exchange after the Presiding Officer had issued an order on a motion for accelerated decision. *In re Goodman Oil Co.*, 2001 EPA ALJ LEXIS 193, at *2 (2001). In another case, the Presiding Officer allowed the Complainant to supplement its prehearing exchange three days before it filed a motion for a default judgment. *In re Joseph Oh and Holly Investment, LLC*, 2012 EPA ALJ LEXIS 48, at *18 (2012). In *Joseph Oh*, the new documents supported the Complainant's prima facie case, and the Presiding Officer found good cause to allow the Complainant to supplement its prehearing exchange. *See id.*

IV. DISCUSSION

The Complainant seeks to supplement its Prehearing Exchange with documents numbered CX 53 to CX 63, adding Theresa Morris as a potential witness and modifying the existing list of the Complainant's witnesses. The requested changes are summarized below.

- A. Documents that have already been provided to the Respondent or that are publically available.
 1. CX 53. October 16, 2014, Declaration of Sue Brauer. The Respondent already has a copy of this document since it was included with the Complainant's October 22, 2014, Motion for Accelerated Decision. Ms. Brauer's declaration may be offered as written testimony pursuant to 40 C.F.R. § 22.22(c).
 2. CX 54. March 17, 2014, *Complaint and Compliance Order, with attachments*, (Complaint), *In the Matter of: Summit, Inc.*, Docket No.: RCRA 05-2014-0006 (Complaint). The Respondent has a copy of this document and it is part of the record for this case. The Complainant is including it with this supplement in case it is used or referred to by the witnesses.

3. CX 55. April 17, 2014, *Summit 30-Day Response and Request for Hearing for Complaint and Compliance Order, with attachments (Answer) and Respondent's Prehearing Exchange*. The Respondent has these documents since it filed them. The Answer is already part of the record for this case. The Complainant is including it with this supplement for two reasons. First, it contains documents that the Respondent has incorporated into its prehearing exchange but did not physically include. Second, it may assist witnesses when they testify. The Respondent's Prehearing Exchange is included since it incorporates the Answer.
4. CX 56. The following documents may be used by Ms. Lara Lasky when she testifies. They may be used as demonstrative exhibits. The Respondent has access to a plethora of information about Environmental Justice at <http://www3.epa.gov/environmentaljustice> and about EPA's new Environmental Justice mapping and screening tool, EJSCREEN², at <http://www.epa.gov/ejscreen/what-ejscreen>. The EJSCREEN tool can be found at <http://ejscreen.epa.gov/mapper>.
 - a. EJSCREEN regional map with Summit location and two-mile buffer – February 10, 2016. This map may assist various witnesses when they testify. It may also be used as a demonstrative exhibit.
 - b. EJSCREEN ACS Summary Report – February 10, 2016.
 - c. EJSCREEN Explore Reports (Demographic Indicators, Environmental Indicators and EJ Indexes) – February 10, 2016.
 - d. EJSCREEN Report – February 10, 2016.
 - e. Résumé Lara Lasky – revised to correct typographical error.

² Since Complainant submitted its Prehearing Exchange, EPA replaced EJVIEW with EJSCREEN. The EJVIEW documents found at CX 25, pgs. CX 001042-45, are out-of-date.

5. CX 57. Revised Exhibit 35 – Penalty Summary Chart. Revised to correct typographical errors.
 6. CX 58. December 22, 2006, ATC Associates, Inc., *Report of Further Site Investigation, November 13, 2006, Summit Inc., 6901 West Chicago Avenue*. The Respondent provided this document as part of its September 18, 2008, response to EPA’s request for information. See, CX 13, p. CX 000435.
 7. CX 59. Revised Exhibit 39 – Inspection Photos.– Summit March 15, 2005. Revised to correct an incorrectly labelled photo and to renumber and reorder consistent with the black and white photos found at CX 26, pgs. CX 001053-57.
- B. Modification to Existing Witness List. The Complainant proposes to remove Jamie Paulin as a potential witness. Additionally, the Complainant seeks to qualify Sue Brauer as an expert in geology/hydrogeology and expand her testimony accordingly. Ms. Brauer is identified as a potential Used Oil expert in the Complainant’s initial prehearing exchange with her résumé included as CX 22. The Complainant stated that Ms. Brauer may testify to the hazardous constituents of concern that U.S. EPA found in used oil. As part of that testimony Ms. Brauer may testify about the specific constituents found at or near the Summit site; their impact on human health and the environment, including but not limited to the ground water and surface waters located in the vicinity. Her testimony may include a discussion of the local geology and ground water flow.
- C. New Potential Witness – Expert Chemist. The Complainant seeks to add Theresa Morris, Chemist, National Enforcement Investigations Center (NEIC), U.S. EPA. Mrs. Morris’s résumé is included as CX 60. The Complainant anticipates that it may call Mrs. Morris to testify how she calculated the TCLP benzene concentration of the mixture of the 4 drums of

characteristic hazardous waste with the 3,000 gallons of liquid wastes sent to Beaver Oil. Mrs. Morris is expected to testify about the data she reviewed, the reliability of that data, laboratory procedures and how she calculated the concentration of benzene in the mixture in the accumulation tank. She may also testify to the accuracy and reliability of the related sampling data, including the TCLP, flash point and totals analysis methods employed in testing the soils and drum samples; and the laboratory processes employed.

D. New Documents. The Complainant identifies the following new documents:

1. CX 60. Résumé of Theresa Morris.
2. CX 61. Charts related to benzene concentration in accumulation tank. These documents were prepared under the direction and supervision of Mrs. Morris and may be used to assist Mrs. Morris in her testimony identified above.
3. CX 62. Maps – Related to EPA’s March 18, 2009, inspection. This document may assist in understanding the Site and the testimony of various witnesses. It may be used as a demonstrative exhibit.
4. CX 63. Map and related information of RCRA-regulated handlers in the vicinity of Summit.

E. The Complainant renews³ its right to call witnesses identified in the Respondent’s prehearing exchange, including but not limited to, employees and representatives of the Respondent, the State of Indiana and the City of Gary.

The Complainant’s motion to supplement is timely since it is submitted before the February 22, 2016, deadline established in the Presiding Officer’s *Scheduling Order*. Furthermore, allowing the Complainant to supplement its prehearing exchange at this time is unlikely to prejudice the

³ The Complainant first made this reservation in its September 19, 2014, Rebuttal Prehearing Exchange.

Respondent in its preparation for hearing because the Respondent either has some of the supplemental documents or they are publically available. With respect to the new documents, there is good cause for submitting them because they may either assist in the explanation of witness testimony or may be used as demonstrative exhibits. The Respondent will not be harmed in its hearing preparation by these documents because they may provide the Respondent with knowledge of potential testimony prior to it being presented at hearing. This level of detail is not required by the CROP.

There is also good cause to permit Mrs. Morris's testimony because it is relevant to establishing the Respondent's liability under RCRA as to Counts 2 and 3 and portions of Count 4 for the mixture contained in the 3,000-gallon accumulation tank. *See Joseph Oh*, 2012 EPA ALJ LEXIS 48, at *18. Her testimony is based on applying general, well-known chemistry principles to the sampling analytical data contained in the Complainant's July 17, 2014, Prehearing Exchange.

The Respondent will not be prejudiced by the addition of Mrs. Morris or her proposed testimony. The subject matter of Mrs. Morris's testimony is consistent with the allegation in the Complaint that the mixture in the accumulation tank is a RCRA hazardous waste. The Complainant provided the data Mrs. Morris relies upon in its July 17, 2014, Prehearing Exchange. Mrs. Morris will replace Ms. Paulin. Both are identified as expert chemists. Mrs. Morris's testimony will be more limited in scope than Ms. Paulin's.⁴ The Respondent identified two individuals with Bachelor of Science degrees as potential fact and expert witnesses. These individuals can both advise the Respondent and testify for it.

⁴ The Complainant identified Ms. Paulin's testimony as including the collection and handling of samples taken on March 17, 2009. See, CX 37. The Complainant believes that this component of her testimony is no longer necessary given the Presiding Officer's finding that the four drums contained hazardous wastes.

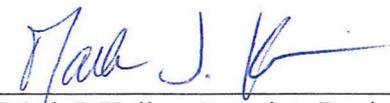
Identifying Ms. Brauer as an expert in geology/hydrogeology is consistent with her résumé included in the Complainant's initial prehearing exchange. See, CX 22. It is also within the scope of her testimony identified in the Complainant's initial prehearing exchange. The Complainant identified Ms. Brauer as potentially discussing the hazardous constituents of concern in used oil.⁵ That discussion necessarily includes an explanation of the potential impact of the hazardous constituents on human health and the environment. Ms. Brauer may use existing publically available information or documents provided by the Respondent⁶ to describe the local geology and/or hydrogeology and the presence and potential impact of various used oil constituents on the local environment.

RESPECTFULLY SUBMITTED,

2/18/16
Date


Richard J. Clarizio, Associate Regional Counsel
U.S. EPA, Region 5, Office of Regional Counsel

2/18/16
Date


Mark J. Koller, Associate Regional Counsel
U.S. EPA, Region 5, Office of Regional Counsel

⁵ The Complainant believes that it is not required to further describe the extent of this area of Ms. Brauer's testimony in the prehearing exchange. However, the Complainant provides this information voluntarily so as to minimize potential objections at hearing.

⁶ See, CX 28-32 and 58.

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CERTIFICATE OF SERVICE

I certify that the *Motion to Supplement, Memorandum of Law and Exhibits 53-63* were sent this day to the addressees as listed below:

By email of original PDF to
OALJfiling@epa.gov and
Original and one copy by
UPS Overnight delivery to:

Sybil Anderson
Headquarters Hearing Clerk
U.S. EPA, Office of Administrative Law Judges
Ronald Reagan Building, Room M1200
1300 Pennsylvania Avenue, NW
Washington, D.C. 20460

By email of original PDF to
OALJfiling@epa.gov and
One copy by UPS Overnight delivery to:

M. Lisa Buschmann,
Administrative Law Judge
U.S.EPA, Office of Administrative Law Judges
Ronald Reagan Building, Room M1200
1300 Pennsylvania Avenue, NW
Washington, D.C. 20460

By causing a copy to be sent
UPS Overnight delivery to:

Mark A. Thiros, Esq.
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Dated: 2/18/2016



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